Analysis&Perspective

With the proliferation of brownfield and voluntary cleanup programs (VCPs), institutional controls play an increasingly important role in remedy selection. States employing such programs generally permit less stringent cleanup standards for properties that will not be used for residential purposes, relying on institutional or engineering controls to prevent exposure to residual contamination. Indeed, a recent study by the U.S. Environmental Protection Agency reveals that the 60 percent of all cleanups EPA approved in 1997 use institutional or engineering controls as part of the remedy.

Land-use controls have been criticized by some government regulators and environmental organizations, which point out that unlike permanent remedies, land-use controls need continual monitoring. Critics fear that local governments lack the oversight apparatus required to ensure that the controls remain protective over the long-term. After all, they say, it was the failure of an institutional control at Love Canal in 1978 that led to the superfund law and its progeny.

Despite such concerns, the growing use of institutional controls gives environmental lawyers powerful tools to help clients minimize cleanup liability. To use these tools effectively, however, a number of vexing legal considerations must be addressed. This article reviews the drafting, implementation, enforcement, and termination of particular institutional controls under the various kinds of state VCPs.

Practical Considerations for Using Institutional and Engineering Controls in Brownfield Redevelopment Projects

BY LARRY SCHNAPF*

Institutional controls are legal or administrative mechanisms that limit use or access to property in order to eliminate exposure to hazardous materials as well as to ensure the effectiveness of ongoing remedial activities.

** Larry Schnapf is the founder of the New York law firm of Schnapf & Associates, which provides assistance on environmental issues associated with real estate and corporate transactions as well as regulatory counseling. He is also an adjunct professor of environmental law at New York Law School and a member of the ASTM Task Force currently drafting the "Standard Guide for the Use of Activity and Use Limitations."*

Engineering controls, often used in conjunction with institutional controls, are physical modifications to a site designed to control or contain migration of hazardous substances or to prevent, minimize, or mitigate environmental damage that may otherwise result from exposure to residual contamination on the site. Engineering controls include impermeable caps or covers, dikes, trenches, leachate collection systems, treatment systems, and groundwater containment systems. When a remedy provides for engineering controls, some form of institutional control is also usually required to ensure their effectiveness.

There are essentially four broad categories of institutional controls: proprietary controls, government controls, enforcement tools, and non-enforceable information tools.

Following is a brief description of each:

Proprietary Controls— Proprietary controls are private contractual mechanisms that are contained in a deed or other instrument used to transfer title to property. They

  TXLR ISSN 0887-7394

include restrictive covenants, easements, reversionary interests, and equitable servitudes.

■ *Restrictive Covenants*—This is a promise by a landowner to take or refrain from taking certain actions. For example, an affirmative covenant may be a promise by an owner to maintain a fence that surrounds a former hazardous waste disposal site. Alternatively, a restrictive covenant can be a promise not to use groundwater or conduct certain activities at a site. If the covenant "runs with the land," it can be enforced against subsequent landowners.

■ *Easement*—This is a right to limited use or enjoyment of the land of another. An easement usually creates a benefit for one parcel of land (the "dominant estate") and an obligation or burden for another (the "servient estate"). When an easement, such as a right of access for a landlocked parcel, attaches to the land it is known as an "appurtenant easement." In contrast, easements, such as utility easements that are granted to a particular party, are known as "easements in gross." An affirmative easement grants the right to use of another while a negative easement restricts lawful uses of land. If the property owner violates the easement, the easement holder may bring suit to restrain the owner.

■ *Reversionary Interest*—This is a conditional right to future enjoyment of property currently owned or occupied by another. One way that an owner conveying contaminated property may enforce a use restriction or covenant is to provide that the land will revert to the grantor (or designee such as a regulatory agency) if the conditions are violated.

■ *Equitable Servitude*—This is a restriction on the use of land that is enforced in equity against future transferees of the property. The restriction creating the servitude may take the form of a promise, covenant, or reservation. The servitude must generally be memorialized in writing and be intended to restrict uses of the land (as distinct from preventing an individual from taking certain actions on the land). Either actual or constructive notice of the servitude must be given to any transferee.

Enforcement of these forms of institutional controls can be undermined by traditional doctrines of real property law that favor the free alienability of land and disfavor the enforcement of restrictions against owners who take title long after a restriction is imposed.

