Law Office of James A. Dumont, Esq., P.C.

15 Main St., P.O. Box 229, Bristol VT 05443
802-453-7011; Toll Free: 866-453-7011; fax 453-6040
email: jim@dumontlawvt.com; website: dumontlawvt.com

James A. Dumont, Esq.

Kit D. Donnelly, Legal Assistant
Caroline Engvall, Legal Assistant

December 12, 2012

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

Re: Request for Jurisdictional Opinion re: Burlington International Airport

Dear Ms. Monaghan and Mr. Keibel:

I write to you pursuant to Rule 3 and 10 V.S.A. § 6007, seeking a Jurisdictional Opinion, publication and distribution pursuant to that statute, on behalf of numerous landowners and residents in South Burlington, Winooski and Burlington by whom I have been retained.

The key land use impacts at issue pertain to 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**." (Emphasis added.)

My clients include owners of homes whose property has already suffered substantial loss of value, and whose lives and neighborhoods have already been disrupted, by the physical changes to the Burlington International Airport (BIA) and the changes in use of the airport associated with the replacement of the earlier F-4 jets by F-16 jets. These changes have included the severe noise impacts of living in the vicinity of the flight path of the F-16 jets. These changes also have included the destruction of entire blocks of South Burlington's neighborhoods, caused by the purchase of homes by the City of Burlington to mitigate the noise impacts of the F-16 jets. These purchased homes were abandoned by their former residents, and later were razed, leaving blocks of empty lots in residential neighborhoods. Exhibits 1-2.

My clients also include persons who will suffer substantial diminution in value of their homes and disruption of their neighborhoods if the proposed F-35 jet project is approved. The land use impacts from the F-35 are projected to greatly exceed those

of the F-16s. According to the recent Draft Environmental Impact Statement (DEIS) conducted by the U.S. Air Force, *thousands* of additional homes will become part of what the Federal Aviation Administration (FAA) considers an area "incompatible" with residential use, those areas exceeding the 65 DNL standard. As a result of the added noise from the F-35 jets, 78% of the housing units in the City of Winooski will be in the "incompatible" 65 DNL area (according to an analysis of the DEIS conducted by a Vermont appraiser, attached). The BIA's 2012 Master Plan explicitly contemplates that additional homes will be purchased and demolished *because of the basing of the F-35s at BIA*. In other words, more homes in these areas will be bought up by the City of Burlington and their occupants will abandon them, and more homes will be razed, leaving additional areas devoid of housing, of families and of community, *because of the F-35s*, according to the City itself. The City's practice is to leave these abandoned homes empty for up to two years before demolishing them. Exhibits 3-7.

South Burlington and Chittenden County already suffer from a shortage of affordable housing. The homes that the City has already torn down were affordable, middle-income homes. The homes that the F-35 will cause the City to tear down also will be affordable, middle-income housing. Exhibit 8. Many of the homes in South Burlington and Winooski that will exceed the 65 DNL standard are affordable, middle-income homes. Under federal standards that are binding on appraisers, the appraised value, and thus the financing of such homes, is jeopardized. For example, if a V.A. loan is the source of the financing, the impact of airport noise must be considered in setting the appraised value and the purchase must include the cost of noise mitigation measures to reduce the noise within the home to 45 DNL. The regulations say that financing cannot be completely rejected "solely" for this reason – but only if there is evidence that airport noise is "accepted in the market." Exhibits 9-10. Many of my clients depend upon affordable housing and their choices, in Winooski and South Burlington, will be severely narrowed because of the F-35 jets.

The large-scale changes in Vermont's landscape wrought by the F-16s, and the even greater changes predicted by the Air Force to result from the F-35s, are precisely the kinds of changes in land use that Act 250 was designed to address. Committee to Save the Bishop's House v. Medical Center Hospital of Vermont, 137 Vt. 142 151-52, 400 A.2d 1015, 1020 (1979). Although, regulation of the level of noise that an airport may emit is preempted by federal law, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), nothing in federal law preempts regulation of the substantial land use impacts that have occurred because of the F-16s and that will occur because of the F-35s. See, e.g., Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission, 634 F.3d 206 (2d Cir. 2011) (rejecting federal preemption of generally applicable state environmental laws unless the application of those laws would have the actual effect of interfering with aircraft safety), In re: Commercial Airfield (Edward V. Peet, Appellant), 170 Vt. 595, 752

A.2d. 13 (2000) (rejecting argument that Act 250 generally is preempted by federal law with respect to airports).

To my knowledge, based upon review of records held by the City, the City of South Burlington, and your own offices, there is not a single Act 250 permit that has been sought or issued for the purchase, abandonment and then eventual destruction of these neighborhoods in the past, nor has the City filed any application for an amended permit for permission to do so in connection with the F-35 jets. Yet this process is occurring pursuant to written plans created and being implemented by the City o Burlington.

A document I obtained by a Public Records Act request from the City explicitly identifies some of the acquisitions/demolitions and states candidly that no Act 250 permit was obtained for these activities. Exhibit 9.

I believe that Rule 34, and the large body of case law applying Rule 34, applies to the BIA's changes of use to base the F-16 jets and now the F-35 jets. In 1987, the City of Burlington was ordered to submit, and did submit to Act 250 jurisdiction, its "Master Plan." See Board Rule 21(F). The Master Plan permit application appears to have been reviewed under docket numbers 4C0034-9 and/or 4C0721. The Master Plan that was submitted encompassed virtually every aspect of the airport's planned future construction and operations, **including its off-site impacts**. The evidence submitted in support of the Master Plan permit explicitly **included the physical structures used by, and the operations conducted by, the Vermont Air National Guard** (ANG). Exhibits 10-12.

The City sought approval of the Master Plan then in effect, its July 1983 Master Plan. Hearings were held on June 1, 1987 and July 20, 1987. The July 1983 Master Plan was Exhibit 5, admitted into evidence at the hearing held on the application. Pages 4-25 and 4-26 of the 1983 Master Plan addressed the noise impacts of the ANG's aircraft. It stated that "most of the flying has been done with the twin-engine B-57 Canberra bomber, plus some flying in the jet trainers T-33 and T-37, and about one flight a day with the EC-135 – the tanker version of the 707." It stated that the ANG "Green Mountain Boys, who are based at the airport, are to be re-equipped with F-4's, a twin-engine fighter aircraft, and the B-57s are to be phased out." It stated that the general level of military operations, about 7,400 itinerant operations and 10,700 local, would remain the same. The noise impacts were evaluated using a different standard than the current DNL standard. The Master Plan found that the impacts of the F-4s would mainly be experienced in Winooski. It identified a small number of land purchases planned for the immediate area of the airport -- but not for mitigation of noise impacts. These purchases were planned to accommodate future hangars and airplane facilities. The Plan stated that "Acquisition of these properties is not expected to alter existing land use patterns due to the relatively small amount of land area affected by the purchase." Exhibit 13.

The maps submitted as exhibits to the District Commission along with the Master Plan reiterated that the sole land areas projected to be purchased were those that were needed for additional airport facilities. On the maps there are variously described as "PROPERTY ACQUISITION ~6 ACRES, PHASE I, II, III, FOR FUTURE HANGAR & APRON DEVELOPMENT" and "PURCHASE 6.2 ACRES FOR FUTURE A/C PARKING AND HANGARS." No area is shown as a site on which homes will be purchased for noise mitigation or where homes will be razed. Exhibits 14, 15.

Based on the City of Burlington's representations in its Master Plan and in other evidence submitted by the City to the District Commission, the City appears to have received approval of the 1983 Master Plan. It appears that part of the approval process committed the City to a future noise assessment process, to be completed subsequent to issuance of the permit. Exhibits 16, 17.

Unfortunately, the 1987 Act 250 permit has been removed from your own files in Essex. The manila file folder states, on the front of the folder, "*Permit Missing." The permit either was never recorded in the South Burlington land records or has been removed from those records as well. We have not been able to locate a single copy. I filed a Public Records Act request with the City, and the files they produced did not contain a copy. One of the reasons I am cc'ing Geoff Green on this submission is that the file indicates that he was the Assistant District Coordinator at the time, and was actively involved in the processing of the permit application. Perhaps he can assist in reconstructing its terms. Exhibit 16-18.

It also appears that the key exhibit, Exhibit 5, the Master Plan, also has been removed from the Commission's files. When I went, personally, to review that file on December 10, it was missing. It is listed as an admitted Exhibit but it's not in the file. (I had already found a copy in the City's files, parts of which I have copied.)

It is reasonable to assume that the permit contained the standard language commonly found in District Commission permits, such as the clauses stating that the applicant is obligated to complete and maintain the project only as approved by the Commission, that the project must be completed based upon the filed plans, that "no changes in the project shall be made without written approval" of the District Commission, that no further development of the land may occur without written approval of the District Commission, and that the permittee shall apply to the District Commission for approval for any change in use of the land that would cause noxious or harmful emissions. As noted above, the Master Plan and the accompanying maps represented that no land acquisition outside the airport would occur except for lands needed for hangars and the apron, and that "Acquisition of these properties is not expected to alter existing land use patterns due to the relatively small amount of land area affected by the purchase."

The BIA Master Plan has changed drastically since that time. For the reasons set forth above, the 2012 Master Plan no longer asserts anything like "Acquisition of these properties is not expected to alter existing land use patterns due to the relatively small amount of land area affected by the purchase." On the contrary, the 2012 Master Plan notes the many properties already acquired and abandoned, some of which have been razed, and predicts that more will follow.

In addition, the proposed basing of the F-35 jets at BIA will necessitate construction of new improvements. A new building will be constructed on leased land at the BIA as part of the F-35 project. Exhibit 19. The basing of the F-16s also necessitated construction of improvements at BIA. Exhibit 20.

In addition to the Master Plan permit proceedings, BIA has applied for and received dozens of Act 250 permits under docket numbers 4C0331 and 4C0034, and subdockets within those dockets. For example, Permit 4C0331 was issued on April 16, 1979 for a 5370-foot runway. The evidence submitted in support of the permit, according to the notes in the file, included consideration of noise and included testimony that BIA was planning to purchase three (3) homes to address the noise problem. As part of those proceedings, BIA and the other parties reached a stipulation that BIA would submit a noise study to the Commission within one year. Exhibits 21, 22.

It is important to note the details of the ANG's presence at BIA. One is that the ANG is a lessee of the City. It owns no real estate. Its lease includes the shared use of the airport's runways, which are well over ten acres. Exhibit 23. Second, instead of paying rent, the ANG provides free emergency and rescue services that, if the City were to provide these, would cost the City $2.5 million each year. This is one of the principal justifications urged by the City for keeping the ANG as a tenant. From the City's perspective, a vital municipal purpose is served by the lease and the lease serves a "municipal purpose" under Rule 2. Exhibit 24. Third, the State of Vermont has not consented to granting legal jurisdiction to the federal government over these lands pursuant to Article I, §8, Clause 17 of the United States Constitution. See, e.g., James v. Dravo Contracting Co., 302 U.S. 134, 141-42 (1937). Fourth, while the lease serves a municipal purpose, the ANG itself serves state purposes and is an agency of the State of Vermont. It is not a federal agency. The ANG's nature as an agency of the State of Vermont has been attested by both the Office of the Attorney General of Vermont and the Vermont Supreme Court. Its presence at BIA is to serve a "state purpose" under Rule 2. Exhibits 23-24.

Finally, I wish to address the Environmental Board's Declaratory Rule #134, In re Air National Guard (1982). In that ruling, the Board agreed that the ANG is a state agency, not a federal agency. Even though the ANG is a state agency, the Board found no jurisdiction over improvements planned for the BIA. The ruling was predicated solely on the *federal purpose* of the improvements. Since the improvements were not for a state or municipal purpose, Act 250 did not apply.

The requested Jurisdictional Opinion in that case was not brought under Rule 34. It did not address issues of material change or substantial change under permits 4C0034-1 through 4C0034-10, 4C0034-9 or 4C0721, or 4CV0331. It did not address preexisting permit conditions that barred any change in use or new development without written approval by the Commission. It did not cite any preexisting Act 250 jurisdiction over the site. Of course, the 1982 ruling predated the issuance of a permit for the BIA's Master Plan in 1987. In addition, I have reviewed that file in the District Commission's office, and there was no evidence that any state or municipal purpose was being served.

Under the analysis of Green Crow LLC, 2007 VT 183 Vt. 33, 944 A.2d 244, In Re: Eustance Act 250 Jurisdictional Opinion, 2009 VT 16, 185 Vt 447, 970 A.2d 1285, Re: Green Mountain Power Corporation and Town of Wilmington, Declaratory Ruling #405, ENB 2002-070; and Vermont Institute of Natural Science, Declaratory Ruling #352, ENB 1999-013, once there is Act 250 jurisdiction over the site, as here, under permits 4C0034, 4C0331 and 4C0721, and their subdockets, any material or substantial change requires a permit amendment under Rule 34, regardless of whether the purpose of that change, by itself, would have been exempt from Act 250. So does any change in use and any development that conflicts with the conditions in each permit.

As you know, farming was and is exempt from Act 250, but in Eustance the change in use of the project site to a farming use required amendment of the permit already issued for that site. In the present case, the change in use is not a technicality. The changes conflict with the standard language in District Commission orders, and they bear upon the fundamental purpose of Act 250 – ensuring careful review, under the statutory criteria, of large-scale changes in land use under criteria 9(K) and 10. The District Commission needs to determine, based on an evidentiary hearing, whether the physical changes and changes in use since 1987 conform to the South Burlington Comprehensive Plan, which states that existing housing development "shall" be protected and is a "fundamental" element of the plan. We think the evidence as hearing will demonstrate that these changes fail to protect that fundamental resource.

Criterion 8, on esthetics, also is adversely affected by the abandonment and razing of homes in residential neighborhoods.

An extreme but simple analogy may illustrate how and why Rule 34 applies. Assume that a mall developer receives an Act 250 permit for her development next to an elementary school, including numerous big box stores such as we are familiar with. Ten years later, a big box store is vacant. The developer wants to lease that space to the Bureau of Alcohol Tobacco and Firearms for a facility in which to explode bombs and test chemical weapons. The fact that ATF is a federal agency does not render Rule 34 inapplicable. The landlord, as the owner of the property, is the permit-holder and remains bound by Vermont law, by Rule 34 and by the conditions in her permit. If the United States were to acquire the real estate itself for

the use of the ATF, with the consent of the State of Vermont under James v. Dravo Contracting Co., above, the outcome would be different.

Therefore I write to request Jurisdictional Opinions stating that:

1) The City's present use of the BIA as a base for the F-16s is a material change and a substantial change in use from the Master Plan permit (4C0034-9 or 4C0721), and/or the City's other Act 250 permits (4C0331 and 4C0034 and their sub-dockets); that change required an Act 250 permit amendment under Rule 34.

2) The City's proposal to use the BIA as a base for the F-35s is a material change in use and also a substantial change in use from the Master Plan permit (4C0034-9 or 4C0721) and/or the City's other Act 250 permits (4C0331 and 4C0034 and their sub-dockets); that change requires an Act 250 permit amendment under Rule 34.

3) The City's past and present actions in purchasing and demolishing residences in South Burlington were a material change in use or a substantial change in use under Rule 34, requiring an amendment of its permit approving the Master Plan (4C0034-9 or 4C0721) and/or its other Act 250 permits (4C0331 and 4C0034 and their sub-dockets). In the alternative, the past and present actions were and are the construction of improvements pursuant to a plan and are subject to Act 250 pursuant to Rule 2.

4) The City's plan to purchase additional homes and raze them, once the F-35 is based at the BIA, is a material change or a substantial change in use under Rule 34, requiring an amendment of its permit approving the Master Plan (4C0034-9 or 4C0721)and/or its other Act 250 permits (4C0331 and 4C0034 and their sub-dockets). In the alternative, the planned actions will be the construction of improvements pursuant to a plan and are subject to Act 250 pursuant to Rule 2.

5) In the event that it turns out that the Master Plan Act 250 permit applied for in 1987 was never denied or granted, that the Commission has jurisdiction to resume those proceedings.

I also ask that you establish a schedule in response to this letter. I ask that the schedule include the following:

First, production by the City or the State of any Act 250 Permit either may possess or have access to that approved of any BIA Master Plan at any time.

Second, a deadline for submission of evidence and/or memoranda of law by any person or party opposing issuance of the requested Jurisdictional Opinions, and also submission by the parties of their position as to whom must be notified pursuant to §6007(c).

Third, a deadline for me to respond to any such evidence or memoranda and to provide a list of persons to be notified pursuant to §6007(c).

Finally, a ruling by you on the merits, with service under the statute.

Please call with any questions.

Sincerely,
Jim
James A. Dumont, Esq.
cc: Mr. Geoff Green
Eileen Blackwood, Office of the City Attorney
William Sorrell, Esq., Attorney General
Ms. Rosanne Greco, Chair, South Burlington City Council
Ron Shems, Esq., Chair, Natural Resources Board