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Base Realignment and Closure (BRAC): Property Transfer and Disposal

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Base Realignment and Closure: Property Transfer and Disposal

Summary

The Defense Base Realignment and Closure Act of 1990 and the Federal Property and Administrative Services Act of 1949 provide the basic framework for the transfer and disposal of military installations closed during the base realignment and closure (BRAC) process. In general, property at BRAC installations is first subjected to screening for use by the Department of Defense and by other federal agencies. If no federal use for the property can be found or if an application for transfer is rejected, the property is deemed "surplus" to the needs of the federal government and made available for disposal through other mechanisms.

At this point, BRAC property is subjected to two simultaneous evaluation processes: the redevelopment planning process performed by a local redevelopment authority comprised of various interested representatives of the community affected by the BRAC action; and a Department of Defense analysis prepared under the aegis of the National Environmental Policy Act and, eventually, informed by the local redevelopment plan.

As a part of this process, screening of the property must be performed to determine if a homeless assistance use would be appropriate. There are also a variety of "public benefit transfers," under which the property may be conveyed for various specified public purposes at reduced cost. It is also possible to dispose of BRAC property through the use of a public auction or negotiated sale, for which fair market value or a proxy for fair market value must generally be obtained. Finally the law governing the BRAC process authorizes economic development conveyances, through which a local redevelopment authority may obtain the property for specified purposes, sometimes for no consideration, and implement its redevelopment plan itself.

A series of legislative and administrative changes have altered the BRAC property transfer process since the last round of closures in 1995. This report provides an overview of the various authorities available under the current law and describes the planning process for the redevelopment of BRAC properties. It also explains the provisions of a recently proposed rule for the administration of BRAC property transfers issued by the Department of Defense. This report will be updated as events warrant.

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Introduction

The nation's military installations have gone through several rounds of base realignments and closures (BRAC), the process by which excess military facilities are identified and, as necessary, transferred to other federal agencies or disposed of, placing ownership in non-federal entities. Since the enactment of the Defense Base Closure and Realignment Act of 1990 (Base Closure Act), transfer or disposal of former military installations has been governed by relatively consistent legal requirements. On December 28, 2001, a new round of base closures in 2005 was authorized by Congress.[1] Subsequently, the Department of Defense (DOD) submitted its recommended BRAC action to the BRAC Commission. The Commission reviewed and revised DOD's recommendations and forwarded its report to the President. Most recently, on September 15, 2005, the President submitted the list of recommended BRAC actions to Congress.

The current BRAC law is similar to the original statute and retains many of the transfer authorities that were available in previous rounds. However, significant amendments in 1999 and 2001 altered portions of the law's disposal authorities. Consequently, DOD has promulgated new proposed regulations to implement the property disposal authorities available for the 2005 round.[2] This report provides an overview of the transfer and disposal authorities available under the law for military installations that may be closed during the 2005 round and indicates how recent amendments to the Base Closure Act have altered the property transfer and disposal process.[3] It also describes DOD's proposed regulations implementing the amended Base Closure Act.

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[1] National Defense Authorization Act For Fiscal Year 2002, Act of December 28, 2001, P.L. 107-107, 115 Stat. 1012 (current version at 10 U.S.C. § 2687 note) (hereinafter "Base Closure Act"). For ease of reference, all citations to the 1990 Act are to the relevant sections of the act as it appears in the note following 10 U.S.C. § 2687.

[2] Revitalizing Base Closure Communities and Addressing Impacts of Realignment, 70 Fed. Reg. 46116 (proposed Aug. 9, 2005) (to be codified at 32 C.F.R. pt. 174) (hereinafter "Proposed Rule"). The comment period ends on October 11, 2005.

[3] It should be noted that significant issues related to environmental cleanup under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) exist at some BRAC properties and that the use of certain property transfer authorities may be contingent upon adequate performance of CERCLA obligations or agreement by the acquiring entity to accept liability for environmental cleanup. *See* 42 U.S.C. § 9620(h); P.L. 107-107, § 3006.

Transfer, Disposal, and Leasing Authorities

The transfer or disposal of much federal property is primarily performed by the General Services Administration (GSA) pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA).[4] The Base Closure Act directs the Administrator of the GSA to delegate specified transfer and disposal authorities to DOD for use at BRAC installations, and DOD has, in turn, delegated this authority to the various military services.[5] Thus, BRAC property transfer and disposal is performed, generally, in accordance with the FPASA and the GSA regulations implementing it. In addition, the Base Closure Act authorizes DOD, with GSA approval, to supersede GSA regulations with BRAC-specific regulations.[6]

Apart from the transfer and disposal authorities typically available for federal property, the Base Closure Act and other provisions of law authorize a variety of other conveyance mechanisms. In some cases, the analysis and use of particular authorities must precede analysis and use of others. On the other hand, there are many transfer and disposal mechanisms that are given roughly equivalent priority; thus analysis and use of them may occur simultaneously.

