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STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 251-4-10 Wrcv

In re Transportation Project
Bethel BHF 0241 (30)S

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter came on for hearing before the Windsor Superior Court, the Honorable Harold E. Eaton, Jr. Presiding Judge, on June 22, 2010 pursuant to an amended necessity petition filed by the Vermont Agency of Transportation (AOT) under 19 V.S.A. Chapter 5.

At issue is the necessity of the State of Vermont's acquisition of certain lands and rights in lands in connection with the proposed replacement of a bridge (Bridge No. 30) carrying Vermont Route 12 over Locust Creek in the Town of Bethel, approximately 0.40 mile south of the junction of Vermont Route 12 and Vermont Route 107. The State's proposed improvements are detailed in plans captioned "BETHEL BHF 0241(30)S," copies of which were attached to the petition and amended petition.

AOT was represented by Assistant Attorney General Daniel D. Dutcher. The following interested parties were present and took part in the hearing:

Daniel Hershenson, Esq., on behalf of John Durfee, abutting land owner

John Schenker, abutting land owner

Upon consideration of the necessity petition, as amended, and the evidence, the Court makes the following Findings of Fact, Conclusions of Law, and Order:

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Findings of Fact

1. AOT, on behalf of the State of Vermont, filed a petition and two amended petitions in this Court under 19 V.S.A. chapter 5 seeking authority to take certain lands and rights in land in connection with Transportation Project Bethel BHF 0241(30)S, the plans for which were attached to the petition and amended petition. Amendment No. 1 corrected two minor clerical errors in the original petition. Amendment No. 2 corrected two additional minor clerical errors in the original petition and also clarified the rights and easements needed for the project. In particular, Amendment No. 2 made clear that a temporary easement to remove an existing drive on Parcel 4 (Linda L. Shekinah) would result in the permanent removal of vehicular access to Vermont Route 12 from that parcel. AOT filed and introduced amended plans for the project to reflect this amendment of the petition.

2. The proposed project involves the replacement of Bridge No. 30 carrying Vermont Route 12 over Locust Creek in the Town of Bethel, Vermont together with necessary roadway and approach work.. Bridge No. 30 is located approximately 0.40 mile south of the junction of Vermont Route 12 and Vermont Route 107. Martha Evans Mongeon is the project manager for the AOT on this project. This is a federal-aid transportation project, with eighty percent of the funding for design, acquisition, and construction coming from federal sources and the State responsible for the remainder. The layout sheets in the plans for the proposed project depict the existing rights-of-way for Vermont Route 12 as well as the new permanent and temporary acquisitions of lands and rights in lands necessary for the proposed project. References on the plans are to "stations"—points located every 100 feet along the centerline of the reconstructed highway.

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3. The proposed right-of-way project begins at station 101+05.39, a point in the Vermont Route 12 right-of-way approximately 395 feet south of the center line of Locust Creek. Thereafter, the proposed right-of-way project for Vermont Route 12 extends north across Locust Creek for another 501 feet or so to station 109+20.95, making the total length of the proposed right-of-way project approximately 816 feet (0.154 mile). The proposed bridge project begins at station 101+35 and ends at station 108+25, for a total length of approximately 690 feet. As the highway traveler on Vermont Route 12 going northward from the starting point of the project proceeds through the existing project area, the grade (vertical alignment) of Vermont Route 12 varies from a maximum ascending grade of 1.28 percent to a maximum descending grade of 2.66 percent. The horizontal alignment of Vermont Route 12 is straight throughout the project area. Although the highway in the project area passes a number of private drives, it does not meet any intersecting public highways. The closest intersecting highway is Vermont Route 107, .4 miles north of the project site.

