



PROPERTY TRANSFER PROCESS

A. INTRODUCTION

This section provides an overview of the key types of transfer processes and conveyance mechanisms that are likely to be most applicable to the needs of the LSAAP and RRAD-WEP facilities. Generally, these conveyance methods fall into two major categories that involve options for transferring the property, or portions of the property, at no cost or reduced cost, as well as others that involve acquisition at market values. Other options discussed in this section involve the potential for early transfer of the facility for civilian use prior to full closure by the military.

All of the options noted above are reflective of the military's criteria for disposal of surplus property emanating from the 2005 BRAC evaluation process. These criteria emphasize, among other factors, the DoD's intent to expedite the transfer process and to maximize a return on investment for the federal government as part of that process. This indicated desire to accelerate the closure process and transfer the facility to community use means that the military may be more flexible in applying a variety of approaches to hasten this conveyance. However, it is also an indication that the military will "rely on and leverage market forces" to the greatest extent possible, as noted in the Base Realignment and Closure Manual (BRRM). All of these factors have ramifications for the LRA's preparation of a final reuse plan which will be discussed in this and subsequent sections of the redevelopment plan.

B. FEDERAL PROPERTY SCREENING PROCESS

Under the 1949 Property Act, closed military facilities must first be "screened" within DoD for other military uses and then with other federal agency for possible reuse. Properties no longer needed within DoD are considered "excess," while properties not useful to other federal agencies are declared "surplus."

Some communities are often fearful that federal agencies will impose their needs and locate undesirable federal activities in an unwilling community. In reality, federal agencies will only locate their Job Corps facilities or their Bureau of Prisons facilities with local support. The Job Corps activities at the U.S. Naval Base in Charleston, South Carolina or at Loring Air Force Base in Maine occurred at the behest of the local communities and their Congressional delegations.

The threat of federal "land grabs" is also a myth. Far more serious, however, is the potential for DoD agencies, such as Reserve or National Guard units, to make piece-meal facility requests following the closure announcement and prior to the base closure property being declared excess.

These piecemeal military agency requests can thereby create a "spotted leopard" effect on the overall remaining base property.

Until October of 1994, the second priority for surplus base closure property was accorded to providers of housing for the homeless under the Stuart B. McKinney Homeless Assistance Act of 1987. While the McKinney Act priority still applies to all other surplus federal property, the impact on base closure communities has been changed. In the waning hours of the 103rd Congress, the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 was approved. This Act focuses all housing the homeless assistance requests through the community's Local Redevelopment Authority (LRA). The LRA, which is the official reuse planning organization, recognized by DoD, must initiate an outreach effort, among other requirements, that addresses homeless housing issues both-on base and off-base.

The final surplus property screening priority is accorded to state and local governments equally as well as federally recognized Native American Indian Tribes. There is no hierarchy at all in the federal screening process among state and local agencies and recognized Indian Tribes, since all state and local government as well as Indian Tribal requests are accorded equal standing.

C. PROPERTY CONVEYANCE METHODS

1. Overview of Transfer Options

The RRRRA's transfer objective is to create a long-term strategy that is consistent with the most current Federal Laws regarding property transfer and to attain the highest returns for Bowie County in terms of economic revitalization, public and social benefit, and consistency with the visions and goals set forth by the Red River Redevelopment Authority, Bowie County, and affected communities. The purpose of this section is to outline the available options for the acquisition of real property at the Lone Star and Red River facilities. The methods available for different types of property transfer to Local Redevelopment Authorities are summarized in Table 7-1 on the following page.

Once the decision has been made through the BRAC process to close a military installation, federal law provides for a number of alternative transfer methods that can be employed by the Department of Defense (DoD) to dispose of the property. One of the first steps in the disposal process is the "screening" of the property to determine if other federal agencies have use for any or all of the facility. In the case of the LSAAP and RRAD-WEP, no other federal users identified an interest in the facility within the allotted time-frame which resulted in its designation by the DoD as "surplus" property. In light of this fact, disposal of the subject properties can potentially occur under one or more alternative methods of transfer that will be dependent upon the type of end user (i.e. public or private) and the intended use.

The primary methods of transfer most likely to be considered by the Army for the LSAAP and RRAD-WEP facilities are outlined in the following table and discussed in more detail in the subsequent portions of this section. These methods are based on information presented in the Base Redevelopment & Realignment Manual (BRRM) 2006, which contains the DoD's primary guidelines for reuse of BRAC facilities.

