

MEMORANDUM

To: Chapin Spencer, Norm Baldwin, & Corey Mims
Burlington Department of Public Works

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

Date: May 17, 2022

Re: Impact of the Federal Infrastructure Investment and Jobs Act on Potential
Champlain Parkway Federal Repayment Obligations

You have asked Dunkiel Saunders to assess the position taken—and recently reaffirmed—by the Federal Highway Administration (“FHWA”) and the Vermont Agency of Transportation (“VTrans”) that the City of Burlington (the “City”) would be responsible for repayment of certain federal funds expended to date in the development of the Champlain Parkway Public Transportation Project (the “Parkway”) in the event the City fails to advance the Project to construction.

Specifically, you asked whether the recently enacted, federal Infrastructure Investment and Jobs Act (the “IIJA”), P.L. 117-58 (Nov. 2021), eliminated the authority FHWA and VTrans have relied on in recent communications to take the position that the City would be responsible for repayment of federal funds if it refused to advance the Parkway.

Executive Summary

The short answer is no, the IIJA did not eliminate the repayment provision on which FHWA’s and VTrans’ recent communications regarding repayment were based. The IIJA did strike language in 23 U.S.C. § 102(b) that required repayment of “preliminary engineering” costs if a project was not completed within 10 years “after the date on which Federal funds are first made available.” However, FHWA’s and VTrans’ warnings regarding repayment appear to be based instead on what they have called the “20-Year Rule” found at 23 U.S.C. § 108, which requires repayment of certain federal funds if property acquired for project right-of-way is not incorporated into a federal aid project within 20 years (subject to discretionary extensions for “reasonable” delays). The IIJA did not repeal or alter that reimbursement provision.

Therefore, while one federal repayment provision giving FHWA the discretion to demand repayment was eliminated by the IIJA, the IIJA did not entirely eliminate FHWA’s authority to

pursue repayment and left in place the provision on which FHWA has relied in its most recent correspondence on this issue.¹

Background

In the years since 1998, when the City first assumed primary responsibility for its development, the Parkway has gone through various iterations and lengthy (and costly) engineering and permitting processes, as well as several rounds of right-of-way acquisition. Those development costs were covered using a favorable 95/3/2 federal/state/local funding mechanism that is no longer available to new projects of this type.² In recent correspondence, FHWA and VTrans have represented that the total project costs expended to date for the project (i.e., federal, state and local costs together) exceed \$45 million.

Moreover, FHWA and VTrans have repeatedly informed the City over the years that if it abandons the project in its current, federally-approved and permitted configuration, the City would be responsible for repayment of certain federal funds expended to date on the Project.

Most recently, in September 2021, both FHWA and VTrans reiterated their longstanding position that reimbursement of federal funds would be required if the Parkway is not advanced in its current form. By letter dated September 10, 2021, FHWA Division Administrator Matthew Hake wrote to VTrans Secretary Joe Flynn, noting that Secretary Flynn

had asked if the City was unable to maintain the momentum to advance this project would this project be subject to FHWA 20-Year Rule requirements for repayment/payback of federal funds. The answer to this question is yes. This project would fall under the terms of the FHWA 20-Year Rule and would require repayment of Federal funds. The FHWA 20-Year rule states that projects must advance from the acquisition of right of way to construction within 20 years or require payback of Federal funds.

See Letter from Matthew Hake to Joe Flynn (Sept. 10, 2021) (attached as **Exhibit A**). Secretary Flynn attached a copy of that letter to a September 13, 2021 letter to Mayor Weinberger, and repeated its position—expressed in similar letters in 2012 and 2020—that VTrans would hold the City responsible for any federal repayment obligation pursuant to the terms of the “existing agreement between the City and [VTrans].” *See* Letter from Joe Flynn to Miro Weinberger (Sept. 13, 2021) (copy attached as **Exhibit B**).

¹ In the event that FHWA were to pursue repayment in a legal action, the City may have arguments regarding the precise categories and amounts of repayment required. Nothing in this Memorandum is intended to opine on the strength of those legal arguments or any issue beyond the question of whether IJA eliminated the authority FHWA has recently relied in claiming authorization to seek repayment. We understand further questions regarding the amount of any repayment owed to be beyond the scope of the City’s instant request and would need to collect more detailed information about the use of federal funding and VTrans’ agreements with FHWA to complete that analysis.