In addition to DOD's role in making disposal and transfer determinations, the Base Closure Act also provides a substantial role for states and communities in the property redevelopment planning process. Thus, local communities can significantly affect the BRAC property transfer and disposal decisions made at the federal level. The specific roles for states and communities as well as the various transfer and disposal authorities are discussed below.

Local Redevelopment Authorities (LRAs). According to the Base Closure Act, an LRA is "any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan."[7] Briefly, once the list of excess BRAC facilities is identified, LRAs begin to form and conduct outreach efforts. They then design a comprehensive plan for reuse of BRAC property, culminating in a redevelopment plan.[8] This plan is not binding upon DOD; indeed, DOD is ultimately responsible for preparing an environmental impact analysis under the National Environmental Policy Act (NEPA), in which it must examine all reasonable disposal alternatives and make

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[4] Act of June 30, 1949, ch. 288, 63 Stat. 377. Transfer and disposal authority is codified at 40 U.S.C. §§ 521-559.

[5] Base Closure Act, § 2905(b); 32 C.F.R. §175.6 (2004) (prior regulations); Proposed Rule at 46119 (to be codified at 32 C.F.R. § 174.5).

[6] Base Closure Act, § 2905(b).

[7] Base Closure Act, § 2910(9).

[8] 32 C.F.R. § 176.20 (2004) (prior regulations); Proposed Rule at 46119-20 (to be codified at 32 C.F.R. § 174.6).

its own disposal decisions.[9] However, the redevelopment plan can have significant influence on DOD disposal decisions, and, in some instances, DOD is statutorily directed to give the LRA's plan considerable weight.[10] Local zoning authorities and state law-based land use regulation also may impact the disposal decisions made by DOD.

No federal statute establishes requirements for LRA formation. DOD proposed regulations indicate that an LRA "should have broad-based membership, including, but not limited to, representatives from those jurisdictions with zoning authority over the property."[11] Further, publications of the DOD Office of Economic Adjustment (OEA) suggest communities ensure that all affected jurisdictions and stakeholders be represented in a community's LRA.[12] Still, LRA formation is primarily a state and local responsibility and that organization and membership decisions are left to the discretion of entities outside of the federal government.

DOD proposed rules also indicate that DOD, through OEA, will "recognize," in general, only one LRA per installation.[13] There do not appear to be formal requirements for "recognition." It should be noted, however, that DOD may possess authority to refuse recognition of an LRA. Indeed, DOD's proposed regulations state that "[i]n the event there is no LRA recognized by DOD ..." or if the LRA fails to perform the role contemplated by the Base Closure Act, DOD may proceed with its own disposal actions after consultation with a state's Governor and the heads of local government.[14]

Federal Screening. The first step in the property transfer process begins when the military service in possession of a BRAC property notifies other DOD branches and federal agencies that property is "excess"[15] to its needs and has become available.[16]

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[9] 42 U.S.C. §§ 4321 *et seq*.

[10] The specific requirements impacting the LRA planning process and DOD's eventual disposal of property are discussed in the sections of this report addressing each disposal mechanism.

[11] Proposed Rule at 46119-20 (to be codified at 32 C.F.R. §174.6).

[12] DEPARTMENT OF DEFENSE, OFFICE OF ECONOMIC ADJUSTMENT, RESPONDING TO CHANGE: COMMUNITIES & BRAC at 9-17, *available at* [http://www.oea.gov/OEAWeb.nsf/130593004D6D595685257000005CD36B/$File/Responding%20to%20Change%205-20.pdf].

[13] Proposed Rule at 46119-20 (to be codified at 32 C.F.R. §174.6).

[14] *Id*. at 46120 (to be codified at 32 C.F.R. §174.6(c)(2)).

[15] "Excess" property is defined as "property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities." 40 U.S.C. § 102(3); Proposed Rule at 46119 (to be codified at 32 C.F.R. §174.3(e)). Under the earlier BRAC regulations, "excess" property was "any property under the control of a Military Department that the Secretary concerned determines is not required for the needs of the Department of Defense." 32 C.F.R. §175.3(e)(prior regulations).

[16] 32 C.F.R. § 175.7(4) (prior regulations); Proposed Rule at 46120 (to be codified at 32 (continued...)

The proposed regulations indicate that this notice of potential availability should be given "on a timely basis, upon request," after the President submits the list of recommended BRAC actions to Congress; a notice of availability, which supplies the operative date for purposes of future deadlines, would have to be provided "within one week of the date of approval of the closure or realignment."[17] Under the proposed rules, if a DOD branch or another federal agency wishes to obtain BRAC property, it must "provide a written, firm expression of interest .... [and] explain the intended use and the corresponding requirement for the buildings and property" within thirty days of the date of the notice of availability.[18] A more comprehensive application is due within sixty days of the date of the notice of availability.[19] The application must support a variety of transfer requirements, including that the property requested be better suited to the requestor's needs than its existing property or other properties and that the transfer would not create a new program.[20] Under the proposed rule, the

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[16] (...continued)
C.F.R. § 174.7(a)-(d)).

