

## MEMORANDUM

To: Kirsten Merriman Shapiro  
City of Burlington

From: Brian Dunkiel & Jon Rose  
Dunkiel Saunders Elliott Raubvogel & Hand PLLC

Re: Champlain Parkway – Necessity Hearing Process

Date: April 10, 2018

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The Champlain Parkway (the “Parkway” or the “Project”), is a proposed transportation link currently being developed by the City of Burlington in cooperation with the Federal Highway Administration (“FHWA”) and the Vermont Agency of Transportation (VTrans). This Memorandum provides a general overview of the Project, the legal underpinnings of the upcoming “necessity hearing,” and a description of the hearing itself.

### I. The Project

The Champlain Parkway, formerly known as the “Southern Connector” originated in the 1960s as a four-lane limited access highway to improve vehicular access between downtown Burlington and I-189. Today’s two-lane version is a multi-modal design that includes bike/pedestrian, traffic calming components, and significant new stormwater management infrastructure. The purpose of the Project is to improve access from the vicinity of the interchange of I-189 and U.S. Route 7 to the Burlington City Center District (“CCD”) and the downtown waterfront area, and to improve circulation, alleviate capacity overburdens, improve safety on local streets in the Project area and provide traffic relief in the southwestern quadrant of the City. The main components of the Parkway are:

- a. Reconstruction of the southernmost section of the Parkway to reduce the roadway width to accommodate two lanes of travel and transition from I-189 to a city street.
- b. Construction of a new roadway between Home Avenue and Lakeside Avenue for one lane of motorized vehicular travel in each direction with turning lanes and traffic signals at major intersections.
- c. Full-depth reconstruction of Lakeside Avenue from the intersection of the Parkway to Pine Street.
- d. Resurfacing of Pine Street.

- e. Construction of a new shared-use path in two locations: along the northern side of the Parkway between Shelburne Street and Pine Street, and from Home Avenue to Kilburn Street along the eastern side of the Parkway, the northern side of Lakeside Avenue, and the western side of Pine Street.
- f. New and reconstructed sidewalks along the eastern side of Pine Street from Lakeside Avenue to Main Street, and along the western side of Pine Street from the terminus of the shared-use path to Main Street.
- g. Exclusive pedestrian phases with pedestrian-activated signals for pedestrian crossings at all intersections with traffic signal controls.
- h. Replacement of four-way stop signs with new traffic signals at the intersections of Pine Street with Maple Street and King Street.
- i. New stormwater infrastructure in various locations throughout the Parkway to ensure that there will be no net loading of pollutants to the receiving waters as a result of the Parkway.

## **II. Legal Background**

As noted above, the Project is a joint state and local effort between the City and VTrans. Under the Cooperative Agreement governing the relationship between the City and VTrans (as amended), VTrans was responsible for developing the Project right of way plans, conducting valuations, and seeking agreements to obtain the necessary property interests. The Cooperative Agreement provides, however, that the City is to act as the “condemning authority” should property interests need to be taken by condemnation.

Design plans for the Project are now substantially complete, and VTrans has identified nearly all temporary and permanent property acquisitions necessary to complete the Project. VTrans has also completed the property appraisal process and has attempted to negotiate with interested property owners for the necessary land rights. It is now time for the City to institute proceedings to acquire the rights not yet obtained by VTrans.

The municipal condemnation proceeding is governed primarily by statute. Municipalities seeking to take land for highway projects must first determine that the projects are supported by a finding of “necessity.” Vermont law defines “necessity” as follows:

Necessity means 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 inconvenience to the condemning party. Necessity includes a reasonable need for the highway project in general as well as a reasonable need to take a particular property and to take it to the extent proposed.

The Vermont Supreme Court has described this standard as something less than absolute necessity. The term “does not mean an imperative, indispensable or absolute 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 (1981).

### **III. The Hearing Process**

#### **A. Initiation**

The City Council initiates the necessity hearing process by ordinance or resolution (here, likely a resolution). *See* Charter § 235. The resolution should set a “time and date both for examining the premises and hearing the persons interested.” 19 V.S.A. § 709. The resolution should be approved more than 30 days prior to the hearing.

#### **B. Notice**

##### **1. Time/Manner of Service:**

The Charter and the condemnation statute spell out two separate notice requirements. Under the statute, notice must be provided to all “persons owning or interested in lands through which the highway may pass or abut” at least 30 days prior to the site visit. 19 V.S.A. § 709. Under the Charter, the City Council must issue a “citation” (that includes a list of all persons to whom notice is to be provided) at least 12 days before the site visit. Charter §§ 252-53. Under the statute, service of the notice may be by certified mail, while the Charter requires service by “sheriff or constable” (or through acceptance of service by those notified).

