

CHAPTER 2

AUTHORITY TO ACQUIRE REAL PROPERTY

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Definition

Unless otherwise noted, the word "property" in this chapter refers to real property.

CHAPTER 2

AUTHORITY TO ACQUIRE PROPERTY

SECTION I - GENERAL

1. PURPOSE AND SCOPE

a. This Chapter sets forth the legislative authority for the acquisition of property and interests in it applicable to the Department of the Navy (DON). The scope is general in nature as later chapters address specific topics in greater detail. Please refer to [SECNAVINST 11011.47A \(reference \(z\)\)](#) and other applicable laws, and regulations for further guidance.

b. As a general policy matter, property may be acquired by DON only if there is no other government-owned property available that adequately satisfies its mission requirements.

c. The Secretary of Defense (SECDEF) by a Memorandum dated 17 November 2002, now memorialized in DODI 4165.71, revised, expanded, and superceded the existing land moratorium policy, issued by the Deputy Secretary of Defense (DEPSECDEF) in memoranda dated 13 September 1990, and 1 December 1994. Accordingly, no major land acquisition proposals within the Washington, DC area may be made public through (1) a request for proposals; or (2) a notice of intent to perform environmental analysis; or (3) request for legislation or budget line item; or (4) press release; or (5) other official notice without the approval of the SECDEF or the DEPSECDEF. All previously approved or announced major land acquisitions within the Washington, DC area for which binding documents have not been executed, as of 17 November 2002, may not proceed until approved by the SECDEF or the DEPSECDEF, after review by the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD (AT&L)). In addition, no major land acquisition proposals outside the Washington, DC area may be made public, in the

manner stated above, without the approval of the USD (AT&L).

(1) Additionally, no proposals for relocating into or within the Washington, DC area that exceed \$500,000 in relocation costs may be made public in the manner stated above without approval by the SECDEF or the DEPSECDEF. All previously approved or announced relocations that have not occurred as of 17 November 2002 may not proceed until approved by the SECDEF or the DEPSECDEF, after review by the USD (AT&L).

(2) The memorandum defines a major land acquisition as the purchase, withdrawal from public domain, lease, or permit from individuals or government entities, or any other type of use agreement involving more than 1,000 acres, or land whose estimated purchase price or annual lease price exceeds \$1,000,000. The Washington, DC area is defined generally as the geographic area within 100 miles of the Pentagon.

(3) Exceptions. By memorandum dated 28 Jul 2005, the Under Secretary of Defense stated that the acquisition of a negative, non-possessory easement pursuant to 10 U.S.C. § 2684a does not constitute a major land acquisition as defined in the memorandum. Also, renewal of existing withdrawals, leases, permits or other use agreements other than those at bases being closed or realigned are not subject to the moratorium.

§2. REFERENCES

- (a) [41 U.S.C. § 14](#)
- (b) [10 U.S.C. § 2664](#)
- (c) [Federal Property and Administrative Services Act of 1949, \(40 U.S.C. §§ 471-535\)](#)
- (d) [10 U.S.C. § 2663](#)
- (e) (removed)
- (f) [10 U.S.C. §§ 18233-18240](#)
- (g) [10 U.S.C. § 2663](#)
- (h) [DOD Directive 4165.6 October 13, 2007](#)
- (i) [10 U.S.C. § 18233a](#)
- (j) [10 U.S.C. § 18234](#)
- (k) [10 U.S.C. § 2571](#)
- (l) [Federal Management Regulation \(41 C.F.R. pts 101-47 and 102-75\)](#)
- (m) [Federal Land Policy and Management Act, \(43 U.S.C. § 1714\)](#)
- (n) [Engle Act, 43 U.S.C. § 156](#)

