

APPLYING AND ENFORCING INSTITUTIONAL CONTROLS IN BROWNFIELDS TRANSACTIONS

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I. INTRODUCTION

Until a few years ago, the term “brownfields” to most real estate lawyers was no more than something that might have been discussed in the same breath with “Blackacre” back in law school, or perhaps in extreme cases, it was something that showed up as a designation on comprehensive land-use plans or zoning maps. Even to many other professionals, the word was virtually unknown. In recent years, the term brownfields has become more familiar to those within the environmental and governmental sectors.

The term brownfields has been given a number of definitions. In the most comprehensive sense, the term generally is used to describe abandoned, unused, or underutilized properties known or believed to be contaminated, which may require environmental cleanup before they can be redeveloped. The 2002 changes to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), enacted through the Small Business Liability Relief and Brownfields Revitalization Act of 2001 (the “Brownfields Revitalization Act”), define brownfields as “real property, the expansion, redevelopment, or reuse of which may be complicated by the

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presence or potential presence of a hazardous substance, pollutant, or contaminant.” Section 211(a) of the Brownfields Revitalization Act, 42 U.S.C. § 9601(39)(A).

The existence of potentially contaminated and abandoned property is not a new problem in many metropolitan areas, especially older cities and suburbs. In areas in which industry has closed or moved, land and buildings are deserted or under-utilized, jobs are lost, and local tax revenues are reduced.

As sophisticated real estate lawyers and their clients have come to realize, under the environmental laws that have evolved over the past thirty years serious environmental liabilities plague prior, present, and prospective owners of contaminated property. Considerations of how to deal with these very real liability concerns have taken precedence in evaluating how, or if, these former industrial sites, now vacant or abandoned, can be developed economically. The potential liability for environmental contamination continues to stand as a major impediment to acquisition, financing, and development of these vacant or abandoned sites.

These are not only issues confronting properties that have been used in the past for production, storage, handling of industrial chemicals, machinery, or equipment. Many properties affected by environmental problems will never be on the CERCLA National Priorities List. Environmental problems such as petroleum contamination from underground tanks, or dry-cleaning solvent contamination, need to be addressed and remedied before property contaminated by those substances can be productive.

As all real estate developers now know all too well, even though thousands of tracts of property are not among the sites listed on the National Priorities Superfund List, the CERCLA legislation and comparable state statutes still may affect the property. CERCLA and its state counterparts govern the cleanup of properties where there has been a release, disposal, or discharge of hazardous materials. At different times, the total number of such contaminated sites throughout the United States has been estimated to range between 400,000 and 1,000,000 brownfields sites.

Clearly the mere perception of contamination has been a very real obstacle to brownfields redevelopment. In its 1996 report on barriers to

brownfields redevelopment, the U.S. General Accounting Office concluded that the principal barrier to redevelopment of these properties was the existence of state and federal environmental laws similar to CERCLA that imposed strict and retroactive liability on owners or operators of the properties that were contaminated. Until quite recently, private developers and their lenders often have been reluctant to purchase or to finance such sites because of such factors as uncertainty over the actual amount of contamination at a site, how much of that contamination regulators would require to be cleaned up, probable actual cleanup costs, potential regulatory “re-opening” of a site enforcement case, and potential third party lawsuits.

This same potential liability and uncertainty, expressed often in terms of anxiety over uncertain environmental remediation obligations and potential third-party claims, has prompted owners of potential brownfields sites to warehouse properties they own instead of placing those properties on the market. These owners believe (especially when state or federal securities laws could mandate some quantification and disclosure of potential liabilities, at least for publicly traded entities) that it is easier and preferable to incur passive holding costs, as contrasted to risks that notoriety or even the mere discovery of prior contamination liability reduced collateral can engender.

