PART III

The Role of States in Community Land Use Planning and Encroachment Prevention

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

U.S. Constitution, 10th Amendment

Table of Contents pgs ix, x, xi, xii, xiii, xiv, xv

INTRODUCTION

Part III explores the role of State governments in community land use planning and the issues of civilian encroachment and its impact on active military installations. It begins with a general discussion of State growth management legislation, illustrating that State governments have become more involved in managing land use, traditionally the province of local governments, especially where unmanaged regional development has led to sprawl. It then proceeds to present case studies of specific state policies aimed at preventing or mitigating the impacts of encroachment on military base operations.

States have two fundamental roles relative to planning: (1) enabling or requiring local governments to take action by statute; and (2) setting statewide policy. State governments may choose to establish overarching policies regarding the presence of the military within the State. For example, States such as Arizona, California, Florida, Georgia, Oklahoma, South Carolina, Virginia, and Washington are among the leading States in the passage of laws dealing with military installations and civilian encroachment.

A. State Planning Authority

All states possess some form of planning and zoning enabling statutes

All States possess some form of planning and zoning enabling statutes. However, the statutes are not uniform in their construction or delegation of local planning and zoning authority. In some States, this delegation is mandatory (15 States). In others, it is optional (10 States). In still others, a State may conditionally mandate planning if there is a functioning planning commission (25 States).[1] (See Appendix 1.1.) This becomes more complex when "property rights" States are considered in the equation.

There are a number of "property rights" States that must be taken into consideration when formulating and applying land use compatibility regulatory tools identified in this Practical Guide. *The reader should be mindful of the potential limitations and seek legal counsel prior to engaging the compatible land use planning process and accompanying land use regulations designed to prevent incompatible development near military installations.*

As background, in 1922, the Supreme Court held that "the general rule is that property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a 'taking'" (*Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415).* Almost every State has considered property rights legislation intended to limit government regulation of land use. Therefore the reader is cautioned to examine the nature of "property rights" statutes that may exist in a particular State and respond accordingly. States such as Arizona, Florida, Mississippi, and Missouri have property rights legislation on the books that require careful and deliberative approaches to the application of local government land use regulations.

This underscores the importance of a local jurisdiction with planning and zoning authority to undertake careful, deliberative, and inclusive comprehensive/general plan process so as to establish the community's land use goals, objectives, and policies in support of the judicious application of land use regulations in the interest of protecting the public health, safety, and welfare. This point cannot be overemphasized.

The laws of property rights and government regulation are difficult to grasp, and complicated by legal arguments on both sides. There is a considerable body of legal precedent to support this. States that have enacted property rights statutes have nevertheless been able to balance a person's rights to property and the military's need to function. This careful balancing has been embedded in the local planning process and is intended to reach a mutual accord through arbitration, as in the case of Florida.[2] Where States have the authority to move forward with encroachment prevention statutes, they have been effective.

Home Rule States and Delegation: The authority of local government to undertake and enforce planning and zoning is derived from three sources: the State constitution, State enabling statutes, and/or city or county municipal charter under home rule authority extended to it by the State. The delegation and extent of authority can be either broad or narrowly defined, depending on the State. In a few States, there are exceptions to this general observation. These States often are referred to as "Dillon's Rule" States.[3] In these States, specific authority not conferred upon a local jurisdiction is reserved to the State legislature. In still other States that are not "Dillon's Rule" States, this rule often is used to interpret the powers granted to local governments under home rule.[4]

Where military installations are experiencing pressures from civilian encroachment, the local city or county governments may not possess the full authority or the planning tools necessary to address proactively the issue of civilian encroachment.

> **Strategy:** *(Once recognized as a local issue), the local government leaders may have no redress other than to petition the State legislature for "specific" authority not generally extended to other local jurisdictions in the State.*

B. State Planning Law

An important aspect of State planning law is that it delegates to local governments the responsibility to conduct land use planning as a grassroots exercise in local governance. In the 1970s, however, State governments began to exercise greater control over growth management and environmental issues at the State and local levels.[5] Some have recognized and gone beyond enabling legislation to establish State policies focused on the question of urban sprawl, managing regional growth, and developments of critical State concern.

"In many cases, sprawl happens because of a lack of political will on the part of local elected officials to oppose it."[6]

Where States have the authority to move forward with encroachment prevention statutes, they have been effective

1. The Urban Growth Management Movement of the 1990s: [7] Smart growth and "Green" initiatives of the last 20 years have grown from State growth management programs that recognized the link between State goals and local land use plans. Typically, there are four elements:[8]

- Enactment of state legislation creating the program
- Preparation of local government comprehensive/general plans
- State review of local plans
- State incentives and disincentives to encourage local compliance

The following are examples of States that have initiated smart growth initiatives:[9]

Arizona's Growing Smarter Act of 1998[10] clarifies and strengthens planning elements of county and municipal general plans by adding four new elements: open space, growth areas, environmental planning, and cost of development. In 2000, the legislature passed "Growing Smarter Plus" to further enhance land use planning statutes in Arizona. Some of the requirements called for voter approval of general plans at least every 10 years, including water resources elements. Another highlight requires mandatory rezoning in conformance with a comprehensive/general plan.

Georgia's Coordinated Planning Act of 1989[11] requires all cities and counties to adopt and implement a comprehensive plan if they wish to be eligible for State economic development funds or to enact impact fees. The legislation also creates regional development centers to mediate disputes among local governments and to provide technical assistance for local planning efforts. Under the legislation, the Georgia Office of Community Affairs is designated the lead agency.

Maryland's Smart Growth Areas Act of 1997[12] focuses on attacking suburban sprawl. It follows on the Economic Growth, Resource Protection, and Planning Act of 1992 that emphasized concentrated development in "suitable" areas and the protection of sensitive and resource areas by directing rural growth to existing population centers.

A key mechanism of the Maryland Smart Growth initiative was the management of growth targets and the funding for assets such as highways, sewer and water construction, economic development assistance, and State office facilities in Priority Funding Areas (PFAs).[13]

The 1997 act provides a geographic focus for the State's investment in growth-related infrastructure and was instrumental in the State's refusal to expend funds to support suburban sprawl. However, this was only one component of a series of State intervention actions. In 1974, the State adopted an intervention policy whereby the Maryland Department of Planning may participate in any local, State, or land use proceedings to inform local decision makers of the State's views on such matters and to act consistent with the general welfare of the State and its residents.

