Stop the F-35 Coalition – Preliminary Dumont Response to City Attorney Memorandm
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1. Eileen Blackwood's memo accepts the most basic point we have been making for months – that unlike South Burlington, Burlington is the *proprietor* of the airport and therefore it has authority that South Burlington lacks. Federal noise standards preempt South Burlington's authority to regulate through zoning or other regulations. The caselaw we submitted and that Blackwood found all agrees that a city that *owns* an airport can set noise or other standards as *proprietor*, not regulator. For example, I attach a copy of the City of San Francisco case she cites. The highlighted parts explicitly state that the City, as owner, has the right to set noise standards.

2. The FAA Issue. The FAA Assurances that much of Blackwood's memo rely on are documents we have had for months. These Assurances repeat that a city/proprietor *can* set standards for the use of its airport so long as the city/proprietor does not unjustly discriminate.

3. What is unjust discrimination? The cases say that it would be unjust to set a noise standard and then apply it unfairly. In the principal case Attorney Blackwood relies on, the City of San Francisco set a noise standard and then applied it in a way that barred a plane that complied with that standard from the airport while allowing other planes that were as noisy or noisier to use the airport. That was unjust discrimination.

4. The national defense issue. Attorney Blackwood's treatment of the federal/military preemption issue is perplexing. The memo quotes cases that have nothing to do with the kind of situation before the City Council, and ignores the caselaw holding that the City Council resolution is perfectly legal. For example, one case cited in the memo (Tarble) involved a decision by a state court in Wisconsin in 1871 to issue a writ of habeas corpus to release a federal soldier held in federal prison. The US Supreme Court said the state courts could not decide this federal military issue. Another case cited in the memo (Perpich), involved a federal statute which explicitly held that state Governors cannot withhold their consent to the active duty by National Guard troops for duty outside the United States. The US Supreme Court upheld the statute because it applied to National Guard officers who had been placed in federal service and it was within the power of Congress to make that decision. The New York decision cited in the memo, Fossella, was decided by a lower court. It addressed a prohibition against any use of city land in connection with nuclear arms. It prohibited stationing US Navy warships in New York harbor, because those warships carried nuclear weapons. The lower court held this was interference with national military authority. Another case cited, Gilligan, involved the shooting of students at Kent State. The Supreme Court rejected a suit by Kent State student government asking that the federal judge oversee the training of National Guard officers. All of these cases involve direct intervention into federal military affairs by local authorities with little or no basis in protecting the health of the local public.

5. None of the cases cited in the memo address the situation in Burlington. Uncited cases and scholarly articles explain that in the Burlington situation local action is acceptable if the purpose is within the traditional purposes of local government – protection of the public health of the local public -- and if the effect is not to directly control military affairs. For example, there is the case of Arthur D. Little v City of Cambridge, decided by the highest court in Massachusetts. The City there adopted a regulation, like the proposed resolution here, which had the purpose of protecting local public health. The regulation banned all manufacture of chemical weapons in

the city. Arthur D. Little, which developed these weapons for the Department of Defense, brought suit. The highest Court in Massachusetts wrote:

> [T]his court, and the United States Supreme Court, have been particularly reluctant to overturn State laws which are "deeply rooted in local feeling and responsibility." *Travelers I, supra,* 385 Mass. at 611, 433 N.E.2d 1223, quoting *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 243-244, 79 S.Ct. 773, 778-779, 3 L.Ed.2d 775 (1959). *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination,* 375 Mass. 160, 174, 375 N.E.2d 1192 (1978). This principle applies with special force to laws designed to protect the public health and welfare, a subject of "particular, immediate, and perpetual concern" to any municipality. E. McQuillin, Municipal Corporations § 24.01 (3d ed. 1980). In fact, according to an early decision of this court, *Vandine, petitioner,* 6 Pick. 187, 191 (1828), "[t]he great object of the city is to preserve the health of the inhabitants." Accordingly, municipal health and safety regulations, such as that at issue here, carry a heavy presumption of validity, and are only rarely preempted by Federal law. *Travelers I, supra,* 385 Mass. at 612, 433 N.E.2d 1223. See *Malone v. White Motor Corp.,* 435 U.S. 497, 513 n. 13, 98 S.Ct. 1185, 1194 n. 13, 55 L.Ed.2d 443 (1978). "The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 105 S.Ct. 2380, 2398, 85 L.Ed.2d 728 (1985), quoting *Slaughter-House Cases,* 16 Wall. (83 U.S.) 36, 62, 21 L.Ed. 394 (1873). *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 442-443, 80 S.Ct. 813, 815, 4 L.Ed.2d 852 (1960)

The Court noted that it is within the City's authority to limit such dangerous activities in densely populated areas, just as F-35 opponents have been arguing about locating the F-35 in an urban area before its crash rate is reduced:

> First of all, we reject ADL's contention that the regulation at issue impermissibly interferes with an integral part of an important national defense program. Nothing in the record suggests that the densely populated city of Cambridge is somehow uniquely suited to research on chemical warfare agents. Banning research on these chemicals within that city hardly requires the abandonment of the DOD's chemical warfare program. The DOD remains free to conduct its research elsewhere. Accordingly, the city of Cambridge has not attempted to dictate the scope of permissible strategic research, or otherwise to interfere with congressional power to "provide for the common Defence." Instead, it has merely taken the position that research on certain chemical warfare agents must be conducted, if at all, outside the city limits.

The Court also ridiculed Arthur D. Little's "domino effect" argument that allowing Cambridge to ban chemical weapons manufacture would lead to such bans all across the country, thus directly interfering with the national defense.

> Nor are we persuaded by what the commissioner has termed "ADL's domestic domino theory." Even if the Cambridge regulation alone does not substantially interfere with national defense, ADL asserts that other municipalities may enact similar prohibitions, and thus seriously hinder the DOD's ability to study chemical warfare agents. We believe that the scenario posited by ADL is far too "hypothetical," *Rice v. Norman Williams Co.,* 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed.2d 1042 (1982), to warrant preemption. According to the record only one other city has even considered the problem, and there is no indication that it will respond as the city of Cambridge has. Moreover, as the judge below recognized, even if a significant number of municipalities did enact such regulations, the DOD would always be free to conduct such research on its military bases.

The parallel to Burlington is striking. No other communities with Air Guard bases have contemplated such action. The other communities considered in the FEIS as Air Guard sites for the F-35 apparently are eager to host the plane to their rural communities. And even if "a significant number of municipalities" did so, the Air Force "would always be free" to base F-35 jets at Air Force bases, rather than use municipally owned public airports shared with the Air Guard.

6. The liability issue. The memo argues that because Burlington must accept whatever the Air Force wants, without any control as to noise or crash rate, it cannot have civil liability. There is no basis for that argument.

7. The latest draft of the City Council resolution meets these standards. It is explicitly a public health measure. Its affect on national security is indirect and miniscule.

8. If the City Attorney has concerns about the resolution, the most constructive way to proceed forward would be to work with City Councilors to more carefully tailor the resolution to meet the established legal standards, instead of throwing out the baby with the bathwater. For example, the resolution could be revised to state no plane should be allowed which creates a significantly larger 65 DNL zone than the F-16 or has a crash risk significantly greater than the F-16. South Burlington cannot "regulate" these standards but Burlington as owner can adopt them.

9. Finally, what is the worst case scenario if the City Council adopts a resolution that the FAA or the Air Force ultimately decides is unlawful? In the San Francisco case, the city was served with a cease and desist order and yet continued its resistance. It seems clear that the City would have the opportunity to hear the FAA's position and decide whether or not to modify or repeal the ordinance before any sanctions are applied.

I will be providing a more detailed, point-by-point, response prior to the City Council meeting.