The notice must also be given to the Planning Commission and posted in the City Clerk’s office. At least 10 days prior to the site visit, the notice must be published in a local newspaper. 19 V.S.A. § 709.

To comply with both the Charter and the statutes, it is our understanding that the City proposes to send the notice (in the “citation” form required by the Charter) first by certified mail at least 30 days before the hearing, along with an acceptance of service form. For those who have not returned the acceptance of service form within 10-12 days, the City will then serve the citation by sheriff/constable. This process should satisfy both the statute and the Charter requirements.

In any event, because the notices will refer to the final Project right of way plans, notice cannot be completed until a final version of VTrans’ right of way plans is filed with the City Clerk’s office.

##### **2. Form:**

Again, the Charter requires that the notice take the form of a “citation” and must list all persons to whom the notice is being provided. The City will provide a notice form, as well as an accompanying cover memo that would explain, in basic terms, the Project and the necessity process.

### 3. Distribution:

By statute, notice of the site visit and necessity hearing must be provided to all “persons owning or interested in lands through which the highway may pass or abut.” 19 V.S.A. § 709. A person “interested in lands” is a person who “has a legal interest of record in the property affected.” 19 V.S.A. § 701(6).

#### **C. The Necessity Hearing and Decision**

The purpose of the necessity hearing is for the City Council to hear “interested parties” on the issue of whether the “public good, necessity, and convenience of the inhabitants of the municipality require the highway” to be constructed. 19 V.S.A. § 740(a).

The hearing should be presided over by the presiding officer. City and VTrans Staff and/or consultants will offer testimony generally describing the purpose and need of the Project and will introduce relevant written materials and exhibits into the record. The condemnation statute’s “interested parties” language<sup>1</sup> suggests that any member of the community should then be allowed a reasonable opportunity to offer testimony on issues related to the necessity of the Project. City Staff and/or consultants may be permitted to respond to any concerns raised by members of the community. The hearing should be recorded through normal City Council means.

The “necessity” standard encompasses a variety of factors bearing on what constitutes “the greatest public good and the least inconvenience.” *See* 19 V.S.A. § 501(1). Prior to the hearing, the Council (through a draft Findings of Fact) and members of the public will be provided with more information about the necessity standard and the issues to be discussed at the hearing.

After the hearing is complete, the City Council will consider the testimony and evidence entered into the record at the hearing. If the Council approves of the necessity finding, it will approve a written decision (an updated version of the draft Findings), which will then be recorded at the City Clerk’s Office. 19 V.S.A. § 711. The decision will include a list of the property interests taken.

#### **D. Appeal of Necessity Determination**

Once the City Council’s necessity decision is filed with the City Clerk’s Office, “a person owning or interested land through which” the Project is laid out will have 30 days to appeal the City Council’s necessity decision to the Vermont Superior Court pursuant to Vermont Rule of Civil Procedure 74. 19 V.S.A. § 740. Upon the filing of the appeal, the Court is required to “appoint three disinterested landowners as commissioners to inquire into the convenience and necessity of” the Project by “examin[ing] the area and hear[ing] testimony.” 19 V.S.A. § 741-42. The commissioners then submit a report, which the Court may adopt or reject, and if it determines that necessity has been shown, may issue an order approving the Project.

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<sup>1</sup> As opposed to the “persons in interested in land” language used in the law to describe those with interests to be taken. *See* Part II.B.3 above.



Construction of the Project cannot begin until any appeal of the necessity finding is resolved. *See* 19 V.S.A. § 743.

### **E. Compensation**

Compensation hearings may be (and regularly are, according to VTrans) conducted separately from the necessity hearing. VTrans and the City have decided to hold the compensation at a later date. The process will be similar, except that notice will only be provided to those whose interests have been taken through the necessary process and only those individuals will be entitled to participate. The central question will be the value of the interests taken, and evidence on that issue will be provided by VTrans, which has been responsible for valuation of the properties. The value is determined in accordance with the statutory definition of “damages,” which provides that:

Damages resulting from the taking or use of property . . . shall be the value for the most reasonable use of the property or right in the property, and of the business on the property, and the direct and proximate decrease in the value of the remaining property or right in the property and the business on the property. The added value, if any, to the remaining property as a result of the taking or use, as distinguished from the general public benefit, shall be considered in the determination of damages.

19 V.S.A. § 501(2) (incorporated into Chapter 7 via 19 V.S.A. § 740(b)).

If they are unsatisfied by the award of damages by the City Council, interested property owners may either request that the City refer the matter to “one or more disinterested persons mutually selected, whose award shall be final,” or they may petition the Superior Court to appoint “Commissioners” to appraise the damages. 19 V.S.A. §§ 725-26. In either case, the appeal “shall not delay opening of the highway.” 19 V.S.A. § 726.