- (o) [DEPSECDEF Memo 13 Sep 90, SECDEF Memo 17 Nov 02, DODI 4165.71](#)
- (p) [10 U.S.C. § 2601](#)
- (q) [SECNAVINST 4001.2H 14 Mar 06](#)
- (r) [10 U.S.C. § 2828](#)
- (s) [10 U.S.C. § 2812](#)
- (t) [10 U.S.C. § 2835](#)
- (u) [10 U.S.C. § 2874](#)
- (v) [GSA Delegation of Space Leasing Authority to Federal Agencies, 72 Fed. Reg. 65,026 \(Nov. 19, 2007\) and 73 Fed. Reg. 5,192 \(Jan. 29, 2008\)\(rural leases\) and Federal Management Regulation 41 C.F.R. pt 101-18 and § 102-73.45\)](#)
- (w) [10 U.S.C. § 2675](#)
- (x) [10 U.S.C. § 2396](#)
- (y) [10 U.S.C. § 2662](#)
- (z) [SECNAVINST 11011.47A 23 Feb 06](#)
- (a1) [41 U.S.C. § 403 \(11\) Office of Federal Procurement Policy Act](#)
- (a2) [USD Memorandum 28 Sep 2001, re: DERP Guidance](#)
- (a3) [10 U.S.C. § 18240](#)
- (a4) [10 U.S.C. § 2661](#)

SECTION II-LEGISLATIVE AUTHORIZATION

3. LEGISLATIVE AUTHORIZATION REQUIRED

a. For purposes of this section, the acquisition of property is limited to that of individuals, states, municipalities and other non-federal entities. [Reference \(a\)](#) states that "no land shall be purchased on account of the United States, except under a law authorizing such purchase." This limitation includes interests in land other than fee simple, since the Attorney General has concluded that the purchase of a leasehold interest is a purchase of land within the intent of reference (a) ([35 Op. Atty. Gen. 183 \(1927\)](#)). Similarly, the Comptroller General has determined that the purchase of a permanent easement is a purchase of land ([17 Comp. Gen. 204 \(1937\)](#)).

(It should be noted that the Attorney General has given an opinion that Congress, in passing [reference \(a\)](#), "had in mind primarily the expenditure of the money of the United States; and that it was not its purpose to prohibit the acquisition by the Government of real property otherwise than for a valuable consideration." ([28 Op. Atty. Gen. 413](#)) By this reading, a "purchase" of land may not be made without legislative authority. However, the Attorney

General also stated that "a donation (of land) to the United States, or (where) the consideration was merely nominal. . . legislative authority was not required." But all Navy acquisitions of property title or interests must be expressly authorized by law as stated in paragraph 4, [reference \(b\)](#). Those acquisitions are not limited to "purchases."

b. The Comptroller General does not consider [reference \(a\)](#) applicable to the rental of space in buildings. (MS Comp. Gen. B-27329 16 July 42). Further, lease-purchase contracts of property under the authority of the Administrator of General Services (Administrator) specifically exempt from this limitation. ([40 U.S.C. § 356](#)).

4. EXPRESS AUTHORIZATION REQUIRED

a. In addition to the general acquisition restriction applicable to Federal agencies in [reference \(a\)](#), military property acquisitions must be expressly authorized by law. ([10 U.S.C. § 2664](#), [reference \(b\)](#)). This limitation does not apply to the acceptance by a military department of property acquired under the authority of the Administrator to acquire property by the exchange of Government property pursuant to [reference \(c\)](#).

b. Subsection (b)(2) of [reference \(b\)](#) further provides that the authority provided by law to a military department "includes authority to acquire the interest in real property by gift, purchase, exchange of real property owned by the United States, or otherwise."

c. The "express" authority to acquire real property interests may also be contained in the:

- The annual Military Construction Authorization Acts (MCON),
a low-cost land acquisition, ([reference \(d\)](#)),
- an urgent land acquisition, [reference \(d\)](#); or
- annual Department of Defense Appropriation Acts.

d. Alternatively, this express authority may be included in "special legislation" enacted into law, or elsewhere expressly authorized in law.

5. LEGISLATIVE AUTHORIZATION FOR LAND ACQUISITIONS

a. Military Construction (MCON) Authorization Acts

(1) The predominant number of "express" authorizations are found in the annual Military Construction Authorization Acts (MCON), which authorize specific construction projects as well as the acquisition of land and related interests. (Land acquisitions costing at or below the statutory limitations in [reference \(d\)](#) are not included in the MCON Acts.) These projects are authorized on the basis of the justification and explanations contained in the [DD Form 1391](#) submitted to Congress as part of the DON's MILCON Program, and it is considered a part of the legislative history of the project. This is an important concept because the express authorization provision in [reference \(b\)](#) cannot be ignored or waived. Therefore, it is essential to include real estate requirements (as a line item in the [DD Form 1391](#) "justification") for construction projects requiring the acquisition of land. If the land requirement is not included, the real estate cannot be acquired in that MILCON program cycle with appropriated funds, unless its acquisition is provided for in other express legislation. These omissions may cause delays in project execution, increase costs, and adversely impact mission accomplishment.

