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' SURREPLY TO APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO INTERVENORS' MEMORANDUM

Appellants submit this response to the recent filings by the City and Intervenors.

1. **Under *City of Burbank v. Lockheed*, generally applicable state land use regulations governing noise are not preempted unless they seek to directly regulate the noise produced by airplanes at the source (the aircraft); state land use regulation may constitutionally impose conditions on an airport project to mitigate noise impacts.**

Although the City (Brief pp.11-13) and Intervenors (Brief pp.12-17) argue to the contrary, it is generally accepted that Justice Rehnquist's dissenting opinion in City of Burbank v. Lockheed, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973) correctly states the effect of the majority opinion. This is that 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.").

These law reviews accurately reflect the court decisions. For example, in 2002 the Maryland Court of Appeals held:

> In *Burbank, supra,* the Supreme Court invalidated a local noise regulation restricting the permissible times of flights in and out of the Burbank airport. *Burbank,* 411 U.S. at 625–26, 93 S.Ct. 1854. That case stands for the proposition that only those local regulations that directly interfere with aircraft operations are invalid. *See City of Burbank v. Burbank–Glendale–Pasadena Airport Authority,* 72 Cal.App.4th 366, 378, 85 Cal.Rptr.2d 28 (Cal.App.2d Dist.1999). In other words, "while a municipality may not control the source of the noise (the aircraft), it may use its police powers to mitigate the noise, such as the zoning power to assure harmonious development. 'Congress has preempted only local regulation of the source of aircraft noise.' " *Burbank,* 72 Cal.App.4th at 379, 85 Cal.Rptr.2d 28, *cert. denied,* 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982) (citing *San Diego Unified Port Dist. v. Gianturco,* 651 F.2d 1306, 1313–14 (9th Cir.1981)). "[A] local regulation may not restrict the use of aircraft or directly control aircraft emissions, but may otherwise use its land use powers to mitigate the noise." *Burbank,* 72 Cal.App.4th at 379, 85 Cal.Rptr.2d 28 (citing *San Diego Unified Port Dist. v. Gianturco, supra*).

Lucas v. People's Counsel for Baltimore County, 147 Md.App. 209, 807 A.2d 1176 (2002) (emphasis added). See also City of Cleveland v. City of Brook Park, 893 F.Supp. 742 (N.D. Ohio 1995) (FAA preemption only applies to local land use controls that attempt to directly regulate noise produced by aircraft).

A District Commission therefore may impose conditions to mitigate noise impacts of airport development and of material changes an airport use already subject to an Act 250 permit. As the Environmental Division is well aware, Act 250 explicitly authorizes the District Commissions to impose conditions in order to mitigate impacts. In re Denio, 158 Vt. 230, 238-240, 608 A.2d 1166 (1992). The Court in Denio quoted the Act's explicit authorization of the use of conditions to mitigate impacts under any of the ten criteria:

> The Board's authority to impose specific conditions on the grant of an Act 250

permit is contained in 10 V.S.A. § 6086(c), which provides:

> (c) A permit may contain such requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to (1) through (10) of subsection (a), including but not limited to those set forth in sections 4407(4), (8) and (9), 4411(a)(2), 4415, 4416 and 4417 of Title 24, the dedication of lands for public use, and the filing of bonds to insure compliance.

158 Vt. 239-240.

The narrow view of F.A.A. preemption set forth in Lucas is the same as that expressed by the Environmental Board and the Supreme Court in 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), although the two decisions did not address the distinction between regulating aircraft noise at the source and mitigating aircraft noise, which was not an issue in the case. The Board explained that while the federal government has preempted certain aspects of the operation of aircraft and airports, "it has not so acted on land use issues such as zoning and environmental review." It cited 14.C.F.R. 157.7(a), which states that the F.A.A.'s study of airport proposals does not consider environmental or land use compatibility impacts. The Board concluded that FAA authority does not preempt Act 250 jurisdiction generally.

The Board cited In re Stokes Communications Corp., 164 Vt. 664 A.2d 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.

> "[S]tate law is pre-empted to the extent that it actually conflicts with federal law," *English v. General Electric Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990), but there is no actual conflict where a collision between two regulatory schemes is not inevitable. See *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963); see also *English v. General Electric,* 496 U.S. at 90, 110 S.Ct. at 2281 (rejecting preemption argument that injured employees would forgo federal relief and rely solely on state remedies as too speculative). There was no evidence that compliance with both regulatory authorities would be impossible. In fact, the testimony was quite the opposite; Stokes's expert testified that based on his understanding of FAA regulation, "the shields will comply and the FAA will approve the use of the shields on the Stokes's tower." Additionally, Stokes has not offered any substantive support, such as citations to FAA regulations, suggesting that installing light shields prior to FAA approval is prohibited or that the shields would violate established requirements. Because there has been no showing of an inevitable collision between the Board's order and an FAA ruling, there is nothing to prevent the Board from imposing an otherwise lawful condition.

