

NAS OCEANA AND THE BRAC ORDER:

WHY WE COMPLY

The BRAC Order required the Commonwealth and localities to take six specific actions to prevent further encroachment around NAS Oceana in order to avoid the possible relocation of the Navy's East Coast Master Jet Base to Cecil Field in Jacksonville, Florida. These six requirements affected land use in more than 23% of the entire City of Virginia Beach. Compliance with the BRAC order therefore was no straightforward matter. It required careful and creative thinking about how to satisfy both the letter and intent of the order consistent with good land use policy.

In the end, the Commonwealth and the Cities of Virginia Beach and Chesapeake have put together a program that satisfies each of the six specific requirements under the BRAC Order. Of these six requirements, it is the second one -- the requirement for a program to "condemn and purchase" all "incompatible use property" within Accident Potential Zone (APZ) 1 -- that has generated the most debate -- and also the most confusion. The questions about whether the

The BRAC Order states:

Realign Naval Air Station Oceana, Virginia by relocating the East Coast Master Jet Base to Cecil Field, Florida, **if** (emphasis added) the Commonwealth of Virginia and the municipal governments of Virginia Beach, VA and Chesapeake, Virginia, fail to enact and enforce legislation to **prevent further encroachment** (emphasis added) of Naval Air Station Oceana by the end of March 2006, to wit: . .

(Condition 2) enact state and local legislation ordinances to establish a program to condemn and purchase all the **incompatible use** (emphasis added) property located within the Accident Potential Zone 1 areas for Naval Air Station Oceana, as depicted in the 1999 AICUZ Pamphlet published by the U.S. Navy and to fund and expend no less than \$15 million annually in furtherance of the aforementioned program, . . .

Commonwealth and the Cities have satisfied this second requirement arise from

focusing too narrowly on the phrase “condemn and purchase” in isolation from the remainder of the BRAC Order and the Navy guidance on which the order is based. Understood in its proper context, the “condemn and purchase” requirement is fully satisfied by the City’s program, which immediately halts all new incompatible development in APZ-1 and rolls back existing encroachment through strong incentives to encourage voluntary conversion of property in APZ-1 to compatible uses under the Navy’s guidelines.

The question now rests with the Department of Defense Inspector General, who must certify whether the Virginia jurisdictions have complied with the terms of the Order. Unfortunately, since the BRAC Order was issued, the frequently repeated media “sound bite” has been that the City “must purchase and condemn homes and businesses in the APZ-1.” Anyone who has tried to read the BRAC Order from beginning to end, however, will appreciate that the dense text of the order defies any attempt to reduce its meaning to a sound bite.

For those who have heard only the sound bite and believe that all 3400 homes must be purchased or condemned in order to comply with the BRAC Order, let me tell you -- as Paul Harvey would say -- the rest of the story.

(1) The plain language of the Order is clear and does not require condemnation of existing homes.

(a) The very first clause of the BRAC Order (see box-insert) makes clear that all six of the specific requirements share a common purpose -- “to prevent further encroachment” at Oceana. The phrase “**prevent further encroachment**” has a meaning that cannot be ignored and cannot be selectively interpreted. There is no need to condemn existing homes to meet the objective of preventing **further** encroachment around the base. In addition, giving proper effect to the phrase “**prevent further encroachment**” assures an interpretation consistent with the phrase “incompatible use property” as explained next.