(2) In describing the estate or interest in land to be acquired, the operative phrase is "land or interests in land" or its substantive equivalent. This phrase provides DON the flexibility to acquire either fee title or a lesser interest. Without this language, fee title must be acquired. ([10 Comp. Gen. 320 \(1931\)](#))

(3) Moreover, at the NAVCOMPT level of MILCON review, land acquisition is presented in the form of a Various

Locations (VARLOC) omnibus project having a grand total cost estimate with the location and area. This action improves DON's negotiating posture by preventing landowners and speculators from obtaining a competitive advantage by having prior knowledge of the exact acreage to be acquired, including specific sites and land costs. (Congress is separately informed of the specific land requirements.) Further, if a specific quantity of land to be acquired is indicated in the justification ([DD Form 1391](#)) delivered to Congress, acquisition of additional land, regardless of the quantity, may not be authorized. ([MS Comp. Gen. B-11712 15 Oct 1953](#)). Some courts have taken the opposite view. Therefore, the Commander, Naval Facilities Engineering Command's (COMNAVFACENGCOM) policy is to omit specific quantities in block 9 of the [DD Form 1391](#), and only describe in general term the nature and dimensions of the proposed acquisition in block 10. This procedure actualizes the "broad authority principle" mentioned in some court cases, thereby giving DON land acquisition flexibility and discretion, i.e., to make reasonable changes in scope.

(4) Although the MCON Authorization Acts authorize land acquisition projects at specific dollar amounts, the Secretary of the Navy has authority, which has been delegated to NAVFACENGCOM, to increase the cost of the project by not more than 25 percent, or 200% of the amount specified by law as the maximum amount for a minor military construction project, and that those variations in cost could not have been reasonably anticipated at the time the project was originally approved by Congress. However, NAVFACENGCOM must find these circumstances:

- (a) The property owner(s) are willing to enter into a negotiate sale or sales;
- (b) The appraised value of the property and/or the relocation expenses has/have increased beyond what was initially estimated, or DON's appraiser finds the amount that the owner is willing to sell for is reasonable; and
- (c) Acquiring the property through eminent domain would be either more costly or not in Navy's best interest.

Cost variations or scope reductions greater than 25 percent are subject to the provisions of [10 U.S.C. § 2664](#).

(5) Acquisitions by land exchange or involving no funds are often included in a Special Provisions section of

the General Provisions of the annual MCON Authorization Act. The annual DOD Appropriations Act provides funding for Navy MILCON projects, and may contain the "express" authorization for leasing property, as well.

b. Urgent Land Acquisition

The Secretary of the Navy may, in accordance with provisions of [reference \(e\)](#), acquire any interest in land when:

(1) he or his designee determines it is needed in the interest of national defense;

(2) it is required to maintain the operational integrity of a military installation; and

(3) considerations of urgency do not permit the delay necessary to include the required acquisition in an annual Military Construction Authorization Act.

(4) the congressional submission required by [reference \(e\)](#) has been made by the COMNAVFACENGCOM. Prior to making the submission, the approval of the DASN (I&F) must be obtained. Appropriations available for military construction may be used for the purpose of acquiring interests in land. If a reprogramming of funds is required, approval of the Appropriations Committees of Congress must be obtained.

c. Low-cost Land Acquisition

Low-cost land acquisitions are not usually listed as line items in the annual MCON Authorization Acts. These interests in land may be acquired under the authority of [reference \(d\)](#), which is both an "express" authorization as well as a continuing one, subject to the following conditions:

(1) the acquisition has been determined to be in the interest of national defense, and

(2) the property can be acquired at a cost not more than the statutory limitation in [reference \(d\)](#) of \$750,000, exclusive of administrative costs and the amounts of any deficiency judgments, and

(a) an acquisition of any interest in land that is needed to correct a deficiency that is life-threatening,

health-threatening, or security-threatening, and does not cost more than the statutory limitation in [reference \(d\)](#) of \$1,500,000.