Washington's Growth Management Program (1995 Growth Management Act)[14] specified three aims: (a) to guide local governments in preparing and implementing comprehensive plans; (b) to integrate environmental regulation with growth management; and (c) to pursue regional coordination and regional planning. In addition, a number of policy goals were established, such as adequate public facilities to support growth, reduced sprawl, efficient multimodal transportation, affordable housing, economic development, protected property rights, timely permits, open space, environmental protection, and quality of life.[15]

As with other States' growth management initiatives, the local comprehensive/general plan is the keystone from which all management techniques and tools are supported. In the State of Washington, the 1995 Growth Management Act requires the designation of "urban growth areas" where the projected population growth and supporting infrastructure are to be provided. This is one of a number of growth management tools available to local governments.[16] Part V of this *Practical Guide* explores these tools in depth.

The local comprehensive/ general plan is the keystone from which all management techniques and tools are supported

Florida's Comprehensive Plan: In 1985, the Florida legislature adopted the State Comprehensive Plan, which provided a long-term planning vision. Noting that urban sprawl was expending the State's lands and resources at an alarming rate and needed to be controlled and managed, the Florida legislature developed the "concurrency" requirement. This mandates that "development cannot be permitted until roads, water, sewer, parks, recreation, and other essential infrastructure is in place."

The statute also requires local cities, and counties' development plans to be consistent with State development and land use policies. [17]

Areas of Critical State Concern: Florida's *1972 Environmental Land and Water Management Act*[18] requires State approval of major development proposals. The law designated "Areas of Critical State Concern" and set thresholds for "Developments of Regional Impact" (DRI).[19] Projects that meet the threshold criteria are reviewed in terms of their anticipated impacts on land use patterns, public services, and the environment.

From time to time, the State land planning agency may recommend nomination of specific areas to the Administration Commission to be designated areas of critical State concern.[20] These recommendations point out the dangers that would result from uncontrolled or inadequate development of the areas recommended and the advantages that would be achieved from development in a coordinated manner. The commission is empowered to designate the area of critical State concern based on the recommendation of the land planning agency.

One of the statutory tests used to determine if an area is eligible to be designated an Area of Critical State Concern is whether there is a "major public facility or other areas of major public investment, including but not limited to highways, ports, airports, energy facilities, and water management projects" in the area under study.[21] Interpretation could include military installations located in the State.

A military installation, be it State-owned or DoD-owned, is a major public facility and could and should be considered eligible for designation as an area of critical State concern, and thus eligible for State oversight and protection.

> **Strategy:** *The Florida Land Development Code, in coordination with the State's critical areas legislation, can serve as a model for encroachment prevention and issues confronting military installations within the State and nationally. What would be required is for the Governor to declare military installations, airfields, and ranges Areas of Critical State Concern not so much on environmental grounds, but on economic development and public health and safety grounds.*

Smart growth/green initiative States have made the local comprehensive/general plan an integral part of the State's growth management strategy and local government's decision making. The focus has been on concentrated areas in which the supply of public facilities and services will permit the greatest economies and efficiencies for the benefit of the general taxpaying populace.

2. Regional Planning: The prevailing thinking of the professional planner's support for regional planning is that it is "superior" to local, grassroots planning — especially in areas involving multiple jurisdictions. Examples include the Minneapolis-St. Paul, Minnesota, area; Portland, Oregon; Silicon Valley, California; the consolidated Indianapolis, Indiana, planning functions; and Cape Cod, Massachusetts. Despite these examples, the question remains why regional planning has not taken stronger root over comprehensive local, grassroots planning.

"If planning is a good thing then it is best kept at the grassroots level"

The answer lies in the same fundamental argument driving strong State-mandated planning. This Nation has fully accepted the grassroots philosophy that "if planning is a good thing then it is best kept at the grassroots level." The conventional wisdom is that regional governments can contribute to regional problem solving, such as regional waste treatment, transportation planning, and growth management, but issues involving individual parcel-specific land use, zoning, and subdivision decisions, should be reserved to the local governing body.

3. Councils of Governments and Metropolitan Planning Organizations: In every State, there are councils of governments (COGs) and/or metropolitan planning organizations (MPOs) that focus on regional planning issues. MPOs have a strong interest in applying smart growth principles that can coordinate better transportation planning with local development decision making. Their purpose is to coordinate Federal highway trust funds to meet transportation requirements and needs in accordance with a regional MPO plan. MPOs perform three basic activities as required by Federal law. They develop a 20-year transportation plan called a Metropolitan Transportation Plan (MTP); they annually develop a 3-year Transportation Improvement Program (TIP), and annually develop a plan of studies to determine transportation needs called a Unified Planning Work Program (UPWP). However, the MPO is not at the grassroots of local decision making.

Without a regional planning context, sprawl cannot be dealt with effectively

4. Uniformity Among Local Governments: In urban regions with multiple cities and counties, even States, different planning authorities, laws, processes, and procedures can create an uneven playing field. This lack of uniformity can spur developers and land speculators to shop for favorable land use consideration and zoning, perhaps settling in the wrong place at the wrong time, negatively affecting the viability of the military mission or contributing to urban sprawl that can tax local government responsibilities to provide adequate public facilities and services. The most visible results of this lack of planning are extended morning and evening peak-hour traffic congestion; overtaxed wastewater treatment facilities; and overcrowded schools, parks, and recreation facilities.

This lack of uniformity is not confined to local governments. Tom Daniels, in a book on managing growth in the metropolitan fringe, states:

> State and local governments have done much to encourage sprawl and the growth of the rural-urban fringe. Pro-growth strategies consciously or unconsciously have held sway. New and improved road networks have helped to open up formerly hard-to-reach places and have brought them into the metropolitan sphere of influence. The pursuit of expanding the local property tax base has led to fiscal zoning and over-zoning for large residential lots and commercial and industrial space.[22]

For military base commanders and government leaders alike, a lack of uniformity among local governments surrounding military installations can exacerbate the problem of consistently managing surrounding civilian encroachment, creating a degrading competitive environment in which there can be no winners.

This section presents four case studies as examples of proactive efforts by States

Pennsylvania has attempted to address the lack of uniformity among local governments in land use planning through legislation enacted in 1999 (Act 67 and Act 68) that authorizes municipalities to formulate multi-municipal comprehensive pans to manage growth on more of a regional basis through designation of growth areas and rural resource areas. Incentives to enter into agreements include authority to share State tax revenue and impact fees with other municipalities in the region, and to adopt transfer of development rights programs (see Part V).

C. State Legislation — Case Studies

This section presents four case studies as examples of proactive efforts by States to strengthen State statutes and, in the process, create uniformity among jurisdictions while respecting each local government's land use planning and regulatory authority and, most important of all, local prerogative.