4. The existing bridge is on a 24-month inspection cycle. As of the last inspection of the existing bridge on June 20, 2009, its sufficiency rating on a scale of 1-100 was 52.8. Sufficiency ratings are a subjective measure, and in past inspections this bridge has earned a sufficiency rating as low as 6.7 (in 2005). The sufficiency rating of a bridge is based on a formula that includes, among other things, ratings of the bridge's structural components. Each structural component—deck, substructure, superstructure, channel, and approaches—are rated on a scale of 0 (which would be a structural failure) to 9 (which would be excellent condition). As of 2009, the condition ratings were 4 (poor condition) for the bridge deck, 5 (fair condition) for the superstructure, 5 (fair condition) for the substructure, 4 (poor condition) for the channel, and 8

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(very good condition) for the approaches. A bridge for which any of these major components is rated 4 or lower is considered structurally deficient.

5. Throughout the project area, except through the existing bridge itself, the existing Vermont Route 12 consists of two 11-foot travel lanes with 4-foot paved shoulders on both sides of the highway. Through the actual bridge area, the existing maximum horizontal clearance is less than 22 feet. The existing Bridge No. 30, a single-span steel-beam structure with a concrete deck, was constructed in 1939 with a fascia-to-fascia width of about 29 feet. (The original curb-to-curb width was 25 feet, 6 inches.) The existing bridge's clear span is 58 feet, and its vertical clearance above the streambed is 9.5 feet. Because the original rails of the existing bridge have failed, AOT installed temporary concrete barriers (Jersey barriers), which have effectively eliminated the narrow shoulders originally included in the existing bridge's design and construction. Exs. 1a through 1c (Hearing Displays); Ex. 2 (Project Plans); Ex. 3 (Photographs of Project Area.) The bridge was designed to shed water off the sides of the bridge, using the crown of the road to provide the necessary pitch. This design has fallen into disfavor since 1939.

6. The present condition of Bridge No. 30 does not provide adequate, if any, shoulder width for bicycle or pedestrian traffic. Since the existing bridge's original construction in 1939, the highway, including the bridge, have undergone periodic resurfacing. The bridge deck, steel beam superstructure, and abutment substructures show an advanced state of deterioration. The concrete and steel in the bridge have badly deteriorated. The wing walls of the bridge are in a state of collapse, with reinforcing bar exposed. The abutments, consisting of reinforced concrete, show leakage, cracking, scaling, and heavy spalling. In addition, the present structure restricts the creek as it passes under the bridge as one of the abutments sits in the streambed. Sediment has accumulated elsewhere beneath the span, further restricting hydraulic capacity. Because of its

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general structural condition, AOT has classified the bridge as structurally deficient. Even if the bridge were in excellent repair, the existing bridge, because of its narrowness, would be functionally obsolete. It is not disputed that the existing bridge is badly in need of replacement. Exs. 1a through 1c (Hearing Displays); Ex. 2 (Project Plans); Ex. 3 (Photographs of Project Area).

7. Vermont Route 12 is a federal-aid primary highway. In terms of functional class, Vermont Route 12 is a Rural Major Collector. Route 12 was taken into the state highway system in 1931. Rural Major Collector routes serve as links between towns not directly served by higher functional class routes and also provide access to important intra-county traffic generators, such as schools, shipping points, and agricultural areas.

8. A traffic study was conducted under the direction of Dr. Bernard Byrne, a traffic research engineer. For the current year (using 2008 data), the construction year (2012), and the design year (2032), AOT has calculated the percentage of trucks on the road and estimated the Annual Average Daily Traffic (AADT) Volume and the Design Hourly Volume (DHV) in the project area. The AADT represents the traffic volume on the roadway without seasonal bias. The DHV is the hourly volume used for design purposes and rests on the assumption that it is not practical to design a highway for the very highest hourly volume that occurs over a year. The DHV is typically the 30th busiest hour of the year. Traffic engineers estimate traffic projections for a future year by looking at the trend over the past 20 years and projecting that trend into the future.

