**In the Supreme Court of the State of Vermont**

# Supreme Court Docket # 2014-192

**In Re: Request for Jurisdictional Opinion Re: Changes in Physical Structures and Use at Burlington International Airport for F-35s**

**Appeal from the Environmental Division of the Superior Court**

# APPELLANTS' REPLY BRIEF

September 29, 2014

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### COURT, ENVIRONMENTAL AND PUBLIC SERVICE BOARD CASES



### CONSTITUTIONS, STATUTES, REGULATIONS AND RULES

**LAW REVIEWS AND TREATISES**

## ARGUMENT

### 1. Burlington's argument hinges on a misunderstanding of the remedy sought -- Appellants do not seek review under Act 250 of the Air Force decision to beddown the F-35 at the BIA.

Burlington's argument hinges on a misconception -- that Appellants seek review under Act 250 of the decision by the Air Force to beddown the F-35 jets at the BIA. See, e.g., Burlington Brief pp. 4, 8, 9. On the contrary, Appellants seek a ruling that there is Act 250 jurisdiction over the land use changes at BIA caused by that federal decision. They do not seek review of the decision itself. Once the District Commission is told it does possess jurisdiction, Appellants would expect the District Commission to conduct itself as it did when reviewing the land used changes required by the Federal Aviation Administration (another federal agency whose decision the District Commission cannot review) when the F.A.A. decided that an improved Instrument Landing System (ILS) was required at the BIA. The District Commission accepted the federal decision as a given, considered the land use impacts of the federal decision, and imposed on the airport owner a requirement to mitigate the land-use impacts of the changed airport use that resulted from the federal decision. See PC 55-67, and our main brief at p.26. This remedy falls within the scope of authority allowed by *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973).

**2. Burlington's argument that the land use impacts of the Air Force decision are preempted relies on an extreme view of the Supremacy Clause – a view which the Air Force itself has disclaimed and which the Act 250 cases cited by Interested Parties also reject.**

Appellants readily concede that if a District Commission were to rule that F-35 jets should not be assigned to the VTANG, the District Commission would be acting in an area reserved to the federal government – and Appellants also note that Burlington's view of federal supremacy is equally extreme and unconstitutional. Burlington's position is that once a town or city decides to develop an airport, federal statutes mandate that all municipal and commercial airports host military planes, and from that point onward no state land use law can be applied to the land use impacts of military use of that airport. Burlington Brief pp. 9, 15-16.

Burlington's position is untenable, and has been rejected by the Air Force itself. Should the BIA scale back or increase its purchase of noise-impacted homes under the Noise Compatibility Program? Should it purchase and raze homes on the National Register of Historic Places? Should the BIA instead of purchasing homes invest its NCP dollars in sound-proofing some homes, such as those with historic value? Should the BIA soundproof schools? Should BIA erect noise barriers to replace razed homes that functioned as noise barriers, to prevent military jet noise from spreading into new neighborhoods once those homes are razed? The record is undisputed that it is noise from military aircraft that BIA is mitigating by its Noise Compatibility Program. PC 190, 301-312. If Burlington is correct, neither the District Commission nor any officer or agency of state or local government can touch these issues. The Secretary of the Air Force alone must decide how BIA should mitigate noise created by military use of the BIA, according to this view. But the Air Force does not possess the time, the expertise,

the interest or the lawful jurisdiction to decide these questions. The Air Force itself contemplates allowing local land use regulation to mitigate the noise impacts of this project, as the Air Force explicitly stated in the EIS in this matter, of which the Court may take judicial notice.[1] The EIS explains that the Air Force uses guidelines intended to assess compatibilities and incompatibilities of noise impacts with surrounding land uses and to identify the actions that could be taken to mitigate those impacts – but "it is up to the city/county zoning and planning entities to determine what land uses are compatible and how they will deal with incompatibilities (e.g., what type of development is allowed, instituting residential buyouts, or whether noise attenuation efforts will be done in residential units)." Final United States Air Force F-35A Operational Basing Environmental Impact Statement, September 2013, pp. 3-37 to 3-39 and pp. C-12 to C-16, *esp.* pp. 3-38 and C-13. The result of the City's position would be that the BIA can do, or not do, as it wishes, subject to no land use law at all -- a result so extreme that the Air Force has rejected it.

