# PART IV

## Federal Government's Role in Community Land Use Planning and Civilian Development Near Military Installations

*"Modern urban life necessitates the placing of new and increased restrictions on development to ensure the comfort and safety of urban dwellers. The desired end purpose is a valid exercise of 'police powers."*

*The Village of Euclid v. Ambler Realty Co.*
274 U.S. 365, 47 S.Ct. 114 (1926)

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## *Introduction*

Part IV explores the role of the Federal Government — its laws, regulations, and policies — in support of State and local governments' responsibilities to promote smart growth and sound land use decision making to protect the public health, safety, and welfare. It reviews a number of related DoD programs, Federal laws, and court decisions that focus on the issues of encroachment and the sustainability of the military presence and mission.

## *A. The Federal Government's Role*

Historically, local land use planning rests with the States. States, in turn, have largely delegated this authority to local governments to conduct local planning and zoning under the general "police powers" and statutory or home rule authority conferred upon local government by State legislatures.

*Historically, local land use planning rests with the States*

The role of the Federal Government in the local land use planning and policy-setting arena is constitutionally limited. Historically, the Federal role has been to provide technical and financial assistance to State and local governments to conduct local general or comprehensive planning or to further local economic development. Examples include the Department of Commerce's Economic Development Administration programs; the Department of Agriculture's Rural Development programs; the Department of Housing and Community Development's Community Development Block Grant program; and statutes such as the National Environmental Policy Act and the Endangered Species Act.

Through Federal legislation, regulations, Executive Orders, and a body of Federal case law, policies, directives, and guidance, the Federal Government has evidenced a legitimate interest in protecting the welfare of the country and its public lands and assets. In some cases, Federal law limits or prevents local, State, and regional authorities from imposing regulations to legislate, for example, aviation and related aircraft noise (including occupational health and safety), waterways, and land owned by the Federal Government.

In the matter of national defense, use of air space, and other matters of national and interstate interest, the "doctrine of preemption" (discussed below) can have significant effect on the prerogatives of State and local government to pass laws that could interfere with national interests (i.e., use of air space or airwaves). Several relevant Federal case laws are cited as examples to help clarify the limited but important role of the Federal Government in the matters of property rights as related to land use planning and regulation at the local level.

The Federal Government has a legitimate role and a responsibility to support and encourage compatible civilian development near Federal property, military installations, airfields, and testing and training ranges. The Federal Government is not only concerned about the impact of civilian encroachment on military missions, it also is concerned about the effects of spreading civilian development that is encroaching upon the valued and protected scenic and natural wonders and riches of this Nation. Areas such as California's Yosemite; Montana and Wyoming's Yellowstone National Park; the Blue Ridge Mountains of the Appalachians; Devil's Tower, Wyoming; and the Florida Everglades are all endangered national resources and assets.

Federal legislation also may regulate actions by Federal agencies in order to protect the natural environment, conserve national resources, and protect endangered species and habitat and to comply with the National Environmental Policy Act (NEPA)[1] and related environmental protection laws. In some cases, Federal statutes require specific actions of state or local governments involving environmental protection, conservation of natural resources, endangered species protection, coastal zone and waterway management, historic preservation, and the like.

*The "doctrine of preemption" and select federal law that imposes duties on Federal agencies may affect local land use decisions*

Part IV attempts to examine the balancing of interests among Federal, State and local governments in the context of the protecting the sustainability of DoD missions and assets. It focuses on two aspects of the federal government's direct or indirect role in community land use planning and civilian development near military installations.

The "doctrine of preemption" and select Federal law that imposes duties on Federal agencies may affect local land use decisions. The role of the Federal court is examined in terms of its interpretation of the extent of individual property rights and actions taken by DoD relative to privately owned land near military installations.

**1. DoD Programs:** This discussion is focused on DoD military installations located in the 50 United States and its territories (Commonwealths of Guam and Puerto Rico). The encroachment of incompatible civilian land use activities too near an installation can negatively affect DoD missions and operations, expose the public to potential health and safety risk, and become a national defense issue. It is DoD policy to promote the local operational mission of the military by working in partnership with Federal, State and local governments. The objective is to achieve balance in local land use matters that may negatively affect the utility of a military installation.[2]

**a. The Office of Economic Adjustment** [3] (OEA) administers a Joint Land Use Study (JLUS) program and supports the DoD Land Use Inter-Service Group (LUIWG).[4] The purpose of OEA is to encourage cooperative land use planning between military installations and the surrounding communities where civilian encroachment is likely to impair the operations and utility of a military installation. In these instances, OEA may provide technical and financial assistance to State and local governments, the District of Columbia, Tribal Nations, and the Commonwealths of Guam and Puerto Rico to achieve local compatible land use planning processes and programs designed to protect the public health, safety, and welfare and sustain military missions and activities.

**b. DoD AICUZ Programs:** There are additional DoD programs expressly focused on encroachment issues as they may affect military operations. The programs include the Navy's and Air Force's Air Installations Compatible Use Zones (AICUZ) program,[5] the Army's Operational Noise Management Program [6](ONMP), and the Navy and Marine Corps, Range Air Installations Compatible Use Zones (RAICUZ) program.[7]

Each program is intended to deal with a specific type of military base. The AICUZ program deals with military airfields. The ONMP deals with Army bases and ranges and the noise associated with ground-based range operations. The RAICUZ program is exclusively associated with Navy and Marine Corps test and training ranges. These programs are prepared by and for the military installation and shared with the supporting local governments to assist in their compatibility planning. The military services seek to assist local government in understanding the mission of a nearby military base or range and the extent of nuisance or risk to life and property associated with military testing and training.

c. **DoD Conservation Partnering Initiative:** In 2002, Congress authorized an additional program aimed at environmental and conservation-related activities. The program is based on the military services' acquiring less than fee simple interest in private property surrounding a military base or test and training range by partnering with conservation-based nongovernmental organizations, States, and local government.[8] These programs are discussed in detail in Part V. Each military service manages its own conservation partnering program under service-specific protocol.

