State of Vermont
Environmental Division
of the
Superior Court

Re: Request for Jurisdictional Opinion re:
Changes in Physical Structures and Use at
Burlington International Airport for F-35A
Vermont Air National Guard Jets

Environmental Court Docket No.42-4-13 Vtec
Jurisdictional Opinion #4-231

APPELLANTS' REPLY TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The District Commission has jurisdiction over the proposed project because: 1) the Vermont National Guard is a state agency; 2) the proposed basing of the F-35 jets and its associated $4.7 million worth of construction, constitute development within the meaning of Act 250, and also constitute a material change to an existing permit and a substantial change to a use predating Act 250; and 3) state jurisdiction has not been federally preempted; indeed federal law unambiguously acknowledges state jurisdiction over state national guards.

1. UNDER THE U.S. AND VERMONT CONSTITUTIONS, THE VERMONT AIR NATIONAL GUARD IS A STATE AGENCY UNDER THE COMMAND OF THE GOVERNOR; F-35 JETS WOULD BE PILOTED AND MAINTAINED BY THE STATE OF VERMONT.

The role of the National Guard was one of the most pressing topics debated during the constitutional convention. Many of the colonists and the Founding Fathers were deeply skeptical of central government, and were afraid of the power of a centrally controlled standing army. The state militias had played an essential role in defeating the British. Without a compromise on the states' role in national defense, there might have been no constitution and no new nation. The compromise that resulted is found in the Militia Clauses and the Second Amendment. These clauses enshrined in the Constitution a permanent role for the states in

governing their own militia. M. Salo, *President or Governor: Who Will Determine Whether the National Guard Helps Secure the Border?* 47 Houston Law Review 437, 440 (Spring 2010); M. Doubler, The National Guard and Reserve (Praeger Security Int'l. 2008) pp.20-21. See also McDonald v. City of Chicago, __US __, 130 S.Ct. 3020, 3038, 3047, 177 L. Ed. 2d 894 (2010) (one of the purposes of the Second Amendment was protection of the role of the state militias as a check against federal power); District of Columbia v. Heller, 554 U.S. 570, 598, 128 S.Ct. 2783, 2801, 171 L.Ed. 2d 637 (same). The Militia Clauses and Second Amendment affirmatively set aside for protection against federal control what is now labelled the National Guard, and was then called the militia.

Article 1, section 8, of the United States Constitution holds that the powers of Congress include raising an Army and a Navy – *but not the militia*, the raising of which was left to each state. Section 8 allows the Congress to make rules for organizing, arming and disciplining the militia – *but not for actually "governing" the militia unless the militia are employed in the service of the United States*. Section 8 *explicitly reserves to the States* the appointment of officers, and the authority to training the militia in accordance with discipline set by Congress. Article II, section 2 of the United States Constitution states that the President is the Commander in Chief of the Army and Navy – but when it comes to the militia, the President is Commander in Chief *only when the militia is called into the actual service of the United States*:

> Article 1, Section 8. To define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; to raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years; to provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval forces; To provide for calling forth the Militia to execute the Laws of the union, suppress

> insurrections and repel invasions; 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 Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.
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> Article 2, Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States.

The Second Amendment, adopted as part of the compromise, states:

> A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms shall not be infringed.

The Houston Law Review summarizes the history of the Militia Clauses by concluding that the Militia Clauses were "a compromise between federalists and antifederalists." The clauses "were an attempt by moderates to strike a balance between vehement states' rights advocates and those who campaigned for total federal control of the military."

> To that aim, they allowed Congress to activate each individual state's militia and put it under the power of the President; however, the President could only use the militia for a limited number of purposes. This limit on federal authority over the militia allowed the Militia Clauses to serve as an important check on the power of the federal government. While the U.S. Constitution has been interpreted to grant the federal government supremacy in the area of military affairs, the first Militia Clause concurrently limits the federal government's use of the militia to "execute the Laws of the Union, suppress Insurrections and repel Invasions." Despite this limit, federal involvement in the National Guard has expanded greatly over time. For example, Congress, pursuant to its authority under the second Militia Clause, has empowered the President to "prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." Despite this authority, the individual states still retain most control over the National Guard when it is not called into federal service by the President.

M. Salo, *President or Governor*, *supra* at 440 (emphasis added). See also J. F. Romano, *State Militias and the United States: Changed Responsibilities for a New Era*, 56 Air Force Law Review 233 (2005) ("It is long-settled law that the governor of each state has almost unbridled power over its militia.") and Rene J. Francillon, *The United States Air National Guard; A*

complete reference work to the ANG history, aircraft, units and insignia (Aerospace Publishing 1993) (p.1) ("The National Guard concept – placing military forces under the control of local governments instead of the central government – is a uniquely American phenomenon…. In non-mobilized status these units are commanded by the governors of the 50 states…"

The United States Supreme Court's decision in Perpich v. Department of Defense, 496 U.S. 334, 110 S.Ct.2418, 110 L.Ed.2s 312 (1990) rejected the authority of a Governor to object to overseas deployment of federalized National Guard units. The decision was based on an Act of Congress which had explicitly removed from State Governors the authority to object to overseas deployment of National Guard troops who had been called into federal service. The Court upheld the power of Congress, under the militia clauses, to supersede the authority that state Governors otherwise possess. In explaining the Congress' authority to supersede gubernatorial control once National Guard members have been called into federal service, the Court made the same point as the authors above make -- that except when National Guard troops are called into federal service, they remain state actors. The decision explains that National Guard solders must keep three hats in their closets – a federal National Guard hat, a state National Guard hat, and a civilian hat. *And they can only wear one hat at a time.*

> Notwithstanding the brief periods of federal service, the members of the State Guard unit continue to satisfy this description of a militia. In a sense, all of them now must keep three hats in their closets-a civilian hat, a state militia hat, and an army hat-only one of which is worn at any particular time.

496 U.S. 348, 110 S.Ct. 2427. Once National Guard members don their federal hats, the President of the United States exercises "plenary" or unlimited control over their duties.

Not surprisingly, the United States Supreme Court also has held that a Maryland Air National Guard pilot who has not been called into active federal service is not a federal employee

regardless of whether he was serving as a "civilian" or a "military" employee of the Guard while piloting an Air Guard airplane. When the Maryland Air National Guard pilot negligently flew his Air Guard plane so that it collided with a civilian airplane, killing all on board the civilian plane, the pilot's actions were those of the State of Maryland, not the federal government. The Court noted:

> It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held.

Maryland for the use of Levin v. United States, 381 U.S. 41, 85 S.Ct. 1293, 14 L.Ed.2d 205 (1965), vacated on other grounds, 382 U.S. 159, 86 S.Ct. 305, 15 L.Ed.2d 227 (1965).

The Supreme Court of Vermont reached precisely the same conclusion from a different angle. In Smith v. Vermont Air National Guard, Chittenden Co. Docket No.S0462-03, Mr. Smith sued the VANG. The VANG, represented by the Office of the Attorney General of Vermont, moved to dismiss the Complaint because the Complaint had not been served on the VANG according to the requirements for service upon a state agency imposed by V.R.C.P. 4(d)(2). That is, the VANG argued that because it is an agency of the State of Vermont, it must be treated by the courts the same as any other agency of the State of Vermont. Superior Judge Katz agreed. He dismissed the claim. The Supreme Court affirmed.

> First, because the Vermont Air National Guard is part of the State government, plaintiff was required to deliver a copy of the summons and of the complaint to the Attorney General or the Deputy Attorney General. See V.R.C.P. 4(d)(2); see also 20 V.S.A. § 361(a) ("The military department, created by [3 V.S.A. § 212] ... shall include the national guard."); 3 V.S.A. § 212(16) (military department is an administrative department of state government). Plaintiff did not deliver his complaint and summons to either of these officials. Instead, these materials were delivered to Colonel Joel Clark in Colchester, Vermont. Because the summons

> and complaint were not served on either the Attorney General or the Deputy Attorney General, service of process was insufficient to obtain jurisdiction over the Vermont Air National Guard, and the complaint was properly dismissed under V.R.C.P. 12(b).

Smith v. Vermont Air National Guard, 2004 WL 558 2255 (Entry Order).

And even the VANG itself agrees on its status as a state agency subject to state environmental laws. In Petition of Vermont Air National Guard for A Certificate of Public Good authorizing the Construction of a 2.1 MW solar array at the Vermont Air National Guard Base at the Burlington International Airport, South Burlington, Vermont, Docket No. 7755, the VANG filed a petition with the PSB alleging that it is "the military department established under 3 V.S.A. § 212 and 20 V.S.A.§ 361(a)" and that it "is subject to the Vermont Public Service Board's jurisdiction pursuant to § 203 of Title 30." (Appellants' Statement of Undisputed Facts ¶ 1, and Attachment A, the VANG Petition). The VANG sought the PSB's approval for construction of a solar farm at the same VANG base that is the subject of this Jurisdictional Opinion appeal. The Board approved. Its ruling, dated 9/29/11, found that the petition was from the military department of the State of Vermont, and that the petition, supported by prefiled testimony, satisfied each of the criteria of 30 V.S.A. § 248. Analysis of aesthetic impacts was performed under the Quechee precedent. (see Appellants' Statement of Undisputed Facts ("ASOUF") ¶ 1).

The City of Burlington also -- in the past -- has agreed that improvements made on the lands it owns at the Burlington International Airport to the VANG are subject to Act 250 jurisdiction, as well as all other state environmental jurisdiction. The City applied for and was granted Land Use Permit 4C0331-20, for the demolition of an existing hangar and office used by the VANG and its replacement by a larger hangar and office "to house relocated employees of the Air National Guard." The City agreed, and the District Commission found, that this work

required an amendment as a "material and substantial change" to the City's basic airport construction permit, Land Use Permit #4C0331. See Land Use Permit 4C0331-20 (March 25, 2005), attached. The Permit incorporates Waste Water Permit WW-4-1042-4, issued February 25, 2005. The City's application for the Waste Water permit described the applicant's tract of land as 942 acres, *i.e.,* the Burlington International Airport. ASOUF ¶ 2).

The Vermont Constitution and the Vermont statutory law reflect and regulate VANG's status as an agency of the state. The Vermont Constitution, Chapter 2, § 59 states:

> 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.

The Vermont Legislature has "directed" there to be a National Guard and has set out its governance and its duties in 3 V.S.A. § 212 and in Chapters 21, 23, 25,27, 29, 31, 33, 35, 37 and 39 of Title 20.

Sections 601 through 609 govern calling out the National Guard for state service. Section 601(b) states that the Governor of Vermont possesses the authority and carries the duty to regulate and command the Vermont Guard in the event of riot, rebellion, insurrection within the state, opposition to the service of process, invasion, imminent danger of invasion, disaster or emergency.

Sections 641-645 govern how the Governor, "upon the requisition of the President of the United States," calls out the Guard for federal service. Because National Guard troops called into federal service do not fall within the command of the Governor, there is no Vermont statutory provision addressing the regulation and command of National Guard members who have been called out for federal service.

In sum, despite its federal funding and its use of federally-owned airplanes, except when the Guard is "federalized" under the control of the President, the VANG remains a state agency under the command of the Governor. The City of Burlington's Statement of Undisputed Facts ("CBSOUF") does not allege that the VANG will be called into federal service in order to operate F-35 jets out of the Burlington airport; for purposes of summary judgment, the Court must assume that VANG's members would continue to "wear their state hats" when piloting the F-35s. Compare Gilbert v. United States, 165 F.3d 470, 473 (6th Cir. 1999) (full-time National Guard officers who were paid with federal dollars but had not been called into federal service remained under the command of the state Governor; therefore the prohibition in the Posse Comitatus Act, 18 U.S.C. § 1835, against federal military participation in law enforcement did not apply.)

2. THE PROPOSED ASSIGNMENT OF F-35 JETS TO THE VANG 158TH FIGHTER WING, AND THE ASSOCIATED PHYSICAL CHANGES AT TAXIWAYS, RUNWAYS AND LEASED LANDS AT THE BURLINGTON INTERNATIONAL AIRPORT, CONSTITUTE "DEVELOPMENT" WITHIN THE MEANING OF ACT 250, AS WELL AS MATERIAL AND SUBSTANTIAL CHANGES.

A. The Project Would Constitute Development for a state purpose.

It is unlawful to commence development without a permit. 10 V.S.A. § 6081(a). Section 6001(3)(v) defines development as including:

> (v) 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. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

The project involves construction of improvements. Land Use Panel Rule 2(C)(3) defines construction of improvements as including "any physical action" on a project site which initiates development for any purpose requiring a permit. According to the final EIS excerpt submitted by the City as an attachment to its motion, the project would include the following

physical actions on the project site: internal renovation of Building 120 for an "F-35A simulator;" adding "270 DC, 28 DC Power in Aircraft Shelter Parking Areas (Buildings 130, 131, 132, 150, 360);" providing "Secure/Classified Upgrades in Rooms 0004/004A, Building 140," and providing a "Secure Parts Storage Area for ALIS, Building 70 Warehouse." (See section BR 2.1.3 and Table BR2.1-2 at pages BR4-4, BR4-5 and BR4-6.) The EIS refers to these changes as "construction… within existing facilities" and states that this construction will cost nearly $4.7 million ASOUF ¶ 3 (EIS p.BR4-6).

The project would involve land exceeding 10 acres. The EIS states that the lands used by the 158th Fighter Wing of the VANG involve 280 acres and 44 buildings. The EIS states that the entire mission of the 158th Fighter Wing would shift to maintaining and flying the F-35 jets. ASOUF ¶ 4 (EIS p. BR4-1). That is, the entire 280 acres, and all of the buildings, would no longer serve F-16s but would serve F-35s. Mr. McEwing's Affidavit, ¶ 12, agrees that the VANG occupies 280 acres and includes 44 buildings.

The project would be used for state purposes as defined by Rule 2(C)(15). The Land Use Panel's Rules define what a "state purpose" is:

> (15) "*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.

Land Use Panel Rule 2(C)(15) (emphasis added). Thus, any "construction of improvements" that is undertaken "by or for" the state and that is to be "used" by the state, by definition serves a "state purpose." A project that is undertaken "for" the VANG and that will be "used by" the VANG serves a state purpose. The City's motion does not dispute that the project will be undertaken for the VANG and that it will be used by the VANG.

The City argues in its summary judgment motion that the purpose of the changes at the airport are for a "federal purpose," national defense, and therefore there is no state purpose and no jurisdiction. The City's motion does not address the definition of "state purpose" set out in Rule 2(C)(15). Rule 2(C)(15) does not allow the Commission (or the Environmental Division) to rely on subjective purpose, or to equate purpose with funding, or to exempt state jurisdiction when there is both a state purpose and a federal purpose. The $4.7 million in improvements would be undertaken "for" the VANG and would be "used by" the VANG. Therefore there is a state purpose.

The Supreme Court of Vermont has, on four occasions, rejected precisely the reliance on subjective purpose that the City now proposes. Act 250 jurisdiction is not determined by consideration of the "overall purpose" of a project; instead, jurisdiction must be determined by examining the impact of the proposed land use on the environment and the plain meaning of the Land Use Panel Rules. In re Appeal of S-S Corporation, 2006 VT 8, ¶ 16,179 Vt. 302, 308, 179, 896 A.2d 67, 73. Any attempt to base jurisdiction on "intent" would, according to the Supreme Court, "undercut Act 250's mandate to assess any proposed development primarily in terms of its impact on the land." In re Appeal of S-S Corporation, *supra*, 2006 VT 8 ¶ 17, 179 Vt. 308-09, 179 A.2d 73.

In the first of the four cases, In re Baptist Fellowship of Randolph, Inc., 144 Vt. 636, 481 A.2d 1274 (1984), the Court held that the proposal by the Baptist Church to build a meetinghouse for parishioners would involve a commercial purpose and therefore required an Act 250 permit. The governing rule stated that the provision of facilities "in exchange for … contribution, donation or other object having value" constituted a commercial purpose. The Court accepted as true that the church itself had no commercial intent or purpose, but that was

beside the point. The fact was that donations would be made and, in return, a church would be built; the purpose of the building to be constructed did not figure into the analysis. The rule talked only of an exchange of donation for services, and had to be applied as written. "Act 250 speaks to land use and not to the particular institutional activity associated with that land use; to exclude a church from the provisions of Act 250 simply because of its evangelical services could not be justified on environmental grounds." 144 Vt. 639, 481 A.2d 1276.

The second decision addressing whether overall purpose is relevant was In re BHL Corp., 161 Vt. 487, 641 A.2d 771 (1994). The "primary purpose" of BHL's activity had been to construct a sheep farm, an activity exempt from Act 250 jurisdiction. In the process, BHL excavated shale and sold twenty-one truckloads of it. Despite the "primary purpose" of the construction, that aspect of that project met the definition of a commercial purpose. The Environmental Board had based its ruling on the principle that "the proper starting point for determining Act 250 jurisdiction is the actual use of the land, not necessarily the overall purpose of a development scheme." The Court, citing In re Baptist Fellowship of Randolph, agreed. 161 Vt. 490, 641 A.2d 773.

In the third decision, In re Spring Brook Farm Foundation, Inc., 164 Vt. 282, 671 A.2d 315 (1995), the Court affirmed the Environmental Board's ruling that a nonprofit, public charitable foundation would need an Act 250 permit to construct a new classroom and residence hall because there was a "commercial" purpose. The Rules state there is a "commercial purpose" whenever services are provided in exchange for payments of a fee or a donation. The proposed building was to be provided to needy children in exchange for donations and contributions by donors other than the children. Citing In re Baptist Fellowship and In re BHL Corp., the Court held that it is "irrelevant" who donates the money or why they donated it "because such

distinctions do not affect land use." 164 Vt. 287, 671 A.2d at 319.

Finally, in In re Appeal of S-S Corporation, *supra*, the Court found a commercial purpose where the developer proposed construction of two residential care homes for physically and mentally disabled adults. The intent to use the property for a charitable purpose was irrelevant. The Land Use Panel's rules defined a "commercial dwelling" as any building or structure that; (1) is for the accommodation of people; (2) is intended for habitation on a temporary/intermittent basis; and (3) provides facilities in exchange for payment or a fee." By focusing on the impacts on the land and the plain meaning of the rule, rather than the intent of the developer, the Environmental Board had properly found jurisdiction, and was affirmed.

The City's Motion relies heavily upon the Environmental Board's 1982 decision in Declaratory Ruling #134, In re Air National Guard. That ruling did not address the wording of Rule 2(C)(15) or its predecessor rule. Instead of considering the wording of the rule, the decision relied on the intended national defense purpose of the project. The Board found that the real "purpose" of the improvements was "solely" federal, not state. By relying on what the project developer said was the purpose of the project, and by ignoring the plain meaning of the rules, the Board engaged in precisely the kind of analysis that the Supreme Court subsequently rejected. The decisions in In re Baptist Fellowship of Randolph, Inc. (1984), In re BHL Corp. (1994), In re Spring Brook Farm Foundation, Inc., (1995) and In re Appeal of S-S Corporation (2006), overrule the entire basis for the Environmental Board's 1982 ruling[1].

1. The decision in In re Baptist Fellowship of Randolph, Inc., had not been an appeal from the Environmental Board. The question of jurisdiction had been decided by a Superior Court Judge. That Superior Court Judge (the Hon. John P. Morrissey) had ruled that the proposed church construction required an Act 250 permit. The Supreme Court of Vermont thereupon ruled that in order to carry out the purpose of Act 250, it was necessary to decide the jurisdictional question without regard to the institutional purposes of the applicant and instead to focus on the land use

The City's motion suffers from a fundamental error that is related to but in addition to ignoring the wording of Rule 2(C)(15) and the holdings of these four Supreme Court decisions. *The City's motion necessarily assumes that the defense of the nation is not part of the state purpose of the VANG.* The defense of the State of Vermont, according to the City, stops at the state's borders. The City relies on statements from the Air Force that the F-35 would not foreseeably be used within the borders of Vermont. Motion p.10. This proposition is unworthy of even a moment's consideration. The defense of the state of Vermont, in this day and age, necessarily must include defense of the United States of America as a whole if it is to be effectual. Without defending the nation as a whole, the National Guard cannot protect the inhabitants of this state against harm caused by foreign governments equipped with long-range bombers or intercontinental missiles, or against terrorist organizations such as the one that killed Vermonters and thousands of other Americans on September 11, 2001. Therefore the raising and governing of National Guard units *to defend this state* includes the raising and governing of National Guard units to *defend the nation*. The missions are inseparable. If ever it were true that the effective defense of Vermont stopped at the state's borders, that ceased to be true a century ago. If today's Guard were raised and governed solely to defend against threats that occur within the state's borders, the Guard could not carry out its constitutional mission to defend the inhabitants of this state.

If the City is correct that there is no state purpose in having the 158th Fighter Wing train to use F-35 jets (and the City is clearly incorrect), then the proposed use of non-federalized

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impacts. Subsequent to the Supreme Court's 1984 ruling in In re Baptist Fellowship of Randolph, the Environmental Board itself adopted the reasoning of the Court. The three subsequent Supreme Court rulings each affirmed Environmental Board rulings based on In re Baptist Fellowship of Randolph. Since the 1984 In re Baptist Fellowship of Randolph decision, it appears that the Environmental Board has never relied on D.R. # 134. Apparently the Board understood that D.R. # 134 had been overruled by In re Baptist Fellowship of Randolph.

VANG pilots to fly F-35 jets and of non-federalized VANG mechanics to maintain the jets, would be unconstitutional under Chapter 2, §59. Section 59 states that "The inhabitants of this state shall be trained and armed for its defense…" If the only purpose of the F-35 is a non-state purpose, the Commander in Chief of the Vermont National Guard would be acting contrary to the mandate of the Vermont Constitution were he or she to allow the 158th Fighter Wing of the VANG, when not called to federal service, to be raised, governed, and trained exclusively to use this purely-federal purpose weapon.

The City's argument boils down to an argument that so long as there is "a" federal purpose, regardless of whether there is also a state purpose, there is no Act 250 jurisdiction. 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.

B. The project would constitute a material change or a substantial change

Material Change to the Act 250-permitted runway. The City, in seeking summary judgment, also argues that there is no existing permit that regulates noise from the airport, and therefore no material change to any existing permit requiring a permit amendment under Rule

34. Motion pp. 17-19. However, Rule 2(C)(6) defines material change as "any change to a permitted development which has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a)(1) through (a)(10)." (Emphasis added.) Once there is Act 250 jurisdiction over a site, any change in use that may result in a significant adverse impact with respect to any of the criteria requires a permit amendment under Rule 34. The change that triggers the need to obtain an amended permit need not be one that, in the absence of a prior Act 250 permit, would have triggered Act 250 jurisdiction. Re: Green Mountain Power Corporation and Town of Wilmington, Declaratory Ruling #405, ENB 2002-070 (change in use); Re Stonybrook Condominium Owners Association, D.R. # 385, 5/10/2001, p.19 (change in what had been an "essential element" of an Act 250-permitted project meets material change standard); Vermont Institute of Natural Science, Declaratory Ruling #352, ENB 1999-013 (change in use); Re Mount Mansfield Co., Inc. (Summer Concert Series), D.R. # 269 (1992) p. 11 (change in use); In re Rusin, 162 Vt. 185, 189-190 (1994) (road construction activities that would not have triggered original Act 250 jurisdiction on undeveloped land were nevertheless subject to an existing Act 250 permit already obtained for proposed development on that land); (In Re: Eustance Act 250 Jurisdictional Opinion, 2009 VT 16, 185 Vt 447, 970 A.2d 1285 (change need not be one that would be jurisdictional without a prior Act 250 permit).

The main runway at the Burlington airport is runway 15-33. Neither the VANG nor the Air Force leases this runway. It is shared. There are numerous Act 250 permits which have been applied for and granted which govern this runway. ASOUF ¶ 5 (District Coordinator's J.O. ¶¶ 8 and 19 and Stanak Affidavit, citing Land Use Permits # 4C0331-13 and Amendments –A, -B and –C and Land Use Permit # 4C0331-26).

The proposed use of the airport by the 158th Fighter Wing will involve use of this Act 250-permitted runway, since no new construction of any runway is planned and the 15-33 runway would be the one used by the F-35. CBSOUF ¶¶19-21, ASOUF ¶ 6 (citing FEIS p.BR4-35).

Obviously, the planned use of the main runway by airplanes was an essential element of the Act 250 permits that were issued. An airport depends upon its runways. Now the City plans to change how this essential element is to be used. Stonybrook Condominium Owners Association, *supra*.

That change in use would have dramatic and harmful consequences. According to the EIS conducted by the U.S. Air Force, (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,) *1,444 additional homes and 3,117 additional individuals*, *i.e.,* in addition to those already impacted by F-16 jets, would become part of what the Federal Aviation Administration (FAA) considers an area *"incompatible" with residential use*, those areas exceeding the 65 DNL noise standard, because of the noise impacts of the F-35 jets that would take off and land on the Act 250-permitted runway. Of these additional persons affected, 182 additional persons would be exposed to DNL noise levels in excess of 75. The DEIS explains (Table 3.2-1, page BR4-23) that one reason for the change is that using the instantaneous Lmax scale -- which is the standard that the Environmental Board's precedents favor (see McLean Enterprises Corp., No. 2S11147-1-EB, 11/24/2004) -- at certain locations the F-35 will be 21 dB higher than the F-16 on take-off, 22 dB higher than the F-16 on arrival, and 25 dB higher than the F-16 on Low Approach and Go. Each 10 dB increase means a doubling in loudness, so a 20 dB increase means the noise will be perceived by the human ear as *four times louder than the F-16.* (EIS p.3-7). ASOUF ¶ 7.

The EIS (p.BR4-78) notes that in Chittenden County as a whole the average annual number of building permits for the past decade has been 573. *The number of additional residential units rendered incompatible with residential use, by introduction of the F-35s, will be the equivalent of 2.4 years of new construction of homes in all of Chittenden County.* ASOUF ¶ 8.

The City's 2012 Master Plan for the airport explicitly contemplates that additional homes "will" be purchased and demolished in the future because of military aircraft noise. ASOUF ¶ 9 (Airport Master Plan). South Burlington and Chittenden County already suffer from a shortage of affordable housing. The South Burlington Comprehensive Plan states: "Existing and developing residential neighborhoods shall be identified and protected through appropriate zoning and responsible site planning. Many of these residences constitute an irreplaceable, lower cost segment of the City's housing stock." Other parts of the Plan reiterate this point, for example stating that "providing for housing is a fundamental element of the Plan." Protection of housing availability and quality, and in particular protection of affordable housing subsidized by government programs, receives even greater emphasis in the Winooski Municipal Plan. See, e.g., pp. 5-7, 20, 23-26. Page 7 also notes that the Burlington International Airport is growing "at the expense of the airport's residential neighbors" because of the impacts of noise on residential neighborhoods. It warns that "this situation may worsen as the operation of the airport grows." ASOUF ¶ 10 (Plans).

The changed use of the Act 250-permitted main runway by the 158th Fighter Wing when using the proposed F-35 jets therefore "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).

The Environmental Board's Declaratory Rule #134, In re Air National Guard (1982), did not address issues of material change under Rule 34. No argument had been made that there

would be a material change. The Board's decision was not asked to find and did not find that there was any preexisting Act 250 jurisdiction over the site. Even if D.R. #134 correctly decided that construction of improvements for the F-4 jets would serve only a federal purpose and therefore was not land development, that would not answer whether the change in use of an Act 250-permitted runway in such a manner as to dramatically affect values protected by criteria 1, 8 and 10 would be a material change[2]. Regardless of whether the Environmental Division determines that the project would constitute development within the meaning of the Act, the project would constitute a material change to the use of the main runway and a permit amendment application must be filed under Rule 34.

Substantial change to the leased lands. The City also argues there is no substantial change from any pre-1970 use, because there is no cognizable physical change to the site as compared to pre-Act 250 conditions. A cognizable physical change means any change that is observable to the eye or ear. A change in the type of equipment used, or a change in the pattern of use so that an area becomes noisier, even the removal of a preexisting house, are all cognizable physical changes. Stonybrook Condominium Owners Association, *supra,* p.8 (razing of a building is a cognizable physical change that may affect Act 250 criteria); Re C.V. Landfill, ENG 1996-020, 10/15/96 (change in rate of extraction is a cognizable physical change); Re Champlain Marble Corp., D.R. # 319, ENB 1996-030, 10/2/96 (change of type of equipment used and increased noise from increased rate of extraction are significant changes).

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2. As the Environmental Division explained in the Eustance case, Docket No. 13-1-06 Vtec, Decision and Order on Cross-Motions for Partial Summary Judgment, 2/16/06, at p.13, "principles of land management embodied in the Act 250 criteria could not be implemented through the permitting program if subsequent exemptions could remove land from the ambit of an issued permit." A landowner could receive an Act 250 permit for an office complex in a business district and then, through its lease with a federal tenant, circumvent Rule 34. The federal tenant could level one of the buildings and use the leased site for a pig farm.

The change from the types of military aircraft in use in June of 1970 on the lands leased by the Air Force and used by the VANG on May 31, 1970, to the type now proposed, the F-35, easily meets the cognizable change standard. The potential for significant impacts from that change in use is enormous, for the same reasons as set forth above in connection with material change.

3. THE CONSTITUTION AND CONGRESS HAVE NOT PREEMPTED THE STATES FROM CONSIDERING ENVIRONMENTAL HARMS IN THE LOCATION OF NATIONAL GUARD FORCES; CONGRESS HAS EXPLICITLY RESERVED TO THE STATES THE AUTHORITY WHERE TO LOCATE NATIONAL GUARD FORCES AND ACT 250 EXPLICITLY ADDRESSES HOW THE COURT SHOULD ADDRESS ANY CLAIM THAT NOISE IMPACTS ARE PREEMPTED.

A. *The shared taxiways and runways and the leased lands are not a federal enclave.*

It is important to make explicit at the outset what is *not* at issue in this case: this is not a dispute about the extent of state law jurisdiction on a federal enclave. Under the so-called Property Clause of the U.S. Constitution, Article 1, § 8, clause 17, and 40 U.S.C. § 3112 (requiring federal consent in writing), when the federal government acquires land in any state, *and* the state explicitly cedes state law jurisdiction to the federal government, *and* the federal government accepts in writing that cession of state law jurisdiction, then and only then does federal law exclusively apply. If the state has not ceded authority, or if the federal government has not accepted cession in writing, then state law continues to apply and the federal government occupies the land as an "ordinary proprietor." Were the law otherwise, unacceptable gaps in law would result on federally controlled land. United States v. Grant, 318 F.Supp.2d 1042 (D.Mont. 2004); United States v. Gliatta, 580 F.2d 156 (C.A. 5 1976), *cert. denied* 439 U.S. 1048, 99 S.Ct. 726, 58 L.Ed.2d 708; Dupuis v. Submarine Base Credit Union, 365 A.2d 1093, 170 Conn. 344 (Ct. 1976); State v. Allard, 313 A.2d 439 (Me. 1973).

Here, there is and can be no claim that the State of Vermont has ceded state law jurisdiction to the Air Force, or that the Air Force has affirmatively accepted cession, as to the taxiways and runways; the Air Force does not lease these and the VANG shares them with other users.

There also is no claim that the State of Vermont has ceded state law jurisdiction to the Air Force with respect to the lands which the Air Force leases, or that the Air Force has affirmatively notified the State of Vermont that it has accepted Vermont's cession of jurisdiction to the federal government on these leased lands. The City's Motion and the CBSOUF contain no such allegation and there is no evidence of cession.

On the taxiways and runways, and on the roughly 280 acres that the Air Force leases from the City, there may occur innumerable acts for which our society compels there to be a legal context – the commission of a crime, a marriage, the execution of a will or a contract, to name a few. Because there has been no cession of jurisdiction, persons accused of a crime on the taxiways, runways and leased lands would be tried under Vermont's criminal code before a Vermont judge and jury, marriages on these lands would be held legal or illegal under Vermont law, and the law of contracts and of wills to be applied would be that of the state of Vermont.

The legality of land development likewise is governed by state law, including Act 250. There is no reason, based on the Constitution, on 40 U.S.C. § 4112 or on any published precedent, to treat state land use laws any differently than the other state laws that apply to the taxiways, runways and leased lands. The issue properly before the Environmental Division therefore is the same as whether federal preemption applies to the particular Vermont National

Guard activities in question were they to occur within any part of Vermont, regardless of land ownership or land lease. That is, would application of Act 250 to the proposed use of the taxiways, runways and leased lands at the Burlington International Airport by the VANG for the basing and use of F-35 jets be preempted by federal law because 1) Congress has explicitly so provided ("express preemption"); or 2) federal law is so pervasive that that there is no room for concurrent regulation under Act 250 ("field preemption"); or 3) there is no federal law to wholly supplant state land use regulation but Act 250 obfuscates the purpose or objectives of a federal law ("conflict preemption")? Investigation into Regulation of Voice-Over Internet Protocol Servs., 2013 VT 23 ¶ 14, Vt ,70 A.3d 997, 1003-004. See also English v. General Elec. Co., 496 U.S. 72, 110 S.Ct. 2270, 2274-75, 110 L.Ed.2d 65 (1990). This is discussed next.

B. The City's preemption argument flies in the face of express federal recognition of state jurisdiction to decide on the location of every National Guard unit

The City's summary judgment motion relies on caselaw generically addressing the division of authority between the federal government and the states in the area of national defense. None of the cases cited by the City addresses the explicit protection of state authority that is set forth in the Militia Clauses. The Militia Clauses are addressed above, in part 1 of this memorandum. The City's motion also does not mention the statutes Congress has passed to implement the Militia Clauses, which explicitly grant every state in the nation the right to decide for itself the location of each unit of the National Guard. Section 104(a) of Title 32 of the United States Code states "Each State, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands may fix the location of the units and headquarters of its National Guard." Proper application of federal preemption analysis requires consideration of the allocation of authority set

forth in the Constitution and in the statutes passed by the Congress specific to the National Guard.

The first step in preemption analysis under Investigation into Regulation of Voice-Over Internet Protocol Servs. is determination of whether Congress has explicitly stated it wishes to supersede state land use law governing National Guard units. The City has not identified any such statute, nor has Appellants' counsel.

The second question is whether Act 250 regulates in a field of law in which the federal role must be so pervasive as to leave no room for state regulation. Perpich disposes of this argument. The militia when not federalized must wear its state hat, and it can wear only one hat at a time. The Militia Clauses give the federal government the authority to raise and govern forces of the Army and Navy but reserve both those rights to the states vis-à-vis the National Guard when the militia is not federalized. Given that the Supreme Court has ruled that when not federalized the National Guard wears only its state hat, it would be absurd to argue that the federal role leaves no room for state decision-making.

Moreover, the Congress has explicitly stated that its intent is *not* to occupy the field exclusively. Section 104(a) of Title 32 declares that "Each State … may fix the location of the units and headquarters of its National Guard." Similarly, 10 U.S.C.A. § 18238 states:

> A unit of the Army National Guard of the United States or the Air National Guard of the United States may not be relocated or withdrawn under this chapter without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia.

When the Congress sets forth a specific area in which state authority is reserved, it would be improper for the courts to overrule the Congress. Pacific Gas & Electric Co. v. State Energy

Res. Conservation & Dev. Comm'n, 461 U.S. 190, 223 (1983) (rejecting argument that the Court should find conflict with federal law where the Congress explicitly reserved a role for the states).

While it lies within the province of the Congress under the Militia Clauses to decide whether not to create the 158th Fighter Wing within the VANG, and to decide how to arm and discipline the 158th Fighter Wing of the VANG, Congress has left to the State of Vermont the authority to decide where the 158th Fighter Wing of the VANG will be located. The VANG currently is based at the Burlington airport because the state "fixed" it there. Whether the state can or should do so, with the advent of new construction and new jets, is a question for Act 250.[3]

Sections 104(a) and 18238 reasonably implement the Militia Clauses. The ability to decide on the location of National Guard units when they are not in federal service is a logical component of each state's exclusive constitutional authority to *raise* and to *govern* its own militia.

City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), is not to the contrary. In City of Burbank the Court held that regulation of the scheduling of commercial aircraft so as to prohibit nighttime flights is preempted. Preemption was required by the need for consistent, nationwide scheduling of aircraft by the Federal Aviation Administration in order to protect air safety. In current terminology, this would be treated as field preemption. The majority opinion repeatedly referred to what was being preempted as all state or local attempts to "regulate" the noise of aircraft. The majority relied on a letter from the Secretary of Transportation which had described

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3. There are 17 other airports in Vermont. Eleven of those are owned by the State of Vermont. ASOUF ¶ 11 (citing Vermont Agency of Transportation website, http://aviation.vermont.gov/airports). None of the other airports is located in a heavily populated urban area.

federal preemption in this area by saying "State and local governments" are "unable to use their police powers to control aircraft noise by regulating the flight of aircraft." 411 U.S. 635.

However, nothing in federal law preempts exercise of longstanding traditional police powers of the state to regulate land use changes at airports and their impacts, even if the impacts are airport noise or the consequences of airport noise. The four dissenting justices in City of Burbank explained that the majority opinion preempted regulation of the scheduling of aircraft and of their noise, but did not prohibit use of local zoning or other land use law to order an airport closed or to prohibit airport expansion even if the closure or prohibition is based entirely on concerns about noise.[4] The most recent Second Circuit Court of Appeals decision to address this issue, Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission, 634 F.3d 206 (2d Cir. 2011), continues to reject federal preemption of generally applicable state environmental laws unless the application of those laws would have the *actual effect* of interfering with aircraft *safety*. See also In re: Commercial Airfield (Edward V. Peet, Appellant), 170 Vt. 595, 752 A.2d. 13 (2000), which rejected the argument that Act 250 generally is preempted by federal law with respect to airports. The application of Act 250 to the VANG's use of the Burlington Airport would neither have any impact on aircraft safety nor interfere in any way with the F.A.A.'s regulation of aircraft safety. There is far too tenuous a connection between air safety, as regulated by the F.A.A, and the constitutional authority of states to decide for themselves where to base their National Guard units,

[4] "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).

for any aspect of that state decision to be preempted by the F.A.A.

The third preemption question is whether application of Act 250 to the project would actually conflict with federal law. The City argues there would be a conflict with the federal government's exclusive authority to defend the nation. The federal government does not have exclusive authority to control the National Guard. The City's argument erroneously treats the National Guard as if it were a component of the Army or Navy, and ignores both the compromise reached in 1787 and the Congress' implementation of that compromise. The Militia Clauses allocate to the states the authority to raise and govern their own militias. Unlike the Army and Navy and now the Air Force, the National Guard is governed by the President only after the militia is called into federal service. Congress has reserved to state governors the authority to object to calling the National Guard into active duty except in the circumstances set out in § 12301(f), and reserved to each state the authority to fix the location of each unit of the National Guard. In Vermont, the decision where to fix each of those locations must be made in conformity with Vermont land use law. Where, as here, the project would constitute land development, and would be a material change of the use of an Act 250-permitted runway, and would be a substantial change in the use of pre-1970 activity on other lands, there is Act 250 jurisdiction.

4. ***Act 250 remains applicable even if there is partial preemption; it would be premature to discard Act 250 jurisdiction because one or more issues may be preempted.***

According to section 6092 of Title 10, preemption of review of part of an activity requires the Commissions and the courts to construe the Act to regulate other activity that has not been preempted.

> In the event that the federal government preempts part of the activity regulated by this chapter, this chapter shall be construed to regulate activity that has not been preempted.

The Supreme Court of Vermont has, in effect, held the same, without citation to the statute. In re Commercial Airfield, *supra*, esp. n.2. The Court affirmed the Environmental Board's ruling that even though F.A.A. may preempt certain aspects of commercial airport use, such as safety and noise, there was still Act 250 jurisdiction. The Court held that at time of permit review the Board would have to address which issues are preempted -- not via a pre-permit ruling on jurisdiction. The potential for preemption of some issues did not excuse the airport owner from applying for an Act 250 permit. "Because appellant has not yet taken the first step of applying for an Act 250 permit, this question is premature."

The same is true here. Section 6092 compels the Environmental Division to construe the Act to regulate VANG activity that is not preempted. If and when the VANG or the City apply for an Act 250 permit or an amended permit, a factual basis will be developed upon which the District Commission can determine which, if any issues are preempted. There may be issues under any or all of the ten criteria, depending on the content of the application. Under § 6092, even if the Commission were to find that it would be unlawful for the Commission to *deny* a permit based on noise because the VANG had shown that denial would substantially and directly affect the F.A.A.'s regulation of airplane safety, the Commission may still *impose mitigation conditions* that would protect the public such as a requirement that the City pay for or install noise insulation at affected residences and schools. There is nothing about imposing a financial condition such as this upon a state agency that would even remotely affect F.A.A. regulation of airplane safety.

5. Motion to Strike CBSOUF ¶¶ 12, 14 and 22.

Appellants submitted interrogatories and requests to produce to the City. Appellants served a subpoena duces tecum and a subpoena for deposition testimony on the VANG, an agency of the State of Vermont. The Return of Service on the VANG was filed with the Environmental Division.

There has been no objection to the manner of service of the subpoenas on the VANG or the propriety of the subpoenas. Nonetheless, a member of the Air Force Judge Advocate Corps sent a letter to Appellants' counsel, purporting to answer interrogatories and requests to produce that were served on the City, and purporting to answer the subpoenas that were served on the VANG.

The Air Force letter acknowledges (p.4) that the relationship between the Air Guard's federal mission and its state mission is "a complex and nuanced topic." The letter then proceeds to conclude that the F-35 would not serve a state mission. The letter also repeatedly states (bottom of p.4 through end of letter) that the Air Force will not provide any opportunity for Appellants to depose any person to verify or challenge the contents of the letter.

The Air Force letter is hearsay from a non-party. The letter is not under oath, contrary to V.R.C.P. 56(e). It contains conclusory statements of opinion that would not be admissible even had the letter been under oath, because there is no foundation set forth in the letter for admitting these opinions as competent expert testimony, again in violation of V.R.C.P. 56(e). The City's Statement of Undisputed Facts, ¶¶ 12, 14 and 22 relies on these statements. These paragraphs should be stricken.

If the Environmental Division intends, nonetheless, to rely on the letter, Appellants hereby move pursuant to V.R.C.P. 37(a)(2) for an order compelling the VANG to produce the

witnesses identified in the subpoenas to answer, under oath, the questions set forth in the subpoena and to produce the requested documents. After that deposition, this matter will be ripe for summary judgment.

Conclusion

The City's motion for summary judgment should be denied. Summary judgment should be entered for the Appellants so that the City may apply for either an Act 250 permit or a permit amendment.

December 2, 2013

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Mr. Edward Stanak and attorneys William A. Nelson and Shawn Jarecki assisted in the preparation of this memorandum