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By email and first-class mail to:

Mr. Peter Keibel
District Coordinator
District # 4 Commission
Vermont Agency of Natural Resources
111 West St.
Essex Junction, VT 05452

RE: REQUEST FOR JURISDICTIONAL OPINIONS RE: BURLINGTON INTERNATIONAL AIRPORT -- RESPONSE TO BURLINGTON

Dear Mr. Keibel:

I am sorry I have not been able to respond to Burlington's filing. The Vermont Yankee trial I am in the midst of has been continuing daily, starting at 8 am or 8:30 am every morning in Barre and then Montpelier, and often running to 6 pm or 7 pm in the evening, and I have not been able to spend significant time on any other matter. The trial now is scheduled to continue into a third week, so I will take this opportunity to respond very briefly.

First, I wish to point out that nowhere in Burlington's submission does it dispute the fact that every square inch of paved runway at the site is subject to an existing Act 250 permit. The DEIS states that changing the use of those runways to base the F-35s will result in **87 to 115 decibels of noise at residences**, which will be **21 to 25 decibels higher than the existing levels, using the Lmax standard adopted by the Environmental Board** (see McLean Enterprises Corp., No. 2S11147-1-EB, 11/24/2004). See Exhibit 2. Given these facts, and given that the law of Vermont is that any material change in use requires a permit amendment, regardless of whether the purpose of that change, by itself, would have been exempt from Act 250, we ask that you find jurisdiction. Avoidance of jurisdiction would be a departure from clearly established law.

Second, I wish to address a procedural issue raised by the recitation of facts, some of which I disagree with, in the Burlington submission. Those facts may well form the basis for a *second* Jurisdictional Opinion, but are improper to consider as the basis for any ruling on the Jurisdictional Opinion I requested in December. The governing statute, § 6007(c), states:

> With respect to the partition or division of land, or with respect to an activity which might or might not constitute development, any person may submit to the district coordinator an "Act 250 Disclosure Statement"; and other information required by the rules of the board, and may request a

> jurisdictional opinion from the district coordinator concerning the applicability of this chapter.

The rules of the board do not set forth any additional information that is required. The intent of the statute and the rules is that you issue a Jurisdictional Opinion *based on the facts that the requesting party submitted.* The precedents agree that the role of the District Coordinator is not to conduct a mini-trial and make a decision on which set of facts to adopt. On the contrary, the role is to apply the law to the facts submitted by the requesting party. As the cases say, each Jurisdictional Opinion is "only as good as the facts upon which it is based."

> … a jurisdictional opinion is issued not after a full evidentiary proceeding, but rather is based, at least initially, solely upon the representations made by the requesting party. Ultimately, a jurisdictional opinion does not give the requestor a permit; it can become a final determination once the appeal period passes, but, once final, it is nothing more than a determination that an Act 250 permit is or is not required, based upon the facts presented. As the former Environmental Board has noted, an Act 250 jurisdictional determination "is only as good as the facts upon which it is based." Re: Dexter and Susan Merritt, Dec. Ruling #407, Mem. of Decision, at 6 (Vt. Envtl. Bd. June 20, 2002), affd 2003 VT 84, 175 Vt. 624 (mem.) (quoting Re: Catamount Slate, Inc. et al., Dec. Ruling #389, Mem. of Decision, at 11 (Vt. Envtl. Bd. June 29, 2001), rev'd on other grounds, 2004 VT 14, 176 Vt. 284).

In re Lake Champlain Bluegrass Festival Jurisdictional Opinion, Decision on the Merits 1/3/12 (Docket No. 204-11-10 Vtec). At this stage of the proceedings the parties lack the opportunity for pretrial discovery, lack the opportunity for cross-examination, and lack subpoena power. There is no way for a District Coordinator to rule on whether the facts alleged by Burlington are more accurate that the facts I alleged. The statute and the rule do not call upon you to do so. Instead, the design of the statute is that you issue a Jurisdictional Opinion that is *based on the facts I have presented to you.*

Burlington has every right to seek a Jurisdictional Opinion based on facts that *it* wishes to present to you. This they have done. I expect that you will rule on their request, based on the facts they believe to be true. But Burlington has no right to, in effect, compel dismissal of the Jurisdictional Opinion we have sought based on the facts that we have presented that Burlington may disagree with.

