

**IN THE SUPREME COURT
OF THE
STATE OF VERMONT**

DOCKET NO. 2014-192

**IN RE: BURLINGTON AIRPORT A250 JO 4-231
(F-35A JETS)**

**APPEALED FROM:
VERMONT SUPERIOR COURT, ENVIRONMENTAL DIVISION
DOCKET NO. 42-4-13 Vtec**

**SUPPLEMENTAL PRINTED CASE
OF APPELLEE
CITY OF BURLINGTON**

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March 21, 2013

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RE: Jurisdictional Opinion #4-231
F-35A - Burlington International Airport, South Burlington, Vermont

Dear Messrs. Dunkiel and Dumont:

This jurisdictional opinion was initiated pursuant to Mr. Dumont's written request of December 12, 2012 and the City of Burlington's ("City") request of January 31, 2013 regarding the applicability of Act 250 jurisdiction over the proposed siting of F-35A jets at the Burlington International Airport ("BTV" or "Airport") and to construct \$2.3 million of new improvements to accommodate the F-35A jets. I have based my analysis on Mr. Dumont's submittals (December 12, 2012, January 29, 2012 and February 21, 2013); the City's submittals (January 31, 2013 and March 12, 2013); data from the Burlington International Airport website; and files in our office. For the reasons set forth below, I have determined that Act 250 jurisdiction does not apply for the proposed siting of F-35As or the proposed improvements.

Facts

1. On Saturday, August 14, 1920, the first aircraft landed at what was, at the time a 72-acre cornfield in South Burlington, Vermont. On July 9, 1921, Burlington Mayor Jackson approved the action of the Board of Alderman to rent and improve fields near Williston Road belonging to C.W. Brownell and C.J. North for use as a landing field and became the Burlington Municipal Airport.
2. The land, on which the Vermont Air National Guard base ("Base") is currently located is situated on the north side of the Airport's runway and was initially used as part of the Ethan Allen Air Force Base ("Ethan Allen AFB"), a United States Air Force Base. While the Ethan Allen AFB was located on land owned by the City, documents submitted by the City indicate that there were formal lease agreements between the City and the U.S. Air Force ("USAF") for the land at least as early as 1946.
3. After World War II, Ethan Allen AFB continued to be used by the USAF. In 1951, the Air Defense Command ("ADC") assigned the 134th Fighter Squadron ("134 FS") to the Base. The mission of the squadron was air defense of northern New England. The 134 FS was subsequently released from active duty and returned to the control of the State of Vermont in 1952. At that time, it was replaced by the ADC's 37th Fighter-Interceptor Squadron ("37 FIS"). With the release of the Air National Guardsmen from federal service, Ethan Allen AFB was re-activated by ADC on the north side of the Airport in 1953.