9. For the current year, the estimated AADT on Vermont Route 12 is 1100. About 7% of the AADT would be truck traffic. The DHV for the current year is 150, with about 6% trucks. For the construction year (2012), the AADT remains 1100, but with about 8% truck traffic. The DHV for the construction year also remains 150, but estimated truck traffic increases slightly to

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about 7%. For the design year (2032), the AADT is 1200, with about 12% trucks. The estimated DHV is 160, with about 10% of that figure constituting trucks.

10. AOT investigates crash histories at various locations across the state using police-reported crashes. There were no police-reported crashes during the period 2005 to 2009 in the project area.

11. There are no objections to the project as a whole or to most of the project as designed. Two abutting land owners, John Durfee and Joseph Schenker expressed objections to aspects of the project. Durfee objects to the permanent placement of the power lines along the western side of Rt. 12. Currently, the lines are on the west of the road to the south of the project, cross to the east for a distance within the project area and then return to the west on the north end of the project. Schenker objects to the raising of the bridge approach and bridge deck. He also objects to the relocation of the power lines, which will result in a service pole being placed less than 20 feet from his house.

12. The design of the proposed project is based on the Vermont Design Standards, which AOT adopted as a formal rule in 1997. The traffic data that AOT gathers for the area of a proposed project helps AOT determine how the Vermont Design Standards apply. The existing bridge is functionally obsolete because it falls short of current design standards based on current traffic data. The proposed new bridge and approaches would meet the requirements of the Vermont Design Standards. No features of the proposed project would require exceptions to these standards. Construction is scheduled for approximately April through October, 2012.

13. The proposed project would remove the existing bridge and replace it with a new single-span, steel-beam bridge with a concrete deck and new concrete abutments and wing walls and perform related channel work. Although the proposed new bridge would be the same type of

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structure as the existing bridge, and would be built on the same alignment, the new bridge would be somewhat longer, wider, and higher over the stream in order to meet current design standards for traffic safety and to have adequate hydraulic capacity. The clear span of the proposed new bridge would be 73 feet, with 11 feet of vertical clearance above the streambed. The proposed horizontal alignment of the proposed new bridge would remain unchanged. The vertical alignment of the proposed new bridge would increase slightly by about 2 to 3 feet on each end. The proposed new bridge would have 11-foot travel lanes and 4-foot shoulders in each direction and would include galvanized steel-beam rails on each side. Channel work would consist of constructing the new abutments and protecting them with stone fill. Exs. 1a through 1c (Hearing Displays); Ex. 2 (Project Plans)

14. The existing bridge fails to meet the hydraulic design standard to account for the anticipated highest stream flow in a 50 year period (Q50) with 1 foot of freeboard at the average low beam of the bridge. (Q50 describes the highest stream flow anticipated to occur on average of once every 50 years.) AOT relied on hydraulics data that it gathered for the project area and on its Hydraulics Manual to design the bridge to adequately accommodate Locust Creek. The proposed new bridge would have a larger waterway opening (620 ft²) than the existing bridge (440 ft²). The larger waterway opening would meet the minimum hydraulic design standard with an extra 0.7 feet of clearance at the average low beam (1.7 feet of freeboard). At the low (north) end of the bridge, the freeboard clearance would be 1 foot above Q50. This larger waterway opening is accomplished by raising the bridge height the 2-3 feet on each end, thereby creating a bigger opening between the bottom of the bridge deck and the surface of Locust Creek. The proposed structure, unlike the existing structure, would span the full bank width. This longer

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span would better match natural channel conditions so that the abutments would no longer normally be in the water.

15. Mr. Schenker, who owns Parcel 3 as depicted on the plans, which is both northeasterly and southeasterly of the bridge, objects to the bridge and its approaches being raised. He feels it is unnecessary to raise the bridge beyond its current height given the past history of the bridge, which included adequate clearance during the catastrophic floods in Windsor County during June 1973. However, the State has established that current design standards concerning hydraulic allowances can be reasonably met only by raising the bridge the 2-3 feet on each end as proposed by AOT.

