From: Springer, Darren [Darren.Springer@vermont.gov]
Sent: Wednesday, June 08, 2016 4:39 PM
To: Copans, Jon
Subject: Fwd: FYI S.230 veto
Attachments: GENERAL-#318229-v2-S_230_Letter_from_Legislative_Council_to_Sen_pro_Tem_re_Gov__Shumlin_Veto.pdf; ATT00001.htm

Sent from my iPhone

Begin forwarded message:

> **From:** Senator Christopher Bray <cbray@leg.state.vt.us>
> **Date:** June 8, 2016 at 12:31:09 PM EDT
> **To:** "Darren M. Springer" <Darren.Springer@vermont.gov>
> **Cc:** Brian Campion <campionvt@gmail.com>, Claire Ayer <senatorayer@gmavt.net>, Virginia Lyons <senatorginnylyons@gmail.com>
> **Subject: Fwd: FYI S.230 veto**
>
> Darren,
>
> Leg Council's legal analysis as requested by Campbell.
> Please review and let's discuss.
>
> —Chris
>
> > Begin forwarded message:
> >
> > From: John Campbell <JCampbell@leg.state.vt.us>
> > Subject: FYI S.230 veto
> > Date: Jun 8, 2016 at 11:43:41 AM GMT-4
> > To: ALL_SENATE <ALL_SENATE@leg.state.vt.us>
> >
> > Dear Senators,
> >
> > Due to the number of inquiries concerning S.230 I have asked Mike O'Grady and Aaron Adler to provide me with a memo outlining the specific issues raised by the Governor in his veto message. I hope this will be helpful for our deliberations tomorrow. As I previously stated, it is my intention to gavel in then move to recess in order to caucus. I will provide more information if things change.

John

Penny Carpenter
Assistant to President Pro-Tempore
Senator John Campbell
Vermont Senate
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Vermont Legislative Council

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MEMORANDUM

To: Sen. John Campbell

From: Michael O'Grady, Deputy Director, Office of Legislative Council
Aaron Adler, Legislative Counsel

Date: June 7, 2016

Subject: S.230

Overview of Question

You asked the Office of Legislative Council to: (1) summarize the issues identified by the Administration on S.230; and (2) provide a legal analysis of the supposed issues, including whether these issues require legislative amendment prior to the convening of the next Vermont General Assembly in January 2017.

On June 6, 2016, Governor Shumlin sent a veto message to the General Assembly regarding S.230. This memorandum summarizes and analyzes the issues raised in that message and addresses amendments that the General Assembly could enact to address the asserted issues.

Issues Identified in Governor Shumlin's Veto Message for S.230

The veto message identifies "four issues with the bill . . ." As to most of these issues, the veto message interprets language in the bill to have effects that the Governor states do "not match what I understand to be the intent of the Legislature."

The "paramount" rule in statutory construction is to give effect to the intent of the General Assembly, and all other principles of statutory construction are subservient to this rule.[1] Therefore, the veto message demonstrates a fundamental legal error by relying on interpretations it acknowledges to be contrary to legislative intent.

To summarize the analysis of the four issues identified:

- The veto message errs in asserting that the bill declares wind generation to create a public health emergency. There is no specific declaration of a public health emergency in the bill, and the veto message's acknowledgement that the General Assembly did not intend to make a declaration contradicts an interpretation that S.230 makes such a declaration. Instead, as with many prior enactments, the bill deems temporary rules on wind sound to meet the standard for emergency rulemaking in order to use that mechanism for swift rule adoption.

[1] *State v. O'Neill*, 165 Vt. 270, 275 (1996).

- The veto message's assertion that the bill requires a "one-size-fits-all" ceiling for the temporary rules on wind sound is inconsistent with the provisions of that section that allow the rules to include standards and methodologies that differ by category of project. In addition, the statement that the bill will drive wind projects "closer to homes" is contradicted by the need to site wind generation where the resource is available.

- The veto message is correct in stating that the bill as passed inadvertently omits language under which $300,000.00 would be used to make energy planning awards to municipalities and regional planning commissions.

- Legal support is lacking for the message's assertion that recording notice of a certificate of public good (CPG) "could create problems for residential solar customers when they go to sell their home." Under Vermont Supreme Court case law, there likely is no encumbrance on the title of property subject to a CPG. If there is an encumbrance, it would be created by failing to obtain and comply with a CPG required under the existing 30 V.S.A. § 248 and not by failing to record the notice required under S.230. Thus, any disincentive on residential solar would arise under current law and not because of the recording requirement.

More detailed analysis of these issues follows, along with discussion of potential changes to address them and whether they can await the 2017 session.