Table 7-1 - Summary of Federal Property Conveyance Methods

Conveyance Method	Conditions	Community Planning Considerations
Public Benefit Conveyance (PBC)	<ul style="list-style-type: none"> The property is conveyed at market value unless a sponsoring agency determines a discount is warranted The property must be used for public purposes (schools, healthcare, recreation, etc.) Sponsoring agencies may impose additional land use controls 	<ul style="list-style-type: none"> Market value is an objective of the sponsoring agency – an appraisal will most likely be needed Consideration should be given to how the reuse plan will affect market value and ultimately the price paid to the sponsoring agency
Economic Development Conveyance (EDC)	<ul style="list-style-type: none"> The military department is required to seek market value However, the military can grant an EDC without consideration if proceeds support economic development for 7 years Proceeds not used for economic development can be recouped by the military 	<ul style="list-style-type: none"> Market value will need to be determined – an appraisal must be completed If LRA develops property it must determine there are enough qualified investors to warrant a discount A lower market value may be arrived at if reuse plans are more generalized and do not assume high densities of development
Negotiated Sale to Public Entities	<ul style="list-style-type: none"> Property can only be conveyed to public entity for a public benefit Same benefit cannot be obtained from sale or PBC conveyance Congress must approve transaction If property is sold within 3 years all profits revert to the military 	<ul style="list-style-type: none"> Market value will determine final sale price for LRPA or other public body – an appraisal must be completed A very detailed reuse plan may result in higher market value than a more generalized plan
Advertised Public Sale	<ul style="list-style-type: none"> Property is conveyed by the military through public bidding process Military will consult with LRPA before taking this approach The military's objective will be to seek sale to highest responsible bidder 	<ul style="list-style-type: none"> Because this process requires a bid process, market value is assumed to be part of this process The establishment of minimal land use controls in the reuse plan may encourage more rapid, market-driven redevelopment, if so desired by the LRPA
Conservation Conveyance	<ul style="list-style-type: none"> Similar to a public benefit conveyance but property must be used for conservation oriented purposes Management of property must involve state or local government, or non-profit conservation organization Property reverts to United States if use ceases to be for conservation purposes 	<ul style="list-style-type: none"> If conveyance is for no cost – market value is not an issue The community plan should still examine highest and best use since conservation conveyances can severely limit the development potential of an otherwise economically viable site
Environmental Responsibilities Transfer/Sale (Early Transfer)	<ul style="list-style-type: none"> Property is conveyed through two-step bid process The military then requests a covenant deferral from state governor After deferral is approved military can enter into a binding purchase agreement 	<ul style="list-style-type: none"> Because this process requires a bid process, market value is assumed to be part of this process State will assume responsibility for oversight of remedial actions for contaminated sites The establishment of minimal land use controls in the reuse plan may encourage more rapid, market-driven redevelopment, if so desired by the LRPA Consideration should be given to acquiring additional environmental insurance to protect involved parties from future liability

Source: Understanding Key Issues in DoD's Base Redevelopment & Realignment Manual, An Infobrief from the Association of Defense Communities, May 2006

a.) Public Benefit Conveyance

One of the more useful methods of property transfer for a variety of public uses is the Public Benefit Conveyance (PBC). A PBC can be used to convey real or personal property to state and local governments, and certain non-profit organizations, for public purposes at no cost or reduced cost. These purposes include schools, parks, public health facilities, law enforcement, emergency management response, correctional facilities, historic monuments, self-help housing, and wildlife conservation. If this method is selected by the RRRRA, and approved by the DoD, a federal sponsoring agency may request assignment of the property for purposes of conveying the property to a designated eligible recipient. The sponsoring agencies are

responsible for selecting qualified applicants and determining the amount of the discount (if any) from the fair market value of the property. It should be noted that some uses, such as law enforcement, emergency management response, correctional facilities, historic monuments, and wildlife conservation, do not require a sponsoring agency and can be directly transferred from the DoD to an approved recipient. The primary PBC approaches that are potentially useful in redeveloping the LSAAP and RRAD-WEP facilities are summarized below.