State Legislative Initiatives: Establishing State priorities is one important role for State general assemblies. Increasingly States are recognizing the contribution that the military makes to their economies and to national and homeland defense. States such as Arizona, California, Florida, Georgia, Illinois, North Carolina, Oklahoma, South Carolina, Texas, Utah, Virginia, and Washington, to name a few, have or are considering legislation to strengthen local planning processes and programs and regulate land use activity and civilian encroachment that could negatively affect the utility of a military installation. The positive economic impact of the military presence in a State provides a motivator for States to become proactive on the encroachment issue. Nationwide in FY 2004, DoD expended over $345.8 billion.[23]

Establishing State priorities is one important role for State general assemblies

Table III-1 provides a summary of strategies to prevent encroachment and includes their benefits and challenges:[24]

Table III-1

State Initiatives in Encroachment Prevention

Strategy	Benefits	Challenges
State legislation to require compatible land use	*Provides a clear, well-defined law that requires compatible land use*	*Passing legislation is often a long, arduous process*
Local zoning, planning, and noise requirements	*Lets local governments decide how best to approach the problem in their locality* *Allows for detailed provisions that can be amended if necessary*	*Zoning and local land use plans can be influenced by local special-interest groups* *Enforcement can be uncertain*
Statutory authority to designate military installations as protected areas of critical State concern	*Existing legal framework already exists in many States* *Formally recognizes land surrounding military installations as needing protection*	*Not all States have this statutory language in place* *Amending a State statute requires legislative and executive approval*
Acquire property surrounding military installation	*Does not require legislative or regulatory review* *May not require outright purchase of land* *Allows local determination of future land use*	*Land purchase requires significant funds* *Landowner must be willing to sell or trade land or development rights* *All parties must reach agreement on terms*
Create a State military advisory body	*Serves as forum and unified voice for all stakeholders* *Nonregulatory*	*Does not have the authority to regulate or enforce*

Source: National Governors Association, Washington, DC, August 2004.

States delegate to local governments the responsibility to implement local planning and land use control regulations developed, adopted, and approved by local government. In a few States like Arizona, California, and Florida, the State legislatures are more prescriptive in their requirements relative to the contents of a city or county plan and implementing land use regulatory programs.

Following are four case studies of States that have influenced local government planning authority and programs by passing legislation containing encroachment prevention provisions in support of the DoD presence in their States:

1. Case Study – The State of Arizona: The State of Arizona is a leader in protecting the operating mission of military air bases, ranges, and auxiliary airfields. Ten Arizona cities commissioned an independent study in 2002 of the direct, indirect, and induced impacts of the military presence on the State's economy.[25] The study found that the estimated total impact on Arizona's economy was $5.7 billion in 2002. With 83,500 related jobs in the State as a result of the military presence, it is the dominant industry in the State.[26] DoD estimates relative to statewide direct DoD expenditures in FY 2004 were over $11.1 billion in personnel, contracts, and defense grants to support DoD missions in the state.

The State of Arizona is a leader in protecting the operating mission of military air bases, ranges, and auxiliary airfields

There are five major DoD installations in Arizona and a number of associated ranges (e.g., Barry M. Goldwater Range) and National Guard and lesser-sized installations. The principal DoD bases are

- Luke AFB;
- Davis-Monthan AFB;
- Fort Huachuca;
- Yuma Army Proving Grounds; and
- Marine Corps Air Station (MCAS) Yuma.

Collectively, these five installations represent over 25,000 jobs (4,869 civilian and 20,419 military).[27]

Statewide, the total number of civilian and military personnel swells to over 47,000 employees, including Military Reserve and National Guard. This is not insignificant. It speaks directly to the issue of the military and its secondary economic impact on local communities.

In addition to the five bases referenced above, the Barry M. Goldwater Range – Gila Bend Auxiliary Airfield – MCAS Yuma complex and related air space are major test and training ranges used by all military branches. They represent a DoD asset that cannot be replicated.

Beginning in 1995, the State enacted a number of statutory provisions to address the concern that residential development was encroaching too near military airfields, placing future residents in potentially noisy environments and in Accident Potential Zones (APZs), and threatening the operational missions of the military. Arizona has become the leader in hosting and supporting military air operations through the passage of "growing smarter" legislation aimed at reducing civilian encroachment and protecting the public health, safety, and welfare. No other State in the Union has exhibited such vigor or steadfast resolve to promote sound comprehensive/general land use planning to support the military presence.[28]

Under a series of legislative acts, sections of the Arizona Revised Statutes (ARS) were amended to incorporate additional comprehensive planning and land use requirements. The principle theme of these legislative initiatives is to require all surrounding cities, towns,

and counties to adopt or update compatible land use plans and enforce zoning regulations to protect future residents from the potential effects of military operations and to ensure compatible land use.[29] (See a more detailed discussion of these legislative initiatives below.)

- ARS § 9-461.05 contains legislation governing cities and towns with municipal planning responsibilities. It requires that general plans prepared by municipal governments near a military airport have a land use element that includes consideration of military airport operations. ARS § 9-461.06 requires that a governing body shall consult with, advise, and provide an opportunity for official comment by the military if there is a military airport within the territory of a jurisdiction. ARS § 9-462.04 requires formal notification to the military of public hearings involving rezoning of land located within the territory near a military airport and extends an opportunity for the military to comment on the compatibility of the rezoning application with high noise or accident potential generated by military airport operations.

- ARS § 11-806 contains legislation governing counties. It deals with county planning and zoning and the requirement that the county prepare a comprehensive plan that considers the operation of the military airport and offers the opportunity to consult, advise, review, and comment on the plan and rezoning of land (ARS § 11-829).

Beginning in 1995, the State enacted a number of statutory provisions to address the concern that residential development was encroaching too near military airfields

- ARS § 15-2002 and § 15-2041 governs education and the financing of schools. It requires that the military receive notice at least 30 days prior to any scheduled public hearing of any proposal regarding the building of new school facilities near a military airport.

- ARS § 28-8461 contains legislation governing transportation. This section of the statute deals with airport zoning regulations and joint powers airport authorities. It defines the Clear Zone, and military training routes near a military airport and auxiliary airfield and requires a political subdivision to adopt comprehensive and general plans for property in the hazard zones to ensure development compatible with the high noise and accident potential generated by the military airport operations. ARS § 28-8480 authorizes political subdivisions to acquire or lease interest in land for the continued operation of a military airport. ARS § 28-8481 requires political subdivisions located near a military airport to adopt comprehensive/general plans for property in the hazard zones to ensure development compatible with military airport operations. Zoning variances require specific findings that military compatibility is preserved. Public notification of any change in the plan or in zoning regulation affecting military airports is required. ARS §§ 28-8484 and 8485 require public disclosure of military flight operations and the notification to owners or potential buyers of property that an airport influence area may subject residents to aircraft noise and overflights.

