

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' STATEMENT OF QUESTIONS FOR APPEAL

Now come Appellants, by and through the Law Office of James A. Dumont, Esq., PC, and they submit the following questions for appeal pursuant to V.R.E.C.P. 5(f).

1. Under Act 250 and Land Use Panel Rules 2 and 34, does the proposal of the State of Vermont Air National Guard (VT ANG) and the City of Burlington to base F-35 jets at the Burlington International Airport (BIA) and the \$2.3 million worth of new construction that VT ANG proposes to undertake at the BIA to accommodate the F-35 jets, and the resulting acquisition by the City of Burlington of residential properties, razing of those homes, and creation of large areas of empty lots in residential neighborhoods, in order to mitigate the increased noise impacts of F-35 jets, as set forth in the City of Burlington's noise mitigation plans and policies and its longstanding noise mitigation practices, require an amendment to Act 250 permits already issued to the City of Burlington and/or VT ANG (including but not limited to Permits 4C0015, 4C0331, 4C0034 and 4C0034-9, pertaining to the runways that F-35 jets would use and/or the land on which the new facility would be constructed), because the change of use and/or the construction and/or the acquisition and razing of homes and the changes to residential neighborhoods will be "material changes?"
2. Under Act 250 and Land Use Panel Rules 2 and 34, does the proposal of the VT ANG and the City of Burlington to base F-35 jets at the BIA and the \$2.3 million worth of new construction that VT ANG proposes to undertake at the BIA to accommodate the F-35 jets, and the resulting introduction into residential neighborhoods -- affecting thousands of residences -- of unprecedented levels of noise substantially exceeding generally accepted state and federal standards for residential use of property, require an amendment to Act 250 permits already issued to the City of Burlington and/or VT ANG (including but not limited to Permits 4C0015, 4C0331, 4C0034 and 4C0034-9 pertaining to the runways that F-35 jets would use and/or the land on which the new facility would be constructed), because the change of use and/or the

construction will be “material changes?”

3. Under Act 250 and Land Use Panel Rules 2 and 34, does the proposal of the VT ANG and the City of Burlington to base F-35 jets at the BIA and the \$2.3 million worth of new construction that VT ANG proposes to undertake at the BIA to accommodate the F-35 jets, and the resulting acquisition by the City of Burlington of residential properties, razing of those homes, and creation of large areas of empty lots in residential neighborhoods, in order to mitigate the increased noise impacts of F-35 jets, as set forth in the City of Burlington’s noise mitigation plans and policies and its longstanding noise mitigation practices, require an act 250 permit or Act 250 permits because the change of use and/or the construction and/or the acquisition and razing of homes and the changes to residential neighborhoods will be “substantial changes?”
4. Under Act 250 and Land Use Panel Rules 2 and 34, does the proposal of the VT ANG and the City of Burlington to base F-35 jets at the BIA and the \$2.3 million worth of new construction that VT ANG proposes to undertake at the BIA to accommodate the F-35 jets, and the resulting introduction into residential neighborhoods -- affecting thousands of residences -- of unprecedented levels of noise substantially exceeding generally accepted state and federal standards for residential use of property, require an Act 250 permit or Act 250 permits because the change of use and/or the construction will be “substantial changes?”
5. Under Act 250 and Land Use Panel Rules 2 and 34, do the plans of the VT ANG to base F-35 jets at the BIA and the \$2.3 million in construction needed for the F-35s, require an Act 250 permit or permits, or an amended Act 250 permit or permits, on the basis of the detailed factual allegations submitted by Appellants to the District Coordinator in the submissions dated December 12, 2012, January 29, 2013, and February 21, 2013?
6. A. Do the City of Burlington and the VT ANG have the burden of proving the affirmative defense that the proposal to base F-35 jets at the Burlington International Airport (BIA) and the \$2.3 million worth of new construction that VT ANG proposes to undertake at the BIA to accommodate the F-35 jets, the resulting introduction into residential neighborhoods -- affecting thousands of residences -- of unprecedented levels of noise substantially exceeding generally accepted state and federal standards for residential use of property, and the resulting acquisition by the City of Burlington of residential properties, razing of those homes, and creation of large areas of empty lots in residential neighborhoods, in order to mitigate the increased noise impacts of F-35 jets, as set forth in the City of Burlington’s noise mitigation plans and policies and its longstanding noise mitigation practices, all are exempt from Act 250 jurisdiction because of an alleged federal purpose or alleged federal preemption of state law? If so, can the City of Burlington and the VT ANG meet that burden?

B. Did the District Coordinator err as a matter of law in ruling that the proposed changes are exempt from Act 250 on the basis that they would serve a federal purpose because under the Vermont Constitution, the statutes governing the VT ANG and the definition of “development” in Act 250 and the Land Use Panel rules, the construction of the \$2.3 million facility to serve

the VT ANG constitutes the construction of improvements for a “state purpose” including the VT ANG’s “state purpose” of assisting in the defense of the United States of America, and because there is no exemption for state purposes that also serve federal purposes?

C. Did the District Coordinator err as a matter of law in ruling that the proposed changes are preempted from review under the Supremacy Clause on the theory that Appellants’ concern about noise impacts means they actually seek to regulate the movement and operation of aircraft, because *i*) Appellants actually seek a ruling in the present matter solely that a permit or permit amendment must be obtained under the material change or substantial change standards; *ii*) it would be premature to rule that any or all of the orders or conditions that might be imposed by the District Commission necessarily would be preempted; and *iii*) there is no federal preemption of generally applicable state environmental laws governing airports unless the application of those laws would have the *actual effect* of interfering with aircraft *safety* (see, e.g., Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission, 634 F.3d 206 [2d Cir. 2011])?

D. Are any or all of these activities alleged in paragraph A exempt?

E. Even any or all of these activities would otherwise be exempt, if they constitute a material change to an existing permit, must the City of Burlington and/or the VT ANG obtain a permit amendment?

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BY:

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