- **Economic Development** – The presiding military department, which in this case is the Army, has the authority to convey property as a PBC for economic development and job-creation purposes at below market value or “for no consideration” (i.e. at no cost). However, recent transfers of property under this provision suggest that the Army will be more inclined to seek full market value, or at least a large percentage of the value, making the justification for a discounted economic conveyance more difficult to obtain.
- **Conservation Conveyance** – The Secretary of the Army may also convey surplus property that is considered “suitable and desirable” for conservation purposes to a state or local government, or to a non-profit organization that exists primarily for the purpose of natural resource conservation. Such a conveyance may, if noted in the deed, permit the recipient to convey the property for the same purpose and conduct incidental revenue-producing activities. If a property transferred in this manner ceases to be used for conservation purposes, ownership shall revert back to the federal government.
- **Public Safety** – Water and sewer systems, as well as medical facilities, can be transferred without cost as a PBC through the endorsement of the U.S. Department of Health and Human Services.
- **Education** – The U.S. Department of Education can convey land and facilities to public and private non-profit educational institutions on a discounted basis over thirty years. The educational entity actually fulfills the obligation to the Federal Government for the property at the rate of three and one-third percent annually through constructive educational use. Title to the property is conveyed up front, subject to educational use restrictions, and a reverter or buy-out provisions.

b.) Economic Development Conveyance

Transfer of portions of the LSAAP and RRAD-WEP facilities could potentially occur by means of an Economic Development Conveyance (EDC) from the Army. However, only an RRRA is eligible to acquire property under an EDC. The RRRA must demonstrate that the proposed uses for the property will generate sufficient jobs to justify an EDC conveyance, and that the proposed land uses are realistically achievable given current and projected market conditions. In most cases, the Army will be required to seek fair market value consideration for the EDC conveyance although it is authorized, on a case-by-case basis, to grant an EDC for no consideration.

Under this scenario, an Implementation LRA, or other comparable entity, would have to be established to oversee redevelopment of the site once the existing LRA has fulfilled its responsibilities for preparing this reuse plan. The Implementation LRA would have take title to the property within a “reasonable time” after the Army makes its surplus property determination. In addition, the LRA must agree that the proceeds of sale or lease of the property received during the first seven years after initial conveyance shall be used to support the economic development of the installation. The LRA may use proceeds from the property to fund the following activities for supporting economic redevelopment of the site.

- Road construction and public buildings
- Transportation management facilities
- Storm and sanitary sewer construction
- Police and fire protection facilities and other public facilities
- Utility construction
- Building rehabilitation
- Historic property preservation
- Pollution prevention equipment or facilities
- Demolition
- Landscaping, grading and other site or public improvements
- Planning and marketing reuse of the installation

c.) Negotiated Sale or Public Sale

There are a number of other methods that the Army can use to dispose of the surplus property, two of which, negotiated sale to a public entity or an advertised public sale, have reasonable potential for use related to the subject properties. A **negotiated sale** can only be transacted with a public body if a public benefit, which would not be realized from a competitive advertised sale or authorized public benefit conveyance, will result from the negotiated sale. The grantee may not pay less than fair market value based upon a highest and best use appraisal of the property and final approval of the sale must be authorized by Congress. If the property is sold within three years following a negotiated sale, the grantee will be required to remit all proceeds in excess of its initial acquisition costs.

If the LRA, after preparing a reuse plan, determines it is in the best interest of the community not to be directly involved in redeveloping the site, it can recommend that the Army dispose of the property through a **public sale**. The actual method of sale could be one of a number including sealed bid, Internet auction, or on-site auction to the highest bidder. Under such an approach, the DoD would make a determination whether to sell the entire parcel or as subdivided parcels. Property acquired by a private organization or individual is not subject to any restrictions on the use or resale of the property. However, it would be subject to local land use and zoning controls.

d.) Disposal of Property for Use by Homeless

As part of the initial screening process for reuse and disposal of a BRAC property, consideration must be given to potential use for the homeless. Property that has been identified for potential use to the homeless must be conveyed to either an organization that is a representative homeless provider, as approved by the U.S. Department of Housing and Urban Development (HUD) or the LRA. If the property is conveyed to the LRA it must then make it available to the homeless provider for no cost. The LRA is also responsible for monitoring the use of the property and ensuring that the homeless provider complies with the legally binding agreement that must accompany all such conveyances.