Absent specific statutory authority, most jurisdictions require that there be a conveyance of some form of property interest to create an enforceable real property control. Thus, where a site owner conducts a cleanup but does not intend to sell or lease the property, it may be difficult to create a proprietary interest.

Restrictive covenants and easements must comply with certain formalities in order to be enforceable. The deed restriction must "touch and concern" and "attach" to the land, and there must be privity of estate and a written instrument that satisfies the local statute of frauds. Generally, use of the phrases "run with the land," "in perpetuity," or "successors and assigns" will satisfy the requirement that the parties intended the restriction to attach to the land, but local real property law should be consulted.

In addition, subsequent conveyances of property must generally contain a specific reference to the restriction in the new deed (i.e., the deed book and page number where the encumbrance was recorded). If the new deed does not such contain a reference, the restriction may not be enforceable against the new owner. Thus, property owners creating deed restrictions are advised to review and approve the language of future deeds.

Government Controls— Restrictions used by state and local governments that limit the use of property. These controls are exercised through planning and zoning maps, subdivision plats, building permits, siting restrictions, and groundwater use restrictions in the form of well drilling prohibitions or well use permits.

Zoning and land-use planning may not be appropriate enforcement mechanisms when long-term institutional control is required since zoning plans can change over time. Moreover, even where a zoning plan may allow commercial or industrial uses, it generally will not prohibit higher uses such as residential use. In addition, local zoning authorities will not likely have the resources nor the inclination to devote resources to enforce land-use controls arising out of agreements between private parties. Likewise, applications for building permits or subdivision plats generally require evidence of ownership only. Local governments usually will not review an underlying deed to determine if a proposed use violates any existing deed restrictions.

Enforcement Tools—Use restrictions or restrictive covenants may be embodied in enforcement documents such as administrative orders, consent decrees, no further action letters (NFA), and covenants not to sue (CNTs). While these orders can be enforced against the named parties or signatories, they generally do not create or convey a property interest. Therefore, their provisions usually may not be enforced against subsequent owners or occupiers of the property even where the buyer or tenant has actual notice of the restriction.

Environmental authorities try to navigate around this problem by requiring that notice of transfers of the title or possessory interests in the property be given to the agencies and that transferees agree to be bound by the terms of the orders. In addition, most NFA letters and CNTs generally provide that the liability release will be revoked if mandated institutional controls are not maintained. However, in states where innocent landowners may not be liable for pre-existing contamination, state environmental authorities may bring an enforcement action only against the recipient of the NFA or CNTs.

Some state environmental agencies are also required to maintain registries of properties where hazardous waste have been disposed or where use restrictions have been imposed. Oftentimes, the agency must approve transfers or changes in use of listed sites. However, given limited resources, enforcement can be difficult if the owner does not give the state the required notice prior to conveying the property.

Non-enforceable Informational Tools—These devices do not impose affirmative obligations on owners of property but, instead, require that warnings of site hazards be conveyed to the public. Examples of such warnings may be by deed notice, publication in local newspapers, or posting of warning signs at the property. In addition, some states have enacted transfer laws that require sellers to notify prospective purchasers of the existence of contamination at property to be conveyed.

The purpose of these informational tools is to advise future owners and users of property of existing hazards. However, because title searches may sometimes search back only to the most recently recorded warranty, a prospective purchaser may not receive notice of

an older notice. Moreover, tenants usually do not conduct title searches prior to taking possession of property. Therefore, deed notices are generally not effective as institutional controls.

EPA POLICIES ON USING INSTITUTIONAL CONTROLS

The Environmental Protection Agency has promulgated regulations under various statutes and issued a number of guidance documents on the use of institutional controls.