- ARS §32-2113 requires real estate disclosure for property affected by designated military training routes (MTRs), auxiliary airfields, and training ranges. Arizona House Bill No. 2662 (2004) amended ARS §§ 32-2114 through 2116 as related to real estate transactions, land development, MTRs, and real estate disclosures.

Figure III-1 presents an example of a compatible land use plan for the area surrounding Davis-Monthan AFB near Tucson.[30] It depicts APZs, high noise zones, and a new concept exclusive to Arizona referred to as "territory in the Vicinity of …" commonly referred to as the "Vicinity Box." Within the Vicinity Box, real estate disclosure and sound level reduction (SLR) measures are required for all new building construction. The map is referenced in ARS § 28-8461(20).

Within the past 10 years, the State of Arizona became concerned with safety of departing military aircraft

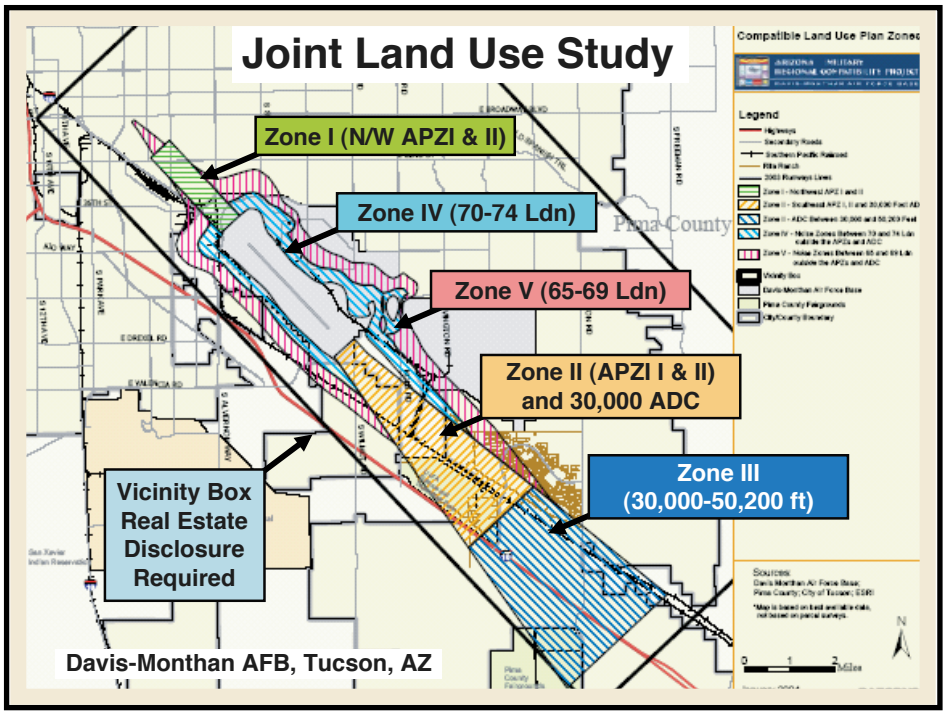
Military Airfield Live Ordnance Departure Corridor:[31] Within the past 10 years, the State of Arizona became concerned with the safety of departing military aircraft, destined for distant training ranges, that carry live bombs and missiles (ordnance) and external fuel tanks attached to aircraft wings.

In response, State law extended by 15,000 linear feet the area of a typical Air Force-recommended APZ. The statute effectively doubles the distance and land coverage for the departure corridors for air bases employing live ordnance by making the area of State protection equivalent to 30,000 linear feet or (5.7 miles) from the end of the military runway.[32]

Military training routes are highways in the sky

Figure III-1

Davis-Monthan AFB Extended APZs Proposed in JLUS



Source: Department of Commerce, State of Arizona, "Arizona Regional Compatibility Project — Davis-Monthan AFB Joint Land Use Study, Prepared for the City of Tucson and Pima County" (February 2004).

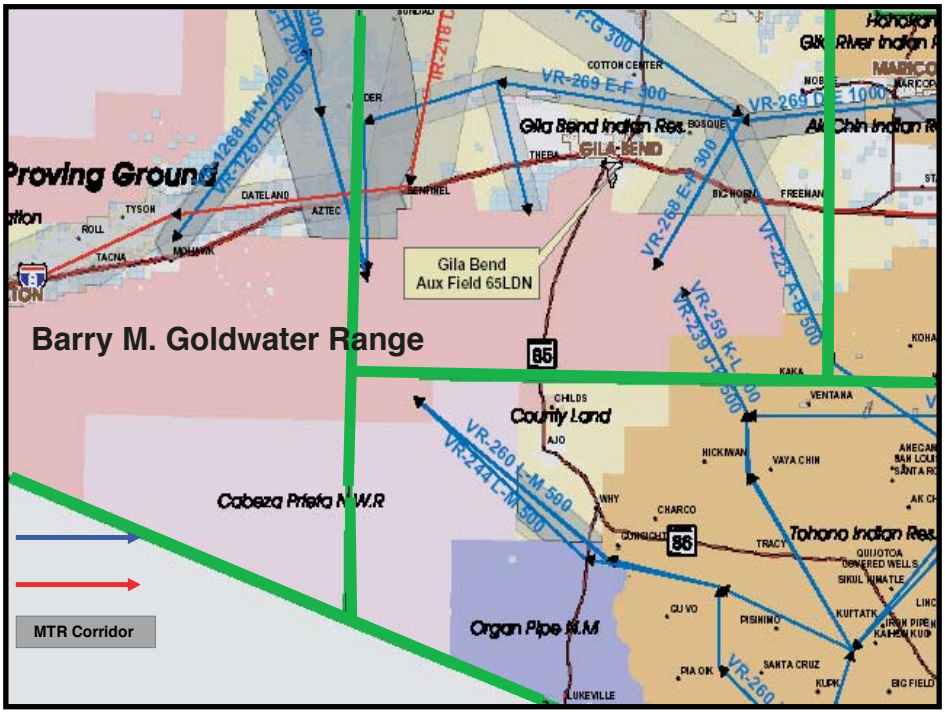
In 2004, the State legislature enacted additional requirements concerning the protection of military air space, known as MTRs, auxiliary airfields, and military operating areas or MOAs.[33] MTRs are highways in the sky. MOAs are restricted air space areas within which military aircraft are authorized to fly and engage in air exercises uninterrupted by commercial aircraft or ground clutter. An MTR is not an exclusive use (restricted) military airspace. However, the DoD maintains exclusivity relative to flight operations.