16. In addition to replacing the existing bridge, the proposed project would also construct new roadway approaches, which would match the proposed bridge's 11-foot travel lanes and 4-foot shoulders. The new approaches would create a smooth transition from the roadway to the proposed bridge. New galvanized steel-beam guardrail approaches and galvanized steel-beam guardrails would extend along the shoulders from the ends of the new bridge's galvanized steel-beam rails. Each of the new guardrail approaches, which would run from the end of the bridge's rails to the new guardrail, would be 29.5 feet in length. The new guardrails would be approximately 49 feet in additional length to the southwest, 20 feet to the northwest, 24 feet to the southeast, and 24 feet to the northeast. The highway approaches to the new bridge would be reconstructed with new sub-bases and bituminous concrete pavement.

17. The existing highway right-of-way along most of the length of the proposed project is at least 66 feet (4 rods), but the right-of-way is wider at the beginning and end of the project area (approximately 82.5 feet and 115 feet, respectively). Safety along the reconstructed Vermont Route 12 would continue to be enhanced by a safety clear zone extending some 20 feet from the

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outside edge of each travel lane. (Since the design includes 4-foot shoulders, the clear zone would extend 16 feet beyond the outside edge of each shoulder.) Guardrail would be provided wherever engineering judgment determined that it would not be feasible to provide a safety clear zone.

18. Inclusion of 4-foot paved shoulders and a safety clear zone in the design of the proposed project will enhance safety by providing a refuge or partial refuge for pedestrians, bicyclists, slow-moving vehicles, breakdowns, and highway-maintenance vehicles. The clear zone can decrease the severity of some crashes by providing an opportunity for vehicles that are out-of-control or forced to take evasive action to regain control or come safely to rest without striking any large fixed objects. Although use of a guardrail as an alternative to a clear zone sometimes is necessary, a guardrail is a less desirable alternative since it can be a hazard in itself. The design speed for the proposed project will remain 50 mph.

19. Stormwater runoff from the proposed highway would drain to surrounding fields and lawns. A ditch from about station 107+00 left to 109+00 left would collect runoff from the hill on that side of the road and drain it to an existing ditch.

20. In addition to the new bridge, the proposed project would also involve a new culvert. A 4-inch PVC sleeve would be installed at about station 103+00 to replace an existing 4-inch sleeve that was installed in this location in 1956. The purpose of this culvert is to allow the possible future installation of a private waterline running from the McKinstry/Schenker property (Parcel 2) to the Suarez property (Parcel 1).

21. During the construction period, two-way traffic through the project area would be maintained over a temporary bridge to be constructed just downstream (east) of the existing bridge. To maintain traffic flows and to minimize the impacts on adjacent properties that would

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result from the potential stacking of vehicles waiting to cross a temporary single-lane bridge, the proposed temporary bridge would be two-lanes wide. Because the proposed temporary detour and certain other construction activities could not be entirely accommodated within the permanent highway right-of-way, it will be necessary to acquire temporary construction easements. Upon completion of the proposed new bridge, the areas affected only by the temporary easements would be restored to their approximate original contours. There are no practicable detours around the proposed construction area using existing roads that would avoid the need for a temporary bridge. Locating the proposed temporary bridge to the east of the existing bridge would be more practical than a westerly location because of thick vegetation and a steep slope on the westerly side of the existing bridge.

22. In order to construct the proposed temporary bridge, utility poles and aerial lines (power and telephone) must be relocated to the opposite (west) side of the highway. This would move the utilities from the existing location along the easterly side of Route 12, where they are located for a short distance, to the westerly side along Parcel 5 as shown in the plans. There is insufficient room to construct the temporary bridge on the east leaving the lines in their current location. The utility companies will relocate the lines at their own expense. Once these utilities are relocated, AOT claims it would be more practical to leave them on the west side of the highway than to move them back to the east side once the proposed temporary bridge is removed. In addition, the cost of returning them to the east side of the road would be approximately \$24,000, an expense which the utilities/AOT do not wish to incur. Accordingly, AOT claims a permanent utility easement on the west side of the highway is necessary. (AOT (with federal aid) covers the expense of the utility easement.)