² The current funding split would be 80% federal/20% state and/or local, typically broken down as 10% state and 10% local.



In April 2022, we understand that after Congress passed the IIJA, FHWA Deputy Division Administrator Larry Dwyer confirmed to the City that the reasoning in the September 2021 letter FHWA had sent to VTrans was still valid insofar as the repayment obligation FHWA referred to was not repealed by the IIJA. You have asked us to confirm FHWA’s analysis that the IIJA did not repeal the reimbursement obligations on which its recent communications regarding cost reimbursement have been based.

Discussion

The City’s repayment obligations with respect to the Parkway are governed by a combination of federal and state law, and the City’s project agreements with VTrans. Technically, federal repayment obligations apply in the first instance to VTrans. However, under both state law and the City’s 1998 “Cooperative Agreement” with VTrans, the City is generally responsible for any federal repayment obligations arising as a result of the “cancellation of the project by the municipality . . . due to circumstances wholly or partly within the municipality’s . . . control,” unless VTrans consents to a different payment allocation or arrangement. 19 V.S.A. § 309c; *see also* 1998 Cooperative Agreement ¶ 18. Thus, VTrans likely would have both the statutory and contractual discretion to shift any federal repayment obligation to the City.

Prior to the passage of the IIJA last November, FHWA had the ability to pursue repayment of Federal highway funds under two separate statutes. The first, 23 U.S.C. § 102(b), required repayment of preliminary engineering funds if a project did not reach the construction or right-of-way acquisition phase within 10 years (subject to extensions for reasonable circumstances). The FHWA’s September 2021 repayment letters (and more recent confirmations) did not rely on that statute as the source of its repayment rights, and in any event, the IIJA repealed the repayment language in § 102(b). *See* IIJA § 11310.

The IIJA did not, however, repeal the second federal highway repayment statute, which is found at 23 U.S.C. § 108, and which authorizes FHWA to seek reimbursement of federal funds if “Federal-aid reimbursement is made for real property interests . . . and the real property interests are not subsequently incorporated into a project eligible for surface transportation funds within [20 years of acquisition].” *See* 23 U.S.C. § 108(a)(2) & (d)(7). FHWA regulations take a broad view of this authorization, and provide that “[i]n the event that actual construction of a road on [right-of-way acquired for a project] is not undertaken by the close of the twentieth fiscal year following the fiscal year in which the project is authorized, the State DOT will repay to the FHWA the sum or sums of Federal funds paid to the transportation department under the terms of the [project agreement].” 23 C.F.R. § 630.112(c)(1).

FHWA has relied on this authority, and not the recently repealed § 102(b), in asserting in its most recent correspondence that repayment of federal funds would be required had the City decided not to advance construction. Therefore, we believe the FHWA is correct in asserting that it still maintains authority following enactment of the IIJA to pursue repayment of at least certain categories of federal funds under § 108, and enactment of the IIJA does not alter the analysis in FHWA’s September 2021 correspondence.

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U.S. Department
of Transportation

**Federal Highway
Administration**

Vermont Division

September 10, 2021

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In Reply Refer To:
HDA-VT

Vermont Agency of Transportation
Joe Flynn, Secretary
219 North Main Street, Suite 101
Barre, Vermont 05641

Subject: Burlington MEGC 5000(1) – Champlain Parkway Repayment/Payback of Federal-Aid Funds

Dear Secretary Flynn:

This letter is in response to your recent request for clarification of the FHWA 20-Year Rule requirements for repayment/payback of Federal funds invested in the project to date.

The Federal Highway Administration, along with the Vermont Agency of Transportation and the City of Burlington, have been working for 50 years to advance the Champlain Parkway project also called the Southern Connector project in the past. This project was authorized under an old funding category of 95/3/2 (Federal/State/Local) match share and is one of the last projects in the country to have this level of formula based Federal funding. New projects of this type would fall under an (80/20) Federal/State or Local share.

