From: Senator Christopher Bray [cbray@leg.state.vt.us]
Sent: Thursday, May 26, 2016 11:02 AM
To: Springer, Darren
Subject: O'Grady memo; JRS 56 and the 6/9 session
Attachments: O'Grady to Bray S230 legal considerations.pdf; ATT00001.htm

Darren,

I am encouraged by your phone call, and will continue to work with you to find a positive path forward.

Here is the O'Grady memo:

From: **Michael O'Grady** MOGrady@leg.state.vt.us
Subject: RE: S.230, legal considerations
Date: May 25, 2016 at 12:31 PM
To: Christopher Bray CBray@leg.state.vt.us

MO

Chris

I reviewed your e-mail and voice mail, and I conferred with Aaron. We think your response is very good. We have some additional information that you can use.

With respect to the issue of CPG recording, I suspect that that the concern is the Hunter Broadcasting/Bianchi issue.

Hunter Broadcasting and Bianchi were two Vermont Supreme Court cases that held that failure to obtain a state permit (Hunter) or municipal permit (Bianchi) constituted an encumbrance on title that could affect marketability of title.

A CPG is a current requirement for operation of a facility. A CPG is also a state permit/approval. Thus, facilities that require a CPG are already subject to the Hunter decision and failure to obtain/amend a CPG when required would be an encumbrance on title under existing law.

Thus, real estate attorneys currently involved in buying/selling energy facilities should already be determining whether the facility has a CPG in order to avoid Hunter/Bianchi issues. Enactment of S.230 does not change this fact.

Moreover, Hunter, Bianchi, and their progeny do not provide that the encumbrance arises only if the required permit is not recorded. The encumbrance arises when the permit is not obtained/renewed/amended when required and a real estate attorney can readily discern the failure to obtain/renew/amend the permit through "the normal scope of due diligence", including search of municipal land records or constructive notice due to the nature of the transaction. See New England Federal Credit Union v. Stewart Title Guaranty Co, 171 Vt. 326, 454-455 (2000).

As we discussed, a real estate attorney should have constructive notice of the need for a CPG due to the nature of the energy production facilities on a property. The presence of a wind turbine is not an indiscernible fact.

Thus, the recording requirement in S.230 does not alter the liability or marketability of title issues that arise from failure to properly obtain/amend a CPG.

Now, a realtor or real estate attorney may not like the requirement because it is something new that they are required to complete, and failure to complete it could subject them to malpractice if some liability arises from the failure to file. But, that is not a marketability of title issue.

With respect to your argument on the sound specifications in rulemaking, it is a very good argument that can be supported by some of the basic tenets of statutory construction.

Generally, when construing statutes, a court's primary goal is to give effect to the Legislature's intent. See Lydy v. Trustaff, Inc./Wausau Ins. Co., 194 Vt. 165, 168 (2013).

The legislative intent should be gathered from a consideration of "the whole statute, the subject matter, its effects and consequences, and the reason and spirit of the law.'" See In re Appeal of Carroll, 181 Vt. 383, 387–88 (2007).

The plain language of the statute should control, but a court should go beyond the plain meaning if a literal interpretation appears to undermine the purpose of a statute or lead to irrational results. See Town of Killington v. State, 172 Vt. 182, 188 (2001).

Thus, you could argue that considering the controlling precedent, Sec. 12(b) when read as a whole and in the context of the legislature's intent should be construed as requiring sound level specifications for classes of substantially similar wind generation equipment/projects. Interpreting the limitation in Sec. 12(b)(3) as limiting sound levels for all future facilities to the sound level of the Vergennes facility would lead to an absurd result in conflict with legislative intent.

In addition, there has been speculation that the temporary sounds rules S.230 as enacted would apply to existing facilities and vested rights in these facilities would somehow not apply because the CPG is not a per se land use permit. Sec. 12(b) of S.230 as passed by both bodies applies to "applications for such facilities under 30 V.S.A. § 248 filed on or after the effective date of this section." Thus, the temporary rules do not apply to existing facilities. Moreover, vested rights attach to more than just land use permits, it applies to environmental permits and CPGs.

There is also a typo in the last paragraph of your argument on temporary rulemaking. It states "there would have no reason…" I think you need a "been" between "have" and "no".

Let me know if you have any questions or need more information.

Michael

From: Senator Christopher Bray [mailto:cbray@leg.state.vt.us]
Sent: Tuesday, May 24, 2016 5:57 PM
To: Michael O'Grady
Subject: Fwd: S.230, legal considerations
Importance: High

Michael,

Can you give this a read through and then we can talk?

I am trying to understand and respond to the concerns that the Administration has on S.230, which they have not taken yet. I know Aaron is out, and I could use some help with this.

Best,
—Chris

Begin forwarded message:

And here's the email I was wrapping up when you just called — on adjournment and reconvening on 6/9 — so we seem to be converging on a common solution.

Best,
—Chris

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Begin forwarded message:

From: Senator Christopher Bray <cbray@leg.state.vt.us>
Subject: JRS 56 -- and what we do when we come back on 6/9
Date: May 26, 2016 at 10:59:01 AM GMT-4
To: John Campbell <Vt13@aol.com>, Shapleigh Smith <shapsmith@gmail.com>

John and Shap,

I wasn't to share some research here relevant to S.230 and our adjournment resolution.

Please find below JRS.56, the resolution that Senate adopted, which was then adopted also by the House, so it guides our actions regarding vetoes.

When I read it, I see no discretion on the part of the House or Senate in terms of returning on June 9.

[from page 2440-2441, Senate Journal, 5 May 2016]

Joint Senate Resolution Adopted on the Part of the Senate J.R.S. 56.

Joint Senate resolution of the following title was offered, read and adopted on the part of the Senate, and is as follows:

By Senator Campbell,

J.R.S. 56. Joint resolution relating to final adjournment of the General Assembly in 2016.

Resolved by the Senate and House of Representatives

That when the President of the Senate and the Speaker of the House of Representatives adjourn their respective houses on the sixth day of May,

2016, they shall do so to reconvene on the ninth day of June, 2016, at ten o'clock in the forenoon if the Governor should fail to approve and sign any bill and should he return it to the house of origin with his objections in writing after such adjournment, but if the Governor should not so return any bill to either house, to be adjourned sine die.

Rules Suspended; Joint Resolutions and Bills Messaged

On motion of Senator Campbell, the rules were suspended, and the following joint resolutions and bills were severally ordered messaged to the House forthwith:

J.R.S. 55, J.R.S. 56, S. 230, H. 875.

The only provisional element is "if the Governor should fail to approve and sign any bill and should he return it to the house of origin with his objections in writing after such adjournment" — and the Governor already vetoed H.512, so as best I can see we ARE coming back. What we're doing when we get there is up for discussion.

E.g. it could be a token session; it could be to override a veto; it could be to introduce another bill altogether —e.g. a new version of S.230 with the current "defects" remedied.

Based on my desire to see S.230 passed AND to have the best possible law, my preference is for curing the defects—if we are able to get the rules suspensions needed and can craft the replacement language that is substantially equivalent to S.230 in terms of its intent but with new expressions of that intent that repair or eliminate all the defects of concern to the Governor's office.

Best,
—Chris