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OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: House Committee on Energy and Technology

From: Luke Martland, Director and Chief Counsel

Date: February 5, 2020

Subject: H.688: Imposition of fees and taxes by rule and the General Assembly's role during the rulemaking process

I. Introduction

H.688 establishes statewide greenhouse gas reduction requirements, creates the Vermont Climate Council to develop a Climate Action Plan to achieve those reductions, and requires that the Agency of Natural Resources (ANR) adopt rules to implement the Action Plan and meet the reduction requirements.

This memorandum addresses the following questions:

- whether ANR can impose a new fee or tax via rule pursuant to H.688;
- if ANR cannot impose a fee or tax pursuant to H.688, whether ANR can modify an existing fee to do an "end run" around these restrictions and impose a broadly applicable fee;
- whether a mechanism exists to allow the General Assembly to obtain updates from ANR as ANR develops rules;
- whether the General Assembly can override or amend a rule once adopted; and
- whether the General Assembly can be required to vote to approve the rules before they go into effect.

II. Rulemaking and the Imposition of Fees and Taxes

A. Distinction between fees and taxes

A "fee" is "a monetary charge by an agency … for a service or product provided to, or the regulation of, specified classes of individuals or entities." 32 V.S.A. § 602(2)(A). A tax, on the other hand, is a legislatively imposed and mandatory "pecuniary burden laid upon individuals or property to support the government." *Black's Law Dictionary* (Fifth Edition, 1979).

Therefore, a tax (unlike a fee) is usually mandatory as opposed to voluntary, raises funds for a general governmental purpose rather than defraying the cost of a specific governmental program or benefit, and is deposited into the general or education funds, as

opposed to a special fund. See, In re Eddy's Estate, 135 Vt. 468, 471 (1977); State v. Caplan, 100 Vt. 140 (1927); *State Taxation, Third Edition*, Hellerstein, Vol. I, ¶ 2.01[2]; see also, U.S. v. Baltimore & O.R. Co., 84 U.S. 322, 326 (1872) ("A tax is understood to be a charge … for the support of government").

B. ANR cannot impose a new fee pursuant to H.688

Pursuant to 3 V.S.A. § 845(a), rules are binding and "shall have the force of law." However, there are limits to what rules can do; one of which is that a rule cannot be utilized to impose a fee unless that fee is specifically authorized by law. 3 V.S.A. § 845(c)(3). Similarly, 32 V.S.A. § 603(1) states that "[a]ny new fee shall be established solely by act of the General Assembly, which shall designate the service or product provided, or regulatory function performed, for which the fee is to be charged". See, 32 V.S.A. § 601 ("It is the purpose of this subchapter to establish a uniform policy on the creation and review of Executive and Judicial Branch fees, and to require that any such fee be created solely by the General Assembly").

Therefore, an agency or other rulemaking body cannot use the rulemaking process to impose a fee that is not authorized by a statute. H.688 does not authorize any new fees. As a result, ANR cannot impose a new fee pursuant to this bill.

C. ANR cannot impose a tax pursuant to H.688

An agency cannot impose a tax through rulemaking because the power to raise revenues rests solely with the General Assembly. VT Const., Chap. II, § 6 (revenue bills "shall originate in the House of Representatives"); U.S. Const., Art. I, § 8 (Congress has the power to tax). H.688 does not impose any new tax. As a result, just as with fees, there is no authority for ANR to impose a tax to carry out the mandates of H.688.

D. ANR cannot attempt to use an existing fee to do an "end run" around its lack of authority to impose a fee pursuant to H.688

Although ANR does not have authority to impose any new fees pursuant to H.688 or to impose a tax, a question has been raised as to whether ANR can use existing authority to impose fees to increase or expand an existing fee to target greenhouse gas emissions. In essence, the question is whether ANR could expand an existing fee to impose a broad-based fee on carbon or greenhouse gas emissions, thereby doing an "end run" around the fact that H.688 does not allow ANR to impose any new fees. Of course, this assumes that ANR would be willing to violate the spirit, if not the letter, of H.688 by attempting such an "end run." However, even if it is assumed for the sake of argument that ANR would be willing to do so, it is unlikely such an effort would be successful for four reasons.

First, 32 V.S.A. § 603(2) requires that in most situations "[t]he rate or amount of, or adjustment to, any fee shall be set by act of the General Assembly." Pursuant to 32 V.S.A. § 605 the General Assembly normally takes up a fee bill every year, with specific

areas of government addressed on three-year cycles.[1] Therefore, if ANR wished to substantially increase a fee in an effort to reduce greenhouse gas emissions, that increase would have to be included in a future fee bill and would therefore be subject to the approval of the General Assembly.

