

## **Land Use Controls: Promoting Reuse and Repositioning of Industrial Properties**

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### **Abstract**

The redevelopment of contaminated property creates livable communities by revitalizing urban areas, which creates jobs, improves the local tax base, and preserves greenspace. In some cases, remediation of contaminated property does not completely remediate the property because of technical or cost limitations. Land use controls (LUCs) can expedite reuse and reduce costs while protecting the public from exposure to residual contamination that remains after cleanup is completed. Proper creation, implementation, management, and enforcement of LUCs require a variety of tools, including a centralized GIS based database to memorialize the LUCs, carefully crafted language in property documents to notify future owners of the LUCs, and property law reform to support their transfer and enforceability. It is crucial to memorialize and manage the LUCs so that future landowners and users will be aware of them and violations can be prevented. LUCs can be integrated with development, either on an individual parcel or a community-wide basis. They can provide certainty in terms of identifying permissible and non-permissible uses of property. This certainty stimulates development by encouraging the community, property owners, developers, and financiers to expedite cleanups, return property to beneficial use, and prioritize use of existing resources.

### **Main Body**

Land use controls (LUCs) are any type of physical, legal, or administrative mechanism that restricts the use of, or limits access to, real property to prevent or reduce risks to human health and the environment. Examples of LUCs include physical mechanisms such as signs placed at the site boundary to warn users of risks, legal mechanisms such as a deed restriction that prohibits excavation past a certain depth to avoid disturbing contaminated soil or a landfill, and administrative mechanisms such as an area-wide ordinance restricting groundwater use.

LUCs are needed when an environmental remedial decision requires controls on, or limits to, property use to prevent or limit exposure to hazardous contaminants. LUCs may be implemented through the police powers of the local governments or through

legal instruments, such as a deed, between two parties. The intent of LUCs is to ensure that land use activities in the future remain compatible with the LUCs imposed on the property during the environmental remediation process

Many of the problems that have been cited with using LUCs center on whether future owners will comply with LUCs, especially after the property has been transferred several times. If the LUCs were lost, future owners would not have knowledge of the LUCs and would be unable to maintain them. Because local laws usually do not address LUCs developed for environmental remediation, it may be necessary to develop LUCs that can be enforced against future landowners to ensure that future users are protected. Effective LUC use and management require a lifecycle approach to selection, implementation, monitoring, enforcement, and termination.

### Selection

LUCs that are imposed during the environmental remediation process, such as groundwater use restrictions, may be in existence for many years until a treatment system has achieved remedial standards or only for the short term to prevent interference with the remedy while remediation is ongoing. Because of the potential longevity of some LUCs, it is important to consider the lifecycle costs associated with including LUCs as part of the remedy. In some cases it may be less expensive to select an initially more expensive remedy that would result in an unrestricted land use than selecting a remedy that would result in restricted property with LUCs.

### Implementation

Effective LUC implementation requires a full suite of tools, depending upon the site-specific conditions. The following are recommended implementation mechanisms:

#### *State LUC Statutes*

State and local governments can create LUC requirements that alleviate the concerns over whether or not a LUC will remain effective against future landowners. Such requirements should resolve many of the current dilemmas surrounding the use of LUCs by providing for two important features:

- ✓ Methods for assuring that the LUC will remain enforceable after subsequent transfers, and
- ✓ Allowing the state to assume some or all of the oversight and enforcement responsibility associated with the LUC.

Because of the broad spectrum of available LUC management tools, it is important to research the state-specific laws to identify and implement LUC mechanisms applicable to the transaction. While these options for increasing local involvement and improving the enforceability of LUCs are promising, they are relatively new and have not matured into a clean body of law.

### *Layering*

Layering of LUCs, that is, using a system of mutually reinforcing LUCs, is an effective method of assuring that owners have notice and, if LUC violations occur, they are discovered and rectified quickly. For example, a combination of a recorded LUC, deed restriction, notice, and zoning can expand the number of parties who are aware of the LUC, which will serve to assure that the LUCs will be heeded and maintained.

### *Notice/Recording*

Notice of a LUC in a deed is an effective mechanism to ensure that prospective owners are put on notice about the extent of any contamination and any LUCs. The deed notice should run in perpetuity unless otherwise modified or terminated pursuant to additional cleanup. The effect of requiring a deed notice to run in perpetuity is to ensure that any subsequent owners are informed of the environmental condition of the property and any LUCs on the property.

Prospective purchasers can also be made aware of a LUC on a parcel if the LUC imposed on the property is recorded in local property records. Additionally, many jurisdictions have established a registry, which provides for the tracking and monitoring of LUCs. The model should require use of this type of registry if one is available.