Such fears also may prompt current owners of brownfields properties to keep the lands off the market. The usual due diligence required as a contract contingency or financing commitment requirement may generate site testing requirements. These requirements may generate results that, at best, diminish sellers’ abilities to claim later that they had no knowledge of contamination, and at worst, CERCLA or state law may require reporting to regulatory agencies.

More recently, real estate lawyers, once they have gotten past the daunting challenges of understanding the potential environmental liabilities, often have recognized that traditional real estate concepts such as assuring a clear, but limited, right of access to a piece of property through an easement or license, or restricting the use of land by a use restriction, can play a major practical role in the implementation of new federal and state efforts to encourage and provide incentives to undertake voluntary use and reuse of such brownfields.

The recently released Restatement (Third) of Property, Servitudes (“Restatement”) may be of some help – albeit limited in some jurisdictions, as noted below – in efforts to clean up and place brownfields sites back into a

contributing role in the economy. Often this process will involve what is referred to as an “institutional control,” and the application of concepts set forth in the Restatement to assure the efficacy for use of such controls

The definition of a servitude in the Restatement—“a legal device that creates a right or an obligation that runs with land or an interest in land”—and the identification of the types of servitudes covered by the Restatement—“easements, profits, and covenants”—encompasses many of these concepts that are used as land-use constraints, as a part of the process of cleaning up formerly and presently contaminated land.

Restrictive covenants affecting land use for environmental purposes can be imposed by a number of different instruments. Until recently, regulatory agencies often referred to “deed restrictions” when describing the context for the creation of such covenants and controls. Perhaps this is because many regulatory agencies acted as if any restrictions had to be imposed as a part of a deed. More recently, the potential for the use of covenants as a viable and enforceable part of environmental remediation has expanded, and the EPA and state agencies have become more knowledgeable in their use of appropriate real estate terminology. Although some states still retain and use the term “deed restrictions”, there seems to be much more use of terms such as “institutional controls,” “environmental covenants,” and “activity and use limitations.”

Some states, as well as the ASTM explanation of this process, use the term “activity and use limitations” to refer to measures that restrict the use of a site, while allowing contamination to remain at the site at levels in excess of what would be allowed for unrestricted use. *See, e.g.*, MASS. GEN. LAWS ch. 21E, § 2 (2002) (defining “activity and use limitation” as “a restriction, covenant or notice concerning the use of real property which is imposed upon real property by a property owner or the department [of Environmental Protection]”). The ASTM International (formerly the American Society for Testing and Materials) (“ASTM”) uses the term “activity and use limitations” in its guide and standard covering access and land-use controls in the context of environmental regulatory programs. (Standard Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls (E 2091-00)).

The term “Activity and Use Limitations”, or “AULs” is also used to describe an institutional control in the Uniform Environmental Covenants Act

(“UECA”) recently adopted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).

However, whatever they are called, federal and state regulatory agencies that are asked to consider allowing land-use controls to be a part of site cleanup and remediation, more and more are raising significant questions about the willingness and the ability of affected property owners, governments, and regulatory agencies to adopt, oversee, and enforce such land-use controls.

As already noted, one relatively recent and potentially significant development affecting this area is the parallel reformulation of uniform real estate laws. This reformulation often attempts to reverse the classical bias against the enforceability of easements “in gross” or similar estates in land that do not directly benefit an adjacent parcel. Probably the best known of these is the American Law Institute’s Restatement of the Law of Property, covering Servitudes.

The beginning of this Restatement sets forth that it intends to simplify and clarify what it recognizes as “one of the most complex and archaic bodies of twentieth century American law.” The Restatement groups together the law of easements, profits, and covenants as an integrated body of doctrine, and explicitly eliminates what it terms to be “needless distinctions, archaic terminology, and obsolete requirements.” The first few paragraphs of the Restatement’s Introduction demonstrate the scope of the suggested change:

“Substantial simplification has been achieved by eliminating the horizontal-privity requirement and limitations or prohibitions on the use of benefits in gross, which eliminates the distinctions between real covenants and equitable servitudes and the distinctions between negative easements and restrictive covenants As a result, there are only three categories of servitudes: profits, easements, and covenants, all of which may be enforced by legal or equitable remedies as appropriate to the particular case. .