4. With the inactivation of the active-duty 134 FIS, the group was reorganized as the 158th Fighter Interceptor Group ("158 FIG") in mid-1960 when the Vermont Air National Guard ("VTANG") began manning alert hangars 24 hours a day. Also in 1960, the Maintenance and Operations Squadrons moved into the former Ethan Allen AFB facilities on the north side of the Airport. The rest of the 158 FIG remained on the Williston Road side of the airfield, and military vehicles were allowed to cross the east end of the runway to transport personnel and materials after receiving clearance from the tower.
5. The ADC closed the Ethan Allen AFB on May 1, 1960 due to budget constraints. With its release from active duty, the VTANG's 134 FIS began operating out of the old airport administration building and the wooden hangar next to it.
6. On November 18, 1971, LUP #4C0015 was issued for an airport hangar and support facilities. This was the first Act 250 Land Use Permit issued to the Airport.
7. On February 23, 1972, the District #4 Commission issued LUP #4C0034 for a major expansion of the existing airport terminal at BTV. The property was then listed as 50 acres.
8. Act 250 permits for the Airport have since followed two basic series #4C0034 and #4C0331. Most of the recent permit amendments (since 1988) have used the #4C0331 series. The numbers are used for administrative reasons and do not have other significance.
9. A Master Plan Act 250 application (#4C0034-9 / #4C0071) for BTV was submitted on April 10, 1987. A hearing was scheduled and held and a second hearing was scheduled. However, to the best of our knowledge the second hearing was not held nor was a permit or findings issued.
10. BTV is a part of the City of Burlington and thus is a municipal entity pursuant to Act 250 Rule 2(C)(14).
11. The National Guard Bureau administers the Air National Guard, a joint bureau of the departments of the Army and Air Force. When Air National Guard units are not mobilized or under federal control, they report to the governor of their respective state, territory or the commanding general of the District of Columbia National Guard. The adjutant general of the state or territory supervises each of the 54 National Guard organizations. Under state law, the Air National Guard provides protection of life, property and preserves peace, order and public safety.
12. According to the Draft USAF F-35A Operational Basing Environmental Impact Statement, the Air Force's purpose for siting the F-35A aircraft at the Airport (i.e. the purpose of the Air Force's proposed action) "is to efficiently and effectively maintain combat capability and mission readiness as the Air Force faces deployments across a spectrum of conflicts while also providing for homeland defense of the U.S." This purpose supports the "overall mission of the Air Force," which is the "defense of the U.S. and fulfillment of directives of the President and the Secretary of Defense."
13. From time to time, the City and the Federal Government have executed supplements to their leases, with the latest one dated March 26, 2012. Currently, the term of the lease has been extended through June 30, 2048.
14. The Environmental Board ruled that the purpose of basing of F-4D Phantoms at the Base is a federal purpose based on the following factors: the improvements are to be (1) constructed, (2) funded, (3) owned by the federal government, and (4) are located on more than ten acres of land controlled by the federal government. Therefore, their siting did not require an Act 250 permit. See *Vermont Air Natl. Guard Declaratory Ruling #134, Findings of Fact, Conclusions of Law and Order* at 3-4 (July 20, 1982) affirming the Project Review Sheet ("PRS") determination

- of January 12, 1982. There is no evidence indicating that the Base has not been in continuous federal control for a federal purpose since the Environmental Board's decision on VTANG.
15. I issued a PRS on August 27, 2002, in which I concluded that work planned within the perimeter of the Base, including parking, fencing, taxiways, and the like, did not require an Act 250 permit "due to the combination of the federal purpose for the project and the federal control of the land."
 16. On August 12, 2004, I concluded in another PRS that a VTANG-related project did require an amendment to Permit #4C0331. This conclusion was based on the fact that the project planned to replace the existing aircraft arresting system on the airport runway, which was situated outside the Base perimeter and thus was not located on federally-controlled land. Consequently, I determined that those proposed improvements were not eligible for the federal purpose and federal control exemption because the land was not under federal control.
 17. The \$2,300,000 in improvements for the siting of F-35As include: (1) internal improvements to Building 120 for F-35A simulator; (2) providing power in aircraft shelter parking areas; (3) providing secure/classified upgrades inside Building 140; and (4) providing a secure parts storage in Building 70.
 18. Those who seek Act 250 review of the above improvements assert that F-35As generate more noise than the noise generated by the F-16s that are currently housed at the Base; increased noise levels are of concern to those who live in the vicinity of the Base, and it is the increase in noise that forms the basis of claims that the proposed VTANG improvements should be subject to Act 250 jurisdiction. No other impacts from the improvements are raised as grounds for the assertion of jurisdiction.
 19. Seventy one (71) Act 250 permits and amendments have been issued to BTV.¹ Eleven (11) have dealt with the terminal and parking garage/lots; twenty one (21) have dealt with hangers and maintenance facilities; twelve (12) were for stormwater or wastewater systems and eleven (11) were for facilities tangential to airport flight operations (e.g. a dog park on airport land, quarry operations, master plan for the southern development area). None of these dealt with aircraft operations or noise generated by aircraft. Eighteen (18) permit amendments have dealt with runways and taxiways, and these are the only amendments that have dealt directly with aircraft operations. Land Use Permits #4C0331-13 and amendments -A, -B and -C, and #4C0331-26 have dealt with Runway 15-33, the main runway. No permit covers area within the perimeter of the Base.
 20. At all relevant times, the City of South Burlington has had duly adopted subdivision and zoning ordinances.

Issue

Does the siting of F-35A jets and the concomitant construction require an Act 250 permit as either development, pursuant to 10 V.S. 6001(3)(A)(v) or as a Material Change, pursuant to Act 250 Rule 2(C)(6) to issued Airport permits or as a Substantial Change, pursuant to Act 250 Rule 2(C)(7)?