The same is true here. The FAA encourages and in the past has authorized payment to the City for the same mitigation measures that Appellants seek in this case. See Point 2, below. When it comes to noise mitigation, as with light-shielding, because Act 250 does not conflict with FAA regulations it is not preempted.

It was obvious to the Court in Stokes Communications that the FAA possessed exclusive authority to require lighting of communications towers. If the Board had ruled that Stokes Communications was prohibited from lighting its communications tower, such a ruling would have been in conflict with the regulations of the FAA and it would have been preempted.

However, the FAA's unquestioned authority to require lighting of communications towers did not mean that the Board lost jurisdiction over where the tower would be located or over how the lighting of the tower would be mitigated. In the present matter, the City and Intervenors argue that since the FAA has unquestioned authority to regulate the noise that aircraft generate, the District Commission has no jurisdiction over where that noise will be generated or how it will be mitigated. In effect, they are re-arguing the position that the Supreme Court rejected in

Stokes Communications. See City Reply Brief pp.11-13; Intervenor Brief pp.12-17. Their position is an extreme one, contrary to Stokes Communications. Intervenors' reliance on Board and Environmental Division precedent under the Federal Communications Act, which contains specific language on preemption not found in any of the acts the FAA administers and which was implemented by rulemaking that specifically superseded state land use laws, has no relevance. Compare Intervenors' Brief p.15 with Freeman v. Burlington Broadcasters Inc., 204 F.3d 311, 320-322 (2d Cir. 2000) (explaining why Federal Communications Act, as implemented by FCC, supersedes state law).

The City's and Intervenors' reliance on this extreme view lies at the core of their opposition to issuance of a Jurisdictional Opinion requiring that an Act 250 application be filed. They dismiss the indisputably severe and unprecedented noise impacts of the F-35 jets as off-limits to material change analysis on the grounds that FAA jurisdiction is exclusive; these noise impacts cannot trigger material change jurisdiction, they argue, because there is nothing whatsoever that a District Commission can do about them. City Reply Brief pp.11-13; Intervenors' Brief p.12 n.7, pp.13-14. The City and Intervenors extreme position goes too far[1].

2. The City and Intervenors base their opposition on the mistaken understanding that the Appellants seek a ruling that that the District Commission should decide whether or not to arm the VANG with F-35 jets; Appellants seek only a ruling that the District Commission has jurisdiction to issue non-preempted orders.

The City characterizes Appellants' request for relief as a request to recognize that the District Commission possesses the jurisdiction to decide whether or not the Secretary of the Air Force should "arm" the Vermont Air National Guard (VANG) with F-35 jets. See City Reply Brief at p.2 (claiming Appellants seek to change the decision as to how to "arm" the VANG);

[1] Intervenors' Brief, p. 13, quotes the Supreme Court opinion in Commercial Airfield for the proposition that the Court acknowledged FAA authority over "aircraft noise regulations." The Court did so, correctly, and did not address the distinction between regulating aircraft noise at the source and mitigating aircraft noise, which was not an issue in the case.

pp.4, 8 (asserting that the VANG's operation of the F-35 is exclusively federal because only the USAF can decide whether or not to provide the F-35 to the VANG). The Appellants do not seek such a ruling, nor have they ever sought such a ruling. Appellants have never suggested that the District Commission or this Court have jurisdiction over decisions made by the Secretary of the Air Force as to what weapons to provide the VANG.

What Appellants have sought and continue to seek is a ruling that requires the City to submit an application to the District Commission to review the proposed change of use of the already-permitted runway at the airport for the use of a new generation of military jets the use of which will impose a four-fold increase in noise as measured by the Lmax standard and which will cause nearly 1500 additional homes to become "incompatible with residential use" as measured by the DNL standard. The District Commission may, without invading the province of the Secretary of the Air Force on what weapons to assign the VANG and without invading the province of the FAA to regulate aircraft noise, decide that the mitigation measures *already in use by the City of Burlington* with the explicit purpose of mitigating the *noise of the VANG's existing F-16 jets* should continue or should be expanded as mitigation for the F-35 jets. For example, the City of Burlington has engaged in millions of dollars of mitigation by purchasing affected homes in South Burlington with funding provided to the City of Burlington by the Federal Aviation Administration (F.A.A.) for the express purpose of mitigating F-16 noise. See Attachments 12, 13 and 14 (F.A.A. approvals of federal funding to mitigate noise including F-16 noise).