Resource Conservation and Recovery Act—In the preamble to its initial RCRA regulations, EPA recognized that improper closure of treatment, storage, and disposal facilities (TSDF) is a major threat to human health and the environment.[1] Accordingly, the agency required owners and operators to construct caps and other engineering controls to confine hazardous wastes remaining at a site after partial or complete closure and imposed use restrictions to minimize the possibility that the integrity of the caps, covers, or liners would be jeopardized.[2] The agency also required TSDF owners and operators to file a survey plat with the local authority having jurisdiction over land-use records showing the type, location, and quantity of hazardous wastes disposed of in each hazardous waste cell.[3] To ensure that prospective and subsequent owners of the property were informed of the presence of hazardous wastes, EPA also required that facility owners or operators file a notice on the deed or other instrument customarily reviewed during a title search that would indicate the land had been used to manage hazardous wastes, its use has been restricted, and a plat has been filed with the local land records office. A subsequent owner desiring to remove the hazardous waste would have to seek permission from EPA and could then either remove the deed notation or add a note that the wastes had been removed.[4] The agency did not specifically require that notice be given to holders of easement, right-of-ways, or subsurface mineral rights.[5]

National Contingency Plan—The 1990 National Contingency Plan (NCP) established under the superfund law provides that engineering controls must be one of the remedial alternatives considered during a Remedial Investigation/Feasibility Study (RI/FS) required by the Comprehensive Environmental Response, Compensation, and Liability Act.[6] EPA has stated institutional controls should supplement engineering controls and should not be a substitute for more active measures that reduce or minimize contamination.[7] Moreover, EPA has stated "institutional controls are a necessary supplement when some wastes are left in place, as it is with most response actions."[8] Furthermore, the agency said that in circumstances where the balancing of the various trade-offs during the remedial selection process indicates no practicable way to remediate a site, institutional controls such as deed restrictions or well-drilling prohibitions may be the only means available to protect human health.[9] Because the agency recognized that it might not have the authority to implement institutional controls, it cautioned against using them as the sole remedy and revised the NCP to require state assurance that institutional controls will be implemented and maintained.[10]

In its "Land Use in the CERCLA Remedy Selection Process,"[11] EPA elaborated on its policy towards institutional controls, indicating it would take "reasonably anticipated future land uses" into account when developing remedial action objectives. The agency said that if a remedial alternative requires a restricted land use, "institutional controls will generally have to be included in the alternative to prevent an unanticipated change in land use that could result in unacceptable exposures to residual contamination or, at the minimum, alert future users to the residual risks and monitor for any changes in use."[12] For example, when a remedial alternative includes leaving contaminants in place in soils at concentrations that are protective for industrial exposures but not protective for residential exposures, EPA said that "institutional controls should be used to ensure that industrial use of the land is maintained and to prevent risks from residential exposures."[13]

In developing remedial alternatives that include institutional controls, EPA said that the following should be determined:

a) type of institutional control to be used

b) the existence of authority to implement the controls, and

c) the resolve and ability of the appropriate entity to implement the controls.

While a variety of institutional controls may be used, EPA said that when exposure must be limited to assure protectiveness, "a deed notice alone generally will not provide a sufficiently protective remedy."[14] While the FS and the Record of Decision (ROD) need not specify the precise type of control to be used, EPA said they must contain sufficient analysis "to support a conclusion that effective implementation of institutional controls can reasonably be expected."[15]

Where limited use and restricted exposure are required, EPA said it will conduct site reviews at least every five years. If land use has changed, EPA will determine if the remedy is still protective. If further cleanup is necessary, the agency said it will invoke its powers under CERCLA Section 122(e)(6) to prevent actions inconsistent with the original remedy.

Revised CERCLA Consent Decree—EPA has used superfund consent decrees to establish and enforce institutional controls. Earlier this year, EPA published revisions to the provisions of its Remedial Design/Remedial Action consent decree.[16] The impetus for the changes was "EPA's continued heavy reliance on Superfund remedies which are designed to contain discovered contamination on-site."[17] The changes are intended to provide EPA with a broader range of options and more efficient mechanisms for ensuring that restrictions on land and water use can be enforced against all persons including subsequent purchasers of contaminated sites.

[1] 45 FR 33160 (May 19, 1980).
[2] 40 CFR 264.118; 265.118.
[3] 40 CFR 264.119; 265.119.
[4] 40 CFR 264.120; 265.120.
[5] 51 FR 16436, May 2, 1986.
[6] 40 CFR 300.430(a)(i)(D).
[7] 55 FR 8706, March 8, 1990.
[8] Id.
[9] Id.
[10] 40 CFR 510(c)(1).
[11] OSWER Directive No. 9355.7-04) (May 25, 1995.
[12] Id. at page 9.
[13] Id. at page 8.
[14] Id. at 10.
[15] Id.
[16] 63 FR 9541 (February 25, 1998).
[17] Id.