¹ There is no Master Plan permit for the airport; the processing of the application for a Master Plan (#4C0034-9) was never completed.

Analysis

Development (original jurisdiction)

Act 250 jurisdiction is triggered by either “development” or “subdivision”. “Development” is defined, in part, as “The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.” 10 V.S.A. § 6001(3)(A)(i). “Development” is also defined as “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.” 10 V.S.A. §6001(3)(v).

Act 250 Rule 2(C)(2) defines construction of improvements “as any physical action on a project site which initiates development.” *Re: Real J. Audet and Joe Audet Auto and Truck Sales, Inc.*, Declaratory Ruling #409, Findings of Fact, Conclusions of Law and Order 5 (Vt. Env. Bd. December 5, 2002), *aff’d In re Real Audet*, 2004 VT 30.

The construction of improvements contemplated here are for federal purposes, *Vermont Air National Guard*, Declaratory Ruling #134 (Vt. Env. Bd. July 20, 1982) (“the combination of solely federal purpose and federal control² leads us to conclude that the proposed improvements are not for state purposes within the meaning of 10 V.S.A. § 6001(3).”).

Construction of improvements for a federal purposes is not an action listed within the purposes (commercial, industrial, municipal, county or state) enumerated in the definition of “development” in 10 V.S.A. § 6001(3), and thus it is not within the jurisdiction of Act 250. Therefore, I conclude that the \$2.3 million of improvements do not trigger the requirement for an Act 250 permit pursuant to 10 V.S.A. § 6001(3) as original jurisdiction.

Amendment Jurisdiction

There is a second way that jurisdiction on this property could be triggered, if the proposed jet siting and improvements are a material change to any land use permit that has been issued to BTW. Act 250 Rule 2(C)(6) defines a material change as any change to a permitted development or subdivision which has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in an impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10).

The test for applying Rule 34(A) (“material change” to a permitted development) is whether the change 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. Act 250 Rule 2(C)(6). The test for determining whether a “substantial change” to a pre-existing development has occurred, 10 V.S.A. §6081(b), is virtually identical to the “material change” test in all pertinent respects. *See* Act 250 Rule 2(C)(7) (“‘substantial change’ means any change in a preexisting development or subdivision which may result in significant adverse impact with respect to any of the criteria...”).

First we need to determine if there is a change. There are no physical improvements proposed for the runways and all other improvements (Finding #17) are to the Base that is not governed by any land-

² While the land on which the improvements are to be made is City land, I note that the lease of the land to the VTANG extends for the next 35 years. The VTANG’s long-term control of this land further demonstrates that this project serves a federal purpose for the reasons set out in the Environmental Board’s *Vermont Air Natl. Guard* decision.

use permit. We have not identified any finding, conclusion, term or condition of the Airport's permits that would be significantly impacted by the use of F-35A jets.

As noted in Finding #18, there were no other claims of adverse significant impacts under an Act 250 criterion, other than increased noise from the operation of F-35A jets. In *In re Commercial Airfield*, 170 Vt. 595 (2000), the Vermont Supreme Court held that Act 250 was not precluded from regulating many of the aspects of an airport that arise within the Act 250 Criteria. However, our Supreme Court cited the United States Supreme Court decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 627 (1973), for the proposition that "the FAA has authority over air safety concerns and aircraft noise" and that thus, a regulation "that attempted to interfere with the movements and operation of aircraft" would be pre-empted under the Supremacy Clause, U.S. Const, art. vi, cl. 2.

Therefore, I conclude that the noise arising from the potential siting of F-35A jets at the Burlington Airport is outside the scope of Act 250. There is thus no need to engage further in a "substantial change" or "material change" analysis.³

Conclusions

The siting of F-35A jets and the \$2.3 million of improvements do not trigger the requirement for an Act 250 permit or amendment.

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 and the 5% surcharge required by 32 V.S.A. § 1434a(a), which is \$262.50 as of January 2011.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

³ Nor do I find the *Eustance* decision to mandate jurisdiction. *In re Eustance Act 250 Jurisdictional Opinion*, 2009 VT 16, 185 Vt. 447 (2009). *Eustance* did not address the issues presented here, namely Act 250's regulation of federal activities and preemption.