**2. The Doctrine of Preemption:** In a very general sense, the doctrine of preemption holds that Congress has the power to override State laws in any area where Congress has constitutional authority to act. The basis of the preemption doctrine is article VI, section 2, of the Constitution and the Supremacy Clause.

Since the 1950s, Congress has enacted a series of laws involving avigation and related aircraft noise, environmental protection, coastal zones and waterways management, and claims against the United States for acts considered injurious to individual private property interests.

*In some cases, these statutes can affect local planning and local land use decisions*

In some cases, these statutes can affect local planning and local land use decisions. For example, State and local governments may not regulate actions by the Federal Government unless authorized to do so by Congress. In a like manner, the Federal Government may not regulate directly actions by State and local governments relative to local land use decisions (see Part III). However, Federal law is supreme in areas where Congress is constitutionally authorized to act, and there are Federal laws that affect land use planning. The following are examples dealing with Federal supremacy in certain areas that relate to DoD operations.

## *B. Selected Federal Legislation* [9]

Federal and case law can limit local, regional, and State governments from regulating activities that affect the national interest.

**1. Federal Aviation Law:**

a. **Federal Aviation Act:** [10] This 1958 act regulates air commerce and declares the sovereignty of the United States over air space. The act states, "The United States of America is declared to possess and exercise complete and exclusive National sovereignty in the air space of the United States."[11]

The act requires the Secretary of Transportation to make long-range plans and formulate policy for the orderly development and use of "navigable air space" to serve the needs of civilian aeronautics and national defense except for the needs peculiar to military agencies.

**Relevant Case Law:** In the 1950s, a local minimum altitude regulation prohibited flights of less than 1,000 feet over its territory. The ordinance affected New York's Idlewild Airport (now JFK).[12] In that case, the court found that the law violated the Supremacy Clause, article VI, clause 2, of the U.S. Constitution.

*Every citizen of the United States has "a public right of freedom of transit in air commerce through the navigable air space of the United States"*

In *City of Burbank v. Lockheed Air Terminal, Inc.,*[13] the Supreme Court was faced with another attempt by local authorities to regulate aircraft operations. The local government desired to protect adjacent communities from the adverse impacts of aircraft flight operations by passing an ordinance prohibiting a privately owned airport from allowing aircraft takeoffs and landings between the hours of 11:00 p.m. and 7:00 a.m.

The Court held that the ordinance was an invalid exercise of the local police power because the Federal Government, as represented by the Federal Aviation Administration (FAA) and the Environmental Protection Agency (EPA), has full control over aircraft noise, thereby preempting State and local control. The Court noted the pervasive language of both the Noise Control Act of 1972[14] and the Federal Aviation Act demonstrates the clear intent of Congress to preempt this area from local and State regulation.

**The 500-Foot Rule:** In the Federal Aviation Act, Congress recognized and declared that every citizen of the United States has "a public right of freedom of transit in air commerce through the navigable air space of the United States."[15] This provision has been discussed in various court decisions. The U.S. Supreme Court, in *Causby v. United States,*[16] interpreted the then existing statutes and regulations to mean that the "navigable air space" began at 500 feet for rural areas, excluding air space needed for landing and takeoff. After the decision in *Causby,* Congress redefined "navigable air space" to mean "air space above the minimum safe altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including air space to ensure safety in takeoff and landing of aircraft."[17]

In 1963, the Court of Claims formally announced the so-called "500-Foot Rule" in *Aaron v. United States.*[18] The "500-Foot Rule" provides that overflights having an altitude of 500 feet or more above ground level (AGL) do not constitute a compensable taking because flights 500 feet AGL enjoy a right of free passage without liability to the property owners below.

The court also acknowledged that aircraft flights within the navigable airspace (500 feet and above) could generate damage so severe as to amount to a practical destruction or a substantial impairment of a person's property. In such a case, the court said it "would then have to consider whether the relevant statutes and regulations violated the property owner's constitutional rights."[19] Thus, the United

States is normally protected by the "500-Foot-and-above Rule" and is not liable for taking private property so long as the aircraft does not penetrate airspace at an altitude less than 500 feet AGL.

With the exception of one case,[20] all decisions by the Court of Claims where compensation has been granted for a taking involved overflights by government aircraft at altitudes of 500 feet or less. In both *Hero Lands Company v. United States*[21] and *Stephens v. United States*,[22] the court asserted the general rule that the United States is not liable for a taking to landowners where aircraft fly at or above 500 AGL above their property.

**Relevancy to This *Practical Guide*:** This discussion is relevant to this *Guide* because Federal preemption in this area affects states and localities' land use planning. There are exceptions to the general rule that military flights are regulated by the "500-Foot Rule" over rural areas (1,000 feet AGL in urban or populated areas). The FAA, which controls and regulates use of navigable air space in the continental United States, may designate restricted military airspace or special use airspace for purposes of carrying out military training exercises and missions. Restricted military airspace covers vast areas of the United States. Lands under a restricted military airspace may be owned by the Federal Government, State governments, Tribal Nations, or by private citizens. In restricted airspace, the military trains pilots for air-to-air and air-to-ground combat. In these spaces, high-speed military aircraft may fly as frequently as necessary at low levels (200 feet AGL) and at high airspeeds (greater than 400 miles/hour).

Designated military airspace includes military training routes (MTRs), military operating areas (MOAs), and restricted air space. The FAA manages and designates these air spaces that are set aside for use by the military to conduct aerial testing and training. For the purpose of this *Guide*, MTRs will be the primary focus. MTRs are the avenues in the sky used by the military to connect a military air base with a distant test and training range.

*Aircraft that fly in the MTR corridor may carry live ordnance used for training exercises*

Aircraft that fly in the MTR corridor may carry live ordnance used for training exercises. Their purpose is to train pilots by developing combat proficiency in aerial bombing and gunnery practice and to test and evaluate equipment, including unmanned aerial vehicles (UAVs). Flights involving MTRs can take place at all hours of the day or night. They can be repeated daily or periodically, depending on the nature of the military flying mission. An MTR flight corridor is normally 10 miles wide (5 miles on either side of the flight tracks). However, the dimensions may vary depending on approved FAA flight operations and can extend hundreds of miles, crossing several States.