  TXLR ISSN 0887-7394

Following is a discussion of the principal changes to the RD/RA Consent Decree.

Paragraph 9. Notice to Successors-in Interest— When the settling defendant is the owner of the site, this paragraph requires the settler to file a notice approved by EPA informing future landowners of the site remedy and use restrictions. Thirty days prior to the conveyance of any interest in the site including a sale, lease, or financing of the property, the owner is to provide the grantee with written notice of the consent decree and the instruments granting a right of access or right to enforce use restrictions on the property. The owner must also provide EPA with 30 days advance notice of the conveyance. The owner continues to be responsible for maintaining the institutional controls after the conveyance unless EPA approves the grantee to perform the work.

Paragraph 26. Subparagraph (a) is to be "routinely included" in RD/RA consent decrees. It is used when the settling defendant is the owner and provides EPA with a right of access to monitor the work, verify data, and conduct additional investigation.

Subparagraph (b) is included when the settling defendant is an owner and EPA determines that land/water use restrictions are needed to ensure the integrity or protectiveness of the remedy. The settler agrees to be bound by the use restrictions set forth in this agreement.

EPA believes one of the most powerful tools for restricting site activities on a long-term basis is the acquisition of an easement or restrictive covenant in favor of the government.[18] Consequently, subparagraph (c) requires the settling owner to execute and record an easement in form acceptable to EPA that grants a right of access to EPA and a right to enforce the land/water use restrictions listed in paragraph 26(b).

Paragraph 27. This is used when the property where land/water use restrictions are to be imposed is owned or controlled by persons other than the settling defendants. This paragraph requires the settling defendants to use their best efforts to secure from the owner an agreement to provide access to EPA and to abide by the use restrictions set forth in paragraph 26(b) and to execute and record an instrument granting EPA a right of access and the right to enforce the use restrictions.

EPA said that for purposes of paragraph 27, "best efforts" include the payment of reasonable sums of money in consideration for the right of access, use restrictions, and restrictive easement. If the settling defendant does not obtain such consents with 45 days of the date of entry of the consent decree or the EPA request for an easement, the defendant is to contact EPA and describe the efforts that have been made. EPA may assist the defendants in obtaining such rights and defendants shall reimburse EPA for any expenses incurred in obtaining such consents.

Paragraph 29. Finally, if EPA determines that local governmental controls are needed to implement the remedy and ensure its integrity and protectiveness, the settling defendants are to cooperate with EPA in obtaining such local controls.

DEFENSE DEPARTMENT POLICY

Under CERCLA Section 120(h)(1), a federal agency transferring federal property where hazardous substances have been stored for at least a year and where there are known releases must put a notice in the sale contract. This notice must provide information on the type and quantity of hazardous substances as well as when the hazardous substances were stored, released, or disposed to the extent such information is available in agency files. Section 120(h)(3)(A) also requires that this information be placed in a deed notice transferring the property. Section 120(h)(3)(B) requires that the deed contain a covenant that the transferring agency has taken all remedial actions necessary to protect human health and the environment and will take any additional remedial action that is found to be necessary after the transfer of property.

On July 25, 1997, the Department of Defense issued its "Policy on Responsibility for Additional Environmental Cleanup After Transfer of Real Property." This adopts EPA's policy on using future land-use assumptions when selecting remedial actions for military installations that are to be closed and transferred. When transferring properties pursuant to the Base Realignment and Closure (BRAC) law, DOD will use the land-use plans developed by the local redevelopment agency (LRA). When transferring non-BRAC property, DOD will consult the local land-use plans to develop likely future land uses. If no such plan is available, DOD will consider a range of reasonably likely land uses during the remedial selection process taking into account current land use, current zoning classification, unique property attributes, and surrounding land uses. DOD indicated that it expected the community and the local land-use agency would take the environmental conditions of the property, the planned remedial actions, and any technological or resource limitations into account when developing their reuse plans for the property.

Because of pressure to dispose of these sites as quickly as possible, DOD policy is to rely heavily on the use of institutional controls. DOD will specify the use restrictions and enforcement mechanisms in the ROD, the environmental Finding Of Suitability to Transfer (FOST) document, which is prepared to transfer the property, and the instruments used to transfer the document.