Therefore I object to each allegation and implication in paragraphs 2 and 4 of the Burlington submission which state or suggest that the Air Force alone controls the basing decision without any purpose of or involvement by the State of Vermont or the City. I ask that you base your decision in response to the request I made entirely upon the facts alleged and documented in my letter and its attachments.

This brings me to the third point I wish to address, which is whether the state is deprived of jurisdiction so long as there is "a federal purpose." Burlington asserts (page 1) that so long as there is "a federal purpose," there is no Act 250 jurisdiction. This would be a strange position for any District Coordinator to accept for two reasons. One is the precedents on change of use, addressed in our initial request, which, again, trigger jurisdiction for any material change of use even if the change, by itself, would be outside Act 250 jurisdiction. Second, if the existence of "a federal purpose" sufficed to deprive the state of jurisdiction under Act 250, there would be no jurisdiction over any highway widening or highway construction project, all of which are funded in large part by the federal government, all of which serve a federal purpose that is clearly articulated in federal statutes, and all of which must be performed according to detailed federally dictated standards. The same would be true of all low-income housing projects, most if not all hospitals, all state parks and recreation areas purchased with grants from the Land and Water Conservation Fund and so on. In each of these examples there is "a federal purpose" that is set specifically forth in a federal statute, the federal government provides most of the funding, and the federal government determines the principal parameters governing construction and operation.

The Environmental Board's decision in Declaratory Ruling #134 itself rejects Burlington's view of Act 250 jurisdiction. The Board did not find that the existence of "a federal purpose" ousts the state of jurisdiction. The Board found that the purpose in that case was **"solely"** federal. In the next sentence of the ruling the Board stated that with respect to the Air National Guard's development at the Burlington airport, "a change in control or purpose, or a combination of the two, however very well might trigger Act 250 review under 10 V.S.A. § 6001(3)." Here, there is the "combination" of state, local and federal purposes. As our initial request set forth, the ANG provides free emergency and rescue services that, if the City were to provide them, would cost the City $2.5 million each year. This benefit is one of the principal justifications urged by the City for keeping the ANG as a tenant. A vital municipal purpose is served by the lease and the lease serves a "municipal purpose" under Rule 2. See our Exhibit 24. No combination of municipal and federal purpose was alleged in Declaratory Ruling #134. It is specifically alleged here.

Note that the Board did not find that jurisdiction was preempted. The Board also did not address material change in use from a previously permitted development It found only that in that case, the sole purpose of the proposed new development was federal.

The Board's ruling also should be considered in light of Smith v. Vermont Air National Guard, 2004 WL 5582255 (Supreme Ct of Vt, Entry Order, Docket No.2003-473), which held that the Air National Guard is a state agency, citing 20 V.S.A. § 361(a) ("The military department, created by [3 V.S.A. § 212] ... shall include the national guard."); and 3 V.S.A. § 212(16) (military department is an administrative department of state government).

As I am sure you are aware, the actual wording of Act 250 does not bar jurisdiction if there is "a federal purpose." There is no such language anywhere in the statute. Instead it provides jurisdiction if there is a state or municipal purpose. Section 6001(3)(A)(v) states that "development" includes: "The construction of improvements on a tract of land

involving more than 10 acres that is to be used for municipal, county or state purposes." Burlington reads the statute as if it said "The construction of improvements on a tract of land involving more than 10 acres that is to be used *exclusively* for municipal, county or state purposes."

The wording of the rule also rejects Burlington's position. Rule 2(15) states:

> "*State, county or municipal purposes*" means the construction of improvements which are undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality, or members of the general public.

The Rule recognizes state, county or municipal "purposes" if the construction is to be *undertaken* by or for a state, county or local government, regardless of the actual purpose for which the facility will be used, so long at is *used* by that government or by members of the public. For example, the addition of a wing onto a county courthouse, to house a deputy clerk whose sole purpose would be to process federal passport applications, would be jurisdictional, because the rule does not base jurisdiction upon the purpose of the intended use. The rule based jurisdiction on who undertakes a project, and then who uses it.