The District Commission also may decide that new mitigation measures must be undertaken by the City of Burlington to mitigate the noise of the VANG's F-35 jets, such as soundproofing of homes,. Soundproofing of homes has been approved for funding by the F.A.A.

for the Burlington airport, to mitigate F-16 noise, and has been used to protect homes outside other urban airports -- but has not implemented by Burlington. Attachment 13, p.4 is an FAA Report, co-signed by City of Burlington representative, stating that the FAA had approved use of federal funds for soundproofing of homes affected by Burlington airport noise but the City has elected to use the funds for home acquisition instead. See also Attachments 15 and 16, which are City of Chicago website documents stating that the City and the FAA have funded soundproofing of nearly 8000 homes to mitigate O'Hare airport noise; the City raised funds for this by imposing a surcharge on passengers using its airport. These documents are admissible pursuant to V.R.E.C.P. 2(e), because a reasonable person in the conduct of their daily affairs would rely on noncontroversial factual statements such as this by the City of Chicago.

The District Commission also may decide that the Quechee Lakes test requires the applicant to demonstrate that the use of alternative airport sites, such as the state-owned airports found in less densely populated parts of Vermont, has been considered and rightfully rejected by the VANG. In re Lawrence Thomas, #2W0644-E, 2/18/06, p.11 (requiring applicant to demonstrate that feasible alternatives in a different location off the site would not mitigate impacts under Criterion 8). See also Stokes Communications, *supra*, at 39 ("… we think a generally available mitigating step is one that is reasonably feasible and does not frustrate the project's purpose or Act 250's goals. We note that in some circumstances mitigating steps may be unaffordable or ineffective. In those circumstances, it is within the Board's discretion to grant or deny a permit. 10 V.S.A. § 6086(c)."). The environmental and fiscal cost of improving facilities at an alternative location not surrounded by thousands of homes may turn out to be less than the

environmental and fiscal cost of the VANG operating these jets at the Burlington site and paying for noise mitigation for 1500 homes[2].

For the reasons set forth above in Point 1, none of these possible District Commission decisions would conflict with the FAA's regulatory program. Nor would such decisions by the District Commission have the effect of overruling or undermining the decision by the Secretary of the Air Force to equip the VANG with F-35 jets. These District Commission decisions would address how to mitigate the noise impacts of that federal decision while respecting that the decision has been made and lies outside the District Commission's authority to supersede. As explained in Appellants' Reply to the Motion for Summary Judgment, under the Militia Clauses and the federal statutes which implement the Militia Clauses, the State of Vermont has been allocated the authority and the duty to govern the VANG, to train the VANG under federal standards, and also to determine the location of VANG bases. It is difficult to imagine how the State of Vermont could govern and train its national guard units, and decide on their location, if there were implicit, unexercised[3] yet exclusive federal authority over where that training will occur and how its noise impacts will be mitigated. *Compare* Stokes Communications 164 Vt. 37 (reviewing FAA regulations and finding no conflict with Board jurisdiction).

3. **The City and Intervenors lack standing to challenge whether Act 250 is preempted**

In Parts 1 and 3.B of its brief the City argues explicitly that even if Act 250, as implemented by the Natural Resources Board's rules, provides the District Commission with jurisdiction, the

[2] For example if the cost of soundproofing homes were as low as $10,000 per home, the cost of soundproofing 1500 homes would be $15 million. This is more than three times the total cost of the improvements the VANG plans for its facilities at the airport.

[3] The City and Intervenors have failed to identify a single federal statute or Air Force regulation that would conflict with the exercise of jurisdiction by the District Commission in reviewing the noise impacts of the F-35 jet.

State cannot permissibly regulate aircraft noise because this area is preempted by federal law. This argument is also implicit in much of the remainder of the City's recent brief. The City lacks standing to make this argument. Subdivisions of a state, such as municipalities, lack standing to challenge the constitutionality of a state statute. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 2d 1015; Burbank-Glendate-Pasadena Airport Authority v. City of Burbank, 136 F.3d 1360 (9th Cir. 1998) *cert. den*.525 U.S. 873. See also Town of Searsburg v. State of Vermont, #690-10-08 Wncv, Ruling on Motion to Dismiss and Cross-Motions for Summary Judgment, March 30, 2009, p.8 (relying on Williams to reject town's constitutional challenge to state law). Intervenors also lack standing to challenge whether Act 250 can constitutionally be applied to changes in use at the airport (Intervenor Brief Part II.B.). They have failed to submit to the Environmental Division any grounds for recognizing any injury-in-fact that they will suffer from a ruling that Act 250 permissibly can be applied to the noise or land use impacts of the proposed change in use at the Burlington airport. Intervenors are essentially are acting as *amicus curiae* without standing to raise and litigate this particular issue themselves. Part II.B of Intervenors' brief also should be disregarded. Of course, standing is jurisdictional, lack of standing compels dismissal, and lack of standing is not waivable. Cooperative Fire Assurance Association of Vermont v. Bizon, 166 Vt. 326, 693 A.2d. 722 n.3. Any constitutional objection to Act 250 is not properly before the Environmental Division.

