

Land Use Control Implementation Plans – Protecting Brownfield Redevelopment

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Introduction

As this newsletter's readers certainly know, brownfield redevelopment provides an important if not a crucial tool to help municipalities achieve smart growth. Brownfield redevelopment often relies on risk-based cleanups which allow some contamination to remain in place. In turn, brownfield redevelopment relies on institutional controls to prevent future land activities that might cause contact with or future releases of this residual contamination.

ICs do not yet enjoy a strong stewardship process or an "institution" which actually assures that they will operate properly. Without this infrastructure, redevelopment projects run the risk of again becoming brownfields. As Professor Schilling described, "our redevelopment accomplishments, especially brownfield policies and projects, depend on effective...[IC] infrastructure."¹

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¹ Joseph Schilling, *Ten Years of Land Use Controls Policy Development: Starting Down the*

Just like the case for development in flood plains, hillsides, or other hazard areas, municipal planners and community stakeholders should be provided with information about where controlled sites are, and there should be a means to ensure that any restrictions or conditions for the property are monitored. This requires coordination between different agencies of local and state government. A new strategy achieves these ends, and it has emerged in the form of negotiated agreements called Land Use Control Implementation Plans, or LUCIPs.

IC Stewardship Faces Unique Challenges

ICs divide among four types.² First, deed controls such as restrictive covenants and negative easements, for example, record land use restrictions in a property's direct chain of title. Second, government controls such as municipal ordinances or state laws, for example, which restrict or condition land use. Third, informational devices which provide notice of residual contamination and include, for example, notices in the chain of title, web site registries, and outreach efforts. Finally, environmental agency enforcement orders and environmental agency-private party

IC/LUC Campaign Train, available at www.LUCs.org.

² EPA, INSTITUTIONAL CONTROLS: A GUIDE TO IMPLEMENTING, MONITORING, AND ENFORCING INSTITUTIONAL CONTROLS AT SUPERFUND, BROWNFIELD, FEDERAL FACILITY, UST, AND RCRA CORRECTIVE ACTION CLEANUPS (2003), avail. at www.EPA.gov/superfund/action/ic/guide/index.htm; ASTM INTERNATIONAL, E 2091-00, STANDARD GUIDE FOR USE OF ACTIVITY AND USE LIMITATIONS, INCLUDING INSTITUTIONAL AND ENGINEERING CONTROLS (2000).

agreements, such as certificates of completion and no further action (NFA) letters, which contain land use restrictions or promises to implement land use restrictions, but are often not recorded against the property's chain of title.

Typically, state environmental agencies authorize the use of ICs during their site cleanup approvals. Even though these controls need to function in an "institution" largely controlled by local governments, local governments often have limited or no say in these IC choices.

Whatever this "institution" exactly is, it continues to evolve. The institution's players include the environmental agencies who authorize ICs, as well as the responsible parties and "innocent" purchasers who may be required to "ensure the integrity and effectiveness of ICs." The institution's player also include property buyers (and their lenders) who must conduct all appropriate inquiry, including a search for ICs, during transactions. And it includes public and private "holders" or "grantees" of deed controls, with the ability to enforce these controls. Stakeholders also include "call before you dig" centers, which may alert excavators of environmental contamination. The evolving IC "institution" may also include 3rd Party site control monitoring and risk transfer outfits who, for a fee, will help to assure site-specific compliance with controls.³ But the major players in this evolving institution, almost certainly, are the local government.⁴ Local governments

³ See www.Terradex.com

⁴ For additional discussion of the local government role, see Richard G. Opper,

conduct land use planning, they control land use decisions, and they issue land use, building, grading and development permits.

Gaps in the IC institution remain. "Local governments vary widely in both their interest in [IC] programs and their ability to implement them."⁵ And the variety of institution players defies an easy means for coordination. But some improvements have occurred. Perhaps the most notable of which is the Uniform Environmental Covenant Act which, among other things, ensures that deed controls run with the land.⁶ But even with UECA and UECA-like statutes in many states, gaps remain. Deed controls, UECA and otherwise, do not often cross the desk of local government land use decisions makers. Additionally, though some states may track them, NFA letters remain filed away at many state agencies. Thus, local permitting processes, as well as excavation clearance regimes (i.e. One Call), remain unaware of many ICs.

Existing LUCIP Efforts Demonstrate Their IC Stewardship Potential

The concept of a LUCIP seems to have evolved from the EPA oversight of

Institutional Controls ENV'T. REPT'R (BNA) Vol. 35 No. 50 at 2606(2004).

⁵ Joseph Schilling, *The Local Government Challenges of Long-Term Stewardship: Designing and Implementing Land Use Controls on Brownfield Sites*, in IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES 285, 290 (Amy L. Edwards eds. 2003).

⁶ Amy L. Edwards, *Institutional Controls: The Converging Worlds of Real Estate and Environmental Law and the Role of the Uniform Environmental Covenants Act*, 35 CONN. L. REV. 1255 (2003).