DOD expects that the transferee and subsequent owners will abide by and enforce the use restrictions but reserves the right to enforce deed restrictions or other institutional controls in the event of an owner's inaction. Under the terms of the transfer document, DOD may recover costs incurred to enforce the use restrictions or to take additional remedial actions required as a result of the owner's inaction (e.g., failure by the owner to maintain the institutional controls).

DOD will take additional remedial actions at a transferred property if it determines the remedy is no longer protective, the institutional control has proven to be ineffective, or new contamination attributable to DOD activities has been discovered. However, DOD will not perform or pay for remedial actions needed to allow a use prohibited by the deed restriction or institutional controls. DOD will cooperate with the transferee to revise or remove deed restrictions to facilitate a broader range of uses when the cleanup objectives of the remedy have been attained or if the transferee can provide evidence that a broader range of uses could be undertaken that would continue to be protective of human health and the environment.

[18] Id. at 9543.

STATE REQUIREMENTS FOR CONTROLS

While land-use issues are usually matters addressed by local governments, many states have enacted statutes that impose notice requirements on owners of contaminated property. These may be in the form of simple deed notice requirements similar to those RCRA imposes for the closure of TSDFs, may be part of state transfer statutes requiring sellers to disclose environmental conditions to prospective purchasers, or may be an obligation imposed on landowners to advise occupiers and prospective purchasers of environmental conditions. Some states have also established hazardous waste site registry acts in which use restrictions are placed on properties that are placed on the registry.

Institutional controls are used most frequently in the VCP and brownfield programs to achieve risk-based cleanups. Most states have enacted VCP or brownfield programs that authorize the use of institutional controls but the circumstances under which they may used vary. Some states allow them to be used to achieve cleanup standards while others limit them to maintaining a cleanup standard.

States also vary on how to establish institutional controls. Many do not require restrictions to be recorded. Those that do require recording rely on different types of recording instruments. While some states require that the restrictions be placed on the deed itself, others allow other instruments, such as no-further-action letters, certificates of completion or the remediation agreement itself to be used. Some states have comprehensive forms that must be recorded. There are also differences among the states on how institutional controls may be terminated or modified.

DRAFTING AND NEGOTIATING CONSIDERATIONS

The following issues should be considered when drafting an institutional control instrument:

When are Institutional Controls Appropriate? While reliance on institutional controls can result in quicker and more cost-effective cleanups, there are a number of factors that may make their use at a particular property inappropriate. The key question is whether institutional controls will be effective and reliable. For example, it may be difficult to implement and enforce a proprietary form of institutional control if the consent of multiple landowners is required. Likewise, proprietary controls also may not be advisable where a potentially responsible person needs the consent of an adjacent property owner who seeks a significant sum of money in exchange. Similarly, a tenant may not be able to obtain the consent of its landlord or the landlord may ask to be compensated with a sum the tenant may not be able to afford. If the institutional control requires a land use different from the currently zoned use, a different remedy may be appropriate. In addition, the longer the institutional control must stay in effect, the greater the likelihood it will fail.

The existence of residual contamination or the presence of use restrictions can impair the value of property. Thus, lenders often are uncomfortable securing loans with property subject to institutional controls and may insist on complete remediation.

Before agreeing to an institutional control, owners of contaminated property should ask the state environmental agency to provide their rationale for requiring such controls. States generally require them to prevent the risk of exposure to residual soil contamination. If the only concern at a site is groundwater contamination and the site is connected to public drinking water supplies, there may be no need for controls. Some states have established groundwater classification exception areas (CEAs) in which the agency acknowledges that the groundwater is contaminated but is not used for drinking purposes. Obtaining a CEA may eliminate the need of having a land-use control placed on the property or give the owner the opportunity to avoid performing remediation in exchange for a land-use restriction.

It is also important to review the use assumptions the agency relied on in selecting the remedial action. For example, the agency might request a land-use restriction on the ground that the site has a wide range of uses but, in reality, the site might be able to be developed only as a commercial property.

Some states will not require the filing of a use restriction in the chain of title if it can be shown that there are adequate and reliable local government controls for minimizing exposure to hazardous substances. These will probably be most useful when dealing with contaminated groundwater since permits are usually required before a drinking water well may be installed. Local zoning prohibiting residential development could also eliminate the need to file an instrument.