The distinguishing characteristic and focus of this discussion are the altitude, speed, and aircraft type flown by military within an MTR. Above 500 feet AGL, the issue is moot (see *Aaron v. United States,* 160 Ct.Cl. 295, 311 F.2d 798, 801 (1963)). Below 500 feet AGL, the issues of encroachment become somewhat involved and problematic.[23]

*The right of the military to fly in an MTR is established by the FAA, but that agency has no jurisdiction to control the use of land beneath the airspace, nor can it restrict aboveground structures. (It may require identification markings and flight hazard lights on structures or other measures to ensure aircraft safety.)*

Within these approved air corridors, military aircraft can generate excessive noise on either an episodic or a continuous basis. Episodic noise levels can be as high as 120 dB for a few seconds, which can be highly disturbing to residents living beneath an MTR. The residential living environment and quality of life can and will be severely compromised by frequent overflights, especially during nighttime training.

*The right for the military to fly in an MTR is established by the FAA*

MTRs originally were planned and approved flying corridors over remote, unpopulated, rural, mountainous, or desert locations far away from human population centers. The expectations were that they would go largely unnoticed and create little if any effect on human health or the environment.

However, as population continues to spread into areas once thought remote and as residential subdivisions are developed under MTRs, unsuspecting residents can be rudely awakened in the night by the sounds of a low-level, high-performance military aircraft traveling close to the speed of sound over their homes. Even if the intrusion is for a short duration measured in seconds, the effect can be jarring. When it is repeated five or more times in a given night without warning, residents are justifiably upset and complaints are bound to be abundant.

A second encroachment issue associated with MTRs involves aboveground structures extending well over the 200-foot AGL and high-speed, high-performance military aircraft. Aboveground structures include communication and microwave towers, such as cell and transmission towers; windmill farms for the generation of electricity; or other human-made structures, including water towers and habitable buildings.

*Encroachment of aboveground structures, if not properly coordinated with FAA and the military, can present a serious flight navigation hazard to low-flying, high-performance military aircraft.*

**Strategy:** *The key to this encroachment issue of aboveground structures penetrating into navigable airspace (MTRs) is for the local land use planning officials to be made aware of the presence and location of MTRs, how they function, and how they may affect their area of jurisdiction.*

*Relative to the location and height of structures, the local planning process should require coordination to prevent interference with military operations within an MTR.*

**Competing National Priorities:** In coordinating these structures, it is important to recognize that there may be competing national priorities. For instance, there is a demand to develop alternative energy sources to lessen national dependence on fossil fuels. Developing a cost-effective and environmentally sound alternative,

such as using prevailing winds and coastal wave energy, is an important national priority. The objective of the local community and regional planning processes is to seek a balance among competing interests in making decisions in both the national interest and in ensuring the safety, health, and welfare of their residents.

Regional and local planning officials should obtain information on the location of MOAs and MTRs from the FAA or from the local military air base command. This information is invaluable in considering the merits of a development proposal that may involve a prospective land use or aboveground structure that could be incompatible with the military's high-performance missions.

**Strategy:** *Once the information on the location of MTR is plotted on local planning and zoning maps, it becomes a part of the local government's planning and development review processes, giving an opportunity for local planning officials to consult with all affected parties, including the affected military (see part V).*

Along with recognizing the presence and location of MTRs, requiring local real estate disclosure is perhaps the strongest of planning tools. It can ensure that real estate agents, the home-building community, developers, and prospective purchasers or renters of property know that MOAs and MTRs exist in relation to their interests and could expose future residents underneath these military air routes to low-level, noisy military overflights, during the day or the night (see Part V).

*The presence of a low-altitude MTR and the potential impact local land use decisions may have on respective national defense or local economic priorities transcend local, regional, and State considerations. It becomes a matter of national interest.*

At stake are the matters of public health, safety, and national necessity. State and local governments have powers to regulate the height of structures relative to the safe location of human settlements in the interest of public health and air navigation safety.

*Requiring local real estate disclosure is perhaps the strongest of planning tools*

An example of how States might respond to this issue is reflected in legislation recently enacted by the State of Arizona. The statute requires MTRs to be identified on planning maps of the State Land Department and disclosed to residents purchasing or leasing property under MTRs (ARS 32-2114 (HB-2662 (2004).

**b. Aviation Safety and Noise Abatement Act:** The *Aviation Safety and Noise Abatement Act of 1979* [24] requires the Secretary of Transportation to establish a single system of measuring noise from the operations of airports and to identify land uses that are normally compatible with various exposures to such noise (see Part V).

The act requires all civilian airport operators to submit to the Secretary of Transportation noise-exposure maps that set forth incompatible uses in areas surrounding civilian airports. The act is specifically limited to "public use" airports. It exempts the United States from any liability for damages resulting from

aviation noise by reason of any action taken by the Secretary of Transportation or the Administrator of Federal Aviation. The act prohibits suits by property owners for noise damage where the property owner had actual knowledge of the existence of such noise exposure maps at the time the property was acquired (disclosure).[25]

**Relevance to This *Practical Guide*:** Even though the Aviation Safety and Noise Abatement Act of 1979 and the Noise Control Act of 1972 exempt military aircraft and weapon systems as products, DoD maintains an active noise abatement and sound level reduction programs across the services. The AICUZ, ONMP, and RAICUZ programs are all focused on measures to reduce sound levels, recognizing the potential impact on human health, the environment, and occupational health and safety.

*The act prohibits suits by property owners for noise damage where the property owner had actual knowledge of the existence of such noise exposure maps at the time the property was acquired (disclosure)*

DoD is actively involved in the Federal Interagency Commission on Aircraft Noise (FICAN) to identify metrics to guide the military and other Federal agencies in conducting research in sound-level reduction. It is engaged in model development and simulation relative to noise impacts associated with such diverse subjects as national parks and ecosystems and child learning.

**Real Estate Disclosure:** One strategy that is strongly advocated by DoD under its AICUZ-type programs is real estate disclosure. Buyers and sellers of real property should be required as part of real estate transactions to make prospective buyers and renters of real property aware of noise routinely generated from nearby military installations, testing and training ranges, and military aerial training routes (MTRs). Such real estate disclosure normally is the province of State or local government. However, real estate disclosure is not uniformly required or provided across the country.

**Strategy:** *Experience has shown that real estate disclosure between seller/agent and buyer at time of contract signing and before settlement is the best opportunity to disclose all issues that could affect the buyer's interest in acquiring or renting property.*

Increasingly, States are passing disclosure requirements to enable local governments to enact local ordinances. Arizona, California, Florida, and Virginia are examples of States that have enabled local governments working in cooperation with the real estate industry to establish noise disclosure, whether it be by regulation or voluntary. However, there also is resistance from homeowners and homebuilding and real estate sales interests over added disclosure requirements involving military noise and accident potential.

Appendix 12 discusses noise and its effect on the environment and human health.

**Noise Disclosure Strategy #1:** *Real estate disclosure is one of the most practical and cost-effective encroachment prevention tools available. It can protect the seller (or sales agent) and the buyer (or renter) of real property. This issue of disclosure is not a local issue; it is a human health, national defense, and military readiness issue.*

*By their nature, military installations make noise and present potential for accidents on and off base. National defense imperatives require that the military maintain an active readiness and defense posture capable of responding to any crisis anywhere in the world that could affect the national interests and security of the United States.*

*At the national level, Congress could consider mandating real estate disclosure concerning the presence of military installations under an amendment to the Aviation Safety and Noise Control Act. The disclosure should reveal the presence and proximity of a military installation, the nature of its operations, and the potential for noise and accident to the surrounding resident population should it choose to locate in close to a military installation.*

**Noise Disclosure Strategy #2:** *At the local level, the local military installation command should post the local AICUZ report (including noise maps or equivalent noise study) on the military installation Web site. The same information should be formally released to the public and provided to the local government, the local Board of Realtors, and the official lands record office for posting (even on a Web site, if available), and in the land records as a notarized document.*

*In addition, the military installation commander should publish the availability of AICUZ information in newspapers of local circulation, and invite the public, as appropriate, to open houses and public military briefings.*

*Periodically, the military installation commander should provide informational briefings to local elected officials, planning commissioners, board of zoning appeals members, the real estate industry, and the local chambers of commerce so that the surrounding community leadership are up to date on the changing mission profiles, fleet mix, and military requirements, subject to "need to know" security necessities.*

**Relevant DoD Programs – The Air Installations Compatible Use Zones (AICUZ) Program:**[26] DoD is actively involved in identifying noise generated from high-performance military aircraft and their operations. The Navy and Air Force routinely share this information with local communities through the AICUZ program.

The AICUZ program[27] and associated compatible land use guidelines were carefully coordinated through FICAN[28] of which the FAA is a member. The AICUZ program is closely related to and largely mirrors the FAA noise and land use compatibility standards for civilian/commercial airports.

**Strategy:** *When local planners develop local general plans or review development proposals, especially residential, it is important they do so with an awareness of the presence of a nearby active military base or range. It also is advisable to consult on a regular basis with the local base flight operations or the local base environmental planners to understand the nature of the flying mission, the type of aircraft or military hardware deployed at the installation or routinely tested at nearby ranges, and their operation parameters, noise-level contour datum, and accident potential maps.*

The noise and accident potential maps are developed by the local military air base under the AICUZ[29] program. The mapped information often is presented in Geographic Information System (GIS) format and may be overlaid on local official zoning maps and incorporated in the local general plan so the local planner and planning commission, development community, and residents may be aware of the noise implications from nearby military aircraft operations and plan accordingly.

The AICUZ reports also provide guidance in the form of noise contour maps that can easily be used by local planning officials in general planning and enforcement of local zoning and noise codes. Information on compatible land use also is provided in tabular form for easy reference when local planning officials evaluate a proposed development and its compatibility with nearby military base operations. (See Part V for a description of special defense-related noise and accident potential programs.)

As the Supreme Court indicated, there is pervasive Federal regulation in the noise and aircraft operations area. The impact of these regulations, particularly as they relate to aircraft noise, is such that there is clearly a Federal policy to lessen the impact of aircraft noise and aircraft operations on adjacent landowners. DoD adheres to this policy to the extent that it does not interfere with military training, operational missions, or national defense.

**Strategy:** *The local military installation commander should be available to participate in the local government planning and land use decision-making processes.*

**2. Other Federal Laws That May Affect Land Use:**

**a. National Environmental Policy Act (NEPA):**[30] The National Environmental Policy Act of 1969 requires Federal agencies to file an environmental assessment (EA) and, perhaps, an environmental impact statement (EIS) for "major" Federal actions that have an environmental impact. NEPA is applicable to all Federal agencies, including the military.

**Relevancy to This *Practical Guide*:** NEPA mandates that the military analyze the impact of its actions and operations on the environment, including that of the surrounding communities. Inherent in this analysis is an exploration of methods to lessen any adverse environmental impact. The EIS is a public process that allows participation by the community.

For local planning officials, an EIS or EA is a valuable planning document in determining the extent of impacts of changing military actions or operations on their policies, plans, and programs, if any, and on the surrounding community. Public hearings are required for all EIS and EA documents released by the military under NEPA. A Finding of No Significant Impact (FONSI) under an EA or a full EIS that considers alternatives to the proposed military actions or operations also is required and is subject to public scrutiny. The information obtain by the EIS/EA is valuable in the local planning coordination and policy formulation processes at the local government level.

**b. Coastal Zone Management Act:**[31] The Coastal Zone Management Reauthorization Act of 1985 was passed to preserve, protect, develop, and, where possible, to restore or enhance the resources of the Nation's coastal zone. The act directly applies to approximately 30 coastal States and those States bordering the Great Lakes. The act requires the Secretary of Commerce to assist States in the development of a management program for lands and water resources in the coastal zones. The law has been amended several times, most lately by the Coastal Zone Protection Act of 1996.[32]

Originally, the act excluded lands owned by the United States, including land owned by the military. Today, the requirements of the act pertaining to consistency between Federal activities and State coastal management programs are of particular significance to encroachment prevention programs. When Federal agencies undertake activities that affect any land or water use or natural resource of the coastal zone,[33] there is a requirement that Federal actions be in conformance with an adopted coastal zone management plan.

Thus, actions by the military that might affect land use, water use, or natural resources; endangered species and habitat; and migratory birds, waterfowl, and animals within the coastal zone environment may require special management practices so that such activities will be conducted in a manner consistent with the State coastal zone management plan. There is an exception to the requirement. The statute states that the President may exempt a Federal activity if it is "in the paramount interest of the United States."[34]

**Relevancy to This *Practical Guide*:** Since a large percentage of military installations are located in coastal zone States, the military is required to conduct its activities in a manner consistent with States' management plans. Each military installation is required under the Sikes Act to development Integrated Natural Resource Management Plans (INRMP).[35] The INRMP is a management tool that ensures the military is complying with its legal responsibilities concerning its stewardship of natural resources on an installation and is coordinating with various stakeholders concerning those stewardship responsibilities. These plans protect resources in both coastal and noncoastal zones and respond to a national priority. However, the act stipulates the Federal Government cannot take action that increases value of coastal zone properties.

INRMPs are valuable planning and management tools for local environmental and natural resource planners as well as conservation-based nongovernmental organizations (NGOs). Land trust organizations such as The Nature Conservancy seek to partner with the military and State and local governments to preserve farmland, conserve natural resource areas, scenic vistas, woodlands, and environmentally sensitive lowlands and wetlands; and protect animals and their habitat, especially endangered species.

**c. DoD Conservation Partnering Initiative:** In 2003, Congress amended Title 10 U.S.C. § 2684a and § 2692a (P.L. 107-314) to add authority to DoD to partner with other Federal agencies, States, local governments, and conservation-based NGOs to set aside lands near military bases for conservation purposes and to prevent incompatible development from encroaching on, and interfering with, military missions. This new authority shows great promise for developing lasting partnerships to achieve shared objectives if not for differing reasons. This is an additional tool in the toolkit to support smart planning, conservation, and environmental stewardship on and off military installations.

Examples of where this new authority is being implemented include National Guard Base Camp Blanding, Florida; Fort. Bragg/Pope AFB, North Carolina; Fort. Carson, Colorado; and Eglin AFB, Florida, with its Greenway Program. In the case of Fort Bragg, the Army is partnering with State governments and allied conservation-based NGOs to protect endangered species such as the red-cockaded woodpecker from extinction while providing a natural buffer near important military training and operating areas from civilian encroachment (see discussion in Part V).

## *C. Relevant Federal and State Case Law*

There is a body of case law at both the national and State levels that clears the way for military installations to engage with local government issues and to provide technical information and testimonials before deciding bodies to influence the local decision-making process. The following reviews relevant case law.

**1. In *De-Tom Enterprises, Inc. v. United States,*** [36] the court held that the Air Force was not liable in a takings suit to a private landowner simply because the Air Force had appeared at hearings before a local zoning board to oppose the property owner's petition for a change in zoning classification. Even though the zoning board would have approved the property owner's zoning request but for the Air Force's objections, the court found that the Air Force was not liable for a taking. The basis for the decision was fivefold:

(1) No downzoning was involved (the original zoning classification remained applicable to the subject property)

(2) The value of the plaintiff's property remained approximately the same after the denial of the zoning request

(3) There had been no physical invasion or physical damage to the plaintiff's property by the Air Force

(4) The United States can only be held liable for a taking under the fifth amendment when the United States' own regulatory activity is so extensive or intrusive as to amount to a taking of property

(5) The Air Force, as an interested adjoining landowner, incurred no liability by simply convincing or attempting to convince a local agency to impose land use restrictions. (The court also noted that even if the Air Force's activities amounted to "wrongful coercion" such a claim sounded in tort and, thus, was beyond the jurisdiction of the Claims Court under the Tucker Act.[37])

**2. In *Blue v. United States,*** [38] a landowner living adjacent to Pensacola Naval Air Station, Florida, based a fifth amendment takings claim on the Navy's participation in a local zoning process. The Navy had proposed changes to the county zoning map based on an AICUZ study.

The court held that "[a]lthough the Navy participated in the process by submitting a draft and providing technical assistance, the County is the ordinance adopting government entity," and the county "was free to reject all or part of the Navy's recommendations."[39] In this case, the Navy was acting as a substantial landowner with regard to the AICUZ reports and recommendations and did nothing to incur a taking liability.

In the court's opinion there was no threshold Federal action (where local government acts) because the Navy, as a substantial property owner, may permissibly participate in proceedings at the State or local level just as would any other property owner. The court cited both *De-Tom Enterprise, Inc. v. United States* [40] and *Custom Contemporary Homes Inc. v. United States.*[41] The court likewise rejected the plaintiff's claims of "undue influence" and "due process," holding that "undue influence" sounds in tort and, thus, was beyond the court's jurisdiction, while "due process claims" are likewise beyond the jurisdiction of the U.S. Claims Court (now the U.S. Court of Federal Claims).

**3. In *Landowners v. Wichita Falls, Texas, and the United States,*** [42] the Supreme Court let stand a lower federal appeals court's upholding of a district court's unpublished decision involving a challenge to the application of the Wichita Falls zoning ordinance to areas outside the corporate limits of Wichita Falls. The case involved an extraterritorial zoning requirement and revisions to the Wichita Falls zoning ordinance to incorporate Air Force AICUZ recommendations associated with Sheppard Air Force Base's runway expansion.

Property owners challenged the constitutionality of the zoning restrictions as inverse condemnation. The district court ruled in favor of the city and the Federal Government. It held that, despite the Air Force's extensive participation in the county's zoning process and the county's subsequent enactment of an ordinance substantially similar to the one proposed by the Air Force, no compensable taking had occurred

In 1996, a State district court also had ruled against the landowners in their State taking case. According to the briefs filed by the Federal Government and the city, each of the two lower courts hearing the evidence concluded that the city's airport zoning ordinance was completely appropriate, given the authority granted to the city under State law.[43]

*The district court held that AICUZ studies are planning efforts that "do not control or regulate the use of private lands, and the determination to permit or restrict development or use of private lands is left to the local jurisdiction" under its constitutional police powers.* [44]

These cases represent significant decisions by courts supporting the legitimacy and constitutionality of the DoD AICUZ programs and the right of the Defense Department "like any other citizen or landowner . . . to request local governments to make zoning changes." [45]

## D. The Federal Courts and Individual Property Rights

Historically, courts have considered land use decisions, at least those made by local governing bodies, to be either legislative or quasi-judicial actions. Over time, Federal and State courts have developed a body of case law regarding the constitutionality of State and local governments' actions in undertaking community planning and regulating the use of public and private lands.

*In order to avoid challenges and successful allegations of inverse condemnation, planners must remember that planning tools are to be applied equally with utmost concern for procedural due process, including open public access, complete public disclosure, and equal protection guarantees.*

The courts generally have upheld the constitutionality of land use controls that are under the aegis of a community general or comprehensive planning process that resulted in a duly adopted and approved plan. The plan serves to support legitimate implementing land use regulations such as zoning; subdivision; and public health, safety, and building codes for the protection of the public health, safety, and welfare.

*The plan serves to support legitimate implementing land use regulations such as zoning; subdivision; and public health, safety, and building codes for the protection of the public health, safety, and welfare*

**1. Procedural Safeguards and Relevant Case Law:**

**a. Private Property Rights:** It has been frequently stated that our laws ensuring rights of private property ownership are an important liberty and a major source of creating wealth in the United States.[46] A landowner is said to own a "bundle" of rights to real property (land). These rights include air rights, water rights, mineral rights, and the right to sell the property or pass the property on to heirs, the right to use the property, and the right to develop the property (in accordance with local zoning codes, where applicable). Any single right may be separated from the bundle and sold or given away. However, the right to use, abuse, and abandon property is not without limits. The landowner cannot use or develop property in ways that would harm others or create a public nuisance or public health concerns.

**b. Condemnation:** Under the eminent domain powers, the Federal Government may condemn private property for public use with the subsequent payment of fair compensation. This power is also available to State and local governments as well as special district governing bodies to which the State has delegated its condemnation authority. This eminent domain power may take the form of "quick-take" authority where the empowered governmental entity takes physical possession of the property for public need and necessity and pays the landowner later based on a Federal or State court determination.

**c. Inverse Condemnation:** When a statute, regulation, ordinance, or decision of a governmental authority restricts to some degree one of the traditional rights of a property owner and there is no compensation to the landowner by the governing authority, the result may be an "inverse condemnation" or "regulatory taking."

Inverse condemnation suits against the Federal Government are brought under the Tucker Act (28 U.S.C. 1491).[47] The Tucker Act allows suits against the United States based on the Constitution or any act of Congress or any other regulation of an executive department or on any express or implied contract with the United States. Individual States may also allow the filing of inverse condemnation suits in State courts where such jurisdiction is conferred by the State constitution.

*Inverse condemnation suits against the Federal Government are brought under the Tucker Act*

*When an action for inverse condemnation occurs, courts have generally upheld the constitutionality of land use control, including techniques such as community general planning that are embodied in a duly adopted and approved plan.*

Traditional implementing regulations included zoning; subdivision; and public health, safety, and building codes for the protection of the public health, safety, and welfare.

The jurisprudence surrounding takings legislation, including inverse condemnation actions, is beyond the scope of this *Guide*.[48] However, it is incumbent on local planners to ensure that local planning be conducted with all procedural due process guarantees in place.

Planners must be particularly mindful of the potential legal impact of their actions if there is an allegation that property has been rendered economically valueless.[49] There are four guiding principles for planners to keep in mind when placing restrictions on the use of and access to private property.

***Guiding Principles:***

1. *There must be a demonstrated public justification for the restriction*
2. *The objective must be a legitimate use of police powers*
3. *The means must be reasonable to accomplish the ends*
4. *The means must not be unduly oppressive on the individual.*

**Related Case Law:** The Supreme Court in *Agins v. City of Tiburon*[50] held that a land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests and does not 'deny' an owner economically viable use of his land."[51] Federal and State courts uniformly have held that a per se taking occurs if the regulation denies the owner all economical viable use of the land, unless the regulation is preventing an established common law nuisance.[52] If the landowner has not been denied all economically viable use, the court returns to a balancing of interest as presented in *Penn Central Transportation Co. v. New York City*.[53]

*Repeatedly, the Supreme Court has emphasized that no "set formula" exists for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.*[54]

> **Relevancy to This *Practical Guide*:** One of the aims of the AICUZ-type programs is to guide local land use decisions that ultimately will be compatible with the sustaining military mission.

*Through the AICUZ-type programs, DoD attempts to influence local officials and presiding bodies to adopt by ordinance, rule, or regulation some or all of the land use recommendations contained in the AICUZ study. Such action will help to stop or delay encroachment or incompatible land use activity into areas where there is a significant risk of accidents and/or where noise levels are high (see Part V).*

## *Conclusion*

The Nation's defense and the protection of the public's general health, safety, and welfare are legitimate roles for local, State, and the Federal governments. This is identified in the Constitution, federal laws and regulations, Executive Orders, agency policies and guidelines, and through congressional appropriations. The responsibility falls on State and local governments to exercise prudence and sound judgment in conducting land use planning and zoning under their "police powers."

*The Nation's defense and the protection of the public's general health, safety, and welfare are legitimate roles for local, State and the Federal governments*

Part V presents established local planning and zoning principles and practices that collectively may contribute to a toolkit for compatible land use development in the vicinity of national defense installations. They are the day-to-day tools employed by local city and county planning departments to support compatible development of all types and promote the orderly emergence of compatible human development patterns. Military installations have a place in society and are major contributors to the economic health and well-being of a community. They also are indispensable to our national security.

## ENDNOTES

[1] 42 U.S.C. §§ 4321 *et seq., available at:* http://www.fsa.usda.gov/dafp/cepd/epb/statutes/NEPAStatute.pdf.

[2] Department of Defense Instruction (DoDI) Number 3030.3, *available at:* http://www.dtic.mil/whs/directives/corres/html2/i30303x.htm.

[3] The Office of Economic Adjustment (OEA) receives its authority from 10 U.S.C. 2391(b)(1)(D); OEA is the Department of Defense's primary source for assisting communities that are adversely impacted by Defense program changes, including base closures or realignments, base expansions, and contract or program cancellations. To assist affected communities, OEA manages and directs the Defense Economic Adjustment Program, and coordinates the involvement of other Federal agencies. *Also available at:* http://www.oea.gov/oeaweb.nsf/Profile?OpenForm.

[4] DoD Instruction (DoDI) 3030.3 established within the Office of the Secretary of Defense the Land Use Inter-Service Working Group (LUIWG). The LUIWG is chaired and supported by the Office of Economic Adjustment. Participating DoD components include the Military Departments, the Army and Air National Guards Bureau Headquarters, and various Service and OSD components. This is an interdisciplinary working group of professionals assigned to coordinate land use compatibility programs within the DoD that are designed to protect and sustain the operational utility of military installations and protect the public health, safety, and welfare.

[5] 32 C.F.R. § 256.1(a), *available at:* http://www.access.gpo.gov/nara/cfr/waisidx_98/32cfr256_98.html *and* DoD Instruction 4165.57, Air Installations Compatible Use Zones (AICUZ) (1977); U.S. Navy, Operational Naval Instruction (OPNAVINST) 11010.36B AICUZ (2002); Air Force Instruction 327063 (2002); and the DoD Sustainable Range Operations Program (DoDD 3200.15, Jan 10, 2003.

[6] Army Regulation 200-1 Environmental Protection and Enhancement (2005).

[7] Range Air Installations Compatible Use Zones (RAICUZ) program (OPNAVINST/MCO 3550).

[8] 10 U.S.C. §§ 2684a and 2694a.

[9] The discussion in this section is largely taken from Howard, Needles, Tammen, and Bergendoff in Association with Freilich, Leitner, Carlisle and Shortlidge, Air Installations Compatible Use Zones – Program Evaluation and Assessment (prepared by Naval Facilities Engineering Command, July 1992; updated to reflect interpretations that are more recent and case law).

[10] 49 U.S.C. § 40103, *available at:* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+49USC40103.

Note: Section 11.08.020 Compliance with Federal Aviation Act and Federal Aviation Regulations, *available at:* http://www.ci.lake-havasu-city.az.us/Lake_Havasu_City/Title_11/08/020.html.

A. The Federal Aviation Act of 1958 authorizes the Administrator of the Federal Aviation Administration to prescribe air traffic rules and regulations governing the flight of aircraft. The Federal Aviation Regulations promulgated by the Administrator cover all flights on or in the vicinity of the airport.

B. Aircraft operators, pilots, airmen, and other users of the airport are required to be familiar with and comply with the Federal Aviation Regulations, and, in particular, Part 91, General Operating and Flight Rules, of said regulations.

C. All aeronautical activities at the airport and all flying of aircraft departing from or arriving at said airport shall be conducted in conformity with the Federal Aviation Regulations (Ord. 91-347 [part], 1991)

[11] 49 U.S.C. § 40103(a)(1), *available at:* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+49USC40103.

[12] *Allegheny Airlines, Inc. v. The Village of Cedarhurst,* 238 F.2d. 812 (2d Cir. 1956).

[13] *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973).

[14] 49 U.S.C. § 47523 through § 47528, *available at:* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+49USC47524.

[15] 49 U.S.C. § 40103(a)(2), *available at:* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+49USC40103.

[16] 328 U.S. 256 (1946).

[17] 49 U.S.C. § 40102(30), *available at:* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+49USC40102.

[18] 160 Ct. Cl. 295, 311 F.2d 798, 801 (1963).

[19] *Id.* at 801.

[20] *Branning v. United States,* 654 F.2d 88 (Ct. Cl. 1981). The vital factor in this case was that the overflights (at 600 AGL) by Marine Corps aircraft, designed to practice carrier takeoffs and landings, occurred with the planes' noses up, tails down, and near maximum power in "unvarying loops" over the plaintiff's land. The noise generated from the flights made construction of single-family homes economically unviable. The overflights occurred over the plaintiff's land because alternative locations were determined to be even more objectionable. According to the court, the plaintiff was "consciously singled out or selected to bear a burden which defendant also consciously elected not to impose on others . . . . This is a classic statement of a taking situation." *Id.* at 90.

[21] 1 Ct. Cl. 102, 554 F. Supp. 1262 (1983).

[22] 11 Ct. Cl. 352 (1986).

[23] In 1963, the Court of Claims formally announced the so-called "500-Foot Rule" in the case of *Aaron v. United States* 160 Ct. Cl. 295, 311 F.2d 798, 801 (1963). The "500-Foot Rule" provides that overflights having an altitude of 500 feet or more above ground level are not compensable because flights above 500 feet enjoy a right of free passage without liability to the property owners below. The court acknowledged that aircraft flights within the navigable airspace (500 feet and above) could generate damage so severe as to amount to a practical destruction or a substantial impairment of a person's property. In such case, the court said it "would then have to consider whether the relevant statutes and regulations violated the property owner's constitutional rights" 311 F.2d at 801. Thus, the United States is normally protected by the "500-Foot Rule" and is not liable for taking private property as long as the aircraft do not penetrate airspace at an altitude less than 500 feet above ground level.

Except for one case, *Branning v. United States,* 654 F.2d 88 (1981), all decisions by the Court of Claims where compensation was granted to landowners involved cases in which overflights by Government aircraft occurred at altitudes of 500 feet or less. In *Hero Lands Co. v. United States,* 1 Ct. Cl. 102, 554 F.Supp. 1262 (1983), the court cited Branning but distinguished, holding that the record did not disclose any sort of "peculiar facts" on which the Branning decision had been based. The court reasserted the general rule, that the United States is not liable for taking as a result of aircraft overflights in excess of 500 feet above ground level. *See also Stephens v. United States,* 11 Ct. Cl. 352 (1986).

[24] 49 U.S.C. § 47501 et al., *available at*: http://www.netvista.net/%7Ehpb/usc475-1.html.

[25] 49 U.S.C. § 47503 and § 47506, *Also available at* http://www.netvista.net/%7Ehpb/usc475-1.html.

[26] 32 CFR 256.1(a) and DoD Instruction (DoDI) 4165.57, *available at*: http://www.dtic.mil/whs/directives/corres/text/i416557p.txt .

[27] The Chief of Naval Operations issued a new Instruction (OPNAVINST 11010.36B) in 2002. Its purpose is to a guide Navy and Marine Corps military aircraft operations and identify the impact such operations may have on surrounding communities. Its internal guidelines are contained in military instructions. The Air Force has complementary guidance closely coordinated with the Navy's guidance (AF Instruction (AFI) 327063 (2002)).

[28] Note: Originally, the FICAN was referred to as the Federal Interagency Committee on Urban Noise (FICUN) (1980). Later it became known as the Federal Interagency Committed on Noise (FICON) that published a 1992 report adopting land use guidelines. The committee is now called FICAN and is chaired by a representative from the DoD.

[29] Chief of Naval Operational Instruction (OPNAVINST) 5090.1 or MCO P11000.8 (NOTAL).

30 42 U.S.C. § 4321 *et seq.*, available at http://www.washingtonwatchdog.org/documents/usc/ttl42/ch55/sec4321.html. NEPA requires all Federal agencies to "include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . (i) The environmental impact of proposed action . . . ." Id. at § 4332 (c).

[31] 16 U.S.C. § 1452 *et seq., available at*: http://www.nerrs.noaa.gov/Legislation/306A.html.

[32] Pub. L. 104-150, § 1, June 3, 1996, 110 Stat. 1380 (codified in of 16 U.S.C. § 1454 *et seq.*). *available at*: http://www.washingtonwatchdog.org/documents/usc/ttl16/ch33/sec1451.htmlSec. 1451. Congressional findings.

[33] *Id.* at § 1456(c).

[34] *Id.* at § 1456(c)(1)(B).

[35] Sikes Act, 16 U.S.C. 670. A comprehensive description of an INRMP and DoD, *available at:* https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Laws/Sikes/Misc/summary.html.

[36] 213 Ct. Cl. 362, 552 F.2d 337 (1977).

[37] 28 U.S.C. § 1491, *available at:* http://www.washingtonwatchdog.org/documents/usc/ttl28/ptIV/ch91/sec1491.html

[38] 21 Ct. Cl. 337 (1990).

[39] *Id.* at 362.

[40] 213 Ct. Cl. 362, 552 F. 2d 337 (1977).

[41] 5 Ct. Cl. 88, 90 (1984).

[42] *See Chester Cox, Jr., et al*. v. *City of Wichita Falls, Texas, and the United States,* No. 99-11249 (5th Cir. 2001) (affirming an unpublished decision).

[43] Brief for Appellees, *Chester Cox, Jr. v. City of Wichita Falls, Texas and the United States*, No. 01-62 (U.S.), *available at:* http://www.usdoj.gov/osg/briefs/2001/0responses/2001-0062.resp.pdf.

[44] *Id.* at p. 13.

[45] *Id.* at p. 13.

[46] Tom Daniels, *When City and Country Collide – Managing Growth in the Metropolitan Fringe* (Washington, DC: Island Press, 1999) p. 79.

[47] 28 U.S.C. § 1491, *available at :* http://assembler.law.cornell.edu/uscode/html/uscode28/usc_sec_28_00001491----000-.html US CODE: Title 28,1491. Claims against United States generally; actions involving Tennessee Valley Authority.

48 For more information about recent court decisions in this field, *see* American Bar Association, Hot Topics in Land Use Law – From the Comprehensive Plan to the Del Monte Dunes 16 (Patricia E. Salkin & Robert H. Freilich, eds., 2000).

[49] A taking unquestionably occurs when an entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property. *See* Fowler, No. 99SC304, slip op. at 11; *City of Northglenn v. Grynberg,* 846 P.2d 175, 178 (Colo. 1993).

A regulation or action that renders a piece of property economically valueless may result in a *per se* regulatory taking. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). There is no taking, however, where the Government implements a land use regulation that "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." Nollan, 483 U.S. at 834, 107 S.Ct. at 3147, 97 L. Ed. 2d at 687 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 112, 100 S. Ct. 2138, 2142 (1980)).

[50] 447 U.S. 255 (1980).

[51] For more information on takings case law, *see* American Bar Association, "Hot Topics in Land Use Law – from the Comprehensive Plan to the Del Monte Dunes" 16 (Patricia E. Salkin and Robert H. Freilich, eds., (2000)).

[52] *See* Lucas, *supra* note 50. *See also De Tom Enterprises, Inc. v. United States*. 213 Ct. Cl. 362, 552 F.2d 337 (1977) and Nollan (107 S.Ct. 3141 (1987)):

[53] 438 U.S. 104 (1978).

[54] *See* Penn Central 438 U.S. 104; *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962).