Substantial clarification has been achieved in two areas that have long bedeviled students of covenants law, the touch-or concern doctrine and the vertical-privity doctrine. Although both doctrines, unlike the horizontal-privity doctrine, played useful roles, their archaic terminology made them difficult to understand or use, and they both operated imperfectly. The touch-or-concern doctrine operated both to impose substantive limits on the kinds of arrangements that could be made to run with the land and to provide a de facto method of terminating affirmative covenants. It did the

job poorly, however, in part because its purpose was never clearly understood, and the language tended to divert attention away from the question whether the servitude posed such a threat of harm that it should not be allowed. It also interfered with innovative types of land development, by casting doubt on the validity of affirmative covenants and other servitudes that did not directly involve physical use of the land.

Both roles of the touch-or-concern doctrine are retained in this Restatement, but in a much more direct form. Its role in determining the kinds of arrangements that can be implemented with servitudes is fulfilled by the rule stated in § 3.1, that a servitude is valid unless it is illegal, unconstitutional, or violates public policy. This rule shifts the burden to the person who seeks to avoid enforcement of the servitude to establish that it is an arrangement that should not be allowed to run with the land. This should remove the impediment to innovative land development posed by the old touch-or-concern doctrine without sacrificing the judiciary's ability to eliminate servitudes that create unreasonable risks of social harm.

Simplification and clarification are also made possible by the recognition in § 2.6 that servitude benefits, including easements, may be granted to third parties, and that benefits in gross may be freely created and transferred unless contrary to the intent of the parties.”

These classic common law requirements (such as the concept that a restrictive covenant cannot be accomplished through use of an easement in gross, and that the covenant must touch and concern the affected land) traditionally have been a concern to many regulatory agencies considering acceptance of land-use constraints tied to such covenants as a part of the remediation process.

Covenants included as a part of a conveyance, whereby the grantee is put on notice of contamination and deemed to have released the grantor from any liability related to such contamination, have been disallowed by some courts as being personal in nature and not covenants running with the land. For instance, in *Calabrese v. McHugh* 170 F. Supp. 2d 243 (D. Conn. 2001) the court held that a disclosure and release and covenant not to sue in a deed—despite its inclusion in a recorded deed in the chain of title and despite a clearly stated intent to bind successors in the chain of title—did not touch or concern the land and was not appurtenant to the land and because the

release neither conferred a benefit on the remaining land that had been a part of the contaminated landfill, nor did it impose any burden on the property, the release and corollary notice provisions were deemed by the court to be personal and therefore not running with the land.

By contrast, in other instances, such as an early (1949) decision in New York (*Chemotti v. State*, 88 N.Y.S.2d 879 (N.Y.Ct. 1949)) the Court held that a release of the State of New York from liability for damages to real estate, which was recorded, was a covenant running with the land and therefore binding on the plaintiffs as successors in title to that agreement.

Regulatory agencies considering the potential use of an environmental covenant generally have needed some assurance that the restrictions on land use on the contaminated site, which are a part of the covenant, will continue to be enforceable for as long as environmental contamination of that site affects its potential uses. Because these agencies have become more cognizant of the importance of assured long-term enforceability, unless such agencies are satisfied that a restriction will be treated by the courts as one running with the land, they are becoming increasingly reluctant to accept a reduced level of site cleanup predicated on such continued enforceability. The regulators may be unwilling to let the assurance of continued enforceability depend upon whether, under classical real estate concepts, the restriction is regarded as a personal covenant instead of one that runs with the land.