If the primary concern of the state is that subsequent landowners or users of the property be made aware of the contamination or that local residents be made aware of groundwater contamination, it may be possible to use a deed notice and general information disclosure in lieu of filing an institutional control.

Choice of Instruments. Some states have developed forms with statute-specific language that cannot be modified. While some states require that a notice be placed in the deed to the property, others simply require that the property owner record a restrictive easement or covenant acceptable to the environmental agency. Lawyers should draft the document so that it can stand alone in the event it becomes separated from the deed and other relevant documents.

The instrument creating the restriction or easement must be in recordable form, which means it generally needs to be notarized. While the recorders' offices generally will not allow an instrument to be filed that does not comply with local recording requirements, sometimes such documents can find their way into the chain of title. Even if the document is recorded, a defect can prevent the restriction from being enforced against subsequent landowners.

Counsel should inquire if the filing of use restrictions under a brownfield or VCP program obviates the need to file a deed notice under other state cleanup statutes. Some statutes expressly state that volunteers or prospective purchasers of brownfields who comply with the recording obligations do not have to comply with other notice requirements.

Drafting Use Restrictions. The instrument should contain a specific recitation of the work performed at the site, the prescribed engineering controls and their specific location, uses that are to be prohibited as well as those that are permitted, remediation goals that need to be achieved in order for the restrictions to be lifted (e.g. groundwater contaminant concentrations), and the instrument that must be used to terminate the restrictions. Even in states where specific forms have been prepared or the instrument to be recorded is a decision document like an NFA letter, there will be opportunity

  TXLR ISSN 0887-7394

to review and revise the language creating the use restrictions. The language should track that contained in the ROD or other state decision document.

If only portions of the property are subject to use restrictions, the instrument should clearly limit the restrictions to the affected portions of the site. Refer to a specific lot and block unless the entire site is restricted. While specific language requirements vary with state law, it is advisable to insert language that the use restrictions "run with the land" so that they can be enforced against future owners and occupiers of the property.

Following are examples of typical use restrictions that may appear in an instrument creating institutional controls:

Property Use. Property may not be used for residential purposes or for child day care, hospitals, or schools

Groundwater. Groundwater at the property may not be used for 1) for any purpose; 2) irrigation or watering livestock, or 3) drinking purposes. Installation of new wells or removal of seals on closed wells is prohibited.

Surface water. Limits are put on surface water intakes or recreational uses.

Soil Disturbances. 1) Soil at the property shall not be disturbed in any manner, including limitation drilling or excavation, 2) excavation depths are limited, 3) vegetation may not be disturbed (or may be required to be cut), 4) the soil cap may not be disturbed, 5) no building shall be constructed on the property, 6) no structure may be built with a basement.

Remedial Actions. Integrity of monitoring or treatment wells must be maintained. No action shall be taken, allowed, suffered, or omitted if such action or omission is reasonably likely to create a risk of migration of pollutants, or a potential hazard to human health or the environment, or result in a disturbance of the structural integrity of any engineering controls designed or utilized at the property to contain pollutants or limit human exposure to pollutants.

Many states will not issue NFA letters until the DER has been perfected. Since the issuance of an NFA letter may be a key condition for obtaining financing or for closing the transaction, counsel should consider obtaining state approval of draft restrictions to minimize delays in receiving NFAs.

In addition, some states require the underlying VCP agreement or consent order to remain in effect until the institutional controls are terminated because the control is considered a part of the remedy. However, if the instrument establishing the institutional controls contains a mechanism for the state to enforce the restrictions, the VCP agreement or consent order may be able to be terminated upon the issuance of the NFA letter.

Since there must usually be a conveyance to establish an enforceable property right, many states require that the property owner grant a right of access and an environmental easement to the state environmental agency. Using phrases like "run with the land," "in perpetuity," or "successors and assigns" may be sufficient but local real property law will determine what language is required to ensure that the restrictions be enforced against new owners.

The purposes for which the easement or covenants have been granted should be carefully reviewed to make sure that they are not too broad. The right of access and the covenant or easement should give the state access to the site upon reasonable notice and at reasonable times to determine that use restrictions are being complied with and to ensure the integrity of the engineering controls. The right of access should be granted only for specified purposes, for example, inspection to ensure the integrity of the landfill cap or inspection of the leachate treatment system, groundwater treatment system, or other operation and maintenance system.