The only reasonable and constitutional dividing line between federal and state authority is the one drawn in the EIS -- if an Air National Guard uses a municipal or commercial airport runways for training pilots in the use of military jets provided to it by the Air force: (1) the Air Force decides on what military jets to provide (*i.e.*., how to "arm" the Guard), but (2) state law regulates how the airport owner must mitigate the

[1] The Court is asked to take judicial notice of the EIS. V.R.E. 201(f). See Reporter's Note (stating that under this subdivision of the rule, the rule applies to appellate as well as trial proceedings). The EIS is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b). *Ctr. For Biological Diversity v. Exp.-Imp. Bank of the United States*, C 12-6325 SBA, 2014 WL 3963203 n.6, (N.D. Cal. Aug. 12,2014) (approving of judicial notice of EIS). The EIS can be found at at least two websites. The Department of Defense link is www.dtic.mil/get-tr-doc/pdf?AD=ADA595401. See also the link at our main brief at p.3.

land use impacts of that federal decision. This is the balance the cases have adopted. See, e.g., *British Airways v. Port Authority,* 558 F.2d 75 (2d Cir. 1977).

Interested Parties' Brief relies on jurisdictional analysis which agrees with that of Appellants and the Air Force. Where the choice is between "Act 250 jurisdiction or nothing," the outcome differs from where impacts are subject to "an alternative regulatory scheme." Interested Parties' Brief at p.19, quoting *In re Glebe Mt. Wind Energy, LLC*, No. 234-11-05 Vtec, slip op. 1t 7, (Vt. Envtl. Ct. Aug. 3, 2006) (Durkin, J.) and *In re Eustance Act 250 Jurisdictional Opinion*, No. 13-1-06 Vtec, slip op. at 11 (Vt. Envtl. Ct. Feb. 16, 2007) (Wright, J.). Here, if Act 250 does not provide jurisdiction to the District Commission to accept as a given the federal decision and review how the land use impacts of that decision may be mitigated by the State or the City, those land use impacts will fall into Judge Durkin's "nothing" category. There will be no regulation of the land use impacts and how they may be mitigated.

The City also asserts the argument that all of the exceptions to federal preemption of airport land use impacts are limited to the situation where a local government owns the airport and is imposing its own standards on itself. Burlington Brief p.22. This argument borders on the frivolous, having been rejected by the very source Burlington relies upon, Justice Rehnquist's often-quoted summary of the majority opinion in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). He wrote:

> 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 (emphasis added). *Accord*: L.G. Zambrano, Balancing the Rights of Landowners with the Needs of Airports: the Continuing Battle Over Noise, 66 J.Air L.& Com 445, 465 (2001)("… so long as local or state governments do not regulate aircraft noise emission directly, for example by requiring aircraft to meet certain noise standards or requiring certain technical modifications to jet engine design, they are free to regulate noise for the common benefit."); K. L. Falzone, Airport Noise Pollution: Is There A Solution In Sight?, 26 B.C. Envtl. Aff. L. Rev. 769, 792 (1999) ("While federal law preempts local law in regard to aircraft safety, navigable airspace, and noise control, courts have refrained from applying *Burbank* when land and water use zoning issues are involved."); *Lucas v. People's Counsel for Baltimore County*, 147 Md.App. 209, 807 A.2d 1176 (2002) (no preemption so long as local law does not directly regulate the source of noise emissions or restrict the use of aircraft); *City of Cleveland v. City of Brook Park*, 893 F.Supp. 742 (N.D. Ohio 1995) (same).