Second, there are two types of exemptions from the requirement that the General Assembly approve fee increases. However, neither seem to apply to the "end run" scenario. As noted above, 32 V.S.A. § 603 states that the amount of a fee and any adjustment must be set by an act of the General Assembly, but the same statute exempts fees charged to offset the cost of items such as transcripts, forms, publications, departmental products, and trainings. 32 V.S.A. § 603(3). Even as to this narrow class of fees, any increase by an agency must "be reasonably and directly related to" the costs of the items provided and the fees must be deposited into a special fund and used "to offset the costs of providing these services or products." 32 V.S.A. § 603(3), (4). As a result, it is extremely difficult to see how this limited group of fees for items such as transcripts or trainings could possibly be expanded and used to impose a broad-based fee on carbon emissions. In addition, pursuant to 32 V.S.A. § 602(2)(B), there are certain "charges" that are exempt from the definition of "fee," and thus the requirement that the amount of a fee and any adjustment must be set by an act of the General Assembly. This section explicitly lists charges set by the Public Utility Commission, the Board of Liquor and Lottery, the Department of Financial Regulation, and the Agency of Transportation[2]. In addition, certain other items, such as charges on inmates, students, or patients; monies paid into an enterprise or internal service fund; and transfers between State agencies, are exempted from the definition of fee. 32 V.S.A. § 602(2)(B). Finally, the list also contains "catch all" language that exempts "[a]ny other charge exempt by law."[3] 32 V.S.A. § 602(2)(B)(ix). Notably, ANR is not one of the entities, such as the Public Utility Commission, explicitly mentioned in 32 V.S.A. § 602(2)(B). It is also unclear how any of the other items, such as charges on inmates or transfers between agencies, could afford ANR a mechanism to do an "end run." While the "catch all" language is broad, I am not aware of any ANR charge that falls within his category. 10 V.S.A. § 2603(c). As a result, although there are two types of exemptions to the requirement that the General Assembly approve fee increases, these exemptions are limited and would likely not provide ANR an opportunity to circumvent the legislative process to expand an existing fee or impose a new one.

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[1] ANR's fees were last included in the fee bill in 2018, and a chart of proposed increases can be found here: https://legislature.vermont.gov/assets/Legislative-Reports/Fee-Report-2018-Session-FINAL.pdf Pursuant to 32 V.S.A. § 605(b)(2) ANR's fees would next be considered in 2021. The General Assembly can consider a fee outside of the normal three-year cycle.

[2] The Agency of Transportation can set charges for "motor vehicle and other highway user fees authorized by the General Assembly for the support of the Transportation Fund." 32 V.S.A. § 602(2)(B)(vii).

[3] An example of one such charge is 32 V.S.A. § 604, enacted in 2019, that allows any agency or department that owns or controls electric vehicle charging equipment to establish, set, and adjust fees for the use of that equipment.

Third, if ANR has any existing authority to impose a fee via rulemaking, ANR would have to go through the rulemaking process in order to enlarge the class of Vermonters subject to that fee or to change the amount of the fee. As a result, the steps set forth in the Administrative Procedure Act would have to be followed. If ANR was seeking to substantially change the purpose, amount, or impact of an existing fee to transform it into a broad-based fee, LCAR would have the opportunity to object based on factors such as legislative intent and arbitrariness.

Fourth, and perhaps most important, any fee (regardless of whether it is set via the fee bill, rule, or at the discretion of an agency to offset the cost of specific services such as transcripts or trainings) must relate to and be proportionate to the governmental service being provided. This concept is evident throughout Vermont's statutory scheme. For example, the very definition of a fee requires that the "monetary charge" assessed by an agency be "for a service or product provided to, or the regulation of, specified classes of individuals or entities." 32 V.S.A. § 602(2)(A). As noted above, 32 V.S.A. § 603(1) states that the General Assembly shall establish any new fees, and "shall designate the service or product provided, or regulatory function performed, for which the fee is to be charged." Pursuant to 32 V.S.A. § 603(2), the Joint Fiscal Committee can adjust a fee under certain circumstances, but the statute makes clear that this must be based on the cost of the service provided, and that cost "shall be narrowly construed … [to] include reasonable and directly related costs of administration, maintenance, and other expenses due to providing the service or product or performing the regulatory function."

As is clear from this statutory scheme, fees are imposed to support a defined program or service, and the amount of the fee must be proportionate to that program or service. Therefore, if ANR attempted to greatly expand the class of persons subject to an existing fee, and/or greatly increase the amount of that fee in an effort to do an "end run" around H.688, it is very possible that ANR's actions would be subject to challenge. Of course, any such effort to greatly expand the class of persons subject to a fee and/or the amount of the fee, so that it had little or no connection to the original purpose of the fee, would indicate that the supposed fee was really a tax and ANR was unconstitutionally seeking to impose a tax without legislative approval. See, In re Eddy's Estate, 135 Vt. 468, 471 (1977).

In sum, ANR cannot impose a tax without legislative action. Pursuant to H.688, ANR does not have authority to impose any new fees. Even if ANR attempted to do an "end run" around these restrictions by expanding an existing fee or fees to impose a broad-based "carbon fee," it is unlikely such an effort would be successful.