(b) the land does not involve the acquisition, as part of the same project, of more than one parcel of land unless the parcels are non-contiguous, or if contiguous, unless the total cost is not more than the statutory limitation of \$750,000 in [reference \(d\)](#) for property acquired under paragraph 1 of [reference \(d\)](#), or \$1,500,000, for land under paragraph 2 of [reference \(d\)](#), and

(3) there is no other Government property available that can be used to adequately support the military requirement, and

(4) the proposed acquisition is consistent with the policies stated in [reference \(h\)](#), and

(6) the mission component command/region for Navy projects, or for Marine Corps projects, the Commandant of the Marine Corps (CMC), has approved the project, and

(7) funds are available to cover the acquisition costs of the land and other related charges. Operations and maintenance or construction funds may be used for low-cost land acquisitions as described in paragraph (c) of [reference \(d\)](#).

d. Acquisition of Reserve Facilities

(1.) Pursuant to the authority of [10 U.S.C. §§ 18231-18240](#), [reference \(f\)](#), the Secretary of Defense (SECDEF) may acquire facilities (including land) for use by reserve components of the armed forces. This authority was successively redelegated to the Secretary of the Navy and to the DASN (I&F), and thereafter to the COMNAVFACENGCOM by [reference \(z\)](#). This general authority is limited by [reference \(i\)](#) that prohibits expenditures or contributions for facilities, except for leases or certain other specified projects exceeding \$1,500,000 until 21 days after the congressional submission required by [reference \(i\)](#) is made. [Reference \(j\)](#) limits the locations and uses of the facilities. Appropriations available for operations and maintenance may be used to fund these reserve facilities, subject to the cost limitations in [10 U.S.C. § 2805\(c\)\(1\)](#).

(2) Future reserve facility replacement projects shall give full consideration to the expanded authority contained in [10 U.S.C. § 18240](#). This authority permits the Navy to acquire a facility, or an addition to an existing facility for a reserve component by an exchange of an existing DON-controlled facility through an agreement with a State, local government, local authority, or private entity. Only DON property that is not excess may be exchanged, and if the fair market values of the properties to be exchanged are not equal, cash equalization payments may be made or accepted by DON. Advance notice of proposed exchanges shall be made to the appropriate Armed Services Committees of the Congress, although congressional submissions under [10 U.S.C. § 2662](#) does not apply to these exchanges. Facilities Engineering Commands (FECs) should review the full text of the law for other requirements and consult NAVFACENGCOMHQ for clarification of any related issues.

e. Acquisition Methods

Authority to acquire property under the authorities described in subparagraphs a, b, c, and d(1) above includes authority to make surveys and to acquire interests in land (including temporary interests) by purchase, gift, exchange of government-owned land, or otherwise.

6. ADDITIONAL LEGISLATIVE AUTHORIZATION

The authorities cited in paragraph 5.a. through d. are those that DON ordinarily uses for the acquisition of required lands. Additional authorities do exist and are occasionally used. For example, the Secretary of the Navy may accept, hold, administer, or spend gifts and bequests of property for the benefit of a school, museum, hospital, library, or other institution or organization under Navy jurisdiction ([reference \(p\)](#)). [Reference \(q\)](#) implements this authority.

SECTION III - AUTHORIZATION FOR LAND TRANSFERS AND WITHDRAWALS

7. TRANSFER OF REAL PROPERTY AMONG MILITARY SERVICES.

a. [Reference \(k\)](#) provides that upon the request of one Secretary and the approval of the other, property may be transferred without compensation from one armed force to another. Approval for the transfer of DON property is

predicated upon one of the following determinations:

(1) the property has been determined to be excess to further the needs of DON, or

(2) the appropriate chain of command through the Chief of Naval Operations (CNO), for DON property, or the CMC, for Marine Corps property, has determined that the requirements of the using activity can and should be amended to accommodate the needs of the requesting service, and has approved the transfer.