[17] Proposed Rule at 46120 (to be codified at 32 C.F.R. § 174.7(b), (d)).

[18] *Id.* (to be codified at 32 C.F.R. § 174.7(e)).

[19] *Id.* (to be codified at 32 C.F.R. § 174.7(f)(1)).

[20] A complete application must include:

> (1) A completed GSA Form 1334, Request for Transfer (for requests from DoD Components, a DD Form 1354 will be used)....;
> (2) A statement from the head of the requesting Component or agency that the request does not establish a new program (i.e., one that has never been reflected in a previous budget submission or Congressional action);
> (3) A statement that the requesting Component or agency has reviewed its real property holdings and cannot satisfy its requirement with existing property. This review must include all property under the requester's accountability, including permits to other Federal agencies and outleases to other organizations;
> (4) A statement that the requested property would provide greater long-term economic benefits for the program than acquisition of a new facility or other property;
> (5) A statement that the program for which the property is requested has long-term viability;
> (6) A statement that considerations of design, layout, geographic location, age, state of repair, and expected maintenance costs of the requested property clearly demonstrate that the transfer will prove more economical over a sustained period of time than acquiring a new facility;
> (7) A statement that the size of the property requested is consistent with the actual requirement;
> (8) A statement that fair market value reimbursement to the Military Department will be made at the later of January of 2008, or at the time of transfer, unless this obligation is waived by the Office of Management and Budget and the Secretary concerned, or a public law specifically provides for a non-reimbursable transfer (this requirement does not apply to requests from DoD Components [because the property would likely be retained by the current land holding DOD component for use by the requesting component]);
> (9) A statement that the requesting DoD Component or Federal agency agrees to

(continued...)

transferring DOD Branch will review the applications and make a determination as to whether the transfer is appropriate based on several factors:

> (1) The requirement must be valid and appropriate;
> (2) The proposed use is consistent with the highest and best use of the property;
> (3) The proposed transfer will not have an adverse impact on the transfer of any remaining portion of the installation;
> (4) The proposed transfer will not establish a new program or substantially increase the level of a Component's or agency's existing programs;
> (5) The application offers fair market value for the property, unless waived;
> (6) The proposed transfer addresses applicable environmental responsibilities to the satisfaction of the Secretary concerned; and
> (7) The proposed transfer is in the best interest of the Government.[21]

Additional considerations are contained in the proposed rule to aid in deciding between multiple DOD component or federal agency requests for the same BRAC property:

> (1) The need to perform the national defense missions of the Department of Defense and the Coast Guard;
> (2) The need to support the homeland defense mission; and
> (3) The LRA's comments as well as other factors in the determination of highest and best use.[22]

If another DOD branch/federal agency determines that it requires the property and if the Secretary of Defense concurs, a federal-to-federal transfer may occur with or without reimbursement.[23] If no DOD component or agency pursues acquisition within

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[20] (...continued)

> accept the care and custody costs for the property on the date the property is available for transfer, as determined by the Secretary concerned; and
> (10) A statement that the requesting agency agrees to accept transfer of the property in its existing condition, unless this obligation is waived by the Secretary concerned. Proposed Rule at 46120-21 (to be codified at 32 C.F.R. § 174.7(i)); *see also* 32 C.F.R. § 175.7(a)(9) (prior regulations).

[21] Proposed Rule at 46121 (to be codified at 32 C.F.R. § 174.7(j)); see also 32 C.F.R. § 175.7(a)(10) (prior regulations).

[22] Proposed Rule at 46121 (to be codified at 32 C.F.R. § 174.7(k)); see also 32 C.F.R. § 175.7(a)(11) (prior regulations).

[23] Defense Base Closure and Realignment Act, § 2905(b). The proposed regulations indicate that "fair market value reimbursement to the Military Department will be made at the later of January of 2008, or at the time of transfer, unless this obligation is waived by the Office of Management and Budget and the Secretary concerned, or a public law specifically provides for a non-reimbursable transfer ...." Proposed Rule at 46121 (to be codified at 32 C.F.R. 174.7(i)(8)). As FPASA authorizes waiver of the fair market value requirement and not simply waiver of a time frame for providing compensation, arguably this regulation does not limit the waiver authority to compensation deadlines. However, the proposed regulations also state that "[i]f the Federal agency does not meet its commitment under subsection (i)(8) of this section to provide the required reimbursement, and the requested property has not yet been transferred to the agency, the requested property will be declared surplus and disposed of in accordance with the provisions of this part." *Id*. (to be codified

(continued...)

the specified time frame or if DOD denies the request for transfer, the property is determined to be "surplus" and the disposal process begins.[24] The proposed regulations indicate that, generally, DOD must make its surplus determination within six months of the finalization of the BRAC list, although an extension of up to an additional six months is permissible if such extension is "in the best interests of the communities affected by the closure or realignment."[25] The proposed regulations also indicate that additional extensions may be possible in "unusual circumstances" and that a surplus determination can be withdrawn to allow consideration of a late application for a federal-to-federal transfer in "special cases."[26]

