

**STATE OF VERMONT
VERMONT TRANSPORTATION BOARD**

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In re: TB-478 DuPont/Cotton RLA application

RECESS MEMO AND ORDER

Applicants Larry DuPont and Glenn Cotton, pursuant to 5 V.S.A. § 207, applied to the Board for a Restricted Landing Area (RLA) at 89 Macomb Bay Lane in North Hero. The proposed RLA is an airstrip with a usable length of 2,000 feet and usable width of 60 feet. The Board held a site visit, public hearing, and contested case hearing on October 31, 2018. Numerous public comments were made. The Applicants, two experts retained by the Applicants, North Hero Selectboard Chair Eileen Mitchell, North Hero Fire Chief Michael Murdock, Vermont Department of Fish and Wildlife Biologist John Gobeille, and several neighbor-parties presented testimony at the contested case hearing. Testimony and exhibits presented by the Applicants, Town and neighbor parties at the contested case hearing addressed the Town's process for review of the RLA. The Vermont Department of Fish and Wildlife and some neighbors testified about an active bald eagle nest near the proposed RLA. Bald eagles are classified as endangered in the State of Vermont. The hearing was not completed and recessed at 3:00 p.m.

Under 5 V.S.A. § 207(d), an applicant must support its application for a restricted landing area with, among other things, "documentation showing that the proposed facility has received municipal approval." The Applicants have not done that here. They attached an August 8, 2018 letter from the North Hero Select Board Chair stating that North Hero "has no zoning bylaws or ordinances prohibiting their request." At hearing on October 31, 2018, Select Board Chair Eileen Mitchell read the motion adopted by the Select Board memorialized by the August 8 letter. She further explained that the town's action was based on the understanding that it had no applicable authority. The Select Board Chair's explanation prompted the Applicants to submit their Exhibit 2, an email from the Town Attorney to the Town stating that, "the regulation of that use [RLA] by a town is preempted by state and federal law," and advising the Select Board to act in lieu of the appropriate municipal land-use panel.

Any question of preemption by state law is addressed by 5 V.S.A. § 207(d) that explicitly requires municipal approval. Federal law does preempt regulation of several aspects of an airport such as noise and use of the airspace. In re: Changes in Physical Structures & Use at Burlington Airport for F-35A, 2015 VT 41, ¶¶27-31; In re: Commer. Airfield, 170 Vt. 595, 596-97 (2000). However, land use issues (to the extent that they are not a proxy for noise or management of airspace) are not preempted. Id. This is particularly true in determining whether a new RLA is an appropriate land use. See In re: Changes in Physical Structures & Use at Burlington Airport for F-35A, at ¶¶ 29-30.¹

¹ The Board also notes that, in a separate matter, the Town of North Hero submitted a decision by its Development Review Board denying an application for a RLA – in that case a helipad. In re: Brett and Diana Kernoff, North Hero Bd. of Adjustment, Permit No. 8655 (May 19, 2002). The Applicants and Ms. Mitchell were not aware of that DRB action. The Board is not considering the merits of the

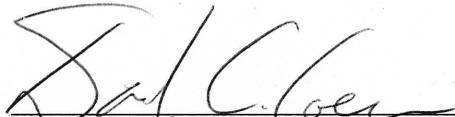
The Select Board framed the question here as whether zoning bylaws or ordinances “prohibit” the RLA. The material question here is whether North Hero can provide “approval,” 5 V.S.A. § 207(d), of this proposed RLA under land-use regulations not preempted by federal law. It may turn out that North Hero’s zoning bylaw or some other ordinance may address, partially address, or not address the siting of this proposed new RLA. This is a determination that rests with the appropriate municipal panel of the Town of North Hero. The rationale provided by the Applicants and Town here does not sufficiently address the requirement that the Applicants document municipal approval. The Board has determined that it will allow the Applicants time to better document any municipal approval.

The Board also heard testimony that the Applicants may need a so-called “take” permit because an active bald eagle nest is close to the proposed RLA. See 10 V.S.A. Ch. 123. The Applicants should use the time allowed by this ORDER to apply for such a permit or seek a formal determination that a permit is not required.

For the above reasons, the Board hereby ORDERS that:

1. The Applicants renew their request for municipal approval before the appropriate municipal panel;
2. The Applicants apply for a permit under 10 V.S.A. Ch. 123, or seek a formal determination that such a permit is not required;
3. This matter is recessed until such time that final decisions regarding municipal approval and the bald eagle nest have issued; and
4. The Applicants shall notify the Board of their decision to pursue, or not pursue, the above-mentioned decisions. The Board may dismiss the application as incomplete if the Applicants do not provide notification within 90 days of this Order.

SO ORDERED on November 7, 2018:


David C. Coen, Chair
Vermont Transportation Board

Concurring:

T. Faith Terry
Vanessa Kittell
Richard Bailey
Wendy Harrison
Timothy Hayward

DRB’s decision, but that decision indicates that there is a process for determining the applicability of North Hero’s zoning bylaw to the RLA here.