In accordance with base closure law, the RRRRA must solicit Notices of Interest (NOI) from state and local governments, representatives of the homeless, and other interested parties in the vicinity of the installation that may be eligible for a public benefit conveyance related to the Lone Star and Red River facilities. The RRRRA must give notice as to the timeframe in which NOIs will be accepted for submittal and hold hearings to allow interested parties to provide input into the reuse planning process. On June 7, 2006 the RRRRA published a public notice soliciting interest from the types of organizations noted above with a deadline for receipt of said notices by September 7, 2006. During this time period the RRRRA received no notices of interest from any qualified organizations or representatives of the homeless.

2. Appraisals and Fair Market Value

It should be noted that the Army, or in the case of a Public Benefit Conveyance (PBC) the sponsoring agency, is required to obtain appraisals of fair market value of the property prior to conveyance. Therefore, any transfer of either property by means of an EDC, negotiated sale, or public sale, as well as a PBC, will necessitate preparation of an appraisal. Appraisals must be based upon the highest and best use of the property, taking account of all property conditions that are relevant to fair market value. The final determination of fair market value is made by the Secretary of Defense, or a designee such as the Secretary of the Army, and cannot be negotiated by the RRRRA.

Determining market value can often appear to be a rather subjective judgment since arriving at a highest and best use for a property is dependent upon a number of assumptions that reflect *potential* future conditions that may exist at the property. Market value is heavily dependent upon assumptions related to market conditions, availability of resources, tenants, environmental contamination, capital costs, and code violations. An analysis of highest and best use is required to determine the highest economic return that is typically based on the four following tests.

- What uses are **physically possible** for the site in that they could function adequately for their intended purpose?
- What uses are **legally possible** based on compliance with all applicable land use regulations and laws?
- Which uses are **financially feasible** in terms of their ability to provide an adequate return on investment?
- What is the **maximum productivity** of the physically, legally, and financially feasible uses, in terms of generating the highest return?

Based on these criteria, it is evident that the local reuse planning process can have a significant impact on determining highest and best use and ultimately market value. The final reuse plan will address issues such as zoning and other land use controls, estimated infrastructure improvements, public land uses, and redevelopment incentives. Detailed plans that provide proposals for high density development, for example, may result in higher market value than less detailed or lower density redevelopment plans. While this possibility should not necessarily preclude planning for more intensive land use it is important that any plan accurately reflect redevelopment potential from an economic perspective, since this planning is likely to effect the purchase price that will have to be recovered by either the community or a private developer.

3. Early Transfer of Property

Under certain circumstances, the military may have unfinished responsibilities regarding a BRAC installation that could preclude immediate transfer of property or otherwise effect the clear-title status of the facility. Provisions of the Comprehensive Environmental Response, Compensation and

Liability Act (CERCLA) require federal agencies to complete all environmental remediation actions for contaminated sites before transferring property by deed to a nonfederal entity.

An amendment to CERCLA in 1996 however, provided an alternative approach that allows for early transfer of contaminated sites prior to full remediation. Furthermore, through the course of the last several BRAC rounds the DoD has made significant efforts to expedite the transfer of such sites, including approaches that involve privatization of all or portions of the environmental cleanup process. Under the provisions of early transfer authority, ownership of the property moves from the DoD to another party with the DoD retaining all legal responsibility and liability for remediation of the site. However, as part of this transfer agreement the DoD can oversee the entire cleanup process or enact a subsidiary agreement with either a local, county, or state governmental agency, or a private entity that represents the interest of a BRAC installation, to oversee cleanup and restoration activities. **It should be noted that if the facility being considered for early transfer is a Non-National Priority List (Non-NPL) site, the Governor must authorize early transfer since the state will be asked to oversee the cleanup process. This may result in staff and budgetary strains for state regulators.**

There are two primary mechanisms typically used by the military to transfer cleanup responsibilities to another entity under this expedited process that include a Performance-based Contract (PBC) and an Environmental Services Cooperative Agreement (ESCA). A PBC establishes performance objectives for the cleanup, rather than a prescriptive scope of work, which offers greater flexibility to contractors in achieving the restoration goals that can help to accelerate the cleanup process and limit liability for the military. An ESCA obligates BRAC funds for the cleanup and assigns partial liability to an entity representing the interests of the installation in exchange for the performance of specific environmental restoration services. Prior to entering into either of these agreements, an environmental assessment must be completed to determine what the estimated cleanup costs will be for the site in question. This process would be overseen by the state and financed with BRAC funds.

a.) Environmental Insurance

As part of any real estate transfer process involving a site that has been subjected to environmental contamination, strong consideration should be given to obtaining environmental insurance. As noted previously, under the provisions of CERCLA, the federal government is responsible for cleaning up any contamination that can be attributed to DoD activities. In addition, BRAC properties are afforded a second level of protection under the National Defense Authorization Act through which, the DoD indemnifies transferees and lessees of base closure property from legal action for releases or threatened releases of hazardous substances resulting from DoD activities.

Although these measures do provide a considerable level of protection for reuse of contaminated sites, the acquisition of environmental insurance may also be warranted to offer further assurance to future owners against potential liability. Environmental insurance can address four key issues related to reuse planning including extended liability protection, protection against business interruption, unanticipated remedial project costs, and as a site marketing tool for attracting potential investors. There are several types of prominently used insurance policies including the following.

- **Pollution legal liability insurance** – will cover claims against the current and previous owners arising from cleanup, bodily injury, or property damage. Both known and unknown pre-existing contamination may be covered in the policy. It may be more practical to segment the site into multiple covered locations, or sublimiting additional insureds to address specific coverage needs with specific policies, as a more effective approach than a single blanket policy.

- **Cleanup cost cap or stop gap insurance** – also known as Remedial Stop Loss insurance, covers instances where actual cleanup costs exceed estimated costs. The types of conditions generally covered by such a policy include a greater spread or higher concentration of contamination, a change in regulatory conditions after inception of the plan, and discovery of unknown contamination during implementation of the remedial cleanup plan.
- **Property transfer insurance** – is designed to cover claims arising from pre-existing unknown contamination and known contamination below reportable levels. This insurance is similar to pollution liability insurance but more focused on the property transfer scenario.
- **Brownfields restoration and redevelopment insurance** – covers a site with known environmental contamination for which cleanup and development activities are planned. In effect, it is a combination of property transfer insurance and cleanup cap insurance.

The application of an environmental insurance policy to a BRAC site is a complex transaction since there can be a number of parties involved in the remediation and redevelopment who are subject to various inherent environmental risks as part of the property transfer process. These parties typically include the LRA, local and county governments, contractor, consultant, project manager, as well as the financial company, developer, or purchaser. In light of this fact, insurance carriers have developed appropriate policies that help to manage these risks in an effort to protect all participants from known and unknown exposures at a given site. The selected policy should be in place as soon as the LRA or other insured entity incurs any liability as a result of any transfer or conveyance mechanism, including the execution of a lease. Prior to selecting the appropriate policy a risk management program should be developed that recognizes and balances the proposed transfer structure, reflects acceptable levels of risk for the parties involved and is flexible enough to adapt to unanticipated future changes. In addition, selection of a qualified insurer will also be an important part of this process. Some key characteristics suggested by the ADC that should be considered when selecting what may be a group of insurers should include the following.

- A strong and stable financial position through industry ratings
- Track record of previous BRAC placement
- Commitment to the BRAC market all the way to senior management
- The ability to bring an efficient team of underwriters, environmental consultants and legal experts with demonstrated BRAC experience to the table
- The ability to work alongside your attorneys, environmental consultants and broker as a team

b.) Interim Use Leases

Another means of facility an alternative type of early transfer is through execution of an interim lease. Prior to deed transfer there may be opportunities for the LRA to obtain access to certain land parcels or facilities on an interim use basis, that could allow economic development to proceed prior to actual installation closure and transfer. There are many examples from previous BRAC rounds where the LRA assumed responsibility for operation of the base's infrastructure in order to facilitate establishment of a master lease agreement that allowed for subleases of specific structures, or sites, for civilian uses. This, in turn, created short-term revenue-generating activities and/or helped to minimize the operating and

maintenance costs of the properties. An interim lease approach may be suitable for portions of the LSAAP facility with regard to the potential continued operation.

The ultimate goal of the military, with regard to BRAC facilities, is to dispose of any surplus property as promptly as possible. If the military determines that the interim use of such property would facilitate state and local economic efforts, and not interfere or delay the final property disposal, it may be inclined to grant such a lease. Further, the military may accept less than fair market value if it determines that such acceptance would be in the public interest and fair market rent is unobtainable or not compatible with such public benefit. Before entering into a lease, the military must consult with the EPA to determine whether environmental conditions on the property are acceptable, as discussed previously under the section related to early transfer authority, for execution of such an agreement.