Subsection (d) of [reference \(k\)](#) further states that no official or agency of the Executive Branch may establish any policy, directly or indirectly, that precludes the military services from exercising this authority.

b. For those transfers of land involving closed or realigned base real property, refer to the [Department of Defense Base Redevelopment and Realignment Manual, DOD 4165.66-M, March 1, 2006](#), and applicable laws at [10 U.S.C. § 2687\(note\)](#).

c. Those transfers are subject to the Defense Environmental Restoration Program (DERP) Guidance contained in [reference \(a2\)](#) that imposes specified environmental restoration responsibilities on the transferee and transferor entities. Further, DON shall retain ownership or control of property where military munitions are known or suspected to be present, but where there has not been an assessment of and a response (where required) to address potential explosives hazards.

8. TRANSFER OF EXCESS REAL PROPERTY BY AUTHORITY OF THE ADMINISTRATOR OF GENERAL SERVICES

a. [Reference \(c\)](#) authorizes the Administrator to provide for transfer of excess property among Federal agencies. This authority is implemented by the Federal Management Regulation at [reference \(1\)](#) that prescribes transfer policies and procedures.

b. Reimbursement to the Administrator in an amount equal to 100 percent of the estimated fair market value of the property is usually required, unless waived by the Office of Management and Budget. If the value exceeds \$750,000, the congressional submission required by [reference \(y\)](#) must be made prior to executing the transfer.

c. These transfers are subject to DERP Guidance contained in [reference \(a2\)](#) that imposes specified environmental restoration responsibilities on the transferee and transferor entities. Further, DON shall not accept such transfers of real property unless the Administrator/cognizant agency issues specified environmental restoration certifications.

9. WITHDRAWAL OF LAND FROM THE PUBLIC DOMAIN

a. The Federal Land Policy and Management Act of 1976, [reference \(m\)](#), authorizes the Secretary of the Interior to withdraw public domain lands upon receipt of an application to withdraw. Withdrawals for defense purposes are authorized by [43 U.S.C § 155](#). Regarding land withdrawn for defense purposes, [reference \(n\)](#) limits this authority. According to the Engle Act, any DOD withdrawal of more than 5,000 acres for any one defense project or facility must be by an Act of Congress.

b. Withdrawals in excess of 1,000 acres are subject to the land acquisition moratorium discussed in [reference \(o\)](#), and require prior approval from the Deputy Under Secretary of Defense (Installations & Environment) DUSD (I&E) before issuing formal public notice, in any manner, of the withdrawal. Requests for exception to this moratorium for urgent military requirements, or when the moratorium will have adverse effects on the Navy's ability to perform its mission must be approved by the DUSD (I&E).

SECTION IV - LEASING AUTHORITY AND PERMITS/LICENSES

10. AUTHORITY TO LEASE PROPERTY

Except as noted in paragraph 11 below, no single act of Congress constitutes the overall authority for leasing of real property for Naval use. The annual Department of Defense Appropriation Act customarily provides for the leasing or renting of property for naval purposes. This authorization does not include leases for family and troop housing that are specifically authorized under [reference \(r\)](#), [reference \(t\)](#), and [reference \(u\)](#). Other leasing authorities exist such as [10 U.S.C. § 2812](#) ([reference \(s\)](#) lease-purchase), [10 U.S.C §2672/a](#) (land leases), and [10 U.S.C. § 18233](#) (lease of reserve facilities).

11. AUTHORITY TO LEASE SPACE

a. The Administrator of GSA has delegated to the heads of Federal agencies, including the Secretary of Defense, authority to lease various categories of space but under numerous new conditions laid out in [reference \(v\)](#), which became effective November 19, 2007. For those extensive conditions, read the *Federal Register* pages cited in the reference. Authorized agencies can no longer lease general purpose space in excess of 19,999 square feet, or special purpose space in excess of 2,500 square feet, irrespective of term, without the prior authorization of GSA following strict compliance with the new conditions. Navy leases, however, are limited to one-year firm terms due to annual appropriations. The use of this delegated authority has been re-delegated under [reference \(z\)](#) to COMNAVFACENGCOM. See Chapter 13 for more details.

b. The Federal Management Regulation at [reference \(v\)](#) describes the following categories of space that can be leased:

- (1) special purpose space,
- (2) categorical space,
- (3) general purpose space outside of the listed urban centers,
- (4) space for nominal consideration of \$1.00 per annum
- (5) space under a specific GSA delegation of authority to the Navy.

c. [Reference a3](#) allows SECNAV to lease "buildings and facilities," and pay rent for them "in advance in connection with...the conduct of field exercises and maneuvers." Since naval operations are primarily conducted on ships at sea, it is at least arguable that during interim periods ashore, matters relative to those ships and their Sailors are part of those "exercises and maneuvers."