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23. Mr. Durfee, owner of Parcel 5 as depicted on the plans, objects to the permanent, but not temporary, relocation of the power lines to the west side of the highway, claiming that the only reasons for leaving them there is one of cost. Such is not the case. If the utilities were moved back to the east side of the roadway after the temporary bridge is removed, a permanent utility easement of similar dimensions to that required on the west side of the bridge would need to be acquired for that purpose because the utility lines would need to be relocated from their existing position to a place further east of their current location to provide an adequate safety clear zone. A dispute exists over the required safety clear zone. The AOT claims 20 feet is required, Mr. Durfee claims only 16 feet is required. Either way, there would be adequate room to restore the lines on the east side without interfering with the Schenker house but they can not be placed back in their current location without being within the safety clear zone.

24. The proposed new utility easement on the west side of the highway would not interfere with the use of or access to any properties. The Durfee property is steep and heavily wooded. Relocating the lines to the west, even temporarily, will require tree cutting. However, no fewer trees would need to be cut to clear the proposed utility easement temporarily on the west side of the roadway than will be required for a permanent relocation to that side. Once the trees are cut the lines, like all others, must be kept clear of brush and trees.

25. It is not disputed that the power lines must, at least temporarily, be moved to the west side of the highway due to placement of the temporary bridge, a reason having nothing to do with cost. The cost to the utilities of relocating the utility poles back to the east side of the highway once the temporary bridge is removed would exceed \$24,000. Cost does not dictate the relocation of the power lines to the westerly side of Route 12; their placement there, at least temporarily, is necessary. That being said, Mr. Durfee's objection is over the duration of the

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lines being on the westerly side of the road, not the necessity for doing so. Therefore, cost alone, as Mr. Durfee asserts, is not the only factor impacting the decision to move the lines or in the decision not to relocate the lines in a new configuration on the easterly side of the road once construction is completed. Taken to its extreme, Mr. Durfee's position could be said to equally apply to the burial of power lines, which is feasible but for the cost. Durfee has raised the possibility that permanent location of the power lines to the west side of the road will impact his future ability to develop his land. He has provided no specifics.

26. Mr. Schenker does not like the proposed location of the service pole near his house if the main utility lines are left on the westerly side of the road. It is not possible to run the lines off the pole on the westerly side of Route 12 directly to the Schenker house as there is not adequate clearance above Route 12 to do so. Mr. Schenker's objection also does not impact on the necessity of moving the lines as an initial proposition.

27. A permanent channel easement and an abutment for the northwest corner of the proposed new bridge would extend into the driveway accessing Parcel 4 (Linda L. Shekinah), which currently has no sight distance on Route 12. In addition, guardrails extending from the northwest corner of the proposed bridge would reach well beyond the northern property line of Parcel 4. As a result, it will be necessary to permanently remove vehicular access from Parcel 4 to Vermont Route 12. No reasonable design solution could avoid the loss of access to Parcel 4. A temporary easement is also necessary to perform work in this area. Ms. Shekinah has not objected to the loss of her driveway access.

28. The proposed project would reduce the existing stopping distance of 622 feet to 492 feet. The required stopping distance for the design speed of 50 mph is 425 feet. Thus, the proposed vertical alignment would remain adequate for the design speed. Passing is not allowed on this

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segment of road, and will not be allowed on the rebuilt road, as the required passing site distance for this design speed is 1835 feet.

29. Current intersection site distances for the drives in the project area are 419 feet (Parcel 1 (Suarez)), 350 feet (Parcel 2 (Schenker)), and 0 feet (Parcel 4 (Shekinah)). The recommended intersection site distance at the design speed of 50 mph is 555 feet. The project would improve the site distance for the first drive to 425 feet, degrade the second to 280 feet, and eliminate the third. The two drives that will remain will be reconstructed at their intersections with Vermont Route 12.