Some studies have been conducted of the interplay between the long-term character and continuing enforceability of such real estate servitude restrictions and their ability to be included as part of an environment cleanup. These studies show that unless environmental regulatory agencies at the state and federal level become much more convinced about the long-term character and continued enforceability and practicality of these land-use restrictions, the restrictions' role in site remediation will inevitably be drastically reduced. The inability to depend upon land-use restrictions as a condition for and assumption in allowing the use of risk-based standards for remediation, will in many cases require affected properties to be cleaned to much more demanding levels, with the potential consequent inability to redevelop many brownfields sites.

Coinciding with the evolution of the ASTM Standard Guide and the Restatement, many jurisdictions have been adopting new state legislation providing specific statutory authority to adopt and enforce land-use controls

intended to achieve environmental cleanup objectives. In the Prefatory Note to the Uniform Environmental Covenants Act, discussed in greater detail below, recognition was given to the fact that at the time the uniform act was being proposed, approximately half of the states had some type of state laws authorizing land use restrictions linked to risk-based contamination remedies. However these Prefatory Note comments also acknowledge that some of these existing state laws do no more than note a need for land use restrictions

During the last two years, a drafting committee of the National Conference of Commissioners on Uniform State Laws has been drafting what they refer to as a “Uniform Environmental Covenants Act” (“UECA”). In August of 2003, the Act was approved by the Conference and recommended for enactment by states. **A copy of the approved final version of the Act is attached to these materials.** In the Prefatory Note to the Uniform Environmental Covenants Act, the Commissioners express their belief that that a uniform model state law on environmental covenants could eliminate some of the common law impediments that have hampered efforts to establish enforceable and reliable institutional controls. In fact, as is also pointed out there, one of the principal policies of the Act is to try to confirm the validity of environmental covenants, and to address a variety of common law doctrines that have cast doubt on the enforceability of such covenants.

The comments to the Act also point out that what is asserted to be “the trend of modern property law,” as reflected in the recently completed Restatement, of Servitudes is to eliminate these doctrinal restrictions.

These common law doctrines present some potential enforceability problems, which in turn can prevent any reliance on the covenants they control as a part of the remediation of a brownfield or other contaminated site. If effective institutional controls are ever to be a part of brownfields and other contaminated site remediation, there certainly will need to be a change in the respect given to these historic doctrines and their related restrictions on the right to limit the use of land. This change may occur through courts’ beginning to accept and apply the principles set out in the Restatement, through final promulgation of the UECA and its adoption by the states, through independent changes in state law even without a Uniform Act, such as the recent Colorado statute noted later in these materials, or perhaps through some combination of these.

II. LIABILITY ISSUES AND CLEANUP STANDARDS— THEIR ROLE IN ESTABLISHING AN INSTITUTIONAL CONTROL

Encouragement for the redevelopment of brownfields has come from many different public and private sources at the federal, state, and local level. In 1993, the EPA began what it called its “Brownfields Initiative,” which was intended to clarify environmental liability concerns and coordinate local, state, and federal financial assistance to encourage the assessment, cleanup, and sustainable reuse of brownfields. Various states have adopted either specific “brownfields” statutes, or statutes authorizing “voluntary” cleanup, or both, in an effort to encourage and to facilitate redevelopment and cleanup of brownfields sites.

According to one recent report, all of the states except one have now developed some form of voluntary cleanup legislation, which can offer encouragement to those parties that choose to become involved in the brownfields cleanup and land re-use process, and can assure them that they will not incur traditional environmental hazardous waste liabilities through their involvement

Now, as a result of Congressional enactment of the Brownfields Revitalization Act, 42 U.S.C.A. § 9601 (West 2003), the EPA has an explicit Congressional mandate to develop guidance for implementation of the Act, to fund additional grants for brownfields assessment and remediation, and to begin the application of the new statutory changes to CERCLA that are tied directly to assuring compliance with land-use controls where those have an impact on remediation requirements. For instance, under the provisions of the Brownfields Revitalization Act, institutional controls are given a significant role in the cleanup of brownfields and other contaminated sites. Section 221 (the “contiguous landowner” defense), section 222 (the “bona fide prospective purchaser” defense), and section 223 (the “innocent landowner” defense) provide defenses to CERCLA’s strict joint and several liability scheme if the party can establish that it “is in compliance with any *land use restrictions established or relied on in connection with the response action* at a vessel or facility” and that it did “not impede the effectiveness or integrity of any *institutional control* employed at the vessel or facility in connection with a response action.” 42 U.S.C.A. § 9601(40)(F) (2003) (emphasis added).”

