SUPREME COURT OF THE
STATE OF VERMONT

Re: Request for Jurisdictional Opinion re:
Changes in Physical Structures and Use at
Burlington International Airport for F-35A
Vermont Air National Guard Jets ("Burlington
Airport A250 JO 4-231")

Supreme Court Docket No. 2014-192
Environmental Div. Docket #42-4-13 Vtec

DOCKETING STATEMENT OF APPELLANTS

A. COURT/COUNSEL.

1. Trial Judge: Hon. Thomas Walsh
2. Trial counsel for Appellants: James Dumont
3. Trial counsel for Appellees: Brian Dunkiel, Erik Nielsen & Gregg Meyer for City
4. Counsel in Supreme Court for Appellants: James A. Dumont, Esq.
5. Counsel in Supreme Court for Appellee: presumably the same as below
6. Other parties and their counsel: Peter Gill for NRB; Chris Roy for Friend of Air Guard and GBIC
7. Date of decision being appealed: May 13, 2014
8. Date notice of appeal filed: May 29, 2014

B. CRIMINAL CASES: N/A

C. BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT

This appeal addresses the changed use of the Burlington International Airport and of the adjacent lands used by the Vermont Air National Guard, an agency of the State of Vermont, in South Burlington, Vermont, for the basing of F-35 fighter-bomber jets, including the changed use of the runways and the construction of millions of dollars of improvements. The landowner is the City of Burlington. An Environmental Impact Statement (EIS) prepared by the Secretary of the Air Force concluded that VANG operation of the F-35s would *quadruple* the instantaneous sound impacts

("Lmax") of jet noise at some locations and would causes *thousands* of homes in Winooski and elsewhere to fall within the 65 db DNL noise zone that the Federal Aviation Administration (FAA) considers incompatible with residential use. The City's past practice has been to purchase and raze homes that experience 65 db DNL.

Appellants argued that the District Commission has jurisdiction over the proposed project because: 1) the Vermont National Guard is a state agency; 2) the proposed basing of the F-35 jets and its associated $4.7 million worth of construction, constitute development within the meaning of Act 250, and also constitute a material change to an existing permit and a substantial change to a use predating Act 250; and 3) state jurisdiction has not been federally preempted; indeed federal law unambiguously acknowledges state jurisdiction over state national guards. Appellants also referred the Environmental Division to . In re: Commercial Airfield (Edward V. Peet, Appellant), 170 Vt. 595, 752 A.2d. 13 (2000) and 10 V.S.A. § 6092, which reject the concept that federal preemption of some aspects of a land use means that there is no Act 250 jurisdiction over other parts, including reasonable mitigation measures that do not interfere with the purpose of the preempted activity. .

The Appellants submitted the following Statement of Questions to the Environmental Division:

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?

The City filed for summary judgment, attaching the Final EIS prepared by the Secretary of the

Air Force. The City argued that there is no state purpose and no material change or substantial change, and also that it would be unconstitutional for Act 250 to regulate land use at the airport that serves the purposes of the Vermont Air National Guard. Appellants replied with their own Statement of Undisputed Facts and memoranda. The City's motion was granted on May 13, 2014. The Environmental Division determined that there is no state purpose and therefore no Act 250 jurisdiction. The Environmental Division also found there to be no change in use, again resulting in no Act 250 jurisdiction.

D. STATEMENT OF ISSUES TO BE RAISED ON APPEAL

(Appellant should state each question in a separately numbered paragraph. Appellee should briefly state position on each question enumerated by appellant and state any cross-appeal questions. All parties should read VRAP 10(b) before completing this section. Separate pages may be attached.)

1. Does the City lack standing under the Vermont Constitution to challenge the constitutionality of Act 250, as explained in Town of Andover v. State, 170 Vt. 552, 742 A.2d 756 (1999)?
2. Does any intervenor have standing under the Vermont Constitution to challenge the constitutionality of Act 250 in this case?
3. Is application of Act 250 to a change in the use of a city-owned airport's runways by a state agency, the Vermont Air National Guard, wholly preempted by federal law, so that a District Commission can neither decide on whether a permit should be granted nor impose any conditions on the city or the state in order to mitigate the impacts?
4. Is application of Act 250 to construction of improvements on city-owned land adjacent to a city-owned airport's runways for use by a state agency, the Vermont Air National Guard, wholly preempted by federal law, so that a District Commission can neither decide on whether a permit should be granted nor impose any conditions on the city or the state in order to mitigate the impacts?
5. Is the City correct in arguing, in effect, that once a city-owned airport is chosen as the base for a state Air National Guard unit, state and local law completely cease to apply to the use, expansion and environmental impacts of the Air National Guard's use and only the Secretary of the Air Force has the authority to address these issues?
6. Did the Environmental Division err as a matter of law in applying and interpreting the

definition of "state purpose" in Act 250, ignoring multiple decisions of the Supreme Court of Vermont in reliance on an Environmental Board decision that predated the Supreme Court opinions and which was been superseded by later Environmental Board decisions?

7. Did the Environmental Division err as a matter of law in finding that the existence of a federal purpose means there is no state purpose?
8. Did the Environmental Division err as a matter of law in applying and interpreting the precedents and statutory intent in interpreting and applying the meaning of a "material change?"
9. Did the Environmental Division err as a matter of law in applying and interpreting the precedents and statutory intent in interpreting and applying the meaning of a "substantial change?"

E. PHOTOCOPIES OF DOCUMENTS TO BE ATTACHED.

Was there a written decision? *Yes. The decision dated May 13, 2014, is attached.*

F. INVENTORY OF HEARINGS; TRANSCRIPTS ORDERED.

The appellant must list every recorded hearing which was held in this matter, including the date, type of hearing (e.g. pretrial, suppression, status conference, trial) and the stenographer for each. If the hearing was tape-recorded, so state instead of naming the stenographer. Attach additional pages if needed. (NOTE: Transcripts must be ordered within 10 days of notice of appeal; the attorney ordering transcripts must serve copies of each order upon the clerk of the Supreme Court and all parties, as well as the trial court. See VRAP 10(b)(1)).

Date	Length (days/hours)	Type	Reporter's Name	Transcript nec. for appeal?	Date ordered

NONE

Does the Appellee agree as to which transcripts are essential for the appeal? If not, indicate names, dates and reporters of additional transcripts needed.

The transcripts all have been prepared already, and Appellant is obtaining copies.

G. CONFERENCE; EXPEDITED RESOLUTION

1. Do you request a conference with a staff attorney to discuss either settlement or expedited resolution? No.

2. Is this matter appropriate for expedited resolution by a three-justice panel pursuant to VRAP 33.1 and the criteria set forth in VRAP 33.2? No.

Please explain: The appeal raises legal issues requiring Court determination.

Submitted by: **James A. Dumont, Esq.**

Dated this 4th day of June, 2014.

Signed: *James A. Dumont*
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cc: Brian Dunkiel, Esq.; Erik Nielsen, Esq. (without attachment)
Gregg Meyer, Esq. (without attachment)
Chris Roy, Esq. (without attachment)