

Base Reuse Consortium BULLETIN

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Member Updates – Redevelopment in the Centennial State

The cities of Denver and Aurora, Colo., have experienced the closure of three major facilities in recent years: Stapleton Airport, Lowry Air Force base and Fitzsimons Army Medical Center. Not only were these sites significant to the local economy, they are all located within just a few miles of each other. This edition of the *Bulletin* reports on the redevelopment progress of the two bases.

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How Virginia Obtained Unprecedented Legal Protections from the Federal Government

At a NAID workshop in Washington, D.C. in March, one issue that arose throughout the day was the anemic liability indemnification that the Department of Defense usually gives transferees of base property. Gregory Hurley raised this issue in the September edition of the *Base Reuse Bulletin*. The state of Virginia managed to make this legal protection rock solid at Fort Pickett. Harry Kelso, Virginia's chief negotiator for Fort Pickett's base closure agreement, shares some of the tactics he employed to win this enhanced liability protection.

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Moving Ahead on Lead

Continuing to follow the lead-based paint issue, Consortium staff researched the disagreement at Fort Benjamin Harrison in Indiana. As EPA and DoD work on a lead-based paint guidebook, the LRA recently received title to a parcel contaminated with high levels of lead-based paint.

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Preliminary Results of the ICMA Base Reuse Consortium's 5-Minute Survey

Preliminary results are now available from the Base Reuse Consortium survey. The survey asked community members about their experiences in the base redevelopment process.

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How Virginia Obtained Unprecedented Legal Protections from the Federal Government

By Harry H. Kelso, Attorney at Law, VA's Chief Negotiator for Fort Pickett's base closure agreement and Chief of Environmental Enforcement for the Avtex Superfund site.

In two recent agreements—one involving a base closure site and the other a Superfund site—the Commonwealth of Virginia and its municipalities avoided committing hundreds of millions of dollars for environmental cleanup, while underscoring that the federal government can be held accountable for environmental damage under the same legal standards as the private sector.

Fort Pickett Base Closure Agreement

On September 30, 1997, the U.S. Army and the Virginia Army National Guard (VANG) entered into a Facility Use Agreement (FUA) regarding Fort Pickett, a 45,000-acre Army post owned and operated by the U.S. Army since its creation in the early 1940s. This FUA provides unprecedented environmental and tort legal protection and federal funding to the Commonwealth of Virginia while allowing VANG the right to use and occupy Fort Pickett. The Army will continue to own the property and VANG will use and occupy the post for an indefinite period of time, maintaining it for its own use and continuing its military training mission. As for environmental liability, VANG is

contractually covered for past (pre-VANG) and future Defense Department activities conducted at Fort Pickett. For the first five years, it is presumed that any *newly discovered* contamination was generated prior to the FUA and is thus the responsibility of the Army. In addition, if the Army fails to complete BRAC environmental studies on the property by the end of those first five years, the presumption period will be extended for five more years. All environmental funding will come exclusively from federal government funds, with the only exception being if VANG's use or occupancy rises to the level of "gross negligence" or "willful misconduct."

Superfund Litigation Against the Defense Department

Three weeks after the FUA was signed, Virginia settled out of court with FMC Corporation and several federal government agencies, including the Departments of Defense, Air Force, and Commerce and NASA for massive environmental contamination of an unrelated, private, Virginia site known as Avtex Fibers. In the Avtex Fibers settlement agreement, the U.S. Government and FMC Corporation reimbursed the Commonwealth of Virginia nearly \$2 million in state funds it had spent over an 8-year period cleaning up the largest Superfund site in the state and one of the largest in the region. The settlement was reached only months after Virginia sued the federal government agencies and FMC in federal court and it virtually ensured

that Virginia will not be required to spend millions in state tax dollars to clean up this federal government/private industry toxic waste site.

Virginia's Tools for Success

Virginia accomplished these precedent-setting agreements with the federal government (as well as private industry) using the same tools. In both situations, the leadership of the state and local governments recognized the gravity of the circumstances and tasked the same individuals to secure commitments with the federal government. The state's team put into motion an aggressive, pro-active approach to meet its goals, not waiting on the federal government to define any issues or agenda over which to negotiate. In short, the team set out to know the federal government's case better than the federal government knew it. They were successful, operating as follows:

1. Clear appointment by top decisionmakers of the negotiating team and its leader, who had ultimate authority to negotiate in behalf of the decisionmakers;
2. Possessing an intricate knowledge of local, state, and federal government operations, including agency operations, laws, and political sensitivities;
3. Possessing strategic negotiating expertise;
4. Gaining a complete understanding of the property, including its historic use as well as environmental dam-

age studies; this was done via comprehensive research of governmental documents, liberally using the federal Freedom of Information Act to uncover governmental actions; and

5. Operating as a singular team, with constant communication between key officials in local, state, and federal government.

These operating requirements were critical to the success of the negotiations in both instances.

Freedom of Information Act (FOIA): A Powerful Tool

The FOIA allows people to access and copy federal government records, unless there is an exemption that allows the government to withhold such documents. In both cases mentioned above, Virginia's team aggressively sought to obtain all federal government records (as well as any state and local government or private records it could locate) relating to both locations: Fort Pickett and the Avtex Fibers Superfund site. Based on the existing knowledge at the commencement of the state's two efforts, the team sought documents from any source potentially involved in each of the two sites and thereafter let its investigating nose follow the document trails.

With respect to Fort Pickett, the Virginia team uncovered Army documents outlining previous Army cleanup plans, some of which were being disavowed in the base closure negotiations. At the Avtex Fibers Superfund site, Virginia sent FOIA requests to multiple federal government agencies and obtained thousands of documents. The papers detailed the federal government's \$44 million bailout (with taxpayer funds) of the nearly-insolvent Avtex Fibers corporation. Many of the documents from the

National Security Council, the Departments of Defense, the Air Force, and NASA, confirmed the federal government's bailout, its control over the company, and its knowledge of the company's sordid environmental record. The papers also documented the toxic contamination of the facility and the adjacent Shenandoah River.

Clearly, the aggressive use of FOIA and research of government records placed Virginia in the position to know what it needed in the way of legal protection from federal government activities. The team's knowledge of federal, state, local, and military operations, combined with the understanding of the two facilities gained by the federal Freedom of Information Act and comprehensive research of government records was fundamental in determining what Virginia required in order to enter into any agreements. To that end, the federal FOIA was especially significant,

for it is the legal tool by which local and state governments, as well as citizens, can inexpensively gain an understanding of federal government activity. (State FOIA laws can serve the same purpose on state activities).

Virginia's successful experience in dealing with the federal government in general, and the Defense Department specifically, ratifies the use of the above principles to any other base closure, and ensures that a local government and/or state government can gain the most protection and funding for itself in dealing with base closures.

For more information, Harry H. Kelso can be reached at 804/364-3970 or by page at 888/930-5818. (Mr. Kelso will be speaking at the Consortium meeting in Phoenix. See article on page 11.) Δ