1. Use of Emergency Rules Process for Temporary Rules on Sound from Wind Generation Facilities.

Sec. 12(b) of S.230 directs the Public Service Board (PSB) to issue "temporary rules on sound levels from wind generation facilities using the process under 3 V.S.A. § 844." For this purpose, Sec. 12(b)(1) states that: "Rules issued pursuant to this subsection (b) shall be deemed to meet the standard under 3 V.S.A. § 844(a)."

a. Analysis of Veto Message

The veto message asserts that this language "unintentionally" constitutes a legislative declaration of a "public health emergency around wind energy," apparently because the standard for emergency rulemaking under 3 V.S.A. § 844(a) refers to "an imminent peril to public health, safety, or welfare. . . ."

The veto message errs in asserting that the bill declares a health emergency. The language does not affirmatively state that there is a public health emergency involving wind. There is no such specific declaration in the bill.

The veto message's statement that the General Assembly did not intend to make such a declaration contradicts the assertion that the declaration was made, since as cited above the paramount rule in statutory construction is to give effect to legislative intent.

Instead, Sec. 12(b)(1) simply states that the *temporary rules* – not any aspect of wind generation itself – are deemed to meet the standard. This represents a common formulation employed by the General Assembly when it seeks to have an agency perform rulemaking quickly but the situation to be addressed does not necessarily meet the "imminent peril" standard. Examples of the previous use of the emergency rulemaking process for temporary rules are enclosed as Attachment A.

In addition, if sound from wind generation were thought actually to present an imminent peril, it would not have been necessary to "deem" the temporary rules to meet the standard. The Vermont Supreme Court has held that it must "presume the Legislature chose its words deliberately."[2]

The bill demonstrates a deliberate choice to deem the temporary rules to meet the standard under 3 V.S.A. § 844(a) in order to use that mechanism for swift rule adoption rather than to declare a public health emergency concerning wind generation.

Finally, the veto message actually supports a conclusion that the bill does not declare a health emergency when it asserts a lack of peer-reviewed science to support such a declaration. This assertion highlights that the bill contains no findings based on review of scientific evidence in support of such a declaration, as would be typical of an enactment identifying a potential risk to public health.[3]

b. Possible Changes

It would be possible to write clarifying language to address concerns regarding the use of the emergency rules process for adoption of temporary rules. For example, the General Assembly could state that the standard under 3 V.S.A. § 844(a) shall not apply to the temporary rules rather than deeming the standard to be met.

An argument for doing so sooner rather than later would be that S.230 directs the rules to be issued within 45 days of passage. However, another perspective would be that the language relates only to rules that will be in place temporarily and that long-term consequences created by this language, if any, could be addressed through an enactment next session.

2. Requirement that Temporary Rules on Wind Sound Not Allow Levels Greater than the Lowest Levels in Prior Wind CPGs

Sec. 12(b)(3) of S.230 provides that the temporary rules on sound from wind generation "shall not allow sound levels that exceed the lowest maximum decibel levels authorized in any certificate of public good that contains limits on decibel levels issued by the Board for a wind generation facility before the effective date of this section."

a. Analysis of Veto Message

The veto message asserts that, in adopting this provision, "the bill unintentionally relies on a standard used in a small 150 kilowatt project as the standard for all wind, large and small, going forward. That standard . . . could have the clearly unintended effect of pushing wind projects closer to homes where the background noise is higher."

The veto message appears to refer to a case in Vergennes in which the PSB required a small, 100 kilowatt wind net metering system to meet a standard of not more than 10 dBA above ambient levels.[4] The Vergennes standard differs from what the PSB has required for larger wind

[2] *McGee v. Gonyo*, 2016 VT 8, ¶ 20.
[3] *See, e.g.*, 2014 Acts and Resolves No. 120, Sec.1.
[4] *In re Petition of Green Mountain Power Corp. for an interconnected group net-metered wind turbine*, CPG NM-1646 (Vt. Pub. Svc. Bd. Jan. 2, 2011).

facilities such as Kingdom County Wind (Lowell) – e.g., 45 dBA (exterior) at "existing surrounding residences."[5]

The veto message contains multiple errors. First, the veto message's "one-size-fits-all" interpretation appears inconsistent with principles of statutory construction, with legislative intent, and with other language of Sec. 12 of S.230. When construing statutes, a court's primary goal is to give effect to the Legislature's intent.[6] 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."[7]

Sec. 12(b) demonstrates an intent not to apply a "one-size-fits-all" standard by stating that the temporary rules for wind generation from electric generation facilities may include: (1) standards that apply to all wind facilities; (2) a method for determining sound levels on a case-by-case basis; or (3) standards that apply to one or more categories of wind facilities, with a methodology for determining sound levels for other such facilities case-by-case. Thus, giving effect to this intent and the section as a whole, the temporary rules could apply noise standards for different categories of facilities, such as the Vergennes case as a maximum for wind net metering systems and the Lowell case as a maximum for larger wind generation.

Second, it is inaccurate to suggest that temporary rules will apply to "all wind, large and small, *going forward*" (emphasis added) when the temporary rules are time-limited. Under Sec. 12(b), the temporary rules apply to facilities filing for a CPG on or after the effective date of the section until the PSB adopts permanent rules under Sec. 12(a) or until July 1, 2017, whichever is earlier.

Third, the assertion that the Vergennes standard will push wind projects "closer to homes" is contradicted by the location of wind resources, which testimony before the General Assembly shows are not found in populated areas but on ridgelines or in other areas with relatively little development. The availability of the resource is likely to be the primary driver in locating wind generation.

b. <u>Possible Changes</u>

It would be possible to write clarifying language to address the asserted concern. For example, Sec. 12(b)(3) could be written so that it expressly divides the "ceiling" sound levels for the temporary rules into more than one category, such as wind net metering systems and larger wind generation.

As with the potential change to Sec. 12(b)(1), an argument for making a change sooner rather than later would be that S.230 directs the rules to be issued within 45 days of passage.

However, there are also arguments supporting an opposite perspective:

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[5] *In re Joint Petition of Green Mountain Power Corporation, Vermont Electric Cooperative, Inc., Vermont Electric Power Company, Inc., and Vermont Transco LLC (Lowell Mountain)* at 178 (Vt. Pub. Svc. Bd. May 31, 2011).

[6] *See Lydy v. Trustaff, Inc./Wausau Ins. Co.*, 194 Vt. 165, 168 (2013).

[7] *See In re Appeal of Carroll*, 181 Vt. 383, 387–88 (2007).

- Even if the Vergennes standard were applied as the standard for all wind generation facilities under the temporary rules, it is unclear why a wind generation facility could not meet the "10 dBA above ambient" standard.

- The temporary rules will only apply to facilities seeking CPGs between now and the adoption of permanent rules or July 1, 2017, whichever is earlier. There do not appear to be many proposed wind projects, if any, that are in a position to seek a CPG in this time frame.

3. Inadvertent Omission of Funding for Local and Regional Energy Planning

The veto message states that "$300,000 in planning funds for communities was unintentionally left out of the bill."

The conference report on S.230 did inadvertently omit language that passed the Senate under which the Department of Public Service (DPS) would use $300,000.00 to make energy planning awards to municipalities and regional planning commissions that would be reimbursed by the electric utilities based on a utility's share of the load.

The omission of the funding for local and energy regional planning could be addressed by the General Assembly in the 2017 Budget Adjustment Act (BAA). Prior to the 2017 BAA, it appears possible for the DPS to award at least some of that money for energy planning.

4. Requiring Recording of a Notice of a CPG

Sec. 11 of S.230 amends 30 V.S.A. § 248 to, in part, require the holder of a CPG for an electric generation facility to file a notice in the land records of the municipality in which the facility subject to the CPG is located.

a. Analysis of Veto Message.

The veto message asserts that this requirement "could create problems for residential solar customers when they go to sell their home." This message appears to suggest that the recording of a notice will create an encumbrance on the residential property, affecting marketability of title.

However, under Vermont Supreme Court case law, there likely is no encumbrance on the title of property subject to a CPG. If there is an encumbrance, it would be created by failing to obtain a CPG required under the existing 30 V.S.A. § 248 and not by failing to record the notice required under S.230. Thus, any disincentive on residential solar exists under the existing law and not because of the recording requirements of S.230.

In *Hunter Broadcasting v. the City of Burlington*, the Vermont Supreme Court held that failure to obtain a State environmental permit may affect title to land.[8] The Court held that the failure to obtain the required State permit was a breach of warranty against encumbrances.[9] However, the Court in *Hunter Broadcasting* determined that failure to obtain the relevant permit

[8] 164 Vt. 391, 397 (1995).
[9] Id. See also *New England Federal Credit Union v. Stewart Title Guarantee Co.*, 171 Vt. 326, 330-331 (2000).

– a State subdivision permit – was an encumbrance because State law at the time prohibited reselling property unless the permit was obtained.[10]

There is no similar State-law requirement or prohibition regarding a property owner's ability to sell property that lacks a CPG for an electric generation facility on the property. Consequently, failure to obtain a CPG is not an encumbrance because it does not affect marketability of title under *Hunter Broadcasting* or its progeny.

Even if a court held that failure to obtain a CPG is an encumbrance on title, the requirement in S.230 to record notice of the CPG would not alter the liability or marketability of title issues that could arise from failure to obtain or comply with a CPG. Under *Hunter Broadcasting*, the encumbrance on title was created by failure to comply with the State subdivision regulations, not by failure to file a permit on land records.

Moreover, under *New England Federal Credit Union v. Stewart Title Guaranty, Co.*, the Vermont Supreme Court held that title insurers must look beyond the review of land records to determine if an encumbrance exists. Constructive notice of matters related to real property is not limited to documents recorded in the municipal land records. Title searchers must employ the normal scope of due diligence, including review of records of State agencies, that may impart constructive notice.[11]

b. Possible Changes

To address the stated concern regarding residential solar, the General Assembly could amend the notice provisions in S.230 so that they apply only to electric generation facilities that are larger than those employed by residential homeowners, which typically are 15 kilowatts or less.

Likewise, despite the fact that the notice requirements of S.230 likely do not create an encumbrance on title, the General Assembly could address continued concerns regarding marketability of title by specifically stating that failure to obtain a CPG or failure to file a notice of CPG shall not constitute an encumbrance on title. Similar language has been enacted by the General Assembly for local land use permits, State stormwater permits, and State wetlands permits. An example of such language is included as Attachment B.

Whether such amendments could await the 2017 session would depend on one's assessment of the risk that homeowners may encounter an issue before the start of session.

[10] *Hunter* at 398.
[11] *New England Federal Credit Union v. Stewart Title Guarantee Co.*, 171 Vt. 326, 331-333 (2000).

Attachment A

Examples of prior enactments deeming 3 V.S.A. § 844(a) to be met

Examples of prior enactments that use similar language to Sec. 12(b) of S. 230 include:

- 2016 Acts and Resolves No. 58, Sec. E.306 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations)
- 2014 Acts and Resolves No. 195, Sec. 2, enacting 13 V.S.A. § 7554c(d)(3) (control of confidential information re pretrial risk assessments)
- 2014 Acts and Resolves No. 179, Sec. E.306.1 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations)
- 2013 Acts and Resolves No. 79, Sec. 51 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations)
- 2013 Acts and Resolves No. 69, Sec. E.307.3 (implementing legislative amendments to Catamount and other health insurance programs)
- 2010 Acts and Resolves No. 156, Sec. E.309.3 (changes to Medicaid coverage)

Illustrative examples of language from these enactments:

- 2014 Acts and Resolves No. 195, Sec. 2, enacting 13 V.S.A. § 7554c(d)(3) (control of confidential information re pretrial risk assessments): "The Vermont Supreme Court in accordance with judicial rulemaking as provided in 12 V.S.A. § 1 shall promulgate and the Department of Corrections in accordance with the Vermont Administrative Procedure Act pursuant to 3 V.S.A. chapter 25 shall adopt rules related to the custody, control, and preservation of information consistent with the confidentiality requirements of this section. Emergency rules adopted prior to January 1, 2015 pursuant to this section shall be considered to meet the 'imminent peril' standard under 3 V.S.A. § 844(a)."
- 2014 Acts and Resolves No. 179, Sec. E.306.1 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations): "The Agency of Human Services shall adopt rules pursuant to 3 V.S.A. chapter 25 prior to June 30, 2015 to conform Vermont's rules regarding operation of the Vermont Health Benefit Exchange to federal guidance and regulations implementing the provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the federal Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152. The rules shall be adopted to achieve timely compliance with federal laws and guidance and shall be deemed to meet the standard for the adoption of emergency rules required pursuant to 3 V.S.A. § 844(a)."

Attachment B

Examples of enactments re effect of permits on marketable title

27 V.S.A. § 612. MUNICIPAL PERMITS

(a) Notwithstanding the majority decision in Bianchi v. Lorenz (1997), for land development, as defined in 24 V.S.A. § 4303(10), no encumbrance on record title to real estate or effect on marketability shall be created by the failure to obtain or comply with the terms or conditions of any required municipal land use permit as defined in 24 V.S.A. § 4303(11).

(b) A purchaser shall have the right to terminate a binding contract for the sale of real estate if, prior to closing, the purchaser determines and gives written notice to the seller that land development has occurred on the real estate without a required municipal land use permit or in violation of an existing municipal land use permit. Following the receipt of written notice, the seller shall have 30 days, unless the parties agree to a shorter or longer period, either to obtain the required municipal land use permits or to comply with existing municipal land use permits. If the seller does not obtain the required municipal land use permits or comply with existing municipal land use permits, the purchaser may terminate the contract if, as an owner or occupant of the real estate, the purchaser may be subject to an enforcement action under 24 V.S.A. § 4454.

27 V.S.A. § 615. WETLAND PERMIT

No encumbrance on record title to real estate or effect on marketability shall be created by failure to obtain or comply with a permit of the secretary of natural resources pursuant to 10 V.S.A. chapter 37.