Parties Included. It is important to include in the instrument any party who may have an interest in the property to ensure that controls can be reliably enforced and maintained.

Some states require a purchaser, lessee, or transferee to acknowledge that institutional controls may be required. It is important to make sure that by executing such a certification one does not waive the right to object to implementation of such controls.

In some states, landowner consent is required to create a CEA only if the use restriction involves soil contamination. If a tenant or prospective landowner cannot obtain the consent of the owner, the state may require remediation to the higher cleanup standards associated with unrestricted use. A restriction also may not be enforceable against a lender who is holding a mortgage that was perfected prior to its imposition. Technically, if such a lender forecloses on the property and then sells it, the use restriction may not be enforceable against the transferee. This may have little practical effect since the transferee may not be able to obtain title insurance. Nevertheless, some states require the grantor to have a subordination agreement executed by lenders, lien holders, lessees and other owners of previously perfected property or possessory interests. Borrowers should consider contacting their lenders even if the state does not require a subordination agreement to confirm that the granting of such interests will not violate the terms of their loan agreement.

Enforcement and Maintenance. One of the most important factors for ensuring the effectiveness of institutional controls is the existence of a reliable enforcer. State environmental authorities and parties to real estate transactions often assume local government will enforce the restrictions. However, real property law gives the right to enforce a property interest only to the grantee. If the grantee fails to do so, it might to difficult for another party to compel compliance.

In any case, most local governments lack the experience, resources, and inclination to verify compliance. According to a recent survey published by the Washington, D.C.-based International City/County Management Association (ICMA), 74 percent of the responding local government officials did not have experience implementing institutional controls.

Further complicating the matter is that it is usually county governments and not local town officials who are responsible for recording deeds and other land-use restrictions. Thus, local authorities may not even be aware of the existence of the institutional controls. Accordingly, it is advisable for town attorneys and managers to establish an information exchange with the county governments and perhaps even establish procedures for enforcing institutional controls in their building or zoning codes.

It can be difficult to determine who a grantee is especially when the current property owner creates a deed restriction and no property transaction is contemplated. Thus, is important for the instrument to identify who has the right to enforce the document. In doing so, the

parties should also determine the most appropriate enforcer. For example, the seller may not want the responsibility of making sure that the controls are enforced and maintained and may insist that the purchaser assume the responsibility. However, this might not work when a developer is the purchaser. Once the project is completed and the developer no longer has title to the property, the developer will have little interest or incentive to monitor compliance.

Since failure of the engineering or institutional controls could expose the seller to liability, the seller should reserve the right to enforce restrictions and inspect the site to assure compliance. If a developer purchases the property, the instrument should expressly extend the seller's right of enforcement to succeeding entities such as a condominium association. In addition, the document should specify the enforcement rights. For example, will the seller be entitled to injunctive relief as well as damages for additional remediation costs? It is advisable also to agree on a court of jurisdiction.

The instrument should indicate who will be responsible for maintaining and repairing the controls and for funding the work. By operation of law, some states require future owners, lessees, or any one person operating a business on property to maintain controls. If the purchaser of the property will be responsible, the seller may want to require insurance or some other financial assurance mechanism to ensure that the purchaser will have the resources to do long-term operation and maintenance.

A related issue is responsibility for additional remediation due to a change in use. Usually this obligation would fall upon the party redeveloping the site. Whatever arrangement is negotiated, it should be expressed in the instrument.

Modifying or Removing Controls. Another important issue that must be addressed is the mechanism for modifying or terminating land-use controls. Modification may be necessary to excavate soil for an expansion of a building or to repair utility lines. If a new land use will require additional remediation, the parties need to agree on who will pay for the work. Usually the party who desires the change will bear the costs of the additional cleanup.

Controls should be removed when they are no longer needed to protect human health or the environment and a transfer instrument should identify the process by which this is done. A handful of states specify a form that must be executed by the state environmental agencies to terminate institutional controls. In most other states, it may be unclear what document has to be presented to the local records clerk to prove that the remedy has been completed and the controls can be released. Though the parties could provide that institutional controls will terminate automatically upon achieving certain environmental standards, a better practice is to require that a separate instrument be recorded terminating the controls. This could an NFA letter or a release of the controls similar to the removal of a lien that is filed when a mortgage is paid off. If this latter approach is followed, it is important during the negotiation of a VCP or brownfield agreement for counsel to negotiate a form of release that will be used as well as to specify the procedures that need to be followed, such as who needs to receive notice.