Another section of the Brownfields Revitalization Act further recognizes the importance of institutional controls by requiring states to maintain registries of brownfields sites, listing those sites that rely on institutional controls because they have not been cleaned up to an “unrestricted use” level. See 42 U.S.C.A. § 9628(b)(1)(C) (2003).

This is further emphasized in the draft guidance regulations that the EPA released in February 2003 to evaluate issues of institutional control planning, implementation, monitoring, and enforcement. (DRAFT GUIDANCE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, INSTITUTIONAL CONTROLS: A GUIDE TO IMPLEMENTING, MONITORING AND ENFORCING INSTITUTIONAL CONTROLS AT SUPERFUND, BROWNFIELDS, FEDERAL FACILITY, UST AND RCRA COLLECTIVE ACTION CLEANUPS (2003), available at <http://www.epa.gov/superfund/action/ic/guide.htm>]

The Institutional Controls Guidance addresses brownfields laws and their relationship to institutional controls. With specific reference to the Brownfields Revitalization Act, the Institutional Controls Guidance discusses the implications of the Act on potential liability as that relates to institutional controls, noting that to receive and retain the liability protections of the Act, a property owner must comply with land-use restrictions and must agree to implement and maintain any institutional controls on their property. Among the requirements suggested in the Institutional Controls Guidance would be a requirement for annual reviews of the effectiveness of land-use and institutional controls.

In March 2003, one month after the EPA announced the Institutional Controls Guidance, the EPA further emphasized this interrelationship when the agency released what is commonly referred to as the Common Elements Interim Guidance Memorandum (the “Common Elements Guidance”, available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>).

The Common Elements Guidance sets out the criteria that the EPA believes landowners must meet to achieve and maintain the exemptions from CERCLA liability under the Brownfields Revitalization Act’s innocent landowners, contiguous properties, and bona fide prospective purchaser provisions. One example noted in the Common Elements Guidance, of an obligation that must be met to retain the benefit of CERCLA liability

exemption is to continue to encourage landowners to comply with land-use restrictions and institutional controls and not to “impede the effectiveness or integrity of any institutional control employed in connection with a response action.”

The requirements not to “impede the effectiveness or integrity of any institutional control” and to be “in compliance with any land use restrictions established or relied on in connection with the response action” come directly from the statutory requirements of the Brownfields Revitalization Act. The Common Elements Guidance expands and interprets these requirements to mean that failing to comply with a land-use restriction that is identified as a component of the remedy could be the basis to force a landowner to forfeit the Brownfield Revitalization Act’s liability protections. This is so even if those land-use restrictions had not been properly implemented through the use of an enforceable institutional control. These requirements could authorize the EPA to remedy the violation allowed by the ineffectiveness of the institutional control, and could allow the EPA to sue that noncompliant landowner for CERCLA cost recovery!!

The Common Elements Guidance goes on to illustrate actions that the EPA or state governments might view as impeding the effectiveness or integrity of an institutional control:

(1) Removing an on-site notice that contamination is present at the location where the notice was posted;

(2) Failing to provide notice of the existence of institutional controls to a purchaser of the site;

(3) Applying for a zoning change or variance if the current “designated” use of the property was intended to act as an institutional control; or

(4) Refusing to assist in the “implementation” of an institutional control by not recording a required notice in the public records, or not agreeing to grant an easement or use restriction covenant that was contemplated by the institutional control.

