

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

January 29, 2013

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

RE: REQUEST FOR JURISDICTIONAL OPINIONS RE: BURLINGTON
INTERNATIONAL AIRPORT -- SUPPLEMENTAL FILING

Dear Mr. Keibel:

I write to follow up on my December 12, 2012 request for a Jurisdictional Opinion in light of your email stating that it appears that the 1987 permit application referred to in my request, for approval of the airport master plan, was withdrawn before it was ruled upon.

If that is the case, I want to be clear that our request for a Jurisdictional Opinion continues to be based both upon the material change doctrine and the substantial change doctrine.

The material change doctrine is applicable because of the existing Act 250 permits. There are so many that it would take many pages to describe them all. Your recent Jurisdictional Opinion #4-229, dated January 17, 2013, summarizes this history. The airport was established in 1920 on a 72-acre cornfield. On November 18 of 1971, soon after the effective date of Act 250, LUP #4C0015 was issued for an airport hangar and support facilities. On February 23, 1972, LUP #4C0034 was issued for a major expansion of the airport, covering 50 acres. A great many Act 250 permits have been issued since then, in what your letter refers to as "two basic series," which are #4C0034 and #4C00331. My review of some of (but, so far, not all of) these files reveals that there is probably not a square foot of ground anywhere in the airport that was not the subject of a permit, and there is definitely not a single foot of paved runway that was not the subject of a permit.

The changes in use of this ground and of these runways that were described in my December 12, 2012 request require an amended permit under the material change doctrine. The December 12, 2012 request concluded: "Under Rules 2 and 34, the plans to install the F-35s, and the construction needed for the F-35s, require an amendment to the permits issued in 4C0331 and 4C0034, as well as 4C0034-9 (the Master Plan permit)." That remains our position.

The December 12, 2012 request also relied upon the substantial change doctrine, out of an abundance of caution. We continue to rely on that doctrine as well. If for any reason the

changes in land use described in the request do not utilize land or improvements that were subject to a preexisting permit, they now trigger Act 250 jurisdiction as substantial changes. As the December 12 request stated, the proposed basing of the F-35 jets at BIA will necessitate construction of \$2.3 million in physical improvements on airport lands. These improvements are “a cognizable physical change” to preexisting land development. In re Snopeck & Telscher, Docket no. 269-12-07 Vtec (7/24/08) p.3. The DEIS demonstrates that the environmental consequences of the switch to F-35s, and this new construction, will be severe -- that is, the change has “the potential for significant impact under one or more of the ten Act 250 criteria,” thus triggering jurisdiction as a substantial change under Rules 2 and 34. In re Snopeck & Telscher, p.4

The changes proposed by the City, to base the F-35 jets, are development within the meaning of In re Agency of Administration, 141 Vt. 68, 93 (1982) -- unlike the situation you addressed in JO #4-229. The basic concept from In re Agency of Administration is that Act 250 jurisdiction is triggered when the activity is about to impinge on the land and attaches to activity which has achieved such *finality of design that construction can be said to be ready to commence*. The construction of the \$2.3 million in improvements is a definite, concrete, imminent act that would not occur but for basing of the jets at the airport. This scenario is precisely what the Supreme Court in In re Agency of Administration held was missing in that case. The purpose of the construction is to serve the Vermont Air National Guard, a state agency, and thus to keep the Vermont Air National Guard at the airport in order to provide \$2.5 million in vital emergency and rescue services, for free, to the City. The purposes of the construction therefore include state and municipal purposes and are not exempt.

Please call with any questions.

Sincerely,

*J*_{im}

James A. Dumont, Esq.

cc: Greg Meyer, Office of the City Attorney
Brian Dunkiel, Esq.
Ms. Rosanne Greco, Chair, South Burlington City Council
Ron Shems, Esq., Chair, Natural Resources Board