### *Zoning*

The use of the local zoning authority and ordinances can support the implementation of LUCs if they incorporate the LUCs. For example, zoning ordinances can include special overlay areas for parcels with LUCs that protect landfill caps or otherwise limit soil penetration. These ordinances would prohibit excavation on such sites without the prior approval of public officials. To allow excavation, officials would have to certify that the integrity of the landfill cap would not be threatened by the proposed construction.

The disadvantage to relying on zoning as a method for protecting LUCs is that zoning is subject to change by the local zoning authority without input from environmental regulators. In addition, land use decisions may be made irrespective of the health and environmental concerns that prompted the application of the LUC. While zoning should not be relied upon as the sole oversight tool, the local zoning authority can be an important enforcement component of the LUC.

### *Transaction-triggered Statutes*

Several states in the United States have enacted due-diligence type laws that are triggered when property is to be transferred. The information required varies, but generally they require information about the environmental condition of the property. This is an effective means to assure that a prospective purchaser will be notified of the existing contamination and LUCs prior to purchasing the property.

## Management

### *Annual Notification*

Regulators, using LUC registries discussed below, can provide an annual notice to a landowner that the property has a LUC. This will ensure as the property use and owners change over time, that knowledge about the existence of LUCs remains.

### *Self-Certification*

Another important tool that may be used is self-certification where the responsibility of providing notice about the condition of the property on a regular basis is placed on the owner. The property owner would certify on a regular basis to a regulatory body that the property was still used for its intended purpose and the LUCs remain in effect. Because of the high cost of physically inspecting properties to observe land use, self-certification can be a simple, cost-effective approach to obtaining information from someone currently on the property.

### *Tracking Systems/Registries*

Local laws could provide or mandate the use of registries to track contaminated sites and the LUCs on those sites. With technologies available today such as geographic information systems (GIS), it is possible to build a system that not only allows the public to view a list of properties with LUCs, but to actually see where those LUCs are located. Municipalities could also incorporate LUC information into their building permit approval process and GIS systems to ensure that LUCs are part of new development.

### *Inspections/Monitoring*

Regular inspections and monitoring can ensure that property use remains consistent with LUCs imposed on the property. For example, an inspection can ensure that an industrial site is not converted into a playground. The options for providing inspection or monitoring responsibility are numerous. For instance, it may be possible to have a third party oversee the continued effectiveness of a LUC. Third parties could include regulators, local agencies, or other interested organizations. An easement that would allow a third party access to property should be granted to allow future inspections that would ensure that any LUCs are still in place.

### *Enforcement*

Enforcement is arguably the most difficult aspect of effectively managing a LUC. Many jurisdictions do not have the type of statute that would allow enforcement of a LUC by a third party who is not part of the ownership chain. A statute that would allow an enforcement scheme by a regulator or other third party irrespective of ownership issues

would be very helpful. In addition to statutes specific to enforcement, there are other methods of enforcement.

Land use management and control are historically local concerns. LUCs that are incorporated into local land use management systems should be enforced through local processes. For instance, zoning and groundwater use are established and modified through the regulatory authority of a local government and cannot be enforced by the federal government. Similarly, enforcing a deed restriction is dependent on local law.

### Modification and Termination

As cleanups are completed, it is possible that the LUCs imposed on the property will no longer be required. LUCs will be used on a property until either a remedy has attained its cleanup goals or as long as residual contamination no longer requires restricted land use. If a remedy has attained its cleanup goals, the LUC protecting the remedy is no longer necessary and should be removed from the deed.

Generally, only the party imposing the LUC can modify or terminate it. The LUC should clearly lay out the termination procedures and responsibilities in the deed or other document at the outset of the LUC so that subsequent transferees can follow a process for terminating the LUC. After a decision has been made that a termination is appropriate, the actual termination can be as simple as the transferor (or other interest holder) releasing, abandoning, and forever discharging the LUC. If no other LUCs are required on the property it is also important to release not only the LUC itself, but also the easement that the transferor (or other interest holder) held to inspect the property, if any.

### Conclusion

LUCs promote redevelopment of property with residual contamination by:

- ✓ Providing cost-effective means to manage risk at sites where unrestricted cleanup is impractical or unwarranted.
- ✓ Allowing for reuse of such property while protecting the public from residual environmental risks.
- ✓ Aiding communities by returning property to beneficial use quickly, improving employment, tax base.
- ✓ Providing long-term certainty to landowners, investors, property users and their successors that they will be protected from residual contamination over time.

LUCs encourage the integration of cleanup and reuse strategies, which eases the creation of livable communities by revitalizing urban areas and preserving green space. In addition, they stimulate development by encouraging the community, property owners, developers, and financiers to return property to beneficial use, and prioritize use of existing resources.