Notice. It is important to know if the state requires that notice of institutional controls be provided before they are approved by the state environmental agency or after the instrument of conveyance has been recorded. Some states require that proposed land-use restrictions be published in local newspapers to provide the public with an opportunity to comment. Other states require that various local government agencies also be given notice of the restrictions.

Sometimes a seller fails to inform the buyer that the seller plans on using institutional controls to achieve state cleanup standards. Many real estate contracts simply require the seller to comply with law without specifying if institutional controls are an appropriate means of compliance. Since these restrictions can interfere with a buyer's plans for a site, it is important that counsel for purchaser address this issue during the contract negotiations.

INNOVATIVE USES OF CONTROLS AND DUE DILIGENCE

Some Fortune 500 companies selling surplus industrial properties file extensive deed disclosures, far beyond what states require, in an effort to cut off future claims for personal injury and property damages. This approach has been used particularly where a property is to become a residential development. The disclosures may be several pages in length and describe in detail the kinds of activities that were conducted at the site, the nature of the contamination and the remedial efforts that were performed. Often, the disclosures also state that pursuant to a state NFA letter, the seller has no further responsibility for any contamination. Whether this will effectively cut off future claims remains to be seen. A similar deed notice and release of liability did not prevent Hooker Chemicals & Plastics Corp. from being held liable for contamination at Love Canal.

Databases customarily searched by environmental consultants may not contain any information on institutional controls. Thus, it is important to make a thorough search of real estate records to determine if any environmental land-use restrictions are in effect. There have been instances where such controls have been missed by title companies because the instruments were attached to the back of a deed or were misfiled.

CAVEAT ON INSTITUTIONAL CONTROLS AND DEFENSES TO LIABILITY

Even if an instrument creating land-use restrictions imposes obligations on the seller for maintaining institutional controls, an innocent purchaser may find itself liable under federal or state law in the event the seller fails to do so. A number of state brownfield or VCP statutes expressly provide that innocent purchasers may lose their immunity from liability if controls are not properly maintained.

Under the superfund law's "innocent purchaser's defense,"[19] a subsequent owner must establish that it did not know and had no reason to know that any hazardous substances were disposed of at the facility. To establish that it had no reason to know of the contamination, a defendant must demonstrate that it took "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." In de-

[19] 42 U.S.C. 9601(35)(A).

  TXLR ISSN 0887-7394

termining whether there was an "appropriate inquiry," CERCLA requires that any specialized knowledge or experience of the innocent owner must be taken into account. The relationship of the purchase price to the contaminated property and whether the presence of contamination was obvious or could be detected by an appropriate site inspection are also factors.[20] The constructive notice of contamination provided by the filing of deed restrictions will likely prevent a prospective purchaser from successfully asserting the innocent purchaser defense since it would have had reason to know of the existence of the contamination.

CERCLA's third-party defense allows defendants to avoid liability if they can establish by a preponderance of the evidence that (1) the release or threatened release of the hazardous substance and the resulting damage was due solely to the acts or omissions of a third party who was not an agent or employee of the defendant, (2) the defendant did not have a direct or indirect contractual relationship with the third party, (3) the defendant exercised due care in dealing with the hazardous substances, and (4) the defendant took precautions against foreseeable acts or omissions of any third party and the foreseeable consequences of those acts or omissions.[21]

If an institutional control such as an impervious cap is constructed on a property to prevent exposure to contaminated soils, a subsequent purchaser or lessor will probably be required to ensure that the control is properly maintained to be able to assert the third-party defense even where the seller or lessor contractually agrees to maintain the institutional controls. This is because failure to maintain an institutional control could be construed as a foreseeable omission. Moreover, if the subsequent property owner or lessee fails to monitor the condition of the controls or fails to maintain the controls in the event the seller or lessor fails to do so, this omission could constitute failure to exercise due care.

[20] Id. at 9601(35)(B).

[21] 42 U.S.C. 9607 (b)(3).