

In re Transportation Project Brandon NH 019-3 (495), No. 11-1-08 Rdev (Teachout, J., Oct. 10, 2008)

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STATE OF VERMONT
RUTLAND COUNTY, ss.

SUPERIOR COURT
DOCKET NO. 11-1-08 Rdev

In re Transportation Project)
)
Brandon NH 019-3 (495))

NECESSITY HEARING

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above matter came on for hearing before the Rutland Superior Court, the Honorable Mary Miles Teachout presiding, on April 29, 2008 pursuant to a necessity petition filed by the Vermont Agency of Transportation (VTrans) under 19 V.S.A. Chapter 5 (Condemnation). The court agreed to defer making a ruling until after June 20, 2008 to provide an opportunity for VTrans and interested parties who had raised objections at the hearing to seek resolutions.

The purpose of the hearing was to determine the necessity of the State of Vermont’s acquisition of certain lands and rights in land in connection with the proposed reconstruction of U.S. Route 7, a state highway, in the Town of Brandon. The State’s proposed improvements are detailed in plans captioned “Highway Project Brandon NH 019-3(495),” copies of which were attached to the petition.

VTrans was represented by Assistant Attorneys General John K. Dunleavy and Trevor R. Lewis. The following interested parties who had filed timely objections were present and took part in the hearing:

Curtis Danley and Cheryl Danley (f/k/a Cheryl L. Hamilton) (Parcel 503 A-B);
Elizabeth Dodge (f/k/a Elizabeth J. Kwak) (Parcel 506 A-E);
John R. Perry and Debra L. Perry (Parcel 532 A-B); and
Suzanne H. Bennett (Parcel 533).

Following the hearing, the Court received stipulations of settlement between VTrans and the following:

Curtis Danley and Cheryl Danley (f/k/a Cheryl L. Hamilton) (Parcel 503 A- B);
Elizabeth Dodge (f/k/a Elizabeth J. Kwak) (Parcel 506 A-E); and
Suzanne H. Bennett (Parcel 533).

Upon consideration of the petition, the design plans, the representations of counsel, the evidence, and the settlement stipulations, the Court makes the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact

1. VTrans, on behalf of the State of Vermont, has filed a petition in this court under 19 V.S.A. Chapter 5 (Condemnation) seeking authority to take certain lands and rights in land in connection with “Highway Project Brandon NH 019-3 (495).” The specific part of the overall project that is the subject of the petition is “Segment 5,” consisting of 2.81 miles.

2. The overall Pittsford-Brandon project consists of reconstructing 10.6 miles of U.S. Route 7. The stated purpose is to improve substandard intersections and to add or widen paved shoulders, primarily on the existing alignment. At a few locations, the proposed centerline would be shifted to avoid impacts to historic structures or to minimize other resource impacts. Existing culverts will be widened or changed.

3. Segment 5 begins at the south entrance to the Otter Valley Union High School and extends northerly 2.81 miles, ending at the southerly transition into Brandon village. The Segment 5 project is designed to improve five town highway intersections along U.S. Route 7:

- a. Hawk View Road (Town Highway [TH] #86);
- b. McConnell Road (TH #8);
- c. Wood Lane (TH # 35);
- d. Country Club Road (TH #31); and
- e. Nickerson Road (TH #43).

The Segment 5 project is also designed to improve sight distances along U.S. Route 7, improve access control at business locations, and increase pavement of shoulders.

4. U.S. Route 7 is the principal north-south travel route along most of the western side of the State of Vermont. The Vermont portion of U.S. Route 7 begins at Pownal, on the Massachusetts/Vermont state line, and ends in Highgate, just south of the Vermont/Canada border. Between Pownal and the Interstate 189 interchange in South Burlington, U.S. Route 7 is part of the National Highway System (NHS).

5. The highway now known as U.S Route 7 was first paved in the early 1930s, with Portland cement concrete. These concrete slabs, although since overlaid with multiple layers of asphalt pavement, remain in place underneath most of Segment 5. The expansion joints between the old concrete slabs often cause cracking which extends into the asphalt layers above. In 1983-1984, about 1,400 feet of U.S. Route 7 in the vicinity of Jones Mill Pond received full-depth reconstruction. This area is in better condition than the rest of Segment 5, and is planned to receive only cold planing and new asphalt overlay.