If you have any questions regarding this jurisdictional determination, please call me at (802) 879-5658.

Sincerely,



Peter E. Keibel
District #4 Coordinator

Cc: Ron Shems, Chair, NRB
Louis Borie, Executive Director, NRB
John Hasen, Esq., General Counsel, NRB
Gregg Myers, Esq., City of Burlington
Eileen Blackwood, Esq., City of Burlington
Gene Richards, Burlington International Airport
Robert McEwing, Burlington International Airport
Major James G. Gentry, USAF
Cara Johnson, Esq., USAF
Ray Belair, City of South Burlington
Rosanne Greco

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CERTIFICATE OF SERVICE

I hereby certify on this 21st day of March, 2013 a copy of the foregoing Jurisdictional Opinion #4-231 to Burlington International Airport, c/o Brian Dunkiel, Esq. and James Dumont, Esq., Law Office of James Dumont, Esq., re F-35A, Burlington International Airport, South Burlington, VT, was sent by U.S. mail, postage prepaid to the following individuals without email addresses and by email to the individuals with email addresses listed.

Note: any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes. All email replies should be sent to nrb-act250essex@state.vt.us

Burlington International Airport
c/o Brian Dunkiel, Esq.
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Dated at Essex Junction, Vermont, this 21st
day of March, 2013.

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FOR YOUR INFORMATION

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Natural Resources Board
Montpelier, VT 05620-3201

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 42-4-13 Vtec

Re: Request for Jurisdictional Opinion re:)
Changes in Physical Structures and Use at)
Burlington International Airport for F-35A)
Vermont Air National Guard Jets)

NOTICE OF CROSS-APPEAL

Party Taking Cross-Appeal: City of Burlington

Party Status Authority: This cross-appeal is taken pursuant to 10 V.S.A. § 8504, Vt. Env. Ct. Rule 5

Decision Appealed: March 21, 2013 Jurisdiction Opinion # 4-231

Court of Appeal: Superior Court of Vermont – Environmental Division

Property Address/Location: Burlington International Airport, South Burlington, Vermont

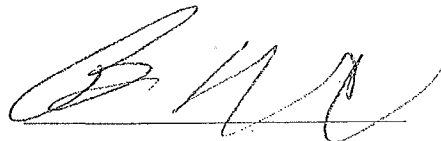
Description of Project: Jurisdiction Opinion # 4-231

Notice to Interested Parties: Any interested person must enter an appearance in writing with the Superior Court, Environmental Division, within 20 days of receiving this notice, or within any other time as may be provided under Vermont Rule of Environmental Court Procedure 5(c), if they wish to participate in this appeal.

DATED at Burlington, Vermont, this 13th day of May, 2013.

DUNKIEL SAUNDERS ELLIOTT RAUBVOGEL & HAND, PLLC

by:



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STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 42-4-13 Vtec

Re: Request for Jurisdictional Opinion re:)
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CROSS APPELLANT THE CITY OF BURLINGTON'S STATEMENT OF QUESTIONS

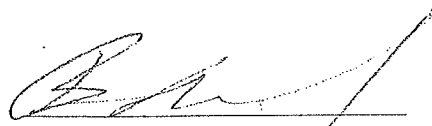
Now comes the City of Burlington, by and through its attorneys Dunkiel Saunders Elliott Raubvogel & Hand, PLLC, and pursuant to Vermont Rule for Environmental Court Proceedings 5(f), propounds the following Statement of Questions:

1. Does the proposal by the U.S. Air Force to site F-35A jets on property leased by the U.S. Air Force at the Burlington International Airport ("BTV") and to construct improvements on the leased land to accommodate the F-35A jets require an amendment to the BTV Act 250 permit, or otherwise trigger Act 250 jurisdiction?
2. Is the Court limited in the evidence it may consider to only that evidence offered by the person or persons who first requested the jurisdictional opinion at issue in this appeal from the district coordinator?

DATED at Burlington, Vermont, this 13th day of May, 2013.

DUNKIEL SAUNDERS ELLIOTT RAUBVOGEL & HAND, PLLC

by:



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