12. FOREIGN LEASING

a. [Reference \(w\)](#) provides that "(t)he Secretary of a

military department may acquire, by lease in foreign countries, structures and real property relating to structures that are needed for military purposes other than for military family housing. A lease under this authority may be for a period of up to 10 years, or 15 years in the case of a lease in Korea, and the rental for each yearly period may be paid from funds appropriated to that military department for that year." Under [reference \(x\)](#), rents may be paid in advance in foreign countries for periods of time determined by local custom.

b. [Reference \(r\)](#) authorizes leases of housing units in foreign countries for assignment as family housing. These leases may have a term of any period not to exceed 10 years, and the rental for each yearly period may be paid from funds appropriated to that military department for that year. A lease under this authority may not be entered into if the average estimated annual rental during the lease term exceeds \$500,000 until a period of 21 days elapses from the date of receipt of written notification of the facts concerning the proposed lease by the appropriate committees of Congress.

13. AUTHORITY TO ACQUIRE PERMITS/LICENSES

No legislative authority to specifically acquire permits and licenses for naval use of property exists. However, such authority is implied in certain instances where the required use is necessitated by an authorized construction project or function. Also, although permits and licenses are not considered to be "interests in land", they do confer temporary use of property. Thus, they are further implied in laws such as [10 U.S.C. § 2672](#), [reference \(e\)](#), which authorizes acquisition "(including temporary use), by gift, purchase, . . . or otherwise."

SECTION V - CONGRESSIONAL REPORTS

14. REPORTS TO THE COMMITTEES OF CONGRESS

a. [Reference \(y\)](#) requires that the Secretary of the Navy, or his/her designee, may not enter into certain transactions until 30 days have expired from the date on which a report of the facts concerning the proposed transaction is submitted to the Committees on Armed Services of the Senate and of the House of Representatives. This requirement applies only to property in the United States, Puerto Rico, Guam, Virgin Islands, American Samoa and the

Trust Territories of the Pacific Islands. (It also does not apply to property acquisitions specifically authorized in a MCON Authorization Act.) The report is applicable for the following transactions:

(1) an acquisition of fee title to any property, if the estimated price is more than the statutory limitation in reference (d) of \$750,000.

(2) a lease of any property to the United States, if the estimated annual rental is more than the statutory limitation in [reference \(d\)](#) of \$750,000.

(3) a lease or license of property owned by the United States, if the estimated annual fair market rental value is more than the statutory limitation in [reference \(d\)](#) of \$750,000.

(4) a transfer of property owned by the United States to another federal agency, or to another military department, or to a State, if the estimated value is more than the statutory limitation in [reference \(d\)](#) (\$750,000 from 15 Oct 03).

(5) a report of excess property owned by the United States to a disposal agency, if the estimated value is more than the statutory limitation in [reference \(d\)](#) of \$750,000.

(6) any termination or modification by either the grantor or grantee of an existing license or permit of property owned by the United States to a military department, under which substantial investments have been or are proposed to be made in connection with the use of the property by the military department.

b. Annual Reports on Certain Low-cost Transactions.

(1) Pursuant to subsection (b) of [reference \(y\)](#), an annual congressional submission shall be made of acquisitions of fee title or leasehold interests having "an estimated value of more than the simplified acquisition threshold specified in section 4(11)" of [41 U.S.C § 403 \(11\)](#), [reference \(a1\)](#), (currently \$100,000), but not more than the statutory limitation in [reference \(d\)](#) of \$750,000.

(2) [10 U.S.C. § 2662](#) is a congressional (Senate and House Armed Services Committees) reporting law covering

certain property transactions. It, however, does not authorize transactions involving acquisition of property for military use. Those transactions still must be expressly authorized by law. Alternatively, laws such as [10 U.S.C. § 2828](#) authorize the military to lease property, as well as having congressional notification requirements pegged to dollar ceilings.