While DOD is ultimately responsible for accepting or rejecting an application for a federal-to-federal transfer, the proposed rule does indicate that the transferring DOD branch "should consider LRA input, if provided, in making determinations on the retention of property (location and size of cantonment area)."[27] In addition, the Secretary of the transferring DOD component would be required to keep the LRA apprised of progress in the federal-to-federal transfer process and to consider the LRA's position on competing applications for transfer and the impact of late agency requests for federal-to federal transfers.[28]

Public Domain Land. One category of BRAC property may be exempted from this process. If the lands comprising the closed or realigned installation were originally withdrawn from the public domain for use as a military facility, then, in accordance with FPASA, the Department of the Interior (DOI), acting through the Bureau of Land Management (BLM), may review the property and decide whether the land is suitable for return to the public domain.[29] After DOD decides it will not retain the property for one of its components, it issues a Notice of Intent to Relinquish.[30] Thirty days after this

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[23] (...continued)
at 32 C.F.R. § 174.7(*l*)). Certainly, the agency's compensation requirement could be to pay nothing, but the language of the regulations may be ambiguous enough to support an interpretation that fair market value will be required and that waiver of only payment deadlines is permissible.

[24] "Surplus" property is defined as "excess property that the Administrator determines is not required to meet the needs or responsibilities of all federal agencies." 40 U.S.C. § 102(10); Proposed Rule at 46119 (to be codified at 32 C.F.R. § 174.3(*l*)). Under previous regulations, surplus property was defined as "any excess property not required for the needs and the discharge of the responsibilities of federal agencies. Authority to make this determination, after screening with all federal agencies, rests with the Military Departments." 32 C.F.R. § 175.3(i).

[25] Proposed Rule at 46121 (to be codified at 32 C.F.R. § 174.7(n)).

[26] *Id*. at 46121-22 (to be codified at 32 C.F.R. § 174.7(p)).

[27] *Id*. at 46120 (to be codified at 32 C.F.R. § 174.7(c)).

[28] *Id*. at 46120-22 (to be codified at 32 C.F.R. § 174.7(g), (k)(3), (p)(3)).

[29] 40 U.S.C. § 102(9).

[30] Proposed Rule at 46121 (to be codified at 32 C.F.R. § 174.7(m)(4)). Similar procedures were mandated under the BRAC regulations governing previous rounds. *See* 32 C.F.R. § (continued...)

notice, BLM must decide, after consulting with the various agencies within DOI, if the land should return to the public domain.[31] If the land is suitable for return, a transfer to DOI occurs and the property cannot be disposed of through any other BRAC-related mechanism.[32] If BLM determines that the land is not suitable for return to the public domain, then, according to DOD proposed rules, it is deemed surplus and available for disposal under other authorities.[33] Because BRAC property withdrawn from the public domain would not be listed in the notice of availability sent to DOD components and other federal agencies, it is not clear whether a period for federal-to-federal transfers, as described above, would be available if BLM rejects the property, unless this situation qualified as a "special circumstance" authorizing late applications. Whether this would run afoul of the statutory requirements of FPASA is an open question.

Homeless Assistance. The Stewart B. McKinney Homeless Assistance Act[34] which allows "excess," "surplus," "unutilized," or "underutilized" federal property to be used as homeless shelters, applied in earlier BRAC rounds.[35] A separate process is now provided for properties closed after October 25, 1994 (the date of enactment for Base Closure Community Development and Homeless Assistance Act of 1994).[36] To comply with the older McKinney Act provisions, DOD was required to submit a description of its vacant base closure properties to the Department of Housing and Urban Development (HUD).[37] HUD would then determine whether any of this property was "suitable for use to assist the homeless."[38] The HUD determination would be published in the *Federal Register*, at which time qualified "representatives of the homeless" could apply for and receive the requested property.[39]

As stated, amendments to the Defense Base Closure and Realignment Act now displace the traditional McKinney Act implementation requirements. The Secretary of Defense is now directed to publish notice of the available property and to submit information on that property to HUD and any LRA.[40] All interested parties, including representatives of the homeless, are then to submit to the LRA a notice of interest in the

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[30] (...continued)
175.7(12).

[31] *Id*. at 46121 (to be codified at 32 C.F.R. § 174.7(m)(4)-(5)).

[32] *Id*. at 46120 (to be codified at 32 C.F.R. § 174.7(d)).

[33] *Id*. at 46121 (to be codified at 32 C.F.R. § 174.7(m)(6)).

[34] 42 U.S.C. § 11411.

[35] *Id*. § 11411(a).

[36] P.L. 103-421, 108 Stat. 4346 (1994).

[37] Defense Base Closure and Realignment Act, § 2905(b); 32 C.F.R. §175.6(b).

[38] *Id*.

[39] *See* National Law Center on Homelessness and Poverty v. U.S. Dept. of Veterans Affairs, 964 F.2d 1210, 1212 (D.C.Cir.1992).

[40] Defense Base Closure and Realignment Act, § 2905(b).

property.[41] In turn, the LRA, in preparing its redevelopment plan, is to consider "the interests in the use to assist the homeless of the buildings and property at the installation that are expressed in the notices submitted to the redevelopment authority ...."[42]

The LRA next submits the plan to the Secretary of HUD and the Secretary of Defense for review. The Secretary of HUD is authorized to review the plan, to negotiate with the LRA for changes, and ultimately must determine, based on statutorily prescribed factors, whether the plan is acceptable.[43] Upon HUD approval, the base redevelopment plan, including any homeless assistance component and agreement to implement no cost homeless assistance property conveyances, is submitted to DOD. DOD is required to give the redevelopment plan's homeless assistance recommendations "substantial deference," a phrase undefined by law or regulation. As originally enacted, the law creating the BRAC-specific homeless assistance program required the transferring Secretary to dispose of BRAC property in compliance with the HUD approved LRA plan.[44] The change in the law would thus seem to clarify DOD's authority to dispose of property in a manner inconsistent with the LRA redevelopment plan, so long as the required level of deference was afforded to the homeless assistance recommendations.[45]

Public Benefit Transfers. Public benefit transfers are authorized under FPASA and allow for the conveyance of property at a discount or for no cost for specified public purposes.[46] Only certain entities may acquire property through a public benefit transfer, and the categories of acceptable recipients vary according to the type of public benefit use contemplated. For instance, transfers for educational use may be to a state, a political subdivision or instrumentality of a state, a tax-supported educational institution, or a 501(c)(3) nonprofit education institution.[47] On the other hand, transfers for use of property as a correctional institution may only be to a state or one of its political subdivisions or instrumentalities.[48]

Various agencies oversee these programs and are authorized to approve applications for acquisitions under them.[49] The military departments are required to inform these agencies of potentially available property and to transmit any expression

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] P.L. 103-421, 108 Stat. 4346 (1994).

[45] *Id.*

[46] *See* 40 U.S.C. §§ 550-554. These include uses for airports, highways, education, wildlife and environmental preservation, and public health purposes.

[47] *Id.* § 550(c).

[48] *Id.* § 553(b).

[49] *Id.* §§ 550-554.

of interest to the relevant LRA.[50] LRA's are encouraged to work with the public benefit transfer agencies and must consider any expression of interest, although they are not required to include it in a redevelopment plan.[51] All the same, DOD must consider these options when examining disposal alternatives, even though a public benefit transfer proposal need not be accepted by DOD with respect to BRAC property.[52] When a public benefit transfer is made, the transferring instrument will generally contain various binding "terms, conditions, reservations, and restrictions" to ensure the use of the property for the purposes for which it was transferred.[53] These various limitations on property rights received pursuant to a public benefit transfer may be enforced by the agency charged with overseeing the public benefit transfer in question and may also be eliminated after the transfer has occurred if the relevant federal official "determines that the property no longer serves the purpose for which it was transferred or that a release, conveyance, or quitclaim deed [terminating any right or reservation held by the Federal Government] will not prevent the accomplishment of that purpose."[54]

In addition to public benefit transfers governed by FPASA and other BRAC-specific disposal authorities, several other statutes authorize mechanisms for disposing surplus property. Conservation conveyances are available when a variety of conditions have been met. The property must be suitable and desirable for conservation purposes, must have been made available for a public benefit transfer "for a sufficient period of time," and must not be subject to a pending request for a public benefit transfer or for transfer to another federal agency.[55] The conveyance is to be made to a state or qualified non-profit entity for conservation purposes and must be subjected to a waiveable reversionary clause authorizing the United States to reclaim the property should use for conservation purposes cease.[56] In general, these conveyances are to be for reduced cost,[57] although the deed may authorize subsequent conveyances which might result in other non-conservation uses if fair market value is then paid.[58]

Authority also exists for the conveyance of surplus property to a State, political subdivision of a State, or tax-supported organization for use as an airport if the Secretary of Transportation and the Administrator of GSA approve of the transaction.[59] In general, except with respect to requests for the property from other federal agencies,

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[50] 32 C.F.R. § 176.20(d); *see also* Proposed Rule at 46121 (to be codified at 32 C.F.R. § 174.7 (o) ("Once the surplus determination has been made, the Secretary concerned shall follow the procedures in part 176 of this title.")).

[51] *Id*.

[52] Defense Base Closure and Realignment Act, § 2905(b); 32 C.F.R. § 176.45.

[53] 40 U.S.C. § 550(b).

[54] *Id*.

[55] 10 U.S.C. § 2694a(a).

[56] *Id*. § 2694a(b), (c).

[57] *Id*. § 2694a(g).

[58] *Id*. § 2694a(d), (e).

[59] 49 U.S.C. § 47151(a).

the transferring agency is directed to give "priority consideration" to a request made by a public agency for use of the property as an airport; however, this requirement is inapplicable to a military installation subject to the closure requirements contained in 10 U.S.C. section 2687, which generally prohibits base closures unless its procedures or the procedures of the Base Closure Act are followed.[60]

Public Auction and Negotiated Sale. In accordance with FPASA, DOD may dispose of BRAC property via public auction or through a negotiated sale with a single purchaser.[61] The public auction process requires public advertising for bids under terms and conditions that permit "full and free competition consistent with the value and nature of the property involved."[62] If adequate bids are received and disposal is in the public interest, the bid most advantageous to the federal government is to be accepted.

A negotiated sale is permissible when: (1) a public auction would not be in the public interest; (2) a public auction would not promote public health, safety, or national security; (3) a public exigency makes an auction unacceptable; (4) a public auction would adversely impact the national economy; (5) the character of the property makes public auction impractical; (6) a public auction has failed to produce acceptable bids; (7) fair market value does not exceed $15,000; (8) disposal is to a state, territory, or U.S. possession; or (9) negotiated sale is authorized by other law.[63] It is also worth noting that even if one of these conditions is met, there is frequently an additional requirement that fair market value and other satisfactory terms can be obtained through negotiation.

Economic Development Conveyances (EDCs). In addition to FPASA authorities, the Base Closure Act has since its enactment provided for EDCs in one form or another. Under its EDC authority, DOD may convey BRAC property to an LRA for less than fair market value. From 1994 until the 1999 and 2001 amendments to the Base Closure Act, the Secretary of Defense was authorized to "transfer real property and personal property located at a military installation to be closed ... to the redevelopment authority ... for consideration at or below the fair market value of the property transferred or without consideration."[64] The reduced or no cost conveyance was authorized when it was determined to be necessary to support economic development and when DOD could show that other transfer authorities were insufficient.[65]

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[60] *Id.* § 47151(e).

[61] *Id.* § 545.

[62] *Id.*

[63] *Id.*

[64] P.L. 103-160, § 2903 (1994).

[65] *Id.* Additionally, a no consideration transfer was formerly required when a closure was to take place in a rural area and would cause "a substantial adverse impact (as determined by the Secretary) on the economy of the communities in the vicinity of the installation and on the prospect for economic recovery . . . ." P.L. 103-160, § 2903, *amended by* P.L. 106-65). For a thorough discussion of the policy behind the EDC, see Randall S. Beach, *Swords to Plowshares: Recycling Cold War Installations*, 15 PROB. & PROP. 58 (2001).

Amendments to the Base Closure Act in 1999 and 2001 significantly altered the requirements applicable to the use of an EDC.[66] Under section 2905(b) of the Base Closure Act, the broad discretion of the Secretary of Defense to authorize reduced or no consideration economic development conveyances has been replaced by what is arguably a more restrictive scheme. Among the changes, the law now states: "the transfer of property of a military installation. . . may be without consideration" only when the transferee agrees to specified terms.[67] These terms include a requirement that the recipient LRA use the proceeds from certain future sales or leases of the acquired property to support economic redevelopment at the former installation and accept control of the property "within a reasonable time after the date of the property disposal record of decision."[68]

Further, under the new legislation, while no consideration transfers remain a possibility as described above, it appears that the authority for *reduced* cost transactions has been eliminated.[69] The Secretary is also now required to "seek to obtain consideration in connection with any transfer ... in an amount equal to the fair market value of the property, as determined by the Secretary."[70] The provision does not explicitly state what the Secretary must do to fulfill this requirement. However, when read in conjunction with the authorization for no consideration transfers, the requirement to seek fair market value would appear to leave open the possibility of a no consideration transfer so long as a reasonable attempt to find or negotiate another transaction is unsuccessful. A concomitant change is the apparent elimination of the statutory requirement that DOD justify its decision to use its EDC authority and not a public auction or negotiated sale.[71]

Under the proposed regulations, an LRA could apply for an EDC after completion of its redevelopment plan. An application would have to be submitted consistent with a schedule devised by the Secretary of the transferring DOD component.[72] Decisions to accept or reject an application for an EDC are made by the Secretary of the transferring DOD component and require the concurrence of the Deputy Under Secretary of Defense for Installations & Environment.[73] To obtain an EDC, an LRA would have to show "why an EDC is necessary for job generation on the installation" and supply information regarding the economic impact of the closure or realignment

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[66] Act of October 5, 1999, P.L. 106-65, 113 Stat. 512; P.L. 107-107, § 3006. Bases closed under previous BRAC law but still owned by the Department of Defense may be included under the new statutory framework, and certain existing contracts may be modified to comply with the updated law.

[67] P.L. 106-65, § 2821, *amended by* P.L. 107-107.

[68] Base Closure Act, § 2905(b)(4)(B)(ii).

[69] *Id.* § 2905(b)(4)(B).

[70] P.L. 107-107, § 3006; *see also* Proposed Rule at 46122 (to be codified at 32 C.F.R. 174.9(b)).

[71] P.L. 106-65, § 2821(a)(3).

[72] Proposed Rule at 46122 (to be codified at 32 C.F.R. § 174.9(d)).

[73] *Id.*

and the planned economic impact of utilizing an EDC.[74] The transferring Secretary would be required to evaluate the application and its proposed terms and condition in accordance with a series of prescribed factors, including the economic effects on the community of the proposed EDC, the interests and concerns of other federal agencies, and the economic benefit to the United States.[75] The transferring Secretary would also be required to appraise the property and determine its fair market value prior to accepting an application.[76] The proposed regulations again reiterate the policy of seeking fair market value, even in the EDC context. They further indicate, paraphrasing the language contained in the Base Closure Act, that a no cost conveyance would only be available when the LRA agrees that the "proceeds from any sale or lease of the property...during at least the first seven years ... [following transfer] shall be used to

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[74] Specifically, an EDC application would have to include:

> (1) A copy of the adopted redevelopment plan.
> (2) A project narrative including the following:
> (i) A general description of the property requested.
> (ii) A description of the intended uses.
> (iii) A description of the economic impact of closure or realignment on the local community.
> (iv) A description of the financial condition of the community and the prospects for redevelopment of the property.
> (v) A statement of how the EDC is consistent with the overall redevelopment plan.
> (3) A description of how the EDC will contribute to short- and long-term job generation on the installation, including the projected number and type of new jobs it will assist in generating.
> (4) A business/operational plan for the EDC parcel, including such elements as:
> (i) A development timetable, phasing schedule, and cash flow analysis.
> (ii) A market and financial feasibility analysis describing the economic viability of the project, including an estimate of net proceeds over a fifteen-year period, the proposed consideration or payment to the Department of Defense, and the estimated present fair market value of the property.
> (iii) A cost estimate and justification for infrastructure and other investments needed for the development of the EDC parcel.
> (iv) Local investment and proposed financing strategies for the development.
> (5) A statement describing why other authorities, such as public or negotiated sales and public benefit conveyances for education, parks, public health, aviation, historic monuments, prisons, and wildlife conservation, cannot be used to accomplish the job generation goals.
> (6) Evidence of the LRA's legal authority to acquire and dispose of the property.
> (7) Evidence that the LRA has full authority to perform all of the actions required pursuant to the terms of the EDC, and that the officers executing the EDC documents on behalf of the LRA have full authority to do so.
> (8) Proof the LRA has obtained sufficient financing for acquiring the EDC property and carrying out the LRA's redevelopment objectives.

Id. at 46122 (to be codified at 32 C.F.R. § 174.9 (e)).

[75] *Id*. (to be codified at 32 C.F.R. § 174.9(g)).

[76] *Id*. (to be codified at 32 C.F.R. § 174.9(h)).

support economic redevelopment ...."[77] If these proceeds are not used by the LRA appropriately, DOD is authorized under the Base Closure Act to recoup the portion of the proceeds received by the LRA in an amount it deems appropriate.[78]

Leases. In addition to the final conveyance of property contemplated by the Base Closure Act, federal law authorizes the leasing of BRAC property under certain circumstances. The Base Closure Act does little more than indicate that proceeds from leases are to be deposited into the BRAC account created by the Base Closure Act.[79] The authority for such leases is instead contained in 10 U.S.C. section 2667, the same statute governing the leasing of non-BRAC military property.[80] Further, DOD's proposed regulations, like their predecessors, indicate that leasing BRAC properties is to be an interim measure between closure and final disposition.[81]

In general, BRAC property may be leased when the Secretary of the relevant military service determines that a lease would "facilitate State or local economic adjustment efforts."[82] Lessees must generally pay fair market value; however, reduced consideration is available if the Secretary of the relevant service finds that:

> (i)A public interest will be served as a result of the lease; and
> (ii) The fair market value of the lease is unobtainable or not compatible with such public benefit.[83]

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[77] The Base Closure Act and proposed regulation indicate what uses would satisfy the requirement that proceeds be put towards economic redevelopment. These are :

> (i) Road construction;
> (ii) Transportation management facilities;
> (iii) Storm and sanitary sewer construction;
> (iv) Police and fire protection facilities and other public facilities;
> (v) Utility construction;
> (vi) Building rehabilitation;
> (vii) Historic property preservation;
> (viii) Pollution prevention equipment or facilities;
> (ix) Demolition;
> (x) Disposal of hazardous materials generated by demolition;
> (xi) Landscaping, grading, and other site or public improvements; and
> (xii) Planning for or the marketing of the development and reuse of the installation. *Id*. at 46123 (to be codified at 32 C.F.R. § 174.10 (e)(2)).

[78] Base Closure Act, § 2905(b)(4)(D); see also Proposed Rule at 46123 (to be codified at 32 C.F.R. §174.10(f)).

[79] Base Closure Act, §§ 2906, 2906A; *see also* 10 U.S.C. § 2667(d)(5).

[80] 10 U.S.C. § 2667(f).

[81] Proposed Rule at 46123 (to be codified at 32 C.F.R. § 174.11)); 32 C.F.R. § 175.7(g) (prior regulations).

[82] 10 U.S.C. § 2667(f)(1).

[83] *Id*. § 2667(f)(2); 32 C.F.R. § 174.11(b)

Before a BRAC property may be leased, the law requires DOD to consult with the Administrator of the Environmental Protection Agency (EPA) to determine whether the property is in suitable condition for leasing.[84] The law also curtails the application of the National Environmental Policy Act (NEPA) to the leasing process. In general, NEPA requires federal agencies to analyze the environmental impacts of a proposed federal action and alternatives to that action.[85] The statute governing BRAC property leases indicates that the scope of environmental analysis required is "limited to the environmental consequences of activities authorized under the proposed lease and the cumulative impacts of other past, present, and reasonably foreseeable future actions during the period of the proposed lease."[86] However, this relief from full application of NEPA does not apply if activities authorized under the lease would:

> (i) significantly affect the quality of the human environment; or
> (ii) irreversibly alter the environment in a way that would preclude any reasonable disposal alternative of the property concerned.[87]

Additional regulatory and statutory provisions indicate that leases of BRAC property are intended to be short-term, interim measures to spur economic development pending final disposition, and therefore these leases "make no commitment for future use or ultimate disposal."[88] More specifically, the regulations indicate that lease terms may extend to up to five years, including renewal options, if the lease is entered into prior to completion of the final disposal decisions.[89] After completion of the final disposal decisions, the lease term may be longer than five years.[90] The proposed regulations also indicate that leases will generally be to an LRA but that leasing to other entities is permissible.[91] When a lease is to an LRA and is provided at below fair market value, if the property is subleased, the LRA would be required to apply the proceeds to the "protection maintenance, repair, improvement, and costs related to the [leased property] ...."[92]

The law and regulations also authorize what has been referred to as a "leaseback," an arrangement wherein the transferring Secretary conveys property to an LRA and the LRA agrees to lease the property to a federal agency.[93] Under the proposed regulations, this arrangement will only be used if the agency that would lease the property agrees to the arrangement, the LRA and the agency can agree to lease terms, and the

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[84] 10 U.S.C. § 2667(f)(3).

[85] 42 U.S.C. §§ 4321 *et seq*.

[86] 10 U.S.C. § 2667(f)(4)(A).

[87] *Id*. § 2667(f)(4)(C).

[88] Proposed Rule at 46123 (to be codified at 32 C.F.R. § 174.11); 32 C.F.R. § 175.7(g) (prior regulations).

[89] *Id*.

[90] *Id*.

[91] *Id*.

[92] *Id*.

[93] Base Closure Act, § 2905(b)(4)(E).

transferring Secretary determines the arrangement is "in the Federal interest....."[94] The transferring Secretary would be authorized to acquire a leaseback arrangement for the Secretary's own DOD component only if the component "certifies that such a leasing arrangement is in the interest of that Agency...."[95] The transferring Secretary would only be able to approve a leaseback arrangement for other DOD components if the transferring Secretary "certifies that such a leasing arrangement is in the best interest of the Military Department and ... is consistent with the obligation to close or realign the installation ...."[96] These leases are to be for terms of no more than fifty years, subject to renewal, and cannot require rental payments.[97] The proposed regulations would also supply the rules governing the property at the termination of the lease.[98]

Conclusion

In sum, the transfer and disposal process for 2005 round BRAC properties is primarily governed by the Defense Base Closure and Realignment Act, as amended, and the Federal Property and Administrative Services Act. The process first requires screening to determine if other DOD branches or federal agencies have a need for the property. In the event that property is not transferred in this manner, it is deemed surplus and may be disposed of pursuant to BRAC and FPASA authorities. Compliance with these disposal authorities will generally require some form of homeless assistance screening and public benefit transfer analysis. DOD is directed to take into consideration multiple factors in determining which authority to use, including consultation with LRAs and consideration of their redevelopment plans, but DOD would appear to be ultimately responsible for making final determinations. Public auctions and negotiated sales are generally available, although it would appear that fair market value must generally be obtained under these authorities. Economic development conveyances are authorized as well, which may be made for no consideration, contingent upon certain conditions of transfer.

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[94] Proposed Rule at 46123 (to be codified at 32 C.F.R. § 174.12(b), (c)).

[95] *Id*. at 46123 (to be codified at 32 C.F.R. § 174.12(f)(1)).

[96] *Id*. at 46123-24 (to be codified at 32 C.F.R. § 174.12(f)(2)).

[97] Base Closure Act, § 2905(b)(4)(E).

[98] *Id*. at 46124 (to be codified at 32 C.F.R. § 174.12(h)(i)).