**3. Burlington misunderstands the "purpose" of VTANG use of the F-35 – under the Militia Clause and Vermont law the use of federally-owned arms such as airplanes to train VTANG pilots serves a state purpose.**

The City's Brief stands 200 years of constitutional law on their head by treating the training of F-35 pilots as indistinguishable from arming and disciplining the National Guard. According to Burlington, these actions all serve a wholly federal purpose. Burlington Brief at pp.9,11, 15-16. Burlington's Brief repeatedly ignores the allocation of state and federal powers agreed upon by the Founding Fathers. The role of the federal government is to arm and prescribe discipline for the militia, now known as the National Guard. The role of the states is to train the National Guard. The militia clause expressly assigns the latter duty to the states.

> The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S Constitution § 8. The role of the states in training the National Guard, appointing its officers, and governing its actions, is every much a state purpose as is the police power – perhaps more so, since this state purpose is explicitly enshrined in the Constitution as an affirmative means of counterbalancing federal power. The leading scholarly treatment of this subject explains that even though the states use federal dollars to pay their National Guard troops, and use federally-owned armament for the training, and do so under a discipline prescribed by Congress, the National Guard remains a militia of each state: "… the National Guard not in federal service is still the militia, and this is so despite its federal pay, its federally-owned equipment and the necessity for federal recognition of its officers." Wiener, *The Militia Clause of the Constitution*, 54

Harv.L.Rev.181, 210 (1940). *See also McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 3038, 177 L.Ed.2d 894 (2010) (one of the purposes of the Second Amendment was protection of the role of state militias as a check against federal power).

As for what prescribing the "discipline" of the militia constitutes, Wiener's article explains that this means prescribing their "system of drill" and possibly the process and procedure of court-martial, for the states to carry out in training. Wiener, *supra* at 210-215. The City relies on *ipse dixit* to conclude that "discipline' includes training. Burlington Brief p. 27.

Vermont's Constitution and statutes also expressly assign National Guard training to the State.

> The inhabitants of this State shall be trained and armed for its defense, under such regulations, restrictions, and exceptions, as Congress, agreeably to the Constitution of the United States, and the Legislature of this State, shall direct.

VT Constitution § 59.

> The organized militia shall be known as the national guard, and shall consist of such organizations and personnel of such arm, service, corps or department as may from time to time be required by the federal government to be maintained in the state, organized in accordance with regulations prescribed therefor by the federal government and approved by the governor. The governor may alter, divide, annex, consolidate, disband or reorganize the same and create new organizations, when the regulations prescribed by the federal government shall so require, in order that the national guard of this state shall conform to any system of drill, discipline, administration and instruction now or hereafter prescribed for the armed forces of the United States. The governor shall prescribe all necessary regulations for the government of the national guard pursuant to this section.

20 V.S.A. § 361.

Thus, when Burlington argues that it is a "wholly federal" purpose to train VTANG pilots on how to fly the F-35, as on p. 11 of its brief, Burlington disregards the United States Constitution, the Vermont Constitution and the statutes adopted by the

General Assembly and signed into law. By law under our federal system, this is a state function, and any land use change for this purpose serves a state purpose.

Burlington's misunderstanding of the constitutional allocation of authority undermines all of its arguments. Argument IV.A assumes that training Vermont pilots to fly F-35 jets serves no state purpose. Argument IV.B assumes that the preexisting VTANG training operation, training on F-16 jets or other military equipment, also did not serve a state purpose.

**4. Substantial change: The physical improvements on the leased land were constructed "for" and "used by" the VTANG; this issue was not waived.**

**i. Pre-existing Development on leased land**

Act 250 jurisdiction attaches to "any substantial change to a pre-existing development." Land Use Panel Rule 2(A). The BIA and the VTANG buildings constructed on leased land were "in existence on June 1, 1970" and are therefore "pre-existing." Land Use Panel Rule 2(C)(7). "Development" is the "construction of improvements" on more than 10 acres "that is to be used for municipal, county or state purposes." 10 V.S.A. § 6001(3)(A)(v). "Improvements" are defined as "any physical change" to a project site that meets the criteria for "development." NRB Rule 2(C)(3). The improvements to be constructed were described by Appellants to the Environmental Court below and clearly constitute "any physical change." PC 131, 153, 298.

Burlington asserts, however, that the pre-existing VTANG development on leased land does not qualify as "development" under Act 250 because it was undertaken for a federal purpose only and because it is on land leased to the Air Force and licensed to the VTANG (pp. 17-18). These arguments disregard the law and the facts. First, as noted above, the "wholly federal purpose" argument ignores the purpose of the National Guard under the Constitutions of this nation and this state. Second, as Burlington concedes, the Supreme Court has not yet addressed the scope of the term "state purposes" and the statute does not define it. But the rules do. The rules state that development that undertaken "by or for" a state agency, and which will be "used by" that agency, constitutes development for a state purpose. Although the pre-existing improvements may have been "constructed, funded, and owned by the federal government," the

improvements were undertaken "by or for" the VTANG, and have been "used by" the VTANG.

As for the City's argument that the federal government "controls" the lands on which the VTANG base is located by virtue of a lease from the City to the Air Force and the license granted to the VTANG by the Air Force, the wording of that license and the precedents and rules of the Environmental Board compel a finding of Act 250 jurisdiction. The license states that the land is granted to the State of Vermont "to use and occupy for year-round training and support of the Vermont Air National Guard." PC 106. The Land Use Panel's rules and the Board's precedents rest upon precisely that kind of day-to-day use as the cornerstone of Act 250 review. The Act concerns itself with land use impacts and it is the party carrying out "day-to-day" use of land who is responsible for ensuring that those impacts are mitigated. Therefore the day-to-day user is required to be an applicant for a project. *Re: Pittsford Enterprises*, LLP, ENB 2002-015 (2002)(U.S. Postal Service required to be co-applicant as lessee of property owned by developer, especially given that the owner resided out of state). The entity which holds the deed, or which holds the lease and then sublets or licenses the property to others, need not even be a co-applicant where the District Commission can impose the necessary mitigation conditions on the day-to-day user alone. Land Use Panel Rule 10(A). The VTANG has been the party conducting the day-to-day training and other use which has occurred on the leased lands pursuant to the license. Therefore the leased land improvements constitute pre-existing development regardless of which entity leased the land from the City.[2]

[2] Appellants note that they served the attorney for the VTANG (the Office of the Attorney General of Vermont) with their Request for Jurisdictional Opinion, and

**ii. The issue of cognizable change to the leased lands was explicitly and repeatedly argued below and was not waived**

Burlington is incorrect when it claims that Appellants did not address the "cognizable changes" of the improvements proposed for the leased lands before the Environmental Division and focused solely on the change in aircraft (p. 18). In their initial memorandum and Statement of Undisputed Facts, Appellants summarized all of the physical changes to the leased land as proposed (PC 131, PC 153 ¶3), they argued that the changes in use on the non-leased land (Runway 15-33) would be material changes (PC 137), and then they argued that the changes to the leased land would be "substantial changes" because they would be cognizable. (PC 141, summarizing the case law on cognizable change, as applied to the leased land improvements). The caption to the latter argument, addressing the cognizable change standard, was "***Substantial change to the leased land.***"

In their reply memorandum, Appellants returned to this argument, arguing that there would be a "cognizable" change to the leased land because the "change in use on the leased lands is not just a change in the type of aircraft." The reply memorandum stated that changes to the leased land were "not just a change in the type of aircraft" because they included the internal renovation of Building 120 for an F-35 simulator, addition of a 270 DC, 28 DC Power in the Aircraft Shelter Parking Areas (Buildings 130,

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subsequently subpoenaed documents from the VTANG by service upon the Office of the Attorney General as well as the VTANG for use in the Environmental Court. In both instances, the Office of the Attorney General and the VTANG chose not to participate in these proceedings.

131, 132, 150, 360), providing "Secure/Classified Upgrades in Rooms 0004/0004A, Building 40," and providing a Secure Parts Storage Area for ALIS, Building 70 Warehouse – that is, the same physical changes already listed in Appellants' brief *and* in Appellants' Statement of Undisputed Facts. PC 298.

There is no basis for arguing, as the City now does, that Appellants waived the substantial change argument as to the leased land by basing it only on the change of aircraft.

**5. Material Change: Burlington argues that because no permits mention military use, all of its permits must have contemplated unlimited military use.**

Appellants explained in their main Brief that, under the material change rule, the burdens of production and of persuasion as to the content and intent of the existing permits fall upon the permit-holder. Appellants quoted their summary judgment memorandum, which had explained that the existing permits authorize only civilian use of runway 15-33 and that the City had failed to produce the permit or permits upon which it was relying in arguing that this military project falls within the intent of any existing permit. Appellants' Brief at 21-22. The City's Brief does not dispute that it failed to produce the permit or permits upon which it is relying as contemplating unlimited military use, regardless of substantial changes in impacts from new military aircraft. Burlington Brief Argument IV.C.

Instead the City engages in a spectacular *non sequitur* in an attempt to justify failure to produce those permits: 1) The City concedes that none of the existing permits mention military use. 2) The City states that none of its prior Act 250 permits (none of which, it has conceded, addressed military use) attempted to impose conditions to mitigate the noise impacts of military use (according to their affiant). 3) Therefore, the City reasons, all their prior permits must have contemplated unlimited future military use regardless of new land use impacts. Burlington Brief p.24.

The City's tortured logic should not excuse it from jurisdiction. The change in use from the currently permitted use (a mix of non-military and F-16 aircraft use) to use by the F-35 (along with non-military use) will cause a tremendous increase in the noise levels associated with the BIA and impair the habitability of large parts of Winooski, and parts of Burlington, South Burlington and Williston. See EIS Table 2-12, p. 2-32; Table

BR 3.10-2; Table BR 3.10-3; Table BR3.2-14; pages BR4-35, BR4-67, BR4-68. The increase in noise levels is a change that would have "a significant impact on any statutory criteria." As explained in Appellants' Brief, an increase in noise levels may cause significant impacts under criteria 1 (air pollution through loud noise), 8 (impacts of noise under aesthetics criteria) and 10 (nonconformity with South Burlington and Winooski plans because of impacts on housing). See also Criterion 9(k). The District Commission cannot and will not attempt to override the Air Force's decision to beddown the F-35 at the BIA, but the District Commission can and should consider the mitigation conditions that the City and the VTANG should undertake in order to respect the intent of the legislature in adopting Act 250.

**6. The City and Interested Parties have failed to comply with V.R.A.P. 44**

V.R.A.P. 44 requires any party challenging the constitutionality of a state law to provide written notice of that claim to the Clerk of the Supreme Court so that the Clerk may certify that challenge to the Attorney General. Notice must be provided "immediately upon the filing of the record or as soon as the question is raised in the Supreme Court." This issue was apparent from the moment the Notice of Appeal and then the Docketing Statements were filed. The City and Interested Parties now have made that challenge (Burlington Brief Argument D, Int. Parties Brief Argument C), but without notice to the Clerk. This argument has been waived. In the alternative, the Attorney General should be notified and given the opportunity to intervene to defend the constitutionality of Act 250. If the latter course is adopted, Appellants ask that all parties be given the opportunity to respond to any brief filed by the Attorney General.

**Conclusion**

Judgment should be entered for Appellants.

Dated: September 29, 2014

Respectfully submitted,

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## CERTIFICATION OF COMPLIANCE

I hereby certify that this reply brief contains fewer than the 4500 word limit contained in the Vermont Rules of Appellate Procedure. According to Microsoft Word 2003 the brief contains a total of 3700 words. It has been checked for viruses and no viruses have been found.

Respectfully submitted,

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