Vermont Legislative Council

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MEMORANDUM

To: Members, Senate Committee on Natural Resources

From: Aaron Adler, Legislative Counsel

Date: January 17, 2014

Subject: S.201, An Act Relating to Siting Review by the Public Service Board

S.201 concerns siting review proceedings before the Public Service Board (Board or PSB) under 30 V.S.A. § 248. The bill addresses three broad areas: (a) participation in the proceedings; (b) fees for § 248 applications; and (c) greater weight to local and regional plans and to the criteria under 10 V.S.A. chapter 151 (Act 250). The following provides a detailed summary of the bill and relevant legal analysis.

Participation

S.201 includes several measures related to participation:

Clarify statutory party status. The bill would give party status by statute to all State and local agencies currently required to receive a copy or notice of a § 248 petition. Those parties are: the Attorney General and the Department of Public Service and, with respect to facilities within Vermont, the Department of Health, Agency of Natural Resources, Division for Historic Preservation, Agency of Transportation, Agency of Agriculture, Food and Markets, and the municipal and regional planning commissions and the municipal legislative body for each town in which the proposed facility will be located.

Under current law, technically only the Department of Public Service, the Agency of Natural Resources, and regional planning commissions are statutory parties and the other state and local entities have to demonstrate by motion that they meet the intervention requirements for nonstatutory parties. The bill would remove any need to make this demonstration.

Align the "interest" category of parties with Act 250. As written, current PSB rules require a greater showing than does Act 250 for a person to establish that the person should be granted party status because the person's interests are affected. S.201 would align the "interested affected" category of participant in § 248 proceedings with the corresponding category in Act 250 proceedings by using language similar to the relevant Act 250 provision.

PSB Rule 2.209(A) requires a person seeking intervention to make a three-part demonstration: (1) the person has a substantial interest which may be adversely affected by the outcome of the

proceeding; (2) the proceeding affords the exclusive means by which the person can protect that interest; and (3) the person's interest is not adequately represented by existing parties.

In an Act 250 proceeding, an adjoining property owner or other person seeking party status need only demonstrate a particularized interest protected under Act 250 that may be affected by an act or decision of the District Commission. 10 V.S.A. § 6085(c)(1)(E).

In this regard, the Environmental Division's precedent is that the person seeking Act 250 party status has to demonstrate that there is a "reasonable possibility" that the interest may be affected rather than demonstrate actual causation. In re Barefoot and Zweig Act 250 Application, No. 46-4-12 Vtec (3/13/2013); In re Bennington Wal-Mart, No. 158-10-11 Vtec, Decision on Motion for Summary Judgment and Motion for Party Status (4/12/2012).

The bill would establish an "interested affected" category of participants for § 248 siting cases by using the same language from Act 250 modified to incorporate the "reasonable possibility" phrase from the Environmental Division's case law:

> With respect to an application under this section for an in-state facility, the Board shall allow as a party any adjoining property owner or other person who demonstrates that the person has a particularized interest protected under this section and there is a reasonable possibility that the interest may be affected by an act or decision of the Board on the application.

Friend of the Board. When the "materially assisting party" category was removed from Act 250, the General Assembly created a "friend of the commission" category that allowed people to participate without becoming a party, similar to an amicus curiae or "friend of the court." S.201 would add a "friend of the Board" category for § 248 siting cases, modeled on the language from Act 250.

Forms. S.201 would require the PSB to adopt forms that a person may complete in order to move for party status or to participate as a friend of the Board.

Limiting Discovery. S.201 contains would place an affirmative duty on the Board to limit discovery to that needed for a full and fair determination. This language is modeled on similar language that governs the Environmental Division, found at 4 V.S.A. § 1001(g)(3). The bill adds language requiring the Board to consider the relative resources of the parties and the need for disclosure by the applicant of relevant information.

Prohibit Postcertification Review for Electric Generation. S.201 would prohibit the PSB's practice of using postcertification review for electric generation facilities, limiting that practice to electric transmission and natural gas facilities. In relevant part, the draft defines "postcertification review" to mean "a procedure under which a certificate of public good is conditioned on subsequent submission and consideration of other approvals issued for a facility or of specific details or designs of a facility prior to its construction. . . ."

Under postcertification review, a case does not end once the certificate of public good is issued. Instead, there are often subsequent proceedings that can involve significant project design changes, necessitating additional expense, time, and effort by parties.

The PSB's practice of postcertification review grew out of § 248 proceedings for electric transmission line proposals by the Vermont Electric Power Company (VELCO). In 1973, the Supreme Court upheld the PSB's practice of certifying a general rather than a specific route, followed by a "post-certification procedure" of detailed plan submittals with a two-week opportunity for parties to comment and request a hearing. In upholding this procedure, the Court stated that there is no prohibition on its use and that the certification of a general route avoids the "unreasonably excessive" costs "to VELCO, and eventually the consumer" of preparing detailed construction plans for multiple alternative routes in advance of approval. In re Petition of Vt. Elec. Power Co., 131 Vt. 427, 434-35 (1973). In a more recent decision, the Court ruled that, while this practice is authorized, it is not required. In re Vt. Elec. Power Co., 2006 VT 69, ¶ 17.

In contrast, Act 250 precedent consistently states that the District Commissions are not authorized to approve projects with a "condition subsequent," that is, a condition that is contingent on future review. See, e.g., In re Norman R. Smith, Inc. and Killington, Ltd., and Killington, Ltd. and International Paper Realty Corp., Nos. 1R0593-1-EB and 1R0584-EB-1 (Vt. Env. Bd. Sep. 21, 1990), aff'd, In re Killington, Ltd., 159 Vt. 206 (1992).

Fees

S.201 require fees for § 248 applications. The fee structure is nearly identical to the fee requirement of Act 250, which is based on construction costs and is capped at $150,000. The major difference is that S.201 caps the fee at $750,000 in view of the potential size and complexity of § 248 projects. In this regard, for electric generation facilities, the California Energy Commission caps its fee for siting review at $750,000.

As drafted, the proceeds of the fees would go to support the costs of the Public Service Board, Department of Public Service, and Agency of Natural Resources.

From the fee, the draft exempts net metering systems, standard offer projects (which are assessed a fee for the administration of the standard offer program), State and municipal projects, and projects by distribution utilities (electric and natural gas).

Local and Regional Recommendations and Act 250 Criteria

The draft bill proposes to require the PSB to give "substantial deference" rather than the current "due consideration" to local plans and the recommendations of local and regional planning commissions and the local legislative body and to the criteria of Act 250. It also proposes to require conformance with the regional plan if the regional planning commission amends the plan to identify areas that are suitable and are not suitable for siting electric generation facilities and analyzes the options available to the region to meet statutory energy goals.

In the context of local and regional recommendations, the bill also proposes to define "substantial deference" as follows:

> In this subdivision (1), "substantial deference" means that a recommendation or land conservation measure shall be applied in accordance with its terms unless there is a clear and convincing demonstration that other factors affecting the general good of the State outweigh application of the recommendation or measure.

In the context of the Act 250 criteria, the bill proposes to define "substantial deference" as follows:

> In this subdivision (5), "substantial deference" to a criterion of 10 V.S.A. § 6086 means that the Board shall:
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> (i) apply the criterion to the facts in the same manner that the criterion is applied under 10 V.S.A. chapter 151; and
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> (ii) if the outcome under the criterion is negative, deny the application unless there is a clear and convincing demonstration that other factors affecting the general good of the State outweigh denial . . . .

By defining "substantial deference," S.201 provides direction to the decision-maker on the weight to give local and regional recommendations and to the Act 250 criteria. Currently there are two provisions in siting statutes that use the term "substantial deference" and neither of these provisions defines the term, therefore giving the decision-maker broad discretion:

- Under 10 V.S.A. § 6086(d), in Act 250 proceedings, the District Commissions are to give "substantial deference" to technical determinations of the Agency of Natural Resources (ANR) in issuing ANR permits. However, neither the statute nor implementing case law defines the term.
- Under 30 V.S.A. § 248a, regarding telecommunications facilities, the PSB is to give "substantial deference" to the recommendations of the local and regional bodies and the local plan "[u]nless there is good cause otherwise . . ." The PSB decides what constitutes good cause.

The definition in the bill draws from Vermont Supreme Court case law on "substantial deference" as a standard of appellate review. When the Court reviews appeals from administrative bodies, it often applies a "substantial deference" standard, defining the standard in various ways. For example, in appeals from the Department of Taxes, the Court has stated that: "We accord substantial deference to matters within the agency's area of expertise, and absent a clear and convincing showing to the contrary, a methodology chosen through that expertise is presumed correct, valid and reasonable." Travia's Inc. v. Dept. of Taxes, 2013 VT 62 , ¶ 18. The Court also applies substantial deference to the Commissioner of Labor's interpretation and application of the workers' compensation statutes, deferring to the Commissioner absent a "compelling indication of error." Lydy v. Trustaff, 2013 VT 44, ¶ 4.

The bill uses the "clear and convincing" language from the Travia case because it embodies a standard known to the Court. It has characterized the standard as "a very demanding measure of proof." The standard is "somewhat less" than proof beyond a reasonable doubt but "substantially more rigorous" than the civil standard of preponderance of the evidence, requiring a demonstration that a contested fact is highly probable. In re N.H., 168 Vt. 508, 512 (1998).

In the case of the Act 250 criteria, the proposed standard includes a requirement to apply the criteria in the same manner as under Act 250. In this regard, the PSB has applied some Act 250 criteria differently from the District Commissions. For example, the PSB has modified the so-called Quechee test for aesthetics by stating that it considers a project's societal benefits in deciding whether a project has an undue adverse effect on aesthetics. See, e.g., In re Green Mtn. Power Corp., et al., Docket No. 7628, Order of May 31, 2011 at 83. Under the bill, the PSB would apply the Quechee test from Act 250 without modification. If the outcome under the test were negative, the PSB would deny approval, unless there is a clear and convincing demonstration that the societal benefits of the project outweigh the undue adverse effect.