30. AOT gave careful consideration to potential alternatives to the proposed project. An alternative to the proposed horizontal alignment would not be practical on this straight section of highway. Using the existing horizontal alignment minimizes property acquisitions, effects on scenic and agricultural values, and impacts on homes and homestead rights. Rehabilitation of the bridge in lieu of replacement would not be cost effective in view of the advanced state of deterioration of the existing structure. Similarly, alternative designs were considered less cost-effective than the selected alternative. Approaches were made as short as possible to minimize construction time and costs. The proposed design would minimize the fill needed to construct the project by keeping as close as possible to the existing vertical alignment. The proposed design would raise the grade of the bridge to gain adequate clearance of the predicted Q50 flood elevation. In addition, the grade would be raised more near the southern end of the bridge than near the northern end in order to drain stormwater from the bridge surface.

31. No significant environmental impacts or impacts on historical or archeological resources are anticipated for this project.

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32. AOT presently owns a highway easement in the area of the proposed project. To maintain full control over the right-of-way, it will be necessary to acquire all remaining right, title, and interest in the existing highway right-of-way, effectively converting the highway easement into fee simple ownership. The proposed project does not require the acquisition of any structures or any types of land outside the existing right-of-way, including school district land. Nor would the proposed project have any significant effect on students traveling to or from school or on fire or ambulance services. The proposed project would not significantly impact any agricultural lands, woodlands, or commercial lands and would not directly affect any water lines or supplies.

33. The proposed project requires the acquisition of various permanent and temporary rights and interests in land outside the existing highway right-of-way, as detailed in the project plans. Permanent rights include channel rights, utility easements, easements to install and maintain guy wires and anchors, and the permanent removal of vehicular access to Vermont Route 12 from Parcel 4. Channel rights are areas where AOT has the permanent right to construct and maintain the channel of a stream of water. The owners of the land where AOT acquires permanent rights retain their rights to make use of the land in any manner that does not interfere with the Agency's rights. Temporary rights include rights for construction, drives, landscaping, slopes, and the detour. These temporary easements provide space for construction activities that cannot be conducted within the permanent right-of-way. Upon completion of the project, temporary easement areas will be restored to their approximate original contours and returned to the control of the landowner.

34. The annual property tax loss to the Town of Bethel resulting from the proposed project would be approximately \$1,258. Measured against the Town's 2009-2010 anticipated total annual property tax revenues of \$1.3 million, this loss will not be significant.

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Proposed Conclusions of Law

1. The requirement of "necessity" derives from the following provision of 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; to the need to accommodate present and future utility installations within the highway corridor; to the need to mitigate the environmental impacts of highway construction; and to the 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, 481 A.2d 1270, 1272 (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

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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). . . .

The statute gives the state highway board broad discretion, “in determining what land it deems necessary for the particular location and route to be followed....”, *Latchis v. State Highway Board, supra*, 120 Vt. at 125, 134 A.2d at 195, and we will not interfere with that determination as long as it is made in good faith and is not capricious. *Id.*

4. The Vermont Supreme Court has provided further guidance:

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 Board, 120 Vt. 120, 124-25, 134 A.2d 191, 194-95 (1957).

5. The General Assembly has declared it to be the state’s policy to provide paved shoulders on major state highways. 19 V.S.A. § 2310. AOT designs highway projects based on the Vermont Design Standards, Vt. Code R. §§ 14 010 019. Under State law,

“[t]he term ‘highway’ includes rights-of-way, bridges, drainage structures, signs, guardrails, areas to accommodate utilities authorized by law to locate within highway limits, areas used to mitigate the environmental impacts of highway construction, vegetation, scenic enhancements, and structures.”

19 V.S.A. § 1(12).

6. State law provides that “[a]ll property rights shall be taken in fee whenever practicable.” 19 V.S.A. § 502(a). Similarly, under federal regulations applicable to federal-aid highway

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projects, "all real property, including air space, within the right-of-way boundaries of a project shall be devoted exclusively to public highway purposes." 23 C.F.R. § 1.23(b).

7. Under the bifurcated procedures of 19 V.S.A. Chapter 5, disputes as to the amount of just compensation to be paid for land actually taken, as well as so-called "severance damages" for the decline in value of remaining lands, are postponed for subsequent determination by the Transportation Board, 19 V.S.A. §§ 511-12, with the right of appeal to the Superior Court and the opportunity for trial by jury. 19 V.S.A. § 513. Accordingly, compensation issues are not properly before the court in a hearing to determine necessity under 19 V.S.A. § 507.

8. The burden of proof concerning necessity rests with the State. *State Transportation Board v. May*, 137 Vt. 320 (1979). Of the statutory factors, the most important is public safety. *Latchis v. State Highway Board*, 120 Vt. 120 (1957). Here, the location of the power lines, height of the roadway approaches and bridge deck, and the location of the service pole to the Schenker house do not impact upon public safety one way or the other.

9. Durfee argues that AOT has not properly considered the statutory factors in connection with this project. On the contrary, the record shows that AOT did give proper consideration to the statutory factors in connection with this project. Defendant contends that the permanent location of the power lines on the western side of the highway will adversely impact future opportunities to develop that land. No evidence was put forward to support that contention.

10. Durfee further argues that the permanent relocation of the power lines to the westerly side of the highway is unnecessary and based upon cost alone. That argument fails as the relocation of the lines to the westerly side of the road during construction is conceded to be necessary. As a result, the argument is one over duration of the relocation, not the necessity of doing so.

Opponents have pointed to no case where a necessary relocation was proper on a temporary basis

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but improper on a permanent one. That the project could be made more palatable to the neighbors if more money was spent would likely be true on any project. What neighbor would not prefer the burying of power lines to running them overhead? There is a need to relocate the power lines here. Once that has been done, there is no need to move them once again simply to suit the desires of some of the adjoining landowners. AOT gave proper consideration to the statutory factors in the development of this project, a matter within the expertise of the AOT. Therefore, while the burden of proof remains with the AOT, the Court will afford the agency some deference concerning the comparatively minor details of the project. *Town of Killington v. Department of Taxes*, 176 Vt. 70 (2003). The AOT is not required to propose a project to which there is no objection but merely to demonstrate reasonable necessity, which they have done.

11. With respect to objections over the approach to and height of the bridge, those are understandable esthetic concerns. However, the AOT has shown those aspects of the project, as they have been designed by AOT are necessary to achieve hydraulic design standards. The Court understands the objection in light of the historical experience of Mr. Schenker during the 1973 flood. Nonetheless, there has been no showing why a deviation from the applicable hydraulic standard should be built into this project when compliance with it is so easily achieved.

12. Applying the above standards, the Court concludes that the Agency of Transportation has sustained its burden of proof and is entitled to an order of necessity under 19 V.S.A. § 507. The Agency has considered the greatest public good and 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 area, scenic and recreational values, the grand list of the Town of Bethel, and to the need to mitigate environmental impacts. The project, as proposed, will enhance service and safety by

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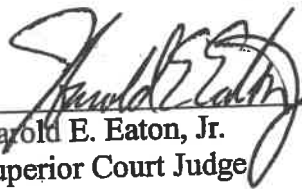
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replacing a structurally deficient and functionally obsolete bridge with a new bridge built to modern engineering standards and by constructing new approaches to the new bridge. In proposing this project, the Agency of Transportation has acted in good faith, without caprice.

Proposed Order

Accordingly, it is hereby ORDERED that the petition, as amended, filed by the Vermont Agency of Transportation on behalf of the State of Vermont is GRANTED. Counsel for the petitioner shall submit a proposed judgment order setting out at length a description of the authorized taking.

Dated at Woodstock this 29 th day of July, 2010.


Harold E. Eaton, Jr.
Superior Court Judge

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