There are two types of MTRs. The first are high-altitude MTRs. These are of little interest in encroachment as the aircraft fly at unobtrusive altitudes in national airspace. However, a second MTR may require pilots to fly low and fast, below the "500-Foot Rule" (see Part IV). The objective is to train at low altitudes and apply terrain avoidance to replicate realistic military combat situations and to render enemy air defenses less effective.

Typically, low-altitude MTR pilots fly at 500 feet and at 480 knots ground speed (about 520 mph), although mission requirements might dictate a higher subsonic speed, up to 540 knots (600 mph). However, in certain designated low-level MTRs, pilots may fly as low as 200 feet above ground level (AGL) at sub-supersonic speeds (ground speeds less than the speed of sound). A typical flight is four airplanes in an "offset box," with the aircraft in a square formation separated by 1 to 4 miles.

Figure III-2

Military Training Routes to Barry M. Goldwater Range, Arizona



Source: Arizona State Land Department, "Military Training Routes, 2004."

These FAA-approved airspace routes crisscross the skies over a State and connect a series of military test and training ranges to the home base and other participating military air bases. In Arizona, there are over 5,000 miles of MTRs, some of which are up to 10 miles wide. This could amount to over 50,000 +/- square miles of airspace above the State.

Arizona statutes require the State Land Department to prepare MTR maps and to provide them to all cities and counties so that they can be recorded in the county land records office. Real estate disclosure is required for all land sales. This requirement will help to inform the public and prospective land buyers of the presence of MTRs prior to land purchase so an informed decision may be made.

Arizona requires MTR maps to be provided to all cities and counties to be recorded in the county land records

Figure III -2 illustrates the Arizona State Land Department official MTR map for use by landowners and real estate professionals.[34]

Arizona's aggressive efforts to take the initiative in dealing with the issue of civilian encroachment near military air stations are paying off. The working partnerships that have developed among the military, officials in neighboring cities and counties, and State government leaders in dealing with the civilian encroachment issue have led to working relationships in dealing with other matters.

2. Case Study — The State of California: In FY 2004, DoD directly expended more than $43.3 billion in personnel, contracts, and grants to California, making it the largest recipient of DoD expenditures of all States in the Union. The DoD presence is significant, with over 62 major and minor installations, airfields, test and training facilities, and ranges employing over 278,904 military and civilian personnel, including reserve, and National Guard.[35] Cities and counties in California have long been able to adopt, administer, and enforce under their police power airport zoning regulations that specify the land uses permitted and also may regulate the height of structures and natural vegetation.[36] Even with this authority, however, the State has deferred to local discretion planning matters and the right to regulate and guide growth and development, subject to limited, unenforceable State oversight.

For example, California's statutes relating to the general plan require the inclusion of an "environmental noise element" as a guideline in developing the local plan's land use element. Military airports operations are listed as a source of environmental noise that must be considered in the mitigating measure section, which includes possible solutions to existing and foreseeable noise problems.[37] How this is accomplished is the responsibility of local government.

California laws and guidelines govern public and private airports under the State's police powers. In 1994, the State law required that airport land use compatibility (ALUC) "be guided by" information in the *Airport Land Use Planning Handbook*.[38] When formulating or amending compatibility plans, the *Handbook* provides extensive guidance on the preparation and content of compatibility plans, on procedures for ALUC review of local actions, and on the responsibilities of local agencies. The *Handbook* also contains background information on noise and safety compatibility concepts, including data not previously available on general aviation aircraft, accident location patterns, and other characteristics.

In1994, the California legislature passed the California Environmental Quality Act (CEQA).[39] It established a tie between the *Handbook* and lead agencies that are required to use the *Handbook* as a "technical resource" when assessing airport-related noise and safety impacts on development-related projects located in the vicinity of airports.

- **Airport Land Use Compatibility Plan (ALUCP):** The basic purpose of the ALUCP is to promote compatibility between airports and land uses that surround them. A land use compatibility plan serves as a tool for airport land use commissions to fulfill the State-mandated responsibility to review airport and adjacent land use development proposals. Compatibility plans set criteria for local (city and county) agencies in their preparation of amendments to local land use plans and ordinances, and guide landowners in their designs for new development near airports.

  The ALUCP sets the policies applicable to future development in the vicinity of military installations. The policies are designed to ensure that future land uses surrounding airports are compatible with realistic forecasts of aircraft activity.[40]

- **Airport Land Use Commission (ALUC):** In 1967, the California State Aeronautics Act[41] established the requirement that every county have an ALUC. The purpose of the commissions is to "protect public health, safety, and welfare by ensuring the orderly expansion of airports and the adoption of land use measures that minimize the public exposure to excessive noise and safety hazards within areas around public airports to the extent that these areas are not already devoted to incompatible uses."[42]

  The statute gives ALUCs two principal powers by which to accomplish this objective. First, ALUCs must prepare and adopt an airport land use plan. Second, they must review plans, regulations, and other actions of local agencies and airport operators for consistency with the ALUCP. Under the statute, an ALUC has no authority over "existing land uses"[43] or over the operation of airports.[44]

In 1994, the California legistature passed the California Environmental Quality Act

  a) **Existing Land Uses and the ALUC:** In California, a land use is generally considered to exist (vested or entitled) once the local regulatory agency has completed all discretional actions on a project and only ministerial approvals remain. A vacant property thus can be considered "devoted to" a particular use, even if the activity has not begun, once certain local government commitments to the proposal have been obtained.

  b) **Airport Operations and the ALUC:** Any actions pertaining to the operation of aircraft either on the ground on in the air around an airport are *not* within the preview of the ALUC's jurisdiction to regulate. The ALUC may take into consideration airport and aircraft operations in development of the land use compatibility plans. ALUCs do have some authority to review proposed airport master plan modifications and certain construction plans or public-use airports for consistency with the commission's plans.

c) **Local General Plans and the ALUC:** The ALUC has limited authority to review local general plans as the primary mechanism for implementing the compatibility policies set forth in the ALUC plan. Counties and cities are required to make general land use plans consistent with ALUC plans (or overrule the ALUC plan by a two-thirds vote of the city/county council). Once a local general plan is adopted, the ALUC's authority over the plan is narrowly limited. The only actions for which review remains mandatory are proposed adoption or amendments of general plans, specific plans, zoning ordinances, and building regulations affecting land use within an airport area of influence. For an ALUC to review individual projects, the local agency must agree to submit them.