6. Most of existing U.S. Route 7 along Segment 5 in Brandon has narrow paved shoulders. In some areas, the narrow shoulders run adjacent to steep side slopes, without proper guardrail protection.

7. The lack of consistent shoulders along U.S. Route 7 results in conditions which are unsafe for breakdowns, wide loads, and bicyclists. Wider, paved shoulders also would provide an “escape route” for vehicles if needed in an emergency situation, as well as for police to conduct motor vehicle stops.

8. Many businesses along U.S. Route 7 through Pittsford and Brandon have wide-open, unrestricted access points, increasing the number of conflict points and causing confusion for motorists.

9. At some intersections between town highways and U.S. Route 7 along Segment 5, specific problems have been identified:

- a. McConnell Road (TH #8): Stopped vehicles on U.S. Route 7 waiting to turn left onto McConnell Road restrict through traffic flow along southbound U.S. Route 7. The design would create a standard intersection.
- b. Nickerson Road (TH #43): Nickerson Road intersects U.S. Route 7 on the outside of a relatively sharp horizontal curve and on a four percent grade. There have been numerous crashes at or near this intersection. The turn lane would be made safer.

10. In 1998, long-standing local concerns about the condition of U.S. Route 7 intensified after a June 1, 1997 crash between the Country Club Road and Nickerson Road intersections in Brandon killed a family of four. In response, VTrans organized a local steering committee, which included local officials, the regional planning commission, and local residents. The public involvement process included local concerns meetings, as well as meetings at which alternatives

were presented to the general public and to the selectboards of Pittsford and Brandon. Steering committee meetings, conducted at two- or three-month intervals, were public, often with extensive coverage in the *Rutland Herald* and the *Brandon Reporter*.

11. On October 17, 2002, a 19 V.S.A. § 502 public hearing was held at Otter Valley Union High School in Brandon. At this hearing, VTrans presented its plans to the affected landowners and local officials and solicited input.

12. In April 2004, preliminary plans were prepared. During August 2004, the property owners along Segment 5 were provided the opportunity to meet separately with project designers. These individual meetings provided the opportunity for property-specific input. In several instances, the project designers were able to modify the design to address property-specific needs or concerns.

13. Between August 2005 and February 2007, as right-of-way plans advanced in five stages from preliminary to final plans, VTrans received additional input at another six steering committee meetings.

14. The proposed project also has undergone extensive federal and state environmental review, including the following milestones:

- a. July 7, 2004: Stream alteration approval from the Vermont Agency of Natural Resources (ANR);
- b. September 2, 2004: Permit from the United States Army Corps of Engineers (ACOE) under Section 404 of the Clean Water Act (discharge of dredged or fill materials into the waters of the United States, including wetlands);
- c. October 1, 2004: Shoreland encroachment permit from ANR under 29 V.S.A. Chapter 11 (management of lakes and ponds);

- d. October 6, 2004: Stormwater discharge permit from ANR.
- e. July 22, 2005: Land use development permit under Vermont's Land Use and Development Act, 10 V.S.A. Chapter 151 (Act 250) for Segments 3 and 5, with affirmative and partial findings for Segments 1, 2, 4 and 6.
- f. September 14, 2005: Concurrence by the Federal Highway Administration (FHWA) that the Segment 5 project, consisting of reconstruction and widening on existing alignment, qualifies for treatment as a "categorical exclusion" (CE) under FHWA's regulations implementing the National Environmental Policy Act. Approval of CE status means that, based on past experience with similar projects, FHWA is satisfied that the proposed project, analyzed both by itself and cumulatively, will not have any significant environmental impacts.

15. During the design process, VTrans considered several U.S. Route 7 upgrade alternatives:

- a. Alternative 1 – No Build: Under this alternative, the roadway would be left in its current condition, with its physical and functional deficiencies left unaddressed. The roadway would continue to degrade and deteriorate over time. VTrans deemed this alternative neither feasible nor prudent.
- b. Alternative 2 – Reconstruct and Widen Entirely on Existing Alignment, with Two-Lane Typical and Standard Ditches: Because constructing standard ditches throughout the project area would result in increased encroachment on environmental, cultural and social resources located adjacent to the roadway, this alternative was not considered prudent.
- c. Alternative 3 – Reconstruct and Widen Generally on Existing Alignment, with Two-Lane Typical and Modified Ditches: This alternative was selected as the most reasonable

solution to address the deficiencies of the existing U.S. Route 7 within the project limits. This alternative was chosen to address safety concerns, upgrade substandard sections of roadway, and add pavement width to shoulders, while modifying the alignment or ditches to reduce impacts to environmental, cultural and social resources.