Unfortunately, both of these new guidance memos create issues and concerns from a real estate perspective. To satisfy both of them, the prospective landowner or lessee would need to know if the property to be acquired or leased is encumbered or affected by an institutional control. If

they know there is a control in place, or if they know what its terms and restrictions are, compliance with such a control and avoiding impeding the effectiveness or integrity of it could be problematic at best. Furthermore, the Common Elements Guidance even seems to imply that because landuse restrictions relied on in connection with a response action could be documented in a risk assessment, a remedy design document, or a permit or consent decree, some search for and review of those might be needed.

Yet, a buyer's or lessor's customary technique used in an effort to demonstrate that all appropriate inquiry had been undertaken to qualify as an innocent purchaser has been the performance of a Phase I environmental site assessment in accordance with the protocol and process established under ASTM Standard Practice 1527. In the Brownfields Revitalization Act, for a limited period of time Congress blessed the acceptability of these Phase I procedures because that Act specified that performance of an assessment in accordance with that process, at least until the EPA promulgated a different or a supplemental standard pursuant to the deadline and the requirements of that Act, would serve to satisfy the all appropriate inquiry threshold requirements to allow qualification for the various landowner liability protections created under the Act. Explicit provisions of the Brownfields Revitalization Act obligate the EPA to develop such a standard by January 2004.

ASTM is in the process of considering changes to the E1527 standard under which such assessments are performed. As a part of this process, ASTM has recognized that in its current form the focus and direction of the standard was toward doing whatever was necessary to qualify as an innocent landowner under the "innocent landowner" provisions of CERCLA. However, as a result of the Brownfields Revitalization Act's changes, three different landowner liability protections are available, covering the innocent landowner, the contiguous landowner, and the bona fide prospective purchaser. As a result of these changes, an ASTM Task Group of ASTM Subcommittee E50.02 currently is considering changes to the standard to reflect all three defenses to CERCLA liability.

The ASTM Task Group and subcommittee hope to clarify how landowners who want to qualify for these defenses can manage to obtain the needed information about the existence and character of institutional controls to allow them to satisfy the continuing requirements relative to institutional controls and land use requirements. One of many issues the Task Group is evaluating is whether the discovery of the existence of an institutional

control, and of the details and terms of that control, should be the responsibility of the environmental professional preparing an ASTM Phase I Environmental Site Assessment, or of the party requesting the assessment, or of both. At the present time, under the current version of the E 1527 ESA Standard Practice, unless otherwise negotiated at the time the Phase I is requested, the owner and not the consultant is responsible for providing information related to title matters, and in the application of this standard, and under the current provisions of E 1527, institutional controls have been regarded as an issue related to title.

Unfortunately, the title searches and other material reviewed by the environmental professional performing the Phase I assessment rarely would show anything disclosing the existence of, let alone the terms of, an institutional control. In most cases, any examination of recorded instruments affecting title has been limited to a search of record owners of the site over a specified time period. According to statements made during the evaluation of the ASTM E1527 standard in 1997 and 2000, potential users of the standard were thought to be reluctant to spend the amounts that more detailed title searches might require. In many instances, the search process is based on the environmental professional's review of databases that may not contain any information on institutional controls.

If some type of public records notice were recorded, *if* the database included a search of the recorded instruments in the public records, *if* any title examination undertaken encompassed more than the mere development of a record of the chain of ownership to the examined parcel, and *if* the recorded notice included more than a restrictive covenant, easement, or deed restriction, *perhaps* the search would disclose the existence of the institutional control. Controls other than proprietary controls rarely are identified in such public records notices. Unless state notice requirements were changed or a registry established, as contemplated by sections of the Uniform Act, or unless a specific state statute required such recordation or registry listing, it would be most extraordinary for the controls such as those used as examples in the new Institutional Controls Guidance — well drilling restrictions and deep excavation permit limits—to surface in even the most thorough public records search.

III. WHAT CAN THE NEW RESTATEