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' BRIEF

August 5, 2014

James A. Dumont, Esq.
Law Office of James A. Dumont, Esq., PC
PO Box 229, 15 Main St.
Bristol VT 05443
802 453-7011

STATEMENT OF ISSUES

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STATEMENT OF THE CASE

A. *Facts*

The Burlington International Airport ("BIA") is owned and operated by the City of Burlington. It was established in 1920. PC 48.

Military use of the airport commenced in the 1940s. PC 53 (McEwing Affidavit ¶ 13). The United States Air Force ("USAF") has rented land adjoining the airport from the City of Burlington since the 1940s, and since 1974 the USAF has licensed the use of that land to the Vermont Air National Guard ("VTANG")[1]. PC 49, 53, 85, 98, 105. Hangars and other facilities for the VTANG were constructed prior to 1974. However, the VTANG uses the BIA's runways. The lands used by the 158 FW currently involve 280 acres and 44 buildings. PC 106-109, 153, 183, 185.

The VTANG has not obtained Act 250 permits for the improvements on its base. The only Act 250 permit which mentions the VTANG base was a permit to construct a building but that was on BIA lands, not on the VTANG base. PC 187, 272.

Runway 15-33 is the main runway for the BIA. After the effective date of Act 250, the City applied for and obtained many Act 250 permits for modification and expansion of runway 15-33. An experienced former Act 250 Coordinator reviewed the files and confirmed that there exist "numerous" Act 250 permits for runway 15-33. PC 48, 53, 186.

In October, 2008, BIA commenced a program of purchasing and demolishing homes within the high noise zone of 65 dB DNL. PC 138. It did so pursuant to its Noise Compatibility Program ("NCP"). Title 49, § 47504 of the United States Code authorizes the FAA to approve of and fund airport NCPs to abate the noise of civilian and military aircraft. 49 U.S.C. §

[1] A small part of this land was discovered to be in federal ownership and the lease was amended to exclude this land. PC 97.

47504(c)(2), (6). NCPs may include noiseproofing of private homes as well as purchase of those homes. 49 U.S.C. § 47504(c)(2). Pursuant to its NCP, BIA has purchased and demolished 120 homes. The NCP was recently before this Court in *In re Burlington Airport Permit*, 2014 VT 72, -- Vt. --, -- A.3d --. The Court held that South Burlington's zoning ordinance does not require a zoning permit prior to home demolition as part of NCP noise mitigation.

The VTANG has been designated by the USAF as the 158th Fighter Wing ("158 FW"). The 158 FW "provides support for federal, state and community interests by providing highly trained personnel and mission-ready equipment for federal contingency missions, as well as state and local emergency missions; protecting life and property; and preserving peace, order, and public safety." Currently, the sole aircraft that the 158 FW is equipped with to carry out this federal, state and local mission is the F-16 aircraft. PC 80

The USAF proposed in 2011 that the 158 FW F-16 aircraft be replaced by 18 or 24 F-35 aircraft. In September of 2013, a Final Environmental Impact Statement ("EIS") was issued by the USAF, and all parties to this matter now have relied on that EIS in their summary judgment filings in this matter. The EIS assessed the noise impacts of operating 18 and 24 F-35 aircraft at BIA. Each F-35 aircraft will, at certain locations, produce instantaneous noise readings of 21 dB Lmax more noise than the F-16 on take-off, 22 dB Lmax more noise than the F-16 on arrival, and 25 dB Lmax more noise than the F-16 on Low Approach and Go. PC 194. 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. PC 195.

The EIS relies upon the "DNL" noise standard to measure the environmental impacts of noise. The DNL standard considers both the instantaneous noise levels and the duration and timing of noise. The FAA, in conjunction with the Federal Interagency Committee on Urban Noise

(FICUN) has determined that noise exceeding 65 dB DNL is "incompatible" with residential use. 40 C.F.R. Part 150 § A150.101(b), Table 1 (reproduced as Brief Exhibit II), referenced at PC 69, 192, 304-306, 312.

After the City had filed its summary judgment motion and Appellants had filed their reply, the Secretary of the Air Force elected to place 18 F-35 jets at the BIA. The replacement of F-16 aircraft by 18 F-35 aircraft would cause an additional 289 acres to experience 65 dB DNL noise. Within this area, an additional 2,061 individuals and an additional 997 households would experience 65 dB DNL noise as compared to existing F-16 noise. Seventy of the additional 289 acres would experience noise in excess of 75 dB DNL. See EIS Table 2-12 (at page 2-32) and Table BR 3.10-2 (page BR4-67) at[2]

http://s3.documentcloud.org/documents/799815/f-35-final-eis-volume-1.pdf.

The off-airport noise of civilian airplanes at BIA is "negligible" compared to that of military planes according to the EIS. PC 190

Regardless of the number of aircraft, 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);"

[2] Appellants' Brief uses the DNL data in the EIS, rather than the data submitted to the trial court and reproduced in the Printed Case, because after the cross-motions were filed the Secretary of the Air Force elected to place 18, not 24, F-35 aircraft at BIA. The DNL data submitted to the trial court in support of the cross-motions had set forth the DNL data only for the beddown of 24 F-35 aircraft. Both sets of data are found in the same chapter of the EIS, found at the web-page listed above. The DNL noise levels predicted for 18 F-35 aircraft impact a smaller number of acres, households and individuals than would the DNL levels for 24 F-35s, so in the interest of accuracy counsel is using the lower numbers in this Brief rather than the numbers in the Printed Case. The higher numbers are found at PC 190. (If 24 F-35 aircraft were to replace the F-16 aircraft, 1,444 additional homes and 3,117 additional individuals, would experience areas exceeding the 65 dB DNL noise standard. Of these additional persons affected, 182 additional persons would be exposed to DNL noise levels in excess of 75 dB.) Nothing in the Environmental Division's ruling hinged on the difference between the noise impacts of 18 F-35 aircraft and the noise impacts of 24 F-35 aircraft.

providing "Secure/Classified Upgrades in Rooms 0004/004A, Building 140," and providing a "Secure Parts Storage Area for ALIS, Building 70 Warehouse." The EIS refers to these changes as "construction… within existing facilities" and states that this construction will cost nearly $4.7 million. PC 182-184.

The entire mission of the 158 FW and the use of all of its existing 44 buildings would shift to maintaining and flying the 18 or 24 F-35 jets. PC 184; see also EIS p. BR4-1.

The South Burlington Comprehensive Plan calls for protection of existing housing. It 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." PC 201.

Protection of housing availability and quality, and in particular protection of affordable housing subsidized by government programs, is also a goal of the Winooski Municipal Plan. PC 207-208, 210-213. The Plan specifically 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." PC 208.

In Chittenden County, the average annual number of building permits for the past decade has been 573. PC 196. The number of additional residential units rendered incompatible with residential use, by introduction of the 24 F-35s (1444), would be the equivalent of 2.4 years of new construction of all new buildings in all of Chittenden County. With 18 F-35 jets, the number of residential units rendered incompatible (997) would be nearly two years worth of new buildings.

B. *Proceedings Below*

Appellants sought a Jurisdictional Opinion from the District Coordinator, with notice to the Burlington City Attorney, the Attorney General, and the Natural Resources Board. The District Coordinator eventually ruled that there was no Act 250 jurisdiction and the matter was appealed to the Environmental Division.

Appellants filed a Statement of Questions asserting Act 250 jurisdiction because the physical changes to the VTANG base will be development or, in the alternative, would be a substantial change under Rule 34. PC 15 The Statement of Questions also asserted that the changed use of runway 15-33 would be a material change from the uses authorized in Permits 4C0015, 4C0331, 4C0034 and 4C0034-9 under Rule 34. PC 21-23.

The City moved for summary judgment, arguing that there is no Act 250 jurisdiction because the purpose of the project is purely federal -- F-35 aircraft are crucial to the defense of the nation, and therefore they serve a federal purpose and not a state purpose. The City also argued that Act 250 is wholly preempted from jurisdiction over any aspect of aircraft noise and any aspect of VTANG activity at BIA. The City also argued that the bed-down of F-35s would involve no cognizable physical change at the airport, so there is no "substantial change" from the pre-1970 use and no material change to the runway 15-33 Act 250 permits, and that there will be no impacts on Act 250 criteria or values because the only impacts are noise and regulation of noise is preempted. PC 30-47.

Appellants responded that Land Use Panel Rule 2(C)(15) controls, and under its terms there is jurisdiction. (The 2009 Land Use Panel Rules henceforth are referred to as the "Rules.") 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." PC 133-137. They argued that this

Court and the Environmental Board both have required application of the plain meaning of the Land Use Panel's rules in determining "purpose." Appellants also cited to Chapter 1, § 59 of the Vermont Constitution, which states that the mission of the militia is defense of the people of Vermont, and to the Vermont statutes which state that the National Guard is the militia. By defending the nation as a whole, the VTANG carries out its mission to defend the people of Vermont, so there is both a state purpose and a federal purpose to VTANG use of F-35 aircraft for training.

Appellants argued that regardless of whether the bed-down of the F-35 aircraft and the $4.7 million in improvements constitutes "development" that would require an Act 250 permit if a new endeavor, under Rule 34 there is jurisdiction. The $4.7 million in improvements to the un-permitted VTANG buildings to accommodate the F-35, coupled with the severe impacts on the community of the F-35, will constitute a material change to the use of the runway and a substantial change to the VTANG's grandfathered use of its base. PC 137-142.

Appellants responded to the national defense preemption argument by citing he United States Supreme Court holdings that unless and until placed under federal control, which has not occurred here, all National Guard men and women are deemed to be officers of the state government, not the federal government. Appellants responded to the FAA noise-preemption argument by referring to the Supreme Court's opinion in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973) and the law review articles and lower court decisions applying *City of Burbank*, which authorize traditional land use regulation of airports, including the power to deny permission for an airport to operate at all, because of noise, as well as the power to impose mitigation conditions. PC 137-149, 288-299.

C. *The Summary Judgment Ruling*

The Honorable Thomas G. Walsh granted summary judgment to the City on the grounds that the project serves a federal purpose. Its state purpose is "ancillary" and "[a]ny state purpose… does not supersede this federal purpose." PC 11.

Judge Walsh also ruled that there will be no material change to the use of runway 15-33. The first step in determining material change is ascertaining whether there will be a "cognizable" change. Judge Walsh relied on Environmental Board precedent which adds to the wording of the rule by requiring proof of what was contemplated by the original permit. Judge Walsh ruled there will be no cognizable change because no one had presented evidence that the existing Act 250 permits did not contemplate use by military aircraft such as the F-35. F-35 aircraft therefore had not been shown to be "beyond the scope of the development" contemplated by existing permits. PC 13.

In a one-sentence footnote, Judge Walsh also ruled that there will be no substantial change to the VTANG base. The footnote states that there is no substantial change because "we find there is no physical change to the Airport runway." PC 13. But Appellants had argued there will be physical change to the VTANG's support buildings, not just runway 15-33. PC 141-142.

D. *Issues on Appeal*

Appellants respectfully submit that Judge Walsh erred in ruling that the proposed $4.7 million in improvements at the VTANG base are not development for a state purpose. The project has a state purpose under the plain and ordinary meaning of Rule 2(C)(15). Unless and until Vermont secedes from the union, the intent of the VTANG to train on the F-35 in order to defend the nation simultaneously implements the Vermont Constitutional purpose of the Vermont National Guard to defend the people of Vermont. There is no reason that one purpose needs to supersede the other.

Appellants also submit that Judge Walsh erred in ruling that the $4.7 million in improvements to the VTANG base are not a substantial change. Judge Walsh addressed only whether there will be physical changes to runway 15-33.

Lastly, as to material change, Appellants respectfully submit that Judge Walsh erred in his application of the Board precedents he relied upon. The cases he cited for the proposition that there must be proof of what was contemplated in the existing permits do, indeed, set forth that requirement. But they place the burden of production and of persuasion as to the content of those existing permits on the permit-holder, not on the stranger to the permit. Appellants alleged that the existing permits did not contemplate a use such as the F-35. PC 297 (Existing permits cited by the City authorize only civilian use of runway 15-33; a permit for "use of the runway for military aircraft has never been sought or obtained.") It was BIA's burden to produce those permits and demonstrate that F-35 use falls within their scope. Judge Walsh erred in ruling that Appellants had failed to prove the content of those permits. It was BIA that failed to prove their contents.

E. *Standard of Review*

A grant of summary judgment is reviewed *de novo* in the Supreme Court, applying the same standards as the trial judge. *In re Burlington Airport Permit*, 2014 VT 72 ¶ 6, -- Vt --, -- A.3d --. This Court has not expressly decided whether the Environmental Division's interpretations of Act 250 are entitled to the deference previously afforded to decisions of the Environmental Board in interpreting its own rules. *In re CVPS/Verizon Act 250 Land Use Permit Numbers 7C1252 and 7C0677-2*, 2009 VT 71 ¶10 n.4, 186 Vt. 289, 294, 980 A.2d 256, 260. Because the Environmental Division is not an executive branch agency entitled to deference under the separation of powers, and because the Environmental Division had no role in issuing

the Land Use Panel Rules that it interpreted and now this Court is called upon to interpret, Appellants suggest that no deference is due.

ARGUMENT

INTRODUCTION – THE VTANG IS A DEPARTMENT OF THE STATE OF VERMONT, SUBJECT TO VERMONT LAW, UNDER THE U.S. CONSTITUTION AND THE VERMONT CONSTITUTION

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*, 561 US 742,130 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*. See Brief Appendix I, setting forth the Militia Clauses of the United States Constitution.

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.2d 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.

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). *See also Association of Civilian Technicians v. United States of America*, 603 F.3d 989, 992-994, 390 U.S.App. D.C. 260, 263-265 (2010) ("…when not called to federal duty by the President…a state National Guard is under the command of the state Governor and the State Adjutant General…" and therefore the United States was correct that it lacked the authority to overrule a Puerto Rico National Guard decision not to reinstate a discharged National Guard member); *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.)

The allocation of authority contemplated in the Militia Clauses conforms to the Vermont Constitution and to Vermont statutes. Chapter 2, § 59 of the Constitution 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.

The Superior and Supreme Court of Vermont and the Public Service Board have applied Title 20 and concluded the Guard is a state agency. In *Smith v. Vermont Air National Guard*, Chittenden Co. Docket No.S0462-03, Mr. Smith sued the VTANG. The VTANG moved to dismiss the Complaint because the Complaint had not been served on the VTANG according to the requirements for service upon a state agency imposed by V.R.C.P. 4(d)(2). Superior Judge Katz agreed. The Supreme Court affirmed, citing the statement in 20 V.S.A. § 361(a) that "The military department created by [3 V.S.A. § 212]… shall include the national guard." *Smith v. Vermont Air National Guard*, 2004 WL 5582255 (Three-Justice Entry Order). Similarly, the VTANG has formally submitted to the Public Service Board that it is a state agency -- and also that it is subject to state land use regulation as a state agency. PC 157-173 (*Petition of VTANG for A Certificate of Public Good authorizing the Construction of a 2.1 MW solar array at the VTANG Base at the BIA,* Docket No. 7755, and Board Order)

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 VTANG remains a state agency under the command of the Governor. The City of Burlington's Statement of Undisputed Facts did not allege that the VTANG 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 should accept that VTANG's members would continue to "wear their state hats" when piloting F-35 aircraft at the BIA.

POINT I
THE PROPOSED REPLACEMENT OF F-16 AIRCRAFT BY F-35 AIRCRAFT, ACCOMPANIED BY $4.7 MILLION IN VTANG BUILDING RETROFITTING, AND RESULTING IN A FOURFOLD INCREASE IN INSTANTANENOUS NOISE LEVELS AND IN 65 DB DNL NOISE AT A THOUSAND ADDITIONAL HOMES, CONSTITUTES LAND DEVELOPMENT FOR A STATE PURPOSE

The proposed $4.7 million in building retrofitting, resulting in a four-fold increase in instantaneous noise levels and in 65 dB DNL noise levels at a thousand additional homes, constitutes land development for a state purpose.

10 V.S.A. § 6001(3)(v) defines development:

> (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.

A. The project involves construction of improvements.

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. The slightest act of construction triggers jurisdiction. *In re Audet*, 2004 VT 30 ¶ 11, 176 Vt. 617, 619-620, 850 A.2d 1000, 1004 ("any construction activity, no matter how minute, triggers Act 250 jurisdiction.") The physical actions here are the internal renovation of Building 120 for an F-35A simulator, the addition of 270 DC, 28 DC Power in Aircraft Shelter Parking Areas, the addition of "Secure/Classified Upgrades in two rooms, and the addition of a Secure Parts Storage Area.

B. The project would involve land exceeding 10 acres.

The lands used by the 158 FW includes 280 acres and 44 buildings, all of which would be used to maintain the F-35 aircraft. PC 53.

C. 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.

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 VTANG and that will be "used by" the VTANG serves a state purpose.

The City's Statement of Undisputed Fact, ¶¶8-9, stated that the leased land is "the VTANG's base" and that the buildings on this land are used "in support of their [the VTANG's] mission." PC 49. The City also agreed that the $4.7 million in improvements project will be undertaken "within existing VTANG buildings on its base." PC 50 (¶ 20). The VTANG is a department of the State of Vermont. The project will be undertaken "for" the VTANG and will be "used by" the VTANG. It serves a state purpose. Appellants made this argument explicitly. PC 131-135.

However, instead of parsing the rule, Judge Walsh relied on a 1982 Declaratory Ruling by the Environmental Board, *In re Vermont National Guard*, D.R. 134, which found that improvements needed at the VTANG's base to accommodate the F-4 fighter jet would serve an exclusively federal purpose. D.R. 134, in turn, had not parsed the definition of state purpose in the rules. The Board's logic was that the F-4 is needed for the defense of the 50 states, and the defense of the 50 states does not include the defense of the 14th state. Therefore there was no state purpose.

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 VTANG and would be "used by" the VTANG. Therefore there is a state purpose.

The Supreme Court of Vermont has, on four occasions, rejected reliance on overall purpose instead of application of the plain meaning of the Land Use Panel's rules. 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. 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 plain meaning 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.

Most recently, in *In re Appeal of S-S Corporation*, 2006 VT 8, ¶ 16,179 Vt. 302, 308, 179, 896 A.2d 67, 73, 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 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. The Supreme Court of Vermont's affirmance in 1984, holding that it was necessary to decide the jurisdictional question without regard to the institutional purposes of the applicant, and instead to apply the plain meaning of the rule, was heeded by the Environmental Board in subsequent cases.

The three subsequent Supreme Court rulings noted above each affirmed Environmental Board rulings based on the plain meaning of the purpose definition. Apparently the Board understood that D.R. 134 had been overruled by *In re Baptist Fellowship of Randolph* in favor of reliance on plain meaning.

Judge Walsh erred in relying on D.R. 134, in disregarding the Vermont state purpose served by the VTANG when it defends the United States of America, and in rejecting the plain meaning of Rule 2(C)(15). The proposed improvements on the VTANG base will be development as defined in 10 V.S.A. § 6001(3)(v).

POINT II
THE PROJECT WOULD BE A SUBSTANTIAL CHANGE TO THE VTANG BASE

Rule 2(C)(7) defines "substantial change" as "any change in a pre-existing development or subdivision which may result in a significant adverse impact with respect to any of the criteria" of the Act. The Environmental Board and the Environmental Court have applied a two-step analysis. First the tribunal ascertains whether there will be a "cognizable" change. If so, the tribunal determines whether the change may have a significant impact on any of the statutory criteria. *In re: Hale Mountain Fish and Game Club, Inc.*, 2007 VT 104, ¶ 4, 182 Vt. 606, 607, 939 A.2d 498, 501.

To be "cognizable," the change need not involve outside construction, or even construction that is visible. In *Re: Village of Ludlow*, Declaratory Ruling #212, Findings of Fact, Conclusions of Law and Order (Dec. 29, 1989) slip op. at 9, the Board found there to be a substantial change when a sewage plant would require new parts "such as the comminutor and channel for the headworks and the additional chlorine tank." A cognizable change may occur solely through changed use with little construction or no new construction at all. *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 cognizable changes); See also *In re Gregg Gallagher*, 150 Vt. 50, 51, 549 A.2d 637 (1988) (reversed to allow evidence that conversion of cabins to condominiums without any physical change to the buildings themselves would lead to year-round use, with accompanying changes in waste water production or pollution of shorelines and streams). Most recently, in Jurisdictional Opinion #7-274, the District 7 Coordinator summarized the Environmental Board's and the Environmental Division's broad interpretation of cognizable change as follows:

> … many decisions on this question have involved cognizable physical changes. But the Act 250 Rule defines substantial change as *any* change with a potential for significant adverse impact. Act 250 Rule 2(C)(7). The plain language of the rule is clear. In the context of "substantial change" analysis, "any change" includes both physical changes to the project and changes in its use.

Modification of the Portland Montreal Pipeline, Revised Jurisdictional Opinion #7-724, Sept. 23, 2013. In the *Portland Montreal Pipeline* matter, all or nearly all of the cognizable physical changes would occur underground and out-of-sight, such as "removal of below-grade valve access silo structures." These changes were all cognizable.

The changes at the VTANG base would include visually cognizable changes -- renovation of Building 120 to add an F-35A simulator, adding 270 DC, 28 DC Power in five Aircraft Shelter Parking Areas, constructing Secure/Classified Upgrades in certain rooms, and constructing a Secure Parts Storage Area in a warehouse. These visible changes in turn will make possible, indeed inevitable, the audible changes created by the F-35 aircraft. Without these improvements at the VTANG base, none of the noise impacts of the F-35 will occur; with these improvements in place, the noise impacts are certain to occur, according to the EIS. Both the intentional change

and its inevitable consequences are cognizable changes. *In re Gregg Gallaher, supra*.

These changes will not just be cognizable; they will be disruptive and harmful to entire neighborhoods. They will generate noise four times louder than the existing use, when measured by the instantaneous Lmax standard, and will impose noise that the federal government considers incompatible with residential use on nearly a thousand additional homes (18 F-35s) or nearly 1500 additional homes (24 F-35s). If BIA purchases and levels these 1000 homes, entire neighborhoods may disappear. Protection of residential areas from excessive noise is one of the values protected by Act 250 Criterion 8. See, *e.g.*, *McLean Enterprises Corp.*, No. 2S11147-1-EB, at pp. 11/24/2004). Preserving and protecting residential areas is one of the core principles of the South Burlington and Winooski municipal plans, a value protected by Criterion 10. The cognizable changes 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).

POINT III
THE PROJECT WOULD BE A MATERIAL CHANGE TO ACT-250 PERMITTED RUNWAY 15-33

Rule 2(C)(6), as of a rule change in 2009, 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)." 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 Environmental Board and the Environmental Court have applied a two-step analysis similar to that used for substantial change. First the tribunal ascertains whether there will be a

"cognizable" change. If so, the tribunal determines whether the change either will have a significant impact on a finding or condition, or may result in significant adverse impact on any of the criteria.

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); *Vermont Institute of Natural Science,* Declaratory Ruling #352, Findings of Fact, Conclusions of Law and Order (Vt. Envtl. Bd. Feb. 11, 1999) (change in use); *Re Mount Mansfield Co., Inc. (Summer Concert Series)*, D.R. # 269 (1992) p. 11 (change in use).

Judge Walsh ruled that in order to determine whether there is a cognizable change, he must first determine whether the change was "contemplated as part of the approved project in the first instance," citing *Vermont Institute of Natural Science,* Declaratory Ruling #352, *supra* at 26, and *Developer's Diversified Realty Corp.,* Nos. 364, 371, and 375, Findings of Fact, Conclusions of Law and Order, at 18 (Vt. Envt'l Bd March 25, 1999). These cases do add this element of proof to material change cases. But they place the burden of production and of persuasion as to the content of the existing permits on the permit-holder. The prior page or the very same page cited by Judge Walsh for this requirement, in each case, states that it is a requirement that must be met by the permit-holder. *Vermont Institute of Natural Science, supra* ("The burden of proof to show that a project is exempt from Act 250 permitting requirements is on the person claiming the exemption, in this case VINS."); *Developer's Diversified, supra* ("The burden of proof to demonstrate an exemption from Act 250 jurisdiction is on the person claiming the exemption -- Developer's Diversified in this proceeding.")[3] Appellants had raised material change in their

[3] See also *Re: Green Mountain Power Corp and Town of Wilmington, D.R. #405* (Vt. Envtl. Bd.9/19/02, slip op. at p.5 ("… the burden of proof is on the permittee when the question is raised regarding changes to an already permitted project… Thus the permittee, in this case the

Statement of Questions and cross-motion for summary judgment. In response to the City's claim that the F-35 had been contemplated, Appellants argued that the City had failed to produce the permits needed. PC 297 (Existing permits cited by the City authorize only civilian use of runway 15-33; a permit for "use of the runway for military aircraft has never been sought or obtained.") The fact that BIA failed to produce those permits and demonstrate that uses such as the F-35 were contemplated dictated entry of judgment for Appellants, not for BIA.

The Environmental Board's Declaratory Rule #134, *In re Air National Guard*, did not address issues of material change under Rule 34. 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. The issue was squarely raised in this case, and BIA did not meet its burden of proof in rebutting it.

POINT IV
THE LAND USE IMPACTS OF AIRPORTS AND GUARD BASES ARE NOT WHOLLY PREEMPTED FROM REVIEW; ACT 250 EXPLICITLY ADDRESSES PARTIAL PREEMPTION

The preemption issue may arise in this Court if this Court determines that there is jurisdiction under Rules 2 and 34. Application of Act 250 to the project would be preempted if: 1) Congress has explicitly stated that state law is preempted; 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").

Petitioner, must prove that the changes comply with the permits or are not substantial or material…" , citing *Vermont Institute of Natural Science* and *Developers Diversified Realty*.

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 6 (1990). The City has not identified any statute which sets forth express preemption. As to the second and third questions, *Perpich, supra,* and *City of Burbank, supra* provide the necessary guidance.

Perpich disposes of the argument that states have no role in governing the National Guard or that their role would conflict with the federal role. The Court expressly held that when not federalized the militia 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 or that state decision-making necessarily conflicts with federal.

City of Burbank disposes of the argument that the states cannot regulate the land use impacts of airport noise. 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 FAA in order to protect air safety, but the same reasoning does not apply to traditional land use regulation. Justice Rehnquist, joined by three other Justices, described the majority's ruling as follows:

> 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.

It is generally accepted that Justice Rehnquist's opinion correctly states the effect of the majority opinion. States and municipalities constitutionally may apply generally applicable land use laws to airport land use decisions so long as the state or municipality does not seek to directly regulate the noise emanating from airplanes. 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).

This Court and the Environmental Board have adopted a similarly narrow view of FAA preemption. *In re Commercial Airfield*, DR # 368, 1/28/99, *aff'd In re: Commercial Airfield (Edward V. Peet, Appellant)*, 170 Vt. 595, 752 A.2d. 13 (2000). The Board and the Court both cited 14.C.F.R. 157.7(a), which states that the FAA's permitting of airports does not consider environmental or land use compatibility impacts, leaving this area open to state control.

The Board cited *In re Stokes Communications Corp.*, 164 Vt. 30, 37, 664 A.2d 712 (1995) for the proposition that Act 250 jurisdiction is not defeated by the need for FAA approval for some aspects of a project. In *Stokes Communications*, the Supreme Court addressed a Board ruling that had imposed a light-shield condition on the construction of a communications tower despite the applicant's objection that the FAA has exclusive regulatory authority over light-shielding of communications towers. The Supreme Court agreed with the Board. The type of light shield required under Act 250 was consistent with light-shielding favored by the FAA. Because there was no evidence that compliance with both state and federal regulatory authorities would lead to an "inevitable collision," state law was not preempted. The same is true here. The FAA NCP program authorizes payment for the some of the same mitigation measures that Appellants seek in this case. If the District Commission were to order mitigation that the FAA approves of, *Stokes Communications* would be indistinguishable.

Section 6092 of Title 10 states that if there is federal preemption of part of an activity regulated by Act 250, Act 250 "shall be construed to regulate activity that has not been preempted." That was, in effect, the outcome in *Stokes Communications* and *Commercial Airfield*.

In re Commercial Airfield, *supra*, n.2 should control this case. The Court held in the footnote that at time of permit review the Board would have to address which issues are preempted and which are not -- 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."

Commercial Airfield acknowledged FAA authority over "aircraft noise regulations." But

that was a reference to regulating aircraft noise at the source, which is preempted, not to applying land use controls to avoid or mitigate aircraft noise, which the Court's reference to *City of Burbank* showed it understood not to be preempted.

An example presented to Judge Walsh by the City illustrates how the District Commission is likely to address this case, after remand. In 1997, BIA filed an Act 250 application for physical improvements to the main runway that were required to meet FAA operational safety standards. The improvements destroyed a deer yard. The Commission agreed that operational safety, *per se*, was off limits. The District Commission instead regulated the land use impacts of complying with the FAA's operational safety requirements. The District Commission ordered that the VTANG provide mitigation for loss of the deer-yard (either setting aside of other VTANG air base land for deer habitat, or obtaining off-site land to set aside). PC 55-67. *In re City of Burlington, Burlington International Airport*, # 4C0331-9 (June 26, 1997). *See also* PC 157-173, *Petition of VTANG for A Certificate of Public Good authorizing the Construction of a 2.1 MW solar array at the VTANG Base at the BIA,* Docket No. 7755, Board Order dated 9/29/11 (regulating the land use impacts of the VTANG's project to meet its electricity needs by imposing a mitigation plan).

CONCLUSION

Judgment should be entered for Appellants.

Dated: August 5, 2014

Respectfully submitted,

James A. Dumont

James A. Dumont, Esq.
Law Office of James A. Dumont, Esq.
15 Main St., PO Box 229

Bristol VT 05443
802 453-7011
jim@dumontlawvt.com

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief contains fewer than 9,000 words. According to Microsoft Word 2003 the brief contains a total of 8800 words. It has been checked for viruses and no viruses have been found.

Respectfully submitted,

_James A. Dumont___
James A. Dumont, Esq.

APPENDIX I – THE MILITIA CLAUSES OF THE UNITED STATES CONSTITUTION

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.

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.

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.

APPENDIX II

TABLE 1—LAND USE COMPATIBILITY* WITH YEARLY DAY-NIGHT AVERAGE SOUND LEVELS

Land use	Yearly day-night average sound level (L_{dn}) in decibels					
	Below 65	65-70	70-75	75-80	80-85	Over 85
Residential						
Residential, other than mobile homes and transient lodgings	Y	N(1)	N(1)	N	N	N
Mobile home parks	Y	N	N	N	N	N
Transient lodgings	Y	N(1)	N(1)	N(1)	N	N
Public Use						
Schools	Y	N(1)	N(1)	N	N	N
Hospitals and nursing homes	Y	25	30	N	N	N
Churches, auditoriums, and concert halls	Y	25	30	N	N	N
Governmental services	Y	Y	25	30	N	N
Transportation	Y	Y	Y(2)	Y(3)	Y(4)	Y(4)
Parking	Y	Y	Y(2)	Y(3)	Y(4)	N
Commercial Use						
Offices, business and professional	Y	Y	25	30	N	N
Wholesale and retail—building materials, hardware and farm equipment	Y	Y	Y(2)	Y(3)	Y(4)	N
Retail trade—general	Y	Y	25	30	N	N
Utilities	Y	Y	Y(2)	Y(3)	Y(4)	N
Communication	Y	Y	25	30	N	N
Manufacturing and Production						
Manufacturing, general	Y	Y	Y(2)	Y(3)	Y(4)	N
Photographic and optical	Y	Y	25	30	N	N
Agriculture (except livestock) and forestry	Y	Y(6)	Y(7)	Y(8)	Y(8)	Y(8)
Livestock farming and breeding	Y	Y(6)	Y(7)	N	N	N
Mining and fishing, resource production and extraction	Y	Y	Y	Y	Y	Y
Recreational						
Outdoor sports arenas and spectator sports	Y	Y(5)	Y(5)	N	N	N
Outdoor music shells, amphitheaters	Y	N	N	N	N	N
Nature exhibits and zoos	Y	Y	N	N	N	N
Amusements, parks, resorts and camps	Y	Y	Y	N	N	N
Golf courses, riding stables and water recreation	Y	Y	25	30	N	N

Numbers in parentheses refer to notes.

*The designations contained in this table do not constitute a Federal determination that any use of land covered by the program is acceptable or unacceptable under Federal, State, or local law. The responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities. FAA determinations

under part 150 are not intended to substitute federally determined land uses for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses.

Key to Table 1

SLUCM=Standard Land Use Coding Manual.

Y (Yes)=Land Use and related structures compatible without restrictions.

N (No)=Land Use and related structures are not compatible and should be prohibited.

NLR=Noise Level Reduction (outdoor to indoor) to be achieved through incorporation of noise attenuation into the design and construction of the structure.

25, 30, or 35=Land use and related structures generally compatible; measures to achieve NLR of 25, 30, or 35 dB must be incorporated into design and construction of structure.

Notes for Table 1

(1) Where the community determines that residential or school uses must be allowed, measures to achieve outdoor to indoor Noise Level Reduction (NLR) of at least 25 dB and 30 dB should be incorporated into building codes and be considered in individual approvals. Normal residential construction can be expected to provide a NLR of 20 dB, thus, the reduction requirements are often stated as 5, 10 or 15 dB over standard construction and normally assume mechanical ventilation and closed windows year round. However, the use of NLR criteria will not eliminate outdoor noise problems.

(2) Measures to achieve NLR 25 dB must be incorporated into the design and construction of portions of these buildings where the public is received, office areas, noise sensitive areas or where the normal noise level is low.

(3) Measures to achieve NLR of 30 dB must be incorporated into the design and construction of portions of these buildings where the public is received, office areas, noise sensitive areas or where the normal noise level is low.

(4) Measures to achieve NLR 35 dB must be incorporated into the design and construction of portions of these buildings where the public is received, office areas, noise sensitive areas or where the normal level is low.

(5) Land use compatible provided special sound reinforcement systems are installed.

(6) Residential buildings require an NLR of 25.

(7) Residential buildings require an NLR of 30.

(8) Residential buildings not permitted.

Sec. A150.103 Use of computer prediction model.

(a) The airport operator shall acquire the aviation operations data necessary to develop noise exposure contours using an FAA approved methodology or computer program, such as the Integrated Noise Model (INM) for airports or the Heliport Noise Model (HNM) for heliports. In considering approval of a methodology or computer program, key factors include the demonstrated capability to produce the required output and the public availability of the program or methodology to provide interested parties the opportunity to substantiate the results.

(b) Except as provided in paragraph (c) of this section, the following information must be obtained for input to the calculation of noise exposure contours: