

Overview of Legal Authorities and Issues Associated with Housing Privatization

The Military Housing Privatization Initiative (MHPI) was enacted as part of the 1996 National Defense Authorization Act. The initiative provides broad authority for the military services to utilize private sector resources to replace aging military housing. Because the initiative is a departure from standard military construction procedures, legal issues have arisen across a broad spectrum. Not only are there are issues associated with the process of privatization, issues also arise out of the new legal circumstances created by privatized housing.

During the process of privatization, issues have been identified in the areas of procurement, environmental matters, base services, federal impact aid and taxation. After privatization is complete, new circumstances create issues related to jurisdiction, good order and discipline, inspections and searches, and the lawfulness of orders to occupy privatized housing.

The outline that follows will provide a brief introduction to the MHPI authorities, and background on the issues listed above. Two points should be remembered. First, all the issues discussed are to some extent interrelated; they should be considered together as they relate to any particular privatization project. Second, the outline doesn't cover all aspects of housing privatization where legal problems may arise. It is designed to acquaint Air Force attorneys with some of the areas where issues have already been identified.

The primary sources of the information provided are DoD and Air Force publications and the work product of DoD and Air Force attorneys.

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I. The Authority

A. 1996 Defense Authorization Act, Pub. L. No. 104-106, 110 Stat 186 (codified in scattered sections of 10 U.S.C.) contained the Military Housing Privatization Initiative

B. Added Subchapter IV to Chapter 169 of Title 10 – Alternate Authority for Acquisition and Improvement of Military Housing consisting of 10 U.S.C. 2871-2885

1. Provides authority, subject to some limitations, to

- a) Make direct loans to persons in the private sector
- b) Loan guarantees
- c) Convey or lease land or facilities
- d) Invest in nongovernmental entities
- e) Interim leases
- f) Make rental guarantees and differential lease payments (not utilized as a matter of policy)
- g) Any combination of the above

2. Establishes Funds that may be credited with proceeds from the conveyance or lease of property or facilities, and income derived from loans and investments. Funds may be used to carry out activities with respect to military family housing and remain available until expended.

C. Certain Property Management Laws Inapplicable

1. 10 U.S.C. 2667 (dealing with lease of non-excess property)
2. 40 U.S.C. 471 *et seq.* (Federal Property and Administrative Services Act)
3. 42 U.S.C. 11301 *et seq.* (McKinney Homeless Assistance Act)

4. 40 U.S.C. 303b (Economy Act)

D. Authority expires February, 2001

II. Procurement Issues

A. Housing privatization not generally governed by the FAR

1. DoD General Counsel policy letter - 5 March 97

a) FAR applies only when project requires the direct obligation of appropriated funds to directly acquire military housing or services

b) Reliance on FAR provision is appropriate to protect government's interests

B. Housing privatization not generally governed by Competition in Contracting Act (CICA) 10 U.S.C. 2304, since CICA applies to procurement of property or services

C. Where competitive procedures are employed, Procurement Integrity Act, 41 U.S.C. 423 applies to federal employees

1. Prohibition on disclosing or obtaining "contractor bid or proposal information" or "source selection information."

2. Recent GAO decision held Army utility privatization RFP involving sale of water and wastewater treatment facilities in return for the furnishing of potable water and wastewater treatment services was subject to Comptroller General jurisdiction under 31 U.S.C. 3551. GAO found it was a "a solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services." Government of Harford County, Comp. Gen. Dec. B-283259 et al., 1999 WL 1009104 (Oct. 28, 1999).

D. 18 U.S.C. 208 and the Joint Ethics Regulation prohibits DoD employees from:

1. Performing certain acts when to do so would affect their personal or imputed financial interests (JER 5-300, 301)

2. Participating in any official matter when a reasonable person with knowledge of relevant facts would question their impartiality (JER 5-300, 301)

3. Participating in their official DoD capacities in the management of non-Federal entities without authorization from the DoD General Counsel, except for designated entities (e.g. Air Force Aid Society). (JER 3-202)

a) Absent DoD General Counsel approval, this provision would prohibit participation in the management of a limited liability company (LLC), partnership, or other business entity requiring active participation.

b) State law may require members of an LLC to exercise fiduciary responsibility toward LLC. Could require Air Force to disclose sensitive information to LLC to avoid breach of fiduciary duty.

III. Environmental Matters

A. National Environmental Policy Act (NEPA) 42 U.S.C. 4371 *et seq.*, AFI 32-7061, 32 CFR 989 (15 July 1999)

1. Environmental Impact Analysis Process (EIAP) required for major federal actions significantly affecting the quality of the human environment.

2. Environmental Assessment (EA) results in either a Finding of No Significant Impact (FONSI) or a decision to proceed to an Environmental Impact Statement (EIS).

3. Housing privatization EAs normally result in FONSI – but review for adequacy, particularly discussion of alternatives

a) EA/FONSI must be made available to affected public and sufficient time allowed for public comment

b) EA/FONSI may be signed at base level unless otherwise required by AFI (wetlands, floodplain, Clean Air Act conformity determination, etc.) but keep in mind it will be reviewed at higher levels.

B. Environmental Baseline Surveys (EBS) – AFI 32-7066

1. Required for all outgrants of real property – waivers possible under certain limited circumstances not associated with long-term housing privatization

2. EBS should document presence of any contamination on land or structures to be conveyed including asbestos containing material (ACM) and lead-based paint (LBP).

3. EBS should be an attachment to the RFP, and RFP must be clear that offerors are responsible for all requirements associated with ACM or LBP in accordance with law

a) Demolition of housing units with ACM is subject to notice and abatement requirements.

b) If developer will continue to use existing units constructed prior to 1978, LBP disclosures are required in accordance with 40 C.F.R. 745.107. (See *In the Matter of the United States Department of the Navy, Kingsville Naval Air Station*, TSCA Docket No. VI-736C(L) for a case currently in litigation involving a \$400,000 fine assessed by EPA against the Navy for failure to provide LBP disclosures to occupants of military housing)

C. National Historic Preservation Act – 16 U.S.C 470 *et seq.* AFI 32-7065

1. Existing housing may be eligible to be listed on National Historic Register

2. Criteria for evaluating properties for nomination for listing on the National Register are set forth at 36 CFR §60.4

a) Look for property older than 50 years or Cold War resources

3. Before federal projects (or federally assisted projects) affecting eligible historic properties can proceed, Section 106 of the NHPA requires “consultation” with the State Historic Preservation Officer (SHPO). Consultation procedures are at 36 CFR 800.

4. If agreement with SHPO cannot be reached, Advisory Council on Historic Preservation must be afforded a reasonable opportunity to comment. (See 16 U.S.C. §470f.)

5. The consultation process can be combined with the National Environmental Policy Act (NEPA) analysis, or may be done separately, with the results of the consultation then incorporated into the NEPA Record of Decision (ROD) (or finding of no significant impact -- FONSI, as the case may be). Combining the Section 106 consultation process with NEPA analysis will normally be less time consuming, less expensive, and result in more informed decision making.

IV. Base Services – DoDD 1330.9, DoDD 1330.17, DoDI 1015.1, DoDD 1015.2

A. 10 U.S.C. 2881 allows projects to include “ancillary support facilities” defined as facilities related to military housing units, including child care centers, day care centers,

tot lots, community centers, housing offices, dining facilities, unit offices, and other similar facilities for the support of military housing.

B. However, AAFES, DeCA, and Services have exclusive right to provide resale merchandise, services, and recreational operations or activities on DoD installations

C. SAF/MII policy letter (2 Mar 99) requires exclusive rights be extended to Air Force property leased, conveyed or otherwise transferred in the context of housing privatization

1. Developers are to be precluded from providing resale merchandise, services, and commercial operations or activities as part of housing privatization projects
2. Land may be retained by the Air Force for use by AAFES, DeCA, and Services with those organizations having a "first right of refusal" to continue such use.
3. AF/IL tasked to develop coordination process
4. Exceptions to be approved by SECAF

V. Federal Impact Aid and Taxes

A. Issue: Federal property and instrumentalities are not subject to state taxation. States' inability to tax federal property hinders States' ability to fund public education, particularly when families living on base are provided access to State supported public education.

B. Solution: Department of Education pays federal impact aid as a means of compensating local school districts for losses in tax revenue due to the presence of Federal property – 20 U.S.C. 7701 *et seq.*, 34 CFR 222

C. Fee simple conveyance of Federal property for privatization purposes would mean that students no longer reside on Federal property. Could reduce or eliminate impact aid for those schools whose boundaries include these areas

1. However, the loss of impact aid could be offset to some extent by property taxes that could be assessed against the privately owned property.

D. Lease of Federal property for privatization purposes would not adversely affect impact aid. (The students would still be residing on Federal property.)

1. However, depending on state law, a leasehold interest may be taxable. Developer would be liable for these taxes. Use FAR 52.229-3 to make sure contract price includes all applicable federal, state, and local taxes and duties.

E. Bottom line: Coordinate with local school districts that benefit from federal impact aid to determine affect of privatization. Also, consider whether state law allows permits taxation of leasehold interest.

VI. Jurisdictional impacts of conveyance of Air Force real property

A. Jurisdiction on Air Force installations generally either exclusive, concurrent, or proprietary – 40 U.S.C. 255; 10 U.S.C. 2683; AFI 32-9001

1. Exclusive - federal government has sole authority, limited only by minor reservations by states for such things as service of process; sometimes referred to as partial jurisdiction where states reserve more than minor rights

a) State has no obligation to provide services such as fire, police, sanitation, or to extend benefits incident to residence such as voting or access to schools to persons living there

2. Concurrent – federal and state authority with federal supremacy in case of conflict

a) State may provide services and benefits, although it may be reluctant to in the absence of any source of revenue

3. Proprietary – state has sole authority, although federal government still maintains immunity and supremacy for inherently governmental functions

B. Fee Simple Conveyance – USAF no longer has ownership interest in the property.

1. Exclusive jurisdiction retroceded to the State. AFI 32-9001 paragraph 1.9 establishes procedures to acquire or retrocede jurisdiction.

a) Loss of authority to prosecute misdemeanors in Federal Magistrate Court

b) Loss of debarment authority. Title 18 USC 1382 prohibits entry upon a military reservation or installation "for any purpose prohibited by law." Trespass is considered a "purpose prohibited by law." Provides for \$500 fine and/or six months in jail. Same section prohibits entry on a military installation after being barred

c) Loss of 50 U.S.C. 797 authority which allows installation commanders to issue orders or regulations for the protection or security of persons or property on military installations and to regulate the entry onto military

installations under the commander's control. Makes violation a misdemeanor punishable by \$5000 fine and/or one year in jail.

- d) Political activities (yard signs, fund-raising activities, etc).
- e) Operating private businesses out of housing units.
- f) Home child-care operations (licensing requirements, limits on number of children, etc) and child supervision requirements
- g) Charitable and other door-to-door solicitations.
- h) Quarters appearance and occupant maintenance.
- i) Termination of Housing
- j) Suspension/Termination of driving privileges

2. Loss of camaraderie and “feeling of security” for base populace

C. Lease of real property generally has no effect on jurisdiction

- 1. Air Force as lessor retains jurisdiction it had prior to the lease
- 2. Terms of lease can be used to protect Air Force’s ability to control activities on the leased land. Air Force could still control activities listed above
- 3. Potential problem when developers who lease Air Force property subject to exclusive federal jurisdiction sublease to occupants – Developer and occupants may not be able to use state courts and authority to enforce housing leases
 - a) Federal courts and marshals may be required for evictions

VII. Good Order and Discipline

A. Problem: Maximizing occupancy may make segregation of officers and enlisted personnel impractical

- 1. Active duty military may be given priority to insure full occupancy
- 2. Should active duty be allowed to buy up or buy down and occupy a unit designed for another grade?

B. Fraternalization and Unprofessional Relationships: Article 134 of the UCMJ prohibits commissioned or warrant officers from fraternizing on terms of military equality with enlisted members in violation of the custom of the service

1. Because of uncertainty about exactly what the "custom of the service" was in the Air Force, the law on fraternization dealing with sexual relations was unsettled for several years. *United States v. Johanns*, 20 M.J. 155 [cited at] (C.M.A. 1985), *cert. denied*, 474 U.S. 850 (1985); *United States v. Mayfield*, 21 M.J. 418 [cited at] (C.M.A. 1986); *United States v. Wales*, 31 M.J. 301 [cited at] (C.M.A. 1990), *rehearing on sentence*, 35 M.J. 501 [cited at] (A.F.C.M.R. 1992); *United States v. Appel*, 31 M.J. 314 [cited at] (C.M.A. 1990); *United States v. Parillo*, 31 M.J. 886 [cited at] (A.F.C.M.R. 1990); *United States v. Arthen*, 32 M.J. 541 [cited at] (A.F.C.M.R. 1990); *United States v. Fox*, 32 M.J. 747 [cited at] (A.F.C.M.R. 1991), *rev'd*, 34 M.J. 99 [cited at] (C.M.A. 1992); *United States v. Cottrel*, 32 M.J. 675 [cited at] (A.F.C.M.R. 1991); *United States v. Cisler*, 33 M.J. 503 [cited at] (A.F.C.M.R. 1991); *United States v. Kroop*, 34 M.J. 628 [cited at] (A.F.C.M.R. 1992); *United States v. Miller*, 34 M.J. 1175 [cited at] (A.F.C.M.R. 1992); *United States v. Flynn*, 34 M.J. 1183 [cited at] (A.F.C.M.R. 1992).

2. However, it appears clear that prosecution of Air Force officers is possible provided there was a command or supervisory relationship between the officer and the enlisted person. With the decision by the Air Force Court of Military Review in *United States v. Boyett*, 37 M.J. 872 [cited at] (A.F.C.M.R. 1993), *aff'd*, 42 M.J. 150 [cited at] (1995), which held *Johanns* to be fact specific, it appears that a prosecution is possible without a command or supervisory relationship, if custom of the service can be proven.

3. A.F.I. 36-2909, "Fraternalization and Professional Relationships," is now a punitive regulation. Effective 1 May 1996.

4. Abandoning the concept of separate housing for officers and enlisted may erode the Air Force's "custom of the service" against fraternization

C. Other UCMJ offenses require knowledge of status of victim

1. Disrespect Toward Superior Commissioned Officers, Article 89
2. Assaulting Superior Commissioned Officer, Article 90
3. Assault of or Disrespect Toward Warrant Officer or NCO, Article 91

VIII. Inspections and Searches

A. Conveyed property

1. Since conveyed property is no longer part of the installation, the installation commander may no longer authorize inspections
2. Likewise, installation commander may no longer authorize searches of housing, although searches of persons subject to the UCMJ still authorized

B. Leased property

1. Terms of the lease may be key since MRE 315(c)(3) authorizes probable cause searches of "Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located.
2. If leased property remains under military control, commander may also authorize searches of persons and property on leased land even when developer owns housing.
3. Since jurisdiction isn't affected by lease, civilians could be detained by Security Forces, or cited and prosecuted for misdemeanors in Federal Magistrate's Court if committed in areas of federal jurisdiction.
4. Determine how much control the installation commander wants to exercise, and use lease provisions to establish military control.
 - a) Incorporate requirements of AFIs and installation instructions into the terms of the lease

IX. Orders to occupy privatized housing

- A. Can a commander lawfully order a military member to enter a lease for housing with the private company that manages the privatized housing?
- B. 10 U.S.C. 2882(a) authorizes assignment to privatized housing and 10 U.S.C. 2882(b) provides a member assigned shall be entitled to BAH
1. Normally, members assigned to gov't housing are not entitled to BAH under 37 U.S.C. 403(e)
- C. Orders are presumed to be lawful. *United States v. Smith*, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972).

D. Orders must relate to military duty, that is, reasonably necessary to safeguard or promote the morale, discipline, and usefulness of the command. *United States v. Martin*, 5 C.M.R. 102 (C.M.A. 1952).

E. Orders may not unreasonably restrict a personal right. *United States v. Nation*, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958); *United States v. Lehman*, 5 M.J. 740 (A.F.C.M.R. 1978).

F. However, orders that have interfered with personal rights have been upheld.

1. Orders to cease cashing checks at the club. *United States v. Kula*, 22 C.M.R.825 (AFBR 1956).
2. Regulations prohibiting marriage in the Philippines. *United States v. Wheeler*, 12 U.S.C.M.A. 387,30 C.M.R. 387 (C.M.A. 1961); *United States v. Levins*, 30 C.M.R. 641 (NBR 1960).
3. Order to HIV positive military member not to engage in unsafe sexual practices. *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989); *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990); *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993).
4. Order not to drive personal vehicle. *United States v. McDaniels*, M.J. (CAAF No 97-0570, June 9,1999).
5. Order to wear UN insignia on uniform. *United States v. New*, No 9600263 (ACCA 1999).

G. Parallels

1. Requirement for bank account to receive pay via electronic funds transfer
2. Requirement to use government credit card for TDY expenses
 - a) AFI 65-104 (1 May 96) does not require, but “strongly encourages” use of government credit card for travel expenses, however,
 - b) On 16 July 1999, the General Services Administration (GSA) published in the Federal Register an interim rule that amends the part of the Federal Travel Regulation that deals with payment of expenses of official travel. The interim rule creates a requirement that Federal employees use the government contractor-issued travel charge card for all official travel expenses (with certain limited exceptions). The rule is found at Volume 64, pages 38528-38531 of the Federal Register. It

became effective on 16 July 1999, but it applies to the payment of expenses in connection with official travel performed on or after 31 Dec 1999.