May 19, 2025

Testimony by Kail Romanoff to the House Transportation Committee Regarding Trails Language in H.488, 5/15/25

Testimony to the House Committee on Transportation

Attn: Chair Matt Walker

Re: VLCT Testimony on trails language in H.488 and the risk it may pose to municipalities if the Tunbridge case is resolved in favor of the landowner

May 15, 2025

Dear Chair,

First, I want to thank the committee for having me, my name is Kail Romanoff and I am an attorney with VLCT's Municipal Assistance Center where myself and 3 other attorneys help municipal officials by answering their questions concerning general municipal law and local government management and administration and how to apply legal requirements to day-to-day governance and operations including on issues related to highways, trails, and public rights of way. You've heard from my colleague Josh and previous witnesses about some of the policy reasons in favor of the trails language, but I want to address the elephant in the room a little – the threat of an inverse condemnation or takings as a result of this bill if the petitioner in Tunbridge is successful. Myself and my fellow attorneys in MAC don't think the risk of a takings claim against a municipality is

very high if the trails language is included in S.123 is passed. We think that for a couple reasons.

First, it has been the generally accepted legal interpretation that towns have the right to maintain their legal trails. The petitioner in the Tunbridge case highlights that there is no explicit municipal authority for the maintenance of legal trails in Vermont Statute which has brought this bill before us today. However, Dillon's Rule, which guides the scope of municipal authority, is not so rigid as to require the Legislature to explicitly spell out each and every possible authority, and it accounts for additional functions that may be "*incident, subordinate[,] or necessary to the exercise*" of those explicit authorities (*Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486, 380 A.2d 64, 66 (1977)). Maintenance authority for legal trails is clearly implied or incident to multiple explicit grants of authority related to legal trails:

- Legal trails are public rights-of-way. The law does not define public right-of-way for us, so we look to the common meaning. According to Black's law dictionary, 5th Ed., a "public right-of-way" is defined as "[t]he right of passage held by the public in general to travel on roads, freeways, and other thoroughfares." This is akin to an easement in the traditional sense for ingress and egress and maintenance rights are necessary to preserve the intended use of the easement under common law. The holder of a dominant estate in an easement, though, is generally entitled to use an easement "in a manner that is reasonably necessary for the convenient enjoyment of the servitude." *Rowe,* 2006 VT 47, ¶ 23, 904 A.2d 78 (quoting Restatement (Third) of Property, Servitudes § 4.10 (2000). As a public right-of-way, it is implied that the holder of the dominant estate (the easement holder, or in this case the town) has the authority to maintain it for its designated public use whatever it may be.

- There is explicit statutory authority as well, which I believe has been covered by some of the other witnesses. First, the legislature has conferred on town's the authority to regulate the use of its legal trails. 19 V.S.A. § 304(a)(5), "Duties of selectboard [regarding highways and trails] . . . (5) Grant permission to enclose pent roads and trails by the owner of the land during any part of the year, by erecting stiles, unlocked gates, and bars in the places designated and ***to make regulations governing the use of pent roads and trails*** and to establish penalties not to exceed $50.00, for noncompliance." (Emphasis added). This authority has been repeatedly recognized by the legislature toallow municipalities to open legal trails to all-terrain vehicles (ATVs)(23 V.S.A. § 3506(b)(4)), snowmobiles (23 V.S.A. § 3206(6)) and electronic bikes (23 V.S.A. § 1136a(e)(4)). If you can regulate the use of trails, it is necessary to be able to maintain them for those uses. In contrast, if towns open their trails to use by ATVs, snowmobiles, and others, that authority would be effectively useless if they could not also maintain them when they fall into disrepair. If that were the case, municipal regulatory authority on trails would be illusory once the trail is no longer passable.
- The legislature also conferred the authority to lay out new legal trials for both access or recreational use. See 19 V.S.A. § 301(8)(B). "Trail" means a public right-of-way that is not a highway and that: . . . (B) a new public right-of-way laid out as a trail by the selectmen for the purpose of providing access to abutting properties or for recreational use. Nothing in this section shall be deemed to independently authorize the condemnation of land for recreational purposes or to affect the authority of selectmen to reasonably regulate the uses of recreational trails." If you can lay out new trails for recreation, then it is necessary to be able to maintain them for that use or the authority again is illusory.

We think maintenance is an implied authority to each of these express grants of authority. Moreover, the legislature has expressly exempted towns from liability for maintenance of their trails. 19 V.S.A. § 310(c), "A town shall not be liable for construction, maintenance, repair, or safety of trails." Why would the legislature need to exempt a town from liability for maintenance of its trails if they are not authorized to perform that maintenance?

VLCT's legal opinion is that the authority to maintain exists currently and these changes will add clarity to the existing interpretation and general practice that town's can maintain their legal trails for their intended uses and they will provide the certainty municipalities and recreation groups are seeking at this moment.

Secondly, even if the court sides with the petitioner and rules landowners who hold an interest in the underlying property (abutters) have the exclusive right to maintain legal trails despite their public status, it's not clear that municipalities that rely on these proposed provisions would be subject to a Takings claim for their maintenance. legal trails are either a downgraded former town highway or a trail laid out by the selectboard. In either case, the town has condemnation authority and there is a damages and appeal process for impacted landowners through the process of laying out new highways. 19 V.S.A. §§ 708 et seq. If there is a legal trail running through or abutting a property, the landowner or a predecessor in interest either assented to or was compensated for the public right-of-way during the process of laying out the trail or the highway that preceded it. Any case involving a town performing maintenance in the right of way of a legal trail then will focus solely on the damages caused by the maintenance (the singular stick of rights at issue here) and not the use because the town retains that right within their public right of way.

The purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). It's unclear, if the petitioner is successful, whether a municipality improperly maintaining its legal trails is forcing the landowner who holds an underlying interest in the right-of-way to bear any burden since this is a public right-of-way to which the landowner has been compensated or otherwise assented. The determination of burden of course would depend on the level of maintenance. For general trail work this is unlikely to be significant and may be resolved with an injunction commanding the municipality to stop maintenance rather than a takings proceeding. Larger maintenance projects such as road building are more likely to represent a burden. The Vermont Supreme Court, has repeatedly ruled that speculative damages are not compensable in inverse condemnation cases. In re South Burlington/Shelburne Highway, 184 Vt. 553 (2008).

I think a bigger concern is that, if this language is not added, and the petitioner in Tunbridge is successful, Towns are likely to utilize the highway reclassification process to either upgrade trails to class 4 highways, or to discontinue them altogether, because without maintenance authority what is a public right of way? It's just lines on a map.

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Attachments

Letter that was the basis of Kail Romanoff's testimony