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Association of Defense Communities
Comments on the
Department of Defense's Proposed Rule:
Revitalizing Base Closure Communities
And Addressing the Impacts of Realignment
(32 CFR § 174)

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Recently the Department of Defense published its proposed rule to implement Section 2715 of the National Defense Authorization Act for Fiscal Year 2010 related to changes in the Economic Development Conveyance ("EDC") authority. Under Section 2715, the Department of Defense is no longer required to seek to obtain fair market value for EDCs. An EDC may now be for *"…consideration at or below the estimated fair market value or without consideration…."*

The Association of Defense Communities ("ADC") has carefully reviewed the proposed Department of Defense rule published on December 17, 2010 (Federal Register, Vol. 75, No. 242, ¶ 78947; "Proposed Rule"), receiving input from the ADC leadership and numerous local redevelopment authorities ("LRAs") across the country. ADC applauds the Department of Defense for the Proposed Rule and its faithful interpretation of Section 2715 and elimination of the requirement that DOD make a finding of fair market value. More importantly, since there is no longer a requirement to seek fair market value, the Proposed Rule *"…deletes the requirement for the Department to obtain an appraisal of the property as part of an EDC conveyance, including analysis of highest and best use, for that purpose."*

The Proposed Rule notes that *"…estimates of fair market value for property at closing installations, especially those requiring substantial future investment in redevelopment can vary widely due to the uncertainties inherent in significant long-term redevelopment projects…"* and encourages the Military Department disposal agents to approach *value "…by obtaining a share of the revenues obtained from the redevelopment of the property."* Accordingly, the Proposed

Rule adopts in large part the so-called "back-end" participation mechanism recently agreed to by the Navy and the City of San Francisco for the conveyance of the former Naval Station Treasure Island. That agreement allows the Navy to share in the revenues received by the LRA during the development of the property to allow the final consideration for the property to be based upon real world development plans, market conditions, and financing opportunities.

Accordingly, and with the Proposed Rule's purpose clearly in mind, ADC offers the following comments and recommendations:

I. Facilitating Economic Revitalization in Defense Communities

By eliminating the requirement to seek fair market value, the Department is given additional flexibility to work with LRAs, permitting expeditious property transfer, and encouraging economic development. ADC is encouraged by this flexibility which will allow the Department to review each EDC application on a case-by-case basis and take into account the specific circumstances that are unique to each base redevelopment project. ADC is encouraged by the Proposed Rule and is optimistic that it will facilitate economic recovery in communities still reeling from military base closure.

II. Reporting Requirements

Paragraph 174.9(d)(8) of the Proposed Rule states that *"…proceeds from any sale or lease of the EDC parcel (or any portion thereof) received by the LRA during at least the first seven years after the date of the initial transfer of property … shall be used to support economic development…."* However, the paragraph then goes on to state *"[I]n the case of phased transfers, the Secretary concerned may also require that this commitment apply during at least the first seven years after the date of every subsequent transfer of property to the LRA."* In the case of a large installation in which property is likely to be conveyed to the LRA in small increments over decades, this second sentence relating to phased conveyances has the potential to create burdensome reporting and accounting requirements.

Some LRAs are actively redeveloping large installations where the Military Departments transfer property several times a year in small parcels. These continuous and overlapping reporting and accounting requirements result in a difficult, expensive, and time-consuming process for both local jurisdictions and the Department, since the Military Departments require each annual EDC report to be accompanied by a fully certified audit. It is unimaginable that the Department intends for an LRA to provide multiple annual audits each year for each separate parcel conveyed to the LRA. We believe this result and the consequences were unintended.

Accordingly, ADC urges the Department to retain the language of the original rule and require the LRA to account only for "…*proceeds from any sale or lease of the EDC parcel (or any portion thereof) received by the LRA during at least the first seven years after the date of the initial transfer of property*…"

III. Timely Acceptance of Property

The Proposed Rule favorably notes at Paragraph 174.9(d)(9) the requirement for the LRA to *"…accept control of the property within a reasonable time, as determined by the Secretary…"* Presumably, this means within a reasonable time after the property is tendered to the LRA. Nevertheless, the Paragraph fails to address any concomitant obligation of the Military Departments to remediate the property in a manner suitable to accomplish the community reuse plan. We can envision circumstances whereby restrictive covenants are placed in the deeds conveying the EDC property that will prohibit the LRA from implementing the community reuse plan that is the basis for the EDC Agreement and yet the LRA will be forced to accept the property or forfeit its rights under the EDC. While the issue of remediation standards is almost always raised during surplus military base property negotiations and conveyances, that is not the issue we are raising in these comments, nor is that issue appropriate for the Proposed Rule. Rather, the issue raised is one of timing.

If significant remediation of the property is required to achieve the goals of the community reuse plan, and such remediation is to be accomplished by the LRA, then ADC believes the tender of the contaminated property by the Military Department disposal agent and acceptance by the LRA must both be timed reasonably to allow the LRA to remediate and develop the property in accordance with the Reuse Plan. We believe the reasonableness standard should apply to both the tender and the acceptance of the property. Accordingly, we suggest the language of the Proposed Rule be modified such that the tender and acceptance by the LRA be at a time that is reasonable under the circumstances given the needs of the Military Department to dispose of surplus property and the needs of the LRA to maintain such property until it can be redeveloped.

IV. Appraisal

As noted above, the Proposed Rule *"…deletes the requirement for the Department to obtain an appraisal of the property as part of an EDC conveyance, including analysis of highest and best use, for that purpose."* The Military Departments have maximum flexibility to use or not use appraisals in the process when determining consideration for EDC property, even though the intent of the Proposed Rule appears to rely instead on business plans and a development

proforma and move away from a fair market value analysis and the contentious negotiations that arise from "dueling appraisals." Unfortunately, Paragraph 174.9(k) of the Proposed Rule does not clearly address the issue of consideration. Rather, the operative language in Paragraph 174.9(k) of the Proposed Rule is "should" instead of "shall." To clarify the requirement for consideration, ADC recommends that the second sentence of Paragraph 174.9(k) substitute "shall" for "should" and read as follows: *"[t]he consideration negotiated shall be based on a business plan and development proforma that assumes the uses in the redevelopment plan."*