In reviewing recent financial documents for this project, we have found that the total of Federal/State/Local taxpayer funds that has been spent on this project to date is over \$45 million dollars. These funds have been spent on consultant efforts, environmental documents, preliminary engineering, and acquisition of right-of-way for this project.

We are aware of the significant efforts of the City and State to advance this project over the past few years and have also spent considerable Federal funds and staff time advancing this project. We do look forward to this work continuing as this project moves towards construction.

You had asked if the City was unable to maintain the momentum to advance this project would this project be subject to the FHWA 20-Year Rule requirements for repayment/payback of Federal funds. The answer to this question is yes. This project would fall under the terms of the FHWA 20-Year Rule and would require repayment of Federal funds. The FHWA 20-Year Rule states that projects must advance from the acquisition of right of way to construction within 20 years or require payback of Federal funds. The FHWA 20-Year Rule is based on Federal law 23 USC, 108;

(2) Construction. - The agreement between the Secretary and the State for the reimbursement of the cost of the real property interests shall provide for the actual construction of the

transportation improvement within a period not to exceed 20 years following the fiscal year for which the request is made, unless the Secretary determines that a longer period is reasonable.

(7) Reimbursement. - If Federal-aid reimbursement is made for real property interests acquired early under this section and the real property interests are not subsequently incorporated into a project eligible for surface transportation funds within the time allowed by subsection (a)(2), the Secretary shall offset the amount reimbursed against funds apportioned to the State.

This provision is also incorporated into Federal regulations found at 23 CFR Section 630.112. The Federal law and Federal regulations do not allow for a waiver or exemption of this provision. FHWA can grant time extensions for projects that are progressing to construction on a reasonable basis. The FHWA Division Administrator may grant reasonable time extensions to a State DOT if the State DOT submits to the Division office sufficient justification. The delay must be reasonable and beyond the State DOT's control. Shifting priorities, insufficient transportation budgets, State appropriation constraints, and staffing levels are not valid justification for granting time extensions. Our office has previously sent you examples of repayment/payback of Federal funds in Vermont and other states for projects that have not advanced in a timely manner.

I hope this addresses your questions on the FHWA 20-Year Rule and repayment/payback of Federal funds on projects that do not advance in a timely manner. Please let me know if you have further questions or concerns.

Sincerely

Matthew R. Hake, P.E.
Division Administrator
FHWA

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Agency of Transportation

September 13, 2021

Miro Weinberger, Mayor
149 Church Street, Room 34
Burlington, VT 05401

Re: Burlington MEGC 5000(1) - Champlain Parkway
Repayment/Payback

Dear Mayor Weinberger,

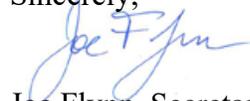
The Agency is pleased with the progress the City has made in advancing the Champlain Parkway project over the past few years. Significant positive momentum has allowed this 50 year project to now be on the verge of construction, this momentum must continue and VTrans stands at the ready to continue to support the City to assure you are able to meet the construction implementation objectives.

It is our understanding that the City is hearing from residents and others who are alleging that the repayment/payback provisions will not be exercised if Burlington were to opt out of the project. As of the date of this letter the total Federal/State/Local tax payer funding spent on all efforts associated with this project through September 3, 2021, is over \$45 million. The construction costs for the project are currently estimated at approximately \$37 million.

In the unfortunate event that the City is unable to maintain the momentum to advance this project, the Agency will be required to seek project cost recovery action against the City under the FHWA 20 Year Rule (23 U.S.C. 108) requirements for repayment/payback of Federal funds invested in the project, as well as State funds invested and recoverable under the existing agreement between the City and the Agency. Attached to this correspondence you will find recent communications between the Agency and the FHWA Vermont Division office articulating details related to the 20 Year Rule and repayment/payback of Federal funds.

The Agency remains optimistic that the City will advance the Parkway project to construction and is pleased with the planned phasing schedule recently developed by the City to assure coordination between this project and other transportation project implementation the City is undertaking. Should you have questions regarding this communication, please feel free to reach out at any time.

Sincerely,



Joe Flynn, Secretary of Transportation

Attachment: Letter from FHWA Division Office to VTrans; September 10, 2021