Here, the improvements are to be *undertaken* by and for the Vermont Air National Guard, which by statute and by Supreme Court decision is a state agency, and these improvements are to be *used* by that state agency as well. As a result, the City will receive millions of dollars in necessary airport operation services, for free, from the ANG,.

Burlington's preemption argument is disposed of by the very case it cites, In re: Commercial Airfield (Edward V. Peet, Appellant), 170 Vt. 595, 752 A.2d. 13 (2000). My clients are not asking you or the District Commission to "regulate" aircraft noise; we are asking that Burlington "apply for an Act 250 permit." If the land use impacts of that noise are undue, or conflict with the local Plan, such as by causing substantial loss of moderate income housing that is in short supply, then the District Commission could either impose conditions on the project (such as requiring construction of replacement housing) or could deny the application. The dissenting opinion in City of Burbank reminds us as that there is a fundamental difference between regulating noise, and regulating the use of an airport:

> A local governing body that owns and operates an airport is certainly not, by the Court's opinion, prohibited from permanently closing down its facilities. A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility. Even though the local government's decision in each case were motivated entirely because of the noise associated with airports, I do not read the Court's opinion as indicating that such action would be prohibited by the Supremacy Clause merely

> because the Federal Government has undertaken the responsibility for some aspects of aircraft noise control.

411 U.S. at 653 (opinion of Justice Rehnquist, joined in by Justices White, Marshall and Stewart)

Finally, I want to address the issue of segmented review. It is a fundamental aspect of environmental review that project applicants should not be allowed to "segment" their proposals into separate pieces in order to avoid jurisdiction by dividing a single project into smaller less-than-jurisdictional components, or in order to avoid review of the cumulative impacts of the separate pieces. The Quechee Lakes decision relied on this concept:

> The record of this case readily demonstrates the pitfalls of segmented, 'piecemeal' review of a phased development. Since 1970, QLC has planned a large residential and recreational resort community comprising 6,000 acres. Development of that community has progressed on a project-by-project basis resulting in incremental loss of open space. However, the consumption of open space by any one such project has not been of sufficient magnitude to conclude that a project's impact on scenic beauty is 'undue.' In contrast, the collective impact of the open space intrusions which have occurred since 1974, and which are likely to continue as QLC works toward its 2,500 housing unit goal (including the Newton and Golf Course projects), may be sufficient to 'offend the sensibilities of the average person.'

In re Quechee Lakes Corp., 1986 WL 58689 (Vt.Env.Bd. No. 3W0411–A–EB 11/4/85, corrected Land Use Permit 1/13/86) p. 21 (emphasis in the original). The Public Service Board's recent decision in In re Blittersdorf, Docket No.CPG-NM991 10/21/10 n. 11 addressed the possibility of an applicant avoiding Board jurisdiction by splitting a single overall proposal into less-than-jurisdictional pieces. The Board rejected Mr. Blittersdorf's attempt to segment his proposal into two different net metering systems, and explained, by analogy, that allocation of output of a generating station among different purchasers does not deprive the Board of the ability to review the construction of the generating station in a single § 248 case. Otherwise "segmented review of the facility" would result. Similarly, in In re MacIntyre Fuels, Inc., 2002 WL 31840770 (Vt.Env.Bd. DR No. 402) p.6, the Environmental Board summarized a long history of Environmental Board precedents governing avoidance of the loss of jurisdiction (under the definition of "involved land") that would result if applicants were able to in partition an overall project into constituent pieces." See also In re: Defreestville Area Neighborhood Association, (3d Dept. 2002) 299 A.2d 631, 750 N.Y.S. 2d 164 (summarizing policy reasons against segmented review under New York's State Environmental Quality Review Act).

That segmentation is what Burlington seeks here. Burlington's position is that neither the change in use of the airport nor the increased purchase and razing of homes is jurisdictional -- even though one causes the other to occur and, when considered together, they satisfy both the criteria for material change and the criteria for substantial change.

Again, I apologize for the delay in getting this to you.

Sincerely,
Jim
James A. Dumont, Esq.

cc: Greg Meyer, Office of the City Attorney
Brian Dunkiel, Esq.
Ms. Rosanne Greco, Chair, South Burlington City Council
Ron Shems, Esq., Chair, Natural Resources Board
Maj. James Gentry
Ms. Cara Johnson (USAF)