Department of Defense cleanups, when Region 4 of the EPA published a memorandum entitled “Assuring Land Use Controls at Federal Facilities.”⁷ This memo required DoD installation to prepare LUCIPs to identify each ICs objectives, the area it affects, and the process to ensure it properly operates over time. ICMA modified this approach for use at brownfields and non-DoD CERCLA cleanups.

According to the International City and County Management Association, a “LUCIP is an agreement (often non-binding) that formalizes the roles and responsibilities of state environmental regulators, local government officials, and private stakeholders in the long-term administration and management of [site controls].”⁸ LUCIPs may involve the property owner, potentially responsible parties, state environmental regulators and/or local government departments.”⁹ “A LUCIP can take many forms depending on the nature of the contamination, the type of [institutional control] used, and the relevant regulatory authorities.”¹⁰

Not including the DoD LUCIPs, the only other LUCIP efforts include: 1) a draft LUCIP prepared by the City and County of Denver and the State of Colorado; 2) ICMA’s model LUCIP; and 3) the ongoing efforts, in National City, California. ICMA based their model

largely on the LUCIP effort in Denver. And National City’s effort routinely consults ICMA’s model. Thus, the ICMA model provides a good framework for discussing existing LUCIP efforts.

Scope. The scope defines the geographical boundaries that the LUCIP will cover, the type of properties to be included, and the site controls involved. For example, National City’s ongoing efforts contemplate a LUCIP scope that covers all properties within redevelopment areas, as defined under California Redevelopment Law, and any controls recorded in a property’s chain of title. Denver’s draft LUCIP covers the entire city of Denver and includes any type of site control, not only recorded ones, as well as engineering controls.¹¹

Participants and Legal Authority. This section identifies the parties involved, and the legal authority for the parties to enter into LUCIPs or to carry out its provisions. The legal authority at issue might include authority for state and local governments to enter into agreements. Or it may identify the provisions which authorize, for example, local governments to impose conditions on land use permits. Generally this section sets out and memorializes that the various parties actually possess the authority to enter into the LUCIP, and to carry out its provisions.

Roles and Responsibilities. This section forms the heart of the LUCIP. It lays out the obligations of the parties involved. It contemplates the future activities which

⁷ Memorandum from Jon D. Johnson, Chief, Federal Facilities Branch United States Environmental Protection Agency, (Apr. 13, 1998).

⁸ INTERNATIONAL CITY AND COUNTY MGMT. ASS’N, LAND USE CONTROL IMPLEMENTATION PLAN MODEL FRAMEWORK 7 (2005), at www.LUCs.org (visited Dec. 22, 2005).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Memorandum from the LUCIP Working Group to Interested Parties (Oct. 2004) (on file with author).

may conflict with site controls and, in turn, it identifies the processes necessary to prevent these conflicts. It allows the parties to agree to any set of roles and responsibilities that they wish. For example, the National City's ongoing LUCIP efforts contemplate a scheme which obligates the state and county environmental agencies to notify the city prior to approving any deed restriction, deed notice, or NFA condition and, then, to provide the city with actual copies of these ICs after they have been approved. The city, in turn, would keep track of all ICs on a publicly available web-based GIS system, and consult it prior to making land use decisions. If land use decisions affected controlled sites, the city would provide the applicant with a "controlled site use approval form," which they would then use to secure approval or denial from the relevant state or county agencies.

The draft Denver LUCIP would require the state to develop a site control tracking system. It would also identify a series of specific actions, such as the state issuances of NFA letters, and then impose an associated obligation, such as adding the site to the site control tracking system and notifying the city and county.¹² These action-obligation requirements would also work in the other direction. Denver's LUCIP obligates city permit issuers to compare land use permit applications against the state site control database and, in turn, to notify the state if permit applications cover sites on the database.

Site Control Selection and Design. The LUCIP may also address site control selection and design. For example, it may require that environmental agencies

consult with local government before approving site controls. This process would satisfy some critics who accuse site control approvals as "back door zoning." Alternatively, the LUCIP may simply document the objectives of each site control, the risk it protects against, the type of site control involved, and similar points. This approach allows LUCIP parties, and other stakeholders, to clearly see which controls actually exist, and why.

LUCIP Costs. In order to carry out the provisions in the LUCIP, each party to it holds the potential to incur costs. Especially with LUCIPs still in their infancy, it will probably be difficult to quantify these costs.¹³ The model LUCIP suggest tracking these costs into the future, and providing means to modify LUCIP agreements if costs become too high or disproportional.

LUCIPs provide a promising approach for IC stewardship at brownfield sites. They offer a flexible approach to coordinate government efforts. They uncover deed controls and NFAs from the depths of property record files, and bring them into both the public eye and on to the desk of land use decision makers. And they can inform stakeholders of land activities that may relate to site risks, before they occur.

¹² *Supra* note 8.

¹³ See John Pendergrass and Katherine N. Probst, *Estimating the Cost of Institutional Controls* (2005), at www.lucs.org (providing a detailed discussion of IC stewardship costs).