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

Aaron M. Flynn
Legislative Attorney
American Law Division

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. 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. This report will be updated as events warrant.

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, transfer or disposal of former military installations has been governed by relatively consistent legal requirements. On December 28, 2001, the most recent changes to the BRAC framework were signed into law (P.L. 107-107)¹, providing for a new round of base closures in 2005.

The current BRAC law is generally similar to the original statute and retains many of the transfer and disposal authorities that were available in previous rounds. However, significant amendments in 1999 and 2001 altered portions of the law's disposal authorities. This report will provide an overview of the transfer and disposal authorities available under the law for military installations that may be closed during the 2005 round

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). 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.

and indicate how recent amendments to the Defense Base Closure Act have altered the property transfer and disposal process.² It will be updated as events warrant.

Transfer and Disposal Authorities

The transfer or disposal of federal property is primarily performed by the General Services Administration (GSA) pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA).³ The Defense Base Closure and Realignment Act directs the GSA to delegate its statutory authority to the Department of Defense (DOD) with respect to BRAC installations, and DOD has, in turn, delegated this authority to the various military services.⁴ Thus, BRAC property transfer and disposal is performed, generally, in accordance with the FPASA and the GSA regulations implementing it. In addition, the Defense Base Closure and Realignment Act authorizes DOD, with GSA approval, to supersede GSA regulations with BRAC-specific regulations.⁵ The FPASA process for BRAC properties is discussed below.

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 that property has become available.⁶ If another branch of DOD determines that it requires the property and if Secretary of Defense concurs, intragency transfer may occur with or without reimbursement.⁷ If no DOD branch requires the property, it is deemed “excess” and a notice of its availability is sent to all other federal agencies.⁸ If no federal agency pursues acquisition within the specified time frame or if DOD exercises residual authority to deny the request for transfer, the property is determined to be “surplus” and the disposal process begins.⁹

Local Redevelopment Authorities (LRAs). An LRA is “[a]ny authority or instrumentality established by a State or local government and recognized by the Secretary of Defense ... as the entity responsible for developing the redevelopment plan” with

² 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.

³ Act of June 30, 1949, ch. 288, 63 Stat. 377. Transfer and disposal authority is codified at 40 U.S.C. §§ 521-559.

⁴ Defense Base Closure and Realignment Act, § 2905(b); 32 C.F.R. §175.6 (2004).

⁵ Defense Base Closure and Realignment Act, § 2905(b).

⁶ 32 C.F.R. § 175.7(4).

⁷ Defense Base Closure and Realignment Act, § 2905(b).

⁸ “Excess” property is defined as “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).

⁹ “Surplus” property is 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).

respect to an installation closed under the BRAC process.¹⁰ Briefly, upon the conclusion of the federal screening process, LRAs are to conduct outreach efforts and design a comprehensive plan for reuse of BRAC property, culminating in a redevelopment plan.¹¹ The redevelopment 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 its own disposal decisions.¹² However, it is worth noting that DOD is statutorily obligated to give the LRA's redevelopment plan considerable weight in making its own disposal determinations. Specific requirements impacting the planning process and eventual disposal of property are discussed below.

Homeless Assistance. The Stewart B. McKinney Homeless Assistance Act¹³ allows “excess,” “surplus,” “unutilized,” or “underutilized” federal property to be used as homeless shelters, and has been applicable to BRAC properties closed in prior rounds.¹⁴ 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).¹⁵ 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).¹⁶ HUD would then determine whether any of this property was “suitable for use to assist the homeless.”¹⁷ 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.¹⁸

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 local redevelopment authority.¹⁹ All interested parties, including representatives of the homeless, are then to submit to the local redevelopment authority a notice of interest in the property.²⁰ Simultaneously, redevelopment authorities are to perform outreach efforts and provide assistance in evaluating property for various reuse purposes. After complying with these requirements and the statutorily imposed information collection time frames, the redevelopment

¹⁰ 32 C.F.R. § 176.5.

¹¹ 32 C.F.R. § 176.20.

¹² 42 U.S.C. § 4321 *et seq.*

¹³ 42 U.S.C. § 11411.

¹⁴ *Id.* § 11411(a).

¹⁵ P.L. 103-421, 108 Stat. 4346 (1994).

¹⁶ Defense Base Closure and Realignment Act, § 2905(b); 32 C.F.R. § 175.6(b).

¹⁷ *Id.*

¹⁸ See National Law Center on Homelessness and Poverty v. U.S. Dept. of Veterans Affairs, 964 F.2d 1210, 1212 (D.C.Cir.1992).

¹⁹ Defense Base Closure and Realignment Act, § 2905(b).

²⁰ *Id.*

authority must prepare a redevelopment plan, which considers “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”²¹ The redevelopment authority 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 redevelopment authority for changes, and ultimately must determine, based on statutorily prescribed factors, whether the plan is acceptable.²² Upon HUD approval, the base redevelopment plan, including any homeless assistance component and agreement to implement no cost homeless assistance property conveyances, are submitted to DOD. Again, it would appear that DOD, giving “substantial deference to the redevelopment plan concerned,” may develop its own disposal plan.²³

Public Benefit Transfers. Public benefit transfers are authorized under FPASA and allow for the conveyance of property at a discount for specified public purposes.²⁴ Various agencies oversee these programs and are authorized to approve a state’s application for acquisition under them.²⁵ The military departments are required to inform these agencies of potentially available property and transmit any expression of interest to the relevant LRA.²⁶ 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.²⁷ All the same, it would appear the DOD must consider these options when examining disposal alternatives even though it would not appear that a public benefit transfer proposal must be accepted by DOD with respect to BRAC property.²⁸

Public Auction and Negotiated Sale. In addition to the public benefit transfer, additional disposal authorities exist. In accordance with FPASA, DOD may dispose of BRAC property via public auction or through a negotiated sale with a single purchaser.²⁹ The public auction process requires public advertising for bids under such terms and conditions as to permit “full and free competition consistent with the value and nature of the property involved.”³⁰ Further, 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 if a series of conditions are met. Generally, negotiated sales are permissible when: (1) a public auction would not be in the public interest; (2) public auction would not promote public health, safety, or national security; (3) a public

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See 4 U.S.C. §§ 550-554. These include uses for airports, highways, education, wildlife and environmental preservation, and public health purposes.

²⁵ *Id.*

²⁶ 32 C.F.R. § 176.20(d).

²⁷ *Id.*

²⁸ Defense Base Closure and Realignment Act, § 2905(b); 32 C.F.R. § 176.45.

²⁹ 40 U.S.C. § 545.

³⁰ *Id.*

exigency makes an auction unacceptable; (4) public auction would adversely impact the national economy; (5) the character of the property makes public auction impractical; (6) 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.³¹ 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 Defense Base Realignment and Closure Act has since its enactment provided for EDCs in one form or another. Under its EDC authority, DOD may dispose of BRAC property for less than fair market value.³² From 1994 until the 1999 and 2001 amendments to the Defense Base Closure and Realignment 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.”³³ 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.³⁴

The 1999 and 2001 amendments³⁵ significantly altered the requirements of the EDC. Under section 2905(b) of the Defense Base Closure and Realignment 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. The law now states: “the transfer of property of a military installation. . . may be without consideration” but only when the transferee agrees to specified terms.³⁶ These terms include a requirement that a transferee use the proceeds from certain future sales or leases of the acquired property to support economic redevelopment at the former installation.

Further, under the new legislation, while no consideration transfers remain a possibility as described above, the Secretary is also now required to “seek to obtain consideration in connection with any transfer . . . in an amount equal to the fair market

³¹ *Id.*

³² Additionally, a no consideration transfer was 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).

³³ P.L. 103-160, § 2903 (1994).

³⁴ *Id.*

³⁵ 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.

³⁶ P.L. 106-65, § 2821, *amended by* P.L. 107-107.

value of the property, as determined by the Secretary.”³⁷ 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. Another significant 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.³⁸ Exactly how this change would affect procedures when read in conjunction with the requirement that DOD seek fair market value must be deemed an open question at present.

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 other 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 but 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 may be authorized as well, which may be made for no consideration, contingent upon certain conditions of transfer.

³⁷ P.L. 107-107, § 3006.

³⁸ P.L. 106-65, § 2821(a)(3).