- d. Alternative 4 – Reconstruct and Widen on Existing Alignment, with Four-Lane Typical with Standard Ditches: This alternative was included for discussion and comparison since future traffic demand forecasts show that four-lane typical is warranted to obtain adequate Level of Service (LOS) in the design year of 2025. However, this alternative would have the greatest impacts and would not be prudent, especially through the village areas where impacts would be severe. For this reason, VTrans did not consider this alternative to be feasible or prudent.
- e. Bypass Alternative (Construction on New Alignment): Bypass options easterly and westerly of the villages of Pittsford and Brandon were studied. In general, these studies found that shorter bypasses around each village were more feasible than bypass alternatives that would both relocate long segments of U.S. Route 7 and bypass the villages. However, bypass alternatives would involve substantially greater impacts to resources and require more extensive environmental analysis. Moreover, two short bypasses of Pittsford and Brandon villages would not address the deficiencies of the overall U.S. Route 7 corridor through Pittsford and Brandon.
- f. Concrete Roadbed Removal/Rehabilitation Considerations: VTrans considered options on what to do with the concrete slabs remaining from the 1931 project. Reducing the concrete to rubble, compacting base materials, and paving with asphalt was rejected because it would not allow for adjustment of the roadway profile. This scenario also

would have resulted in differential settlement and longitudinal pavement cracking over time, as the roadway base materials of the widened sections and the concrete sections would not be homogenous. For the same reasons, conventional asphalt pavement widening with the existing concrete slabs left in place also was ruled out. Similarly, the option of doweling and extending the concrete slab, with conventional asphalt paving while leaving the concrete slabs in place, also was ruled out. VTrans selected the option of removing the existing concrete, undertaking a full-depth reconstruction of the roadway, and paving with asphalt. This will allow optimization of the vertical alignment and drainage design as well as minimization of impacts to adjacent properties. Moreover, the existing concrete slabs will not control the depth of excavation.

16. During the design process for Segment 5, project designers investigated and analyzed several concerns raised by abutting property owners:

- a. Parcel 502 (Otter Valley Union High School District #8): The school district requested that construction activities in front of the high school occur only during the school's summer vacation. On January 14, 2005, VTrans' consulting engineer Christopher R. Bean responded to school principal Dana Cole-Levesque. Mr. Bean advised that because the high school is a public entity, VTrans would consider including special provisions in the construction contract to limit construction activities in front of the high school to times least disruptive to school activities.
- b. Parcel 503 (Curtis Danley and Cheryl Danley, f/k/a Cheryl L. Hamilton): Ms. Danley has expressed concerns about the temporary traffic detour's encroaching on her property, stone-lined ditches along her frontage, and utility line relocations closer to her house. After further investigation, VTrans has determined that the temporary traffic detour

cannot be moved to the other (west) side of U.S. Route 7 without impacts to the high school property, the stone-lined ditches are required at the culvert entrances to prevent erosion, and the utility lines must be relocated to accommodate reconstruction of the highway. Following the necessity hearing, VTrans entered into a settlement stipulation with the Danleys which includes additional commitments by VTrans to mitigate the impacts of the project – including the temporary traffic detour – on the Danleys’ property.

- c. Parcel 506 (Elizabeth Dodge, f/k/a Elizabeth J. Kwak): VTrans staff worked with Ms. Dodge to address her concern about a proposed field-drive entrance on the west side of U.S. Route 7. The configuration was revised to address her concerns. Following the necessity hearing, VTrans entered into a settlement stipulation with Ms. Dodge and Paul C. Dodge (her brother and co-owner of the property). The settlement stipulation includes provisions for a redesigned entrance on the east side of U.S. Route 7, south of the historic farm stand.
- d. Parcel 512 (Kim B. Nelson): Ms. Nelson is very concerned with the sugar maple trees in front of her home. VTrans has considered options such as guardrail at the location. On May 17, 2005, VTrans landscape architect Jane Brown agreed that the sugar maples could be saved since the permanent construction was 15 feet away from the trees. The highway design was modified by pulling in the clear zone so the trees would be outside the clear zone. Also, curbing will be installed to minimize impacts to the roots.
- e. Parcel 533 (Suzanne H. Bennett): The Bennett property is located on the east side of U.S. Route 7, just south of the intersection with Country Club Road (TH #31). The state highway right-of-way is unusually wide on the east side of U.S. Route 7. In April 2008,

Ms. Bennett advised VTrans' project manager Kenneth C. Upmal, P.E. that her septic system is located in the existing state highway right-of-way. Following the necessity hearing, VTrans entered into a settlement stipulation with Ms. Bennett to pull in the boundaries of the proposed fee acquisition to exclude from the fee acquisition the area of the septic system. This will facilitate subsequent release of the excess right-of-way to Ms. Bennett. Under the settlement stipulation, the revised boundary for VTrans' fee acquisition along Ms. Bennett's frontage will be a line 40 feet (12.192 meters) parallel to the centerline of the reconstructed U.S. Route 7.

- f. Parcel 534 (Bernard O. and Terri L. Mecier): The Meciers, who are located on the easterly side of U.S. Route 7 just north of the intersection with Country Club Road (TH #31), have a business sign within the existing state highway right-of-way, which is unusually wide at this point. However, a Vermont statute (10 V.S.A. § 495[d]) prohibits commercial signs within the limits of public highways. Because of the surrounding physical features, simply moving the sign outside the highway right-of-way would seriously reduce its visibility to highway travelers. VTrans staff determined that some of the existing right-of-way is no longer required for highway purposes and that the Meciers' sign easily could be moved to this area without any loss of visibility. This plan has the added benefit of putting the Meciers' parking outside the state highway right-of-way. VTrans staff also explored the possibility of a shared driveway between the Meciers' property and the adjoining Paul J. Bellonio parcel; however, Mr. Bellonio did not consent to a shared driveway.
- g. Parcel 548 (Brandon Fire District No. 1): In response to a concern of the fire chief, VTrans and the fire district agreed that during construction VTrans will notify the fire

chief of any upcoming interruptions to the fire district's access to U.S. Route 7. This notification will occur sufficiently in advance to allow the fire district to relocate emergency vehicles to a temporary location for the duration of the interruption.

17. The design of the proposed project follows the Vermont Design Standards, which were developed in the mid-1990s by a committee including representatives of VTrans, ANR, the Division of Historic Preservation, regional planning commissions, the Vermont Council on the Arts, the Preservation Trust of Vermont, and the Federal Highway Administration (FHWA). In 1997, VTrans adopted the Vermont Design Standards as formal regulations under the rulemaking provisions of the Administrative Procedure Act (APA). In a few locations, VTrans and its consultant, following the "design exception" criteria of the Vermont Design Standards, are proposing minor exceptions to general highway design standards because of the need to accommodate the proposed project to the local terrain.

18. After analyzing the type of terrain, traffic volumes, and the functional classification of U.S. Route 7, VTrans' designers selected a design speed of 50 m.p.h. between certain stations and 40 m.p.h. between other stations. The design speed is the maximum safe speed that can be maintained when conditions allow the design features of the highway to govern driving speed. The geometric design standards of the proposed improvement reflect these design speeds.

19. As reconstructed under the proposed project, U.S. Route 7 will provide two 3.6-meter (approximately 12-foot) travel lanes, with 2.4-meter (approximately eight-foot) paved shoulders on either side. The sharpest horizontal curve (near the Nickerson Road intersection) will have a radius of 255 meters, which satisfies the design standard for a 50 m.p.h. design speed. The minimum stopping sight distance along the reconstructed highway will be above the minimum allowable stopping sight distances of 113 meters for 50 m.p.h. traffic and 94 meters for 40 m.p.h.

traffic. The steepest grade will be 6.1% (i.e., 6.1 units of vertical rise in 100 units of horizontal travel), which is at the maximum allowable grade of 6% for a 50 m.p.h. design speed in rolling terrain.

19. Safety along the reconstructed U.S. Route 7 will be further enhanced by provision of a “safety clear zone” extending from 7.2 meters (approximately 24 feet) to 4.9 meters (approximately 16 feet) from the outside edge of each travel lane. The purpose of a safety clear zone is to provide the driver of an errant vehicle which leaves the traveled portion of the roadway a reasonable opportunity to stop safely or otherwise regain control of the vehicle. This is achieved by designing, constructing and maintaining highway roadsides as wide, flat and rounded as practical and as free as practical from natural or manmade hazards such as trees, drainage structures, non-yielding sign supports, highway lighting supports and other ground-mounted structures.

20. Inclusion of eight-foot shoulders and a safety clear zone in the design of the proposed project will enhance safety by providing a refuge for pedestrians, bicyclists, slow-moving vehicles, breakdowns and highway maintenance vehicles. All drainage features have been designed in accordance with applicable stormwater management criteria of the Vermont Agency of Natural Resources.

21. The proposed project has taken into account certain environmental, historic preservation and similar concerns. Mitigation measures include the following:

- a. To minimize impacts to an historic structure on the Dodge property at Sta. 17+100 RT, the centerline of the reconstructed roadway was shifted westward, away from the historic structure as much as possible.
- b. Temporary traffic controls were designed to avoid affecting wetlands.

- c. A mechanically stabilized earth (MSE) retaining wall with guardrail was designed along Jones Mill Pond to avoid impacts to the pond.
- d. At Sta. 19+711, the alignment of the reconstructed roadway was set to avoid affecting the pond and dam on the east side of U.S. Route 7. Also, in this same area, steep 1.5:1 (i.e., 1.5 units vertical for one unit horizontal) slopes with guardrail protection were designed to minimize impacts to a wetland on the west side of U.S. Route 7.

22. Existing utility poles and lines along Segment 5 must be relocated to accommodate highway reconstruction. The utility companies will begin to relocate their poles and lines before roadway construction begins. To facilitate certain utility relocations outside the state highway right-of-way, VTrans proposes to acquire special-purpose utility easements.

23. To achieve proper coordination between VTrans and the Town of Brandon with respect to town highways affected by reconstruction of U.S. Route 7, VTrans proposes to enter into relinquishments and maintenance agreements with the Town of Brandon. The affected areas are identified on the project plans as “relinquishments” and “maintenance agreement areas.”

24. In a state highway reconstruction project of this type, relinquishments occur when the State acquires additional right-of-way needed to reconstruct or relocate a town highway affected by reconstruction of the state highway. Following completion of construction, the affected area is transferred (or “relinquished”) from VTrans’ jurisdiction to that of the town. The proposed project involves two relinquishments – one at Wood Lane (TH #35) and the other at Country Club Road (TH #31).

25. A “maintenance agreement area” results where a state highway intersects a town highway. To achieve proper coordination between the two facilities, the town must conduct certain maintenance activities within the state highway right-of-way. In a maintenance agreement

area, the respective maintenance duties of VTrans and the town are spelled out so that each party can perform its obligations to the public. The proposed project involves maintenance agreement areas at all five town highway intersections.

26. All driveways along Segment 5 will require some adjustment or reconstruction to match the reconstructed U.S. Route 7. VTrans has found reasonable solutions to these design problems.

27. During construction, traffic will be maintained on a two-lane detour. The detour could not be accommodated within the permanent highway right-of-way. Accordingly, the right-of-way plans show temporary construction easements to allow for the installation of a temporary detour. After construction is complete and traffic is shifted to the new roadway, the detours will be removed and final grading will take place. During construction, there are several crossover locations where it will be necessary to have temporary one-lane alternating traffic. The crossover work is expected to be completed in about one week.

28. The estimated cost of the project in 2008 dollars, not including the cost of design and right-of-way acquisition, is \$11.7 million.

29. U.S. Route 7 through the project area is part of the National Highway System (NHS) and is classified as a “principal arterial,” which is the highest functional class next to the Interstate highway system.

30. As part of its planning process, VTrans maintains an ongoing traffic data program. In the base year of 2005, annual average daily traffic (AADT) on U.S. Route 7 through the project area was 9,000 vehicles, of which approximately 11.5% were trucks. The AADT is a number used in traffic engineering to represent the traffic volume on a roadway without seasonal bias. If

you counted every vehicle that traveled a highway over the course of a year and divided by 365, the number of days in a year, you would have the AADT.

31. Traffic engineers also use the concept of design hour volume (DHV), which recognizes that it is not practical to design a highway for the year's very highest traffic volume. Instead, a highway is designed for a DHV which represents peak conditions which can be expected to recur with enough frequency to make it practical to consider them for design purposes. DHV is often – but not always – the 30th highest hour. For this segment of U.S. Route 7, the DHV for the base year of 2005 was 940 vehicles, of which approximately 10.4% were trucks.

32. Highway engineers also calculate AADT and DHV for a future “design year.” For a roadway reconstruction project, the design year is 20 years after the base year, representing the estimated useful life of the roadway reconstruction project. For the proposed U.S. Route 7 Segment 5 project, the design year is 2025.

33. For the design year of 2025, AADT is estimated to increase to 12,200 vehicles, which represents an increase of 3,200 vehicles or 35.56% from the 9,000 AADT for the base year of 2005. Of these 12,200 vehicles in 2025, approximately 17.4% will be trucks. For the design years of 2025, DHV is estimated to increase to 1,300 – an increase of 360 vehicles or 38.30% increase from the 940 DHV for the base year of 2005. Of these 1,300 vehicles in 2025, approximately 15.7% will be trucks.

34. VTrans' planning process also includes a “sufficiency rating” system, a method used to evaluate the relative condition of the various sections of the state highway system on a scale of 0-100. A sufficiency rating of 80 to 100 is considered “good,” 60 to 80 “fair,” 40 - 60 “poor” and 0-40 “bad.” Because of the two speed zones within Segment 5, VTrans has calculated separate

sufficiency ratings for each speed zone. For the existing segment 5, the 50 mph rating is 54.1 or poor, and the 40 mph rating is 41.5 or poor. VTrans also has calculated sufficiency ratings for the reconstructed segment 5 under design year 2025 conditions: the 50 mph rating is projected as 86.5 or good, and the 40 mph rating is projected as 73.6 or fair.

35. VTrans' planning and engineering staff also analyze police-reported crashes. According to these studies, the present U.S Route 7 through the project area had 24 police-reported crashes during the five-year period between 2002 and 2006. Ten of these crashes involved personal injuries, with a total of 18 individuals injured. The crash rate for the segment in the vicinity of the Nickerson Road intersection is higher than for other comparable state highways in Vermont.

36. U.S. Route 7 through the Town of Brandon was taken into the state highway system in 1931.

37. However, the history of the highway now known as U.S. Route 7 through Brandon goes back to the European settlement of Vermont in the late eighteenth century. There is evidence in the records of the Brandon town clerk and VTrans that in 1797, as part of a survey of a stage road from Rutland to Vergennes authorized by the legislature, a 1.06-mile-long segment closely tracking present-day U.S. Route 7 from the Pittsford-Brandon town line to McConnell Road (TH #8), was laid out at a width of six rods (99 feet). Furthermore, there is evidence in the Brandon town records that in 1809 another legislatively authorized survey laid out a four-rod (66-foot) highway closely tracking a portion of present-day U.S. Route 7.

38. In 1931, shortly after becoming part of the state highway system, U.S. Route 7 was paved with concrete under a federal-aid project. The 1931 project generally followed the alignment of the existing gravel highway alignment.

39. As part of the 1931 project, there were several minor shifts of alignment, and some culverts were reconstructed. To accommodate these changes, the old State Highway Department acquired several parcels of land and easements.

40. In 1953, as part of a federal-aid project in the vicinity of Jones Mill Pond, the State acquired additional strips on the east (*i.e.*, pond) side of U.S. Route 7.

41. In 1973, as part of a federal-aid project, a portion of U.S. Route 7 was reconstructed in the vicinity of the Otter Valley Union High School. The U.S. Route 7 centerline was shifted slightly eastward and a “jughandle” (since removed) was added on the easterly side. In connection with the 1973 project, the State acquired a parcel on the east side of U.S. Route 7, opposite the high school. Just to the north, the State acquired permanent slope rights on the west side of U.S. Route 7, which is the Dodge property.

42. In 1983-84, under a federal-aid highway project, a full-depth reconstruction of U.S. Route 7 was undertaken in the vicinity of Jones Mill Pond to a point north of the intersection with Country Club Road and widened an existing culvert over Jones Brook (the outlet for Jones Mill Pond). The State acquired several additional strips, as well as miscellaneous permanent and temporary rights. The project also included the conveyance of a strip of right-of-way on the east side of U.S. Route 7, north of Country Club Road, to the abutting landowner. The right-of-way plans for this project show an existing right-of-way width of four rods (66 feet), along with the acquisitions of 1931 and 1953. The existing right-of-way width is greater than the three rods (49.5 feet) shown on the 1931 plans but is consistent with the survey of 1809.

43. In light of the history of U.S. Route 7 since it became part of the state highway system in 1931, VTrans, when preparing right-of-way plans for the current Segment 5 project, depicted existing right-of-way limits by relying on the three-rod (49.5-foot) right-of-way

identified in 1931, as supplemented by the additional acquisitions made for the 1931 and later projects. This was a deliberately more conservative course than attempting to resurvey the broader six-rod and four-rod surveys from 1797 and 1809.

44. The proposed project will require the acquisition of approximately 11.96 acres of land outside existing state and town highway rights-of-way. This breaks down as follows:

- Approximately 1.81 acres of agricultural land;
- Approximately 2.87 acres of woodland;
- Approximately 3.21 acres of residential land;
- Approximately 3.35 acres of commercial land;
- Approximately 0.42 acres of school land;
- Approximately 0.29 acres of municipal land; and
- Approximately 0.0089 acres of private road.

VTrans also proposes to acquire various temporary and permanent rights. These temporary rights include the right to reconstruct driveways to match the new highway, construction rights, and slope rights. Some of the permanent rights are drainage rights, utility rights, and slope rights.

45. In terms of grand list values, VTrans' preliminary estimate for the cost of additional land and rights to be acquired for the proposed project, along with impacts on the remaining portions of affected properties, is \$190,000.00. The resulting annual property tax loss to the Town of Brandon will be approximately \$2,300.00, against 2007 total annual municipal property tax revenues of approximately \$2.2 million. This loss will not be significant.

46. The proposed project is not expected to cut off or directly affect any water line or water supplies. Nonetheless, VTrans will monitor water supplies in the project area against possible adverse impacts from construction or use of the new highway. Should construction or

use of the new highway actually damage a water supply, VTTrans will take responsibility for drilling a new well or other appropriate corrective action.

47. The proposed acquisition of approximately 0.42 acres from the Otter Valley Union High School District No. 8 was approved by the school district's voters at the district's annual meeting held on March 1, 2006.

48. The proposed project includes acquisitions from the Brandon Area Rescue Squad, Inc. (Parcel 538) and Brandon Fire District No. 1 (Parcel 548). However, the proposed acquisitions are minor and will not impair the functioning of either facility. VTTrans will coordinate construction activities in front of both facilities to minimize temporary disruptions to access and to provide for short-term relocation of emergency vehicles when access must be unavoidably interrupted for short periods of time.

Conclusions of Law

1. The requirement of "necessity" derives from the Vermont Constitution:

That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

Vt. Const., ch. I, art. 2.

2. For proceedings involving acquisition of additional land for the state highway system, "necessity" has been statutorily defined as follows:

(1) "Necessity" shall mean a reasonable need which considers the greatest public good and the least inconvenience and expense to the condemning party and to the property owner. Necessity shall not be measured merely by expense or convenience to the condemning party. Due consideration shall be given to the adequacy of other property and locations and to the quantity, kind and extent of cultivated and agricultural land which may be taken or rendered unfit for use by the proposed taking. In this matter the court shall view the problem from both a long range agricultural land use viewpoint as well as from the immediate taking of agricultural lands which may be involved. Consideration also shall be given to the effect upon home and homestead rights and the convenience of the owner of

the land; to the effect of the highway upon the scenic and recreational values of the highway; and to effect upon town grand lists and revenues.

19 V.S.A. § 501(1).

3. In *Agency of Transportation v. Wall Management*, 144 Vt. 640, 643, (1984), the Vermont Supreme Court explained the standards to be used in interpreting 19 V.S.A. § 501(1):

This Court has previously stated that the term “necessity,” as used in the statute, does not mean an absolute or imperative necessity “but only that the taking be reasonably necessary to the accomplishment of the end in view under the particular circumstances.” *Cersosimo v. Town of Townshend*, 139 Vt. 594, 597, 431 A.2d 496, 498 (1981); *Latchis v. State Highway Board*, 120 Vt. 120, 123, 134 A.2d 191, 194 (1957)....

4. The Vermont Supreme Court has provided further guidance as to the State’s burden:

The argument that “the state doesn’t need to take my land” merely because some one else’s land might be taken has no validity. After all, if there is to be a road, it of necessity has to go somewhere, some one’s property has to be taken. If imperative or absolute necessity were the test, there would be no practical way in which the crooked road could be made straight. It could always be said “The state already has a road.” To justify a taking, the interests of the State must require it, and it must be so shown, but only to the extent that it is reasonably necessary to accomplish the end in view after weighing all the circumstances which bear on any given situation.

Latchis v. State Highway Bd., 120 Vt. 120, 124-25 (1957).

5. By statute, property rights in fee simple may be taken by necessity for state highway projects whenever practicable. 19 V.S.A. § 502(a).

6. The definition of “highway” in 19 V.S.A. § 1(12) includes “areas to accommodate utilities authorized by law to locate within highway limits” and “areas used to mitigate the environmental impacts of highway construction.”

7. The General Assembly has declared it to be the state’s policy to provide paved shoulders on major state highways to develop an integrated bicycle route system. 19 V.S.A. § 2310.

8. Under the bifurcated procedures of 19 V.S.A. Chapter 5, compensation issues are not properly before the Court in a hearing to determine necessity under 19 V.S.A. § 507. See generally *In re South Burlington-Shelburne Highway Project*, 174 Vt. 604, 605-06 (2002).

9. Applying the above standards, the Court concludes that VTrans has sustained its burden of proof and is entitled to an order of necessity under 19 V.S.A. § 507. The Agency has considered what is in the public interest and would involve the least inconvenience and expense to the abutting property owners. It has given due consideration to effects on cultivated and agricultural lands, homes and homestead rights, convenience to the various landowners along the project, scenic and recreational values, and the grand list of the Town of Brandon. The project, as proposed, will enhance service and safety by replacing a narrow and deteriorated section of highway with a wider highway built to modern engineering standards. In proposing this project, VTrans has acted in good faith.

10. At the time of the hearing, four property owners objected to the project. Of those, three reached agreements with VTrans during the period following the hearing, and stipulations have been filed with the court. The fourth, Mr. Perry, raised three objections. The first was a generalized statement of objection to the project as a whole. The State has, however, demonstrated a sufficient basis for the need for safety improvements in support of necessity for the upgrade of this segment of the state highway. His second objection was to the necessity of taking a fee simple interest where the State already holds an easement sufficient for highway purposes. The statute provides for fee simple ownership by the state for state highway projects “whenever practicable.” There are some circumstances in which fee simple ownership is not practicable. See *In re Highway Project East Montpelier BRF 037-2(8)*, No. 198-3-07 Wncv (Teachout, J., Jan. 2, 2008), available at <http://www.vermontjudiciary.org/tcdecisionscvl/2008->

10-9-1.pdf. Under the circumstances of this case, no such impracticability has been shown. Mr. Perry's third objection is that the taking may diminish the size of his parcel from 4.01 acres to under 4 acres, making it impossible to subdivide. No specific facts or evidence were presented in support of this proposition. In any event, any effect on the market value of the property as a result of such effect is properly addressed in a hearing on the amount of compensation to be paid, which will follow this determination.

Order

For the foregoing reasons, it is hereby ORDERED that the petition filed by the Agency of Transportation is GRANTED. Counsel for the petitioner, in accordance with V.R.C.P. 58, shall submit a proposed judgment order setting out at length a description of the authorized taking, as modified to reflect the settlement stipulations entered between the petitioner and several of the parties who appeared at the necessity hearing.

Dated this 10th day of October, 2008.

Mary Miles Teachout
Superior Court Judge