III. Rulemaking and Oversight by the General Assembly

As discussed in Committee, rulemaking is governed by the Vermont Administrative Procedure Act, set forth in 3 V.S.A. chapter 25. Under the Administrative Procedure Act, there is no mechanism for the General Assembly to vote on a proposed rule. In fact, the ability of the Legislative Committee on Administrative Rules (LCAR), to object to a proposed rule is limited to seven criteria, and a formal objection based on any of these

criteria does not prevent a proposed rule from becoming final. See, 3 V.S.A. § 842. In light of this, a number of questions have been raised concerning what options the General Assembly may have to keep abreast of the rules as they are developed and to, if necessary, override a rule once adopted.

A. Pathways for the General Assembly to stay informed as rules are developed

There are multiple pathways to ensure that the General Assembly remains informed as rules are developed. For example, during the legislative session, a standing Committee can take testimony from ANR concerning its progress in developing rules and what those rules might contain. Similarly, after adjournment, a joint Committee, such as the Joint Carbon Emissions Reduction Committee, could do the same. H.688 goes further and specifically requires that ANR present its proposed rules to the Council and to multiple standing Committees (including this Committee) before filing those rules with the Interagency Committee on Administrative Rules (ICAR). Therefore, pursuant to both the General Assembly's inherent oversight authority and specific language in H.688, ANR is required to keep the General Assembly informed as rules are being developed.[4]

B. The General Assembly can invalidate or amend a rule once it is adopted

The General Assembly can always pass a law to invalidate or amend a rule after it has been adopted. Therefore, if ANR were to adopt a rule that the General Assembly disagreed with for any reason, including as a matter of policy, the General Assembly could pass a law invalidating or amending that rule.

C. Requiring the General Assembly to vote to approve rules

It has been suggested that it might be advisable for the General Assembly to vote to approve ANR's rules before they can go into effect. In essence, this proposal would add another layer (a vote of the General Assembly) to the existing LCAR process.

On one hand, the General Assembly can always modify the existing Vermont Administrative Procedure Act or "notwithstand" its provisions as to one subject area or as to one bill. Therefore, in theory, the General Assembly could add a requirement in H.688 that the General Assembly must vote to approve ANR's rules. However, this idea raises substantial procedural and constitutional concerns.

As a procedural matter, it is unclear what the mechanism would be for the General Assembly to approve ANR's rules. If the mechanism was a bill, how is the General Assembly passing a bill approving ANR's plan (as set forth in rules) to address climate change any different than the General Assembly passing a bill containing that same plan? And, a bill approving ANR's rules, just like every other bill, would have to go through the committee process, be subject to amendment, be passed by both the House and

[4] Legislators can also, like other citizens, attend the public hearings concerning proposed rules to stay informed and can seek to influence the content of those rules by submitting comments.

Senate, be presented to the Governor, and be approved by the Governor (or allowed to go into effect without his/her signature or after having his/her veto overridden).

As to the mechanism being a resolution (which would not need to be presented to or approved by the Governor), a resolution cannot alter legal rights or duties and therefore is not legally binding. See, Kellogg v. Page, 44 Vt. 356 (1871), INS v. Chadha, 462 U.S. 919 (1983).

In addition, requiring that the General Assembly vote on proposed rules before they can become effective raises separation of powers concerns. In essence, pursuant to H.688, the General Assembly is "handing off" the responsibility to develop a plan to address climate change to the Council and giving authority and power to adopt rules to execute that plan to ANR. Once that responsibility and authority has been given to an Executive Branch Agency, it is problematic for the General Assembly to insist that it must still vote to approve the Agency's exercising of that power. Moreover, pursuant to the Vermont Constitution, Chapter II, §§ 6 and 11, although it takes both legislative chambers to create law, the Governor alone has veto authority. Allowing one chamber to essentially exercise a "veto" over an Executive Branch action (ANR rules) by not passing the required bill or resolution raises concerns regarding unicameral action and the constitutional roles of the General Assembly and Governor in enacting law.[5]

IV. Conclusion

As this memorandum has set forth, a State agency or other rulemaking body cannot use the rulemaking process to impose a fee that is not authorized by statute. Nor can a State agency impose a tax. As a result, ANR cannot impose a new fee or a tax pursuant to H.688. There are multiple barriers to ANR attempting to do an "end run" around H.688 by modifying an existing fee to impose a broad-based "carbon fee." For example, such a modification of an existing fee would probably have to be approved through the passage of the fee bill or via rulemaking. In addition, an effort to modify an existing fee to this extent would probably violate the principle that fees must relate to and be proportionate to the governmental service being provided.

The General Assembly has multiple mechanisms to stay abreast of the development of ANR's rules and can always pass a law to invalidate or amend an adopted rule. However, there is no ability under current law to allow or require the General Assembly to vote to approve those rules. Although the General Assembly could "notwithstand" the Administrative Procedures Act to require such a vote, doing so would raise substantial constitutional issues.

[5] It should be noted that Vermont law contains at least one example of such a unicameral "veto." Pursuant to 3 V.S.A. chapter 41 the Governor can propose reorganizations of the Executive Branch via an Executive Order, which take effect "unless disapproved by resolution of either House of the General Assembly within 90 days." 3 V.S.A. § 2002(b). This law raises some of the same constitutional issues as described above.