The State's planning enabling legislation protects, to some degree, military airfields

The State's planning enabling legislation protects, to some degree, military airfields through the ALUC. However, the ALUC's statutory authority over military airfields is also limited. Regulating urban growth encroachment, even though it may threaten the operational integrity of military airfields, is not mandatory. Home rule authority delegates to local municipal and county governments the statutory authority to regulate and influence the use of public and private lands. In the long term, this can work against the sustainability of military installations. Decisions by local government, conscious or not, can and often will infringe upon the operational capabilities of military installations and ranges.

Strategy: *The key is to raise awareness among local government officials of the operational parameters of the military airfield so that they will consciously temper decisions to avoid placing future residents in harm's way. The local military base commander must maintain contact with local government officials, advising them as to the purpose and operating parameters of the installation.*

In 2002, the State passed legislation requiring cities and counties to consider the impact of new growth on military readiness when preparing zoning ordinances and designating land uses covered by the general plan for land adjacent to military facilities or underlying designated MTRs.[45] The law calls for the preparation of an advisory handbook for local officials, planners, and builders to explain how to reduce land use conflicts between civilian development and military readiness activities. The act also encourages cooperation between military bases and neighboring jurisdictions when developing strategies to address growth issues.

In 2004, the California Legislature further amended the act by adding requirements related to the issue of military readiness and encroachment.[46] This amendment requires cities and counties to confer with local base commanders when an application for development is submitted that is located within 1,000 feet of a military installation or within an MOA or MTR.

State policy requires that local governments cooperate with the military to:

- Consider the effects of civilian land uses that may be incompatible with the military's use of its assets; and
- Create a conflict resolution process whereby civilian land use issues and the military use of its assets may be mediated. This mediation provision was provided in the event a development proposal and military readiness needs could otherwise not be resolved through the local planning processes.

A stipulation of the law is that the military must provide the State Office of Planning Research with detailed maps of the MOAs or MTRs. Once accepted by the State Office of Planning Research, the maps will be provided to all cities and counties for use in the local planning and development review processes.

The law provides that the failure to refer a proposed action to the military for review does not affect the validity of that action if it is adopted by a local decision-making body. It further requires real estate disclosure. However, oversight does not affect the final decision by a buyer.

3. Case Study – The State of Florida: Like Arizona and California, Florida is a leader in recognizing the importance of the military presence in the State and in taking steps to create a balance between community development and the military's need to train.

The importance of DoD installations and ranges to the State cannot be underestimated. In 2004, DoD expended in direct payroll, contracts, and grants over $17.8 billion in Florida alone. DoD employs approximately 83,189 military and civilian personnel and another 50,304 Reserve and National Guard for a total impact on the State's economy of over 133,493 workers.[47] In 2004, the State of Florida enacted a statute (SB–1604) requiring, among other things, that military base commanders be notified if a county in which a military installation is located receives an application for land development that could "affect the intensity, density, or use of the land adjacent to or in close proximity to a military installation."[48] The law suggests that a military base commander's comments address whether the proposed changes will be compatible with the following three points:

Florida is a leader in recognizing the importance of the military presence in the State

- The safety and noise standards established in the Air Installations Compatible Use Zones (AICUZ) studies adopted by a military installation;
- The Army's Installation Operational Noise Management Program (ONMP); and
- The findings of a Joint Land Use Study (JLUS).

As part of this new legislation, Florida has instituted an innovative requirement not found in other States. To facilitate the exchange of information between the military installation and the surrounding communities, the law places a representative of the local military installation on a local planning commission acting on behalf of the military as an ex officio, nonvoting member.[49]

The same bill provided for the future land use plan element of comprehensive plans to include compatibility with military installations. The statute also required local governments to update or amend their comprehensive plan by a date certain and provide for coordination between the State land planning agency and DoD on compatibility issues for military installations.[50]

Florida has adopted one of the most ambitious land conservation programs in the country

Florida also has adopted one of the most ambitious land conservation programs in the country through the passage of legislation in 1999 (Chapter 92-247) that created the Florida Forever Program, a 10-year, $300-million annual bond-funded program designed to purchase environmentally sensitive lands. Funds have been used to acquire land or development rights as part of the Northwest Florida Greenway Program to provide land use buffers around military installations in the area, primarily involving Elgin AFB. DoD is partnering with the State and nongovernmental conservation-based organizations to implement this program.

4. Case Study – The State of South Carolina: The importance of DoD installations is measured in terms of DoD direct expenditures in the State. In 2004, DoD expenditures amounted to $4.9 billion in personnel, contractors, and grant expenditures. In October 2004, the Governor of South Carolina signed Bill 4282, entitled Federal Defense Facilities Utilization Integrity Protection Act. The act amended Sections 6-29-1510, 1520, 1525, 1530, and 1540[51] relating to local government planning to provide process and procedures.

The act specified, "local planning entities and local officials must consider certain matters and take certain actions in regard to development in certain areas bordering Federal military installations located in the State or involving overlay zones or 'Air Compatible Use Zones' at military installations."

The act found that significant potential for uncoordinated development in areas contiguous to Federal military installations might undermine the integrity and utility of land and airspace required to sustain military readiness and training. The act established a process to ensure that development near military installations is conducted in a coordinated manner, taking into account the interests of the military.

The act stipulates that a local government with established planning authority, including a board of zoning appeals, charged to establish, review, and enforce the comprehensive land use plan or zoning ordinance shall consider the impacts of a proposed development on the utility of the military installation. When the pending use or zoning decision involves land that is within a "military installation overlay zone" or within 3,000 feet of a military installation, airfield Clear Zone, or APZ, the jurisdiction shall seek from the commanding officer of the affected installation written recommendations, with supporting facts, relating a pending development application.

The legislative intent of the act is to determine whether a land use plan or zoning proposal may cause a safety concern relative to impact on a local jurisdiction's streets, utilities, or schools in the vicinity of a military installation. Other stipulated tests involve the following:

- The potential for negative impacts on the operation and utility of a military installation;
- Whether the proposal has a reasonable economic use as currently zoned;
- If the zoning proposal is in conformance with the adopted land use plan and policies of the local government; and/or
- Other existing or changing conditions supporting either the approval or denial of an application.

The act stipulates that local governments shall "incorporate identified boundaries, easements, and restriction for Federal military installation into official maps as part of their responsibilities delineated in Section 6-29-340."

This most recent State statute represents another effort in recognition of the presence and importance of the military to a State's overall economic base and well-being.

Summary: These selected States represent the "cutting edge" in innovative legislation expressly designed to address the issue of civilian encroachment near military installations. However, these are not the only States to address the issue. The reader is encouraged to visit the respective State Web sites to identify those States that have enacted laws to empower local governments to exercise their police powers to plan and to zone land to protect State assets, such as military installations.

Military installations contribute to the State's economy in ways perhaps not universally understood or appreciated

Strategy: *To protect resources and assets that contribute to the State's economic health and general welfare, it is important that a State establish priorities. Preservation of important State assets for the public good is a valid exercise of State police preemptive authority. Military installations contribute to the State's economy in ways perhaps not universally understood or appreciated.*

In States that authorize the designation of Areas of Critical State Concern, there is an opportunity for the military installation command to collaborate with the State government to protect the sustainability of military missions. This is not only in the State's economic interest, but also in the interest of national defense.

Local governments in States without such mechanisms may wish to consider urging the Governor and State legislature to establish Areas of Critical State Concern or similar legislative initiatives that recognize the importance of the military presence in the State and establish mechanisms by which land use planning can protect the military mission and provide for the public's safety. Such cooperative efforts with the local military installation can leverage resource priorities and promote land use compatibility as an enduring community value.

Conclusion

The challenge confronting states that desire to deal effectively with the issue of encroachment's negative effect on military presence rests with proper delegation of authority and accountability to the lowest government level. However, in order to be in a position to advise local government, State legislation may need to enact additional authority to support local governments in the exercise of their responsibilities or to exercise State authority over regional development that may be of State regional concern.

Part II explored the role of local governments that do have planning and zoning authority and how this authority is exercised through the comprehensive planning process. Now we turn our attention in Part IV to the Federal Government's role in local land use planning.

ENDNOTES

[1] Rodney L. Cobb, *Toward Modern Statutes: A Survey of State Law on Local Land Use Planning,* Amer. Plan. Assoc., Modern State Planning Statutes – The Growing Smart Working Papers Vol. 2. (Plan. Adv. Serv. Rep. No. 480/481 1998).

[2] "Bert J. Harris Private Property Rights Protection Act," Florida Statutes, Title VI, Chapter 70. §70.001 (2004), *available at* http://www.flsenate.gov/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0070/SEC001.HTM&Title=->2004->Ch0070->Section%20001#0070.001.

[3] Dillon's Rule is a rule of statutory construction. It is generally formulated as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable." John F. Dillon, *Commentaries on the Law of Municipal Corporations 448–49* (5th ed. 1911).

[4] Jesse J. Richardson Jr., *The Dillon's Rule Contribution to Urban Spraw,* NewsBrief — Building a Community of Planners in Virginia (Newsletter of Va. Chapter of Amer. Plan. Assoc.), July-Aug. 2001, at 10.

[5] Arthur C. Nelson and James B. Duncan (with Clancy J. Mullen and Kirk R. Bishop), Growth Management Principles and Practices 19 (Amer. Plan. Assoc, Chicago, IL, 1995).

[6] Tom Daniels, *When City and Country Collide — Managing Growth in the Metropolitan Fringe* (Washington, DC: Island Press, 1999) p. 156.

[7] *See* Appendix 1.1, which summarizes the statutory requirements for comprehensive local land use planning for the 50 States. A lack of uniformity can create a local "uneven playing field" among States, regions, cities, and counties. Amer. Plan. Assoc., *supra* note 1, at 26–27.

[8] Dennis Gale, *Eight State-Sponsored Growth Management Programs: A Comparative Analysis,* 58 J. Amer. Plan. Assoc. 425 (1992).

[9] For an in-depth discussion of State programs, *see Jerry Weitz, Sprawl Busting: State Programs to Guide Growth* (1999). *See also* American Planning Association, *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* (Stuart Meck, ed, 2002). As described by the project's editor, the Guidebook is aimed at Governors, State legislators and their staffs, and local government officials, as well as planners, developers, home builders, environmentalists, and other citizens. In formulating the model legislation, the authors tried to answer the kinds of practical questions that State lawmakers might raise — what works and why, and under what conditions (p. xiii).

[10] Information on both the original legislation and its amendment and be found at http://www.commerce.state.az.us/CommunityPlanning/GrowingSmart.asp and at http://www.commerce.state.az.us/communityplanning/gslegis.asp.

[11] Information may be found at http://www.dca.state.ga.us/planning/ *See also* Annotated Code of Georgia Title 63, Chapter 66 §36-66-6 and Code § 36-64-4, *available at* http://ssl.csg.org/dockets/25cycle/2005C/25Cbills/gamilitary.pdf.

[12] Article 66B or the Annotated Code of Maryland, Growth Management and Land Use Definitions and Controls, *available at* http://mlis.state.md.us/2000rs/billfile/sb0624.htm#Synopsis *Information concerning Maryland's legislative approaches in the smart growth is available at* http://www.mdp.state.md.us/smartintro.htm and Governor's Executive Order No. 01.01.1998.04, *available at* http://www.dnr.state.md.us/education/growfromhere/LESSON15/MDP/EXECORDER.HTM and Maryland Chapter 437 of the Acts of 1992, *available at* http://www.mdarchives.state.md.us/msa/mdmanual/21dop/html/dopf.html and http://www.mdp.state.md.us/planningact.htm *See also* David R. Godschalk, *Smart Growth Efforts Around the Nation,* Popular Government 16 (2000).

[13] Baltimore, Maryland, Office of Planning, Smart Growth: Designing Priority Funding Areas (Managing Maryland's Growth: Models and Guidelines Series 1997).

[14] Chapter 36.70A RCW — Growth Management -- Planning by Selected Counties and Cities, *available at* http://search.leg.wa.gov/wslrcw/RCW%20%2036%20%20TITLE/RCW%20%2036%20.%2070A%20CHAPTER/RCW%20%2036%20.%2070A%20chapter.htm.

[15] Godschalk, *supra* note 11 at 15.

[16] A discussion of Washington's program can be found at Washington Research Council, *Washington's Growth Management Act: Goals and Promises, available at* http://www.researchcouncil.org/Briefs/2001/PB01-29/WAGMAGoalsPromises.htm.

[17] Florida's State Comprehensive Plan, Florida Statutes, Title XIII, Chapter 187, *available at* http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0187/SEC101.HTM&Title=->2004->Ch0187->Section%20101#0187.101 Florida's Statutes, Title XI, Chapter 163, Part II; *available at* http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&URL=Ch0163/titl0163.htm&StatuteYear=2004&Title=%2D%3E2004%2D%3EChapter%20163.

[18] The Florida Environmental Land and Water Management Act of 1972, Florida Statutes, Title XXVIII, Chapter 380, *available at* http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0380/PART01.HTM.

[19] Environmental Land and Water Management Act, Florida Statutes, Title XXVIII, Chapter 380.06(1) defines a Development of Regional Impact (DRI) as any development that, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county, *available at* <http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0380/SEC06.HTM&Title=->2004->Ch0380->Section%2006#0380.06.

[20] Regional planning agencies (or local governments where there is no regional planning agency) may recommend candidate areas of critical State concern to the State Planning Agency, which may, in turn, recommend that area for nomination to the Administrative Commission.

[21] Fla. Stat. ch. 380.05(2)(c), *available at* http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0380/SEC05.HTM&Title=-%3e2002-%3eCh0380-%3eSection%2005#0380.05.

[22] Tom Daniels, *When City and County Collide — Managing Growth in the Metropolitan Fringe* (Washington, DC: Island Press, 1999) p. 157.

[23] *See* U.S. DoD, U.S. Data Abstract for the United States and Selected Areas For Fiscal Year 2004, *available at* http://web1.whs.osd.mil/mmid/L03/fy03/03top.htm.

[24] Additional information regarding State initiatives may be found at State Initiatives Supporting Military Range Sustainability, produced by the DoD Range Commander's Council Sustainability Group for information purposes, *available at* < https://www.denix.osd.mil/denix/Public/Library/Sustain/Ranges/StateLeg/stateleg.html.

[25] The cities were Avondale, Glendale, Goodyear, Litchfield Park, Peoria, Phoenix, Surprise, Tucson, Wickenburg, and Yuma. *See* Maguire Company and ESI Corporation, "Economic Impact of Arizona's Principal Military Operations – Executive Summary" (May 2002). The report observed:

> For years, the "Five C's" were used to describe the basic industries of Arizona — Copper, Cotton, Citrus, Cattle, and Climate. These industries were identified as the core of Arizona's economy. Nowhere in this list was there any recognition of the thousands of Arizona jobs tied directly and indirectly to the many military operations within the State.

[26] *Id.*

[27] U.S. DoD, Base Structure Report (A Summary of DoD's Real Property Inventory), Fiscal Year 2004 Baseline, *available at* http://www.acq.osd.mil/ie/documents.htm

[28] The concern regarding encroachment affecting military airport operations is echoed in the Western Maricopa County/Luke AFB's Regional Compatibility Plan. The Plan states that "[t]he ability of the military facilities based in Arizona to perform current and future missions have been negatively affected by a wide range of impacts generated by people living, working, and recreating within areas influenced by military operations."

[29] Ariz. Rev. Stat. §§ 9-461, 11-806, 829 (1995), *available at* http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/09/00461.htm&Title=9&DocType=ARShttp://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/11/00806.htm&Title=9&DocType=ARS; and http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/11/00829.htm&Title=9&DocType=ARS.

[30] Dep't of Commerce, State of Arizona, "Arizona Regional Compatibility Project — Davis-Monthan AFB Joint Land Use Study — Prepared for the City of Tucson and Pima County" (Feb. 2004).

[31] Reference to "Military Airfield Live Ordinance Departure Corridor" is not an accepted U.S. Air Force term of reference, nor is it codified in Arizona laws. It is used here as a term of art to describe the preformed military operation.

[32] *See* Ariz. Rev. Stat. § 28-8462, *available at:* http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/28/08462.htm&Title=9&DocType=ARSFormat Document.

[33] S. 2662, 2140, & 2141 (2004).

[34] *See* Ariz. Rev. Stat. § 28-8483.

[35] *See* U.S. DoD, U.S. Data Abstract for the United States and Selected Areas For Fiscal Year 2003, at http://web1.whs.osd.mil/mmid/L03/fy03/03top.htm.

[36] Calif. Gov't Code § 50485.1 et seq., *available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=50001-51000&file=50485-50485.14.

[37] *Id.* at § 65302(f), *available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=65001-66000&file=65300-65303.4 .

[38] Calif. Dep't of Transp. (rev. 2002). The handbook can be viewed at http://www.dot.ca.gov/hq/planning/aeronaut/htmlfile/landuse.php .

[39] Cal. Pub. Res. Code §§ 21000 *et seq., available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=prc&group=20001-21000&file=21000-21006.

[40] Cal Pub. Util. Code §§ 21670 *et seq., available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=puc&group=21001-22000&file=21670-21679.5 .

[41] *Id.*

[42] *Id.* at §21670(a)(2), *available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=puc&group=21001-22000&file=21670-21679.5.

[43] *Id.* § 21674(a), *available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=puc&group=21001-22000&file=21670-21679.5.

[44] *Id. at* § 21674(e).

[45] Cal. Govt. Code at §§ 65300, 65040.2(f) & 65040.9 (2002), *available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=65001-66000&file=65300-65303.4; http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=65001-66000&file=65040-65040.12; and http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=65001-66000&file=65040-65040.12.

[46] *Id.* at §§ 65352, 65944, 65404, 65940 (2004), *available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=65001-66000&file=65350-65362, and http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=65001-66000&file=65940-65945.7.

[47] U.S. DoD, U.S. Data Abstract for the United States and Selected Areas for Fiscal Year 2003, *available at* http://web1.whs.osd.mil/mmid/L03/fy03/03top.htm.

[48] Legislative findings on compatibility of development with military installations, Fla Stat § 163.3175 (2004)). For the full text of Florida statutes referred to in this section, go to http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0163/SEC3175.HTM&Title=->2004->Ch0163->Section%203175#0163.3175.

[49] *Id.* A similar mandatory referral requirement is found in a number of State statutes, including, among others, Arizona, California, Georgia, North Carolina, and Washington. However, Florida's reservation of a seat on a local planning commission for a representative from the local military installation in an ex officio capacity is a first of its kind.

[50] Fla. Stat § 163.3177, *available at* http://www.flsenate.gov/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0163/SEC3177.HTM&Title=-%3e2004-%3eCh0163-%3eSection%203177#0163.3177. *See also SB-1604 (2004), available at* http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2004&billnum=1604.

[51] South Carolina General Assembly, HB-1482 (2004) signed into law as amending Chapter 29, Title 6 of the 1976 Code adding "Federal Defense Facilities Utilization and Integrity Protection Act" Section 6-29-1510, 1520, 1525, 1530, and 1540, *available at* http://www.scstatehouse.net/sess115_2003-2004/bills/4482.htm.