(b) **The term “incompatible use property” does not include existing homes around Oceana.**

The phrase “incompatible use property” in the BRAC order is taken directly from the Navy's air installation compatible use guideline. That guideline identifies land uses that are generally deemed “incompatible” with flight operations within APZ-1 areas around a Naval air installation — such as residential or retail uses. The guideline also recognizes that the compatibility designations “may vary according to local conditions.” In a letter dated January 21, 2005, NAS Oceana’s Commanding Officer stated “**The developments in the APZ’s are considered pre-existing non-conforming uses and are not NAS Oceana’s number one priority.**” Likewise, the Navy made clear in its testimony before the BRAC Commission that it considered existing development around Oceana to be manageable, which is consistent with the BRAC Order’s focus on preventing “further” encroachment. The Navy guideline also makes clear that

property acquisition for purposes of preventing encroachment at air installations should be limited to undeveloped property “unless unusual situations exist which would warrant the expense and disruption of ‘trying to turn back the clock’ in developed areas. Clearly, the Navy has indicated that existing development at Oceana does not represent an “unusual situation” that would warrant trying to “turn back the clock” by condemning existing homes.

(2) **A "sound bite" interpretation of the BRAC Order as requiring the acquisition of all property in the APZ 1 areas leads to an absurd result.**

If the “condemn and purchase” requirement is read in isolation, without assigning meaning to the term “**prevent further encroachment,**” it would call for a program that would result in spending \$15 Million per year to buy property, which is continuing to increase in value, with money that is decreasing in value. And during that time, new development would be able to continue, because none of the six BRAC recommendations specifically requires the locality to impose any restriction on new development which can be built of-right, i.e., without further local government approval. After 20 years of such a “condemnation only” approach, there will be more incompatible uses in APZ-1 than exist today. Unless the entire BRAC process is irrational, the BRAC Order cannot be read to require a futile “condemnation only” approach that will not meet the order’s stated purpose of preventing further encroachment.

(3) **The City's compliance plan meets the letter and intent of the BRAC Order.**

(a) As noted above, the Order's stated purpose is to prevent further encroachment around Oceana. The BRAC Commission further explained its intentions in the written "Commission Findings" that accompanied the order:

The intent of the Commission is to ensure that the State of Virginia and the municipal governments of Virginia Beach and Chesapeake take immediate and positive steps to halt the encroaching developments that are pending before them now and before them in the future, and also to roll-back the encroachment that has already incurred in the Accident Potential Zones around NAS Oceana and NALF Fentress, particularly in the APZ-1 areas.

The City has instituted concrete measures that stop all future incompatible development, utilizing a combination of land use tools, condemnation, voluntary acquisition and incentive packages to meet the intent of the BRAC Order. Specifically:

1. The AICUZ Overlay Ordinance stops discretionary development of incompatible uses within the 70 decibel noise level and higher.
2. The APZ-1 Ordinance stops all new development of incompatible uses in **all property** in APZ-1 areas. It has the effect of placing an easement "preventing **further** encroachment" by incompatible land use over **all** property in the APZ-1 areas. This land use ordinance is the equivalent of the Navy's purchasing or condemning a restrictive easement over all APZ-1 property. Why the difference in approach? First, the use of a land use control is much more

effective; it achieves immediately a result that would taken a decade or more to achieve through the acquisition of individual restrictive easements at the rate of \$15 million a year. Furthermore, a land use control was not a tool that was available to the Navy. Direct regulation of land use is solely within the authority of state and local governments.

3. The **APZ Use and Acquisition Plan** provides for the purchase of property left without a reasonable use by the APZ-1 ordinance, including undeveloped residential property, developed residential property that could redevelop to duplex, and commercial properties where business purposes have been thwarted by restrictions on expansion of an existing commercial use. Condemnation is available where requested by the property owner.
4. The **Oceana Land Use Conformity Program** is an incentive program that encourages the roll-back of nonconforming uses within the APZ-1. It utilizes tax, land use, financial and economic development incentives to encourage nonconforming uses to relocate outside of the APZ-1 and, likewise, to encourage conforming uses to relocate within the APZ-1. In addition to rolling back incompatible development in an efficient manner, the program also has the benefit of leveraging the use of the \$15 million annual expenditure requirement by encouraging transactions rather than purchasing 100% of the fee simple interest in the property.

The net result is an effective and efficient program to stop and roll back incompatible development around the base. It meets the recommendations and intent of the BRAC Order, it represents good land use policy, and it works.

END.