4. The City's Brief and Intervenors' Brief rely on multiple erroneous legal arguments

"Federal Training." The City asserts that all training on the F-35 will be "federal" training and that the state role in operating the F-35 jets will be "very limited." Brief pp.1, 6. However, Article 1, Section 8 of the Constitution explicitly reserves to the States the authority "govern" the National Guard and to "train" the National Guard. The training must be in

accordance with discipline set by Congress but under our Constitution it is the states that conduct the training of the Guard (as well as govern the Guard). In effect, the federal government determines the curriculum, while the State conducts the actual training of the forces it is governing. The City's characterization of this constitutional compromise as meaning the State's role is "very limited" takes too lightly the constitutional compromise reached in 1787 and the U.S. Supreme Court's application of that compromise, such as Perpich v. Department of Defense, 496 U.S. 334, 110 S.Ct.2418, 110 L.Ed.2s 312 (1990). The City has, in effect, removed the "state hat" from the closet and discarded it. See pages 9-13 of Appellants' initial brief.

"Benchmark" for use of the runway. The City also asserts (p.10) that in order for the cognizable change standard to be satisfied, an existing airport permit had to have contained a specification of the type of aircraft being permitted. Otherwise, argues the City, there is no benchmark against which a change can be compared. The City argues that Act 250 requires such benchmarks because otherwise any Act 250- permitted roadway would require an amended permit "every time a new model car or truck were released." Intervenors make a similar argument (p.18). But the City and Intervenors have admitted that the permit applications for the existing runway, in effect, did contain just such a benchmark. The City's Statement of Undisputed Facts states that the permits sought and obtained were only for civilian aircraft. The use of the runway for military aircraft has never been sought or obtained. To use the City's analogy, the permits here were for cars only and now trucks are being used.

The City relies on Hiddenwood Subdivision, DR #378 (1/8/2000) for the proposition that a benchmark is needed. Hiddenwood addressed an alleged change to a subdivision where the plans in the Act 250 permit file for the subdivision had contained no details for any of the driveways to the lots created by the subdivision -- the creation of the lots had been approved of

but without any showing of how they would be accessed. In response to a complaint that an access road was being constructed without a permit amendment, the Board ruled that without some sort of benchmark showing how the lots were to be accessed, there was insufficient proof of a material change. Hiddenwood's facts are a far cry from the present case. Here, the existing permits were for civilian aircraft use of the runway and the longterm historic use of the runway is about to change with the introduction of a new, unanticipated military technology that did not exist at the time of the original permitting and which will inflict severe, far-reaching impacts on the community that were unprecedented and unforeseeable at the time of the original permitting. The reasoning of Hiddenwood compels a contrary outcome on the facts of this case.

"Benchmark" for Leased Lands. The City argues (p.10) that there is no cognizable change to the use of the leased lands because there have already been many different types of aircraft used there. But the change in use on the leased lands is not just a change in the type of aircraft. The project would include 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.) ASOUF ¶ 3 (EIS p.BR4-6). 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. The cases do not require that the prior permit establish a benchmark where the benchmark is established by the facts on the ground at the time the permit was granted. 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). The Board's and the Environmental Division's many decisions on whether a grandfathered use has undergone a "substantial change" usually rely on just this type of historic facts to establish a benchmark; no approved plan or permit condition containing the benchmark is needed, nor could it be, since the grandfathered operation by definition predated Act 250.

Intervenors' misreading of Act 250 language. Intervenors Argument I (pp.4-9) is based on a misreading of the statute. Intervenors argue that the statute, §§ 6001(3)(a)(v) and 14(A), limits "development" to land that is under the control of a state, municipal or commercial entity; since the federal government leases the VANG building sites, there is no state control, according to this argument. But the section defining development does not say that. The definition addresses land that "is to be used" for state purposes, without regard to control or ownership. The Rules define that state purpose, as explained in Appellants' initial brief. Those Rules include this project. Intervenors and the City are seeking a way to argue that the plain meaning of the statute controls over the Rules, but it does not.

Unsupported Factual Allegations by Intervenors. Intervenors have submitted pages of factual argument without any foundation in any Statement of Undisputed Facts or affidavit See pages 18-20. These arguments should be rejected.

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.

January 10, 2014

Richard Joseph et al.

BY:
James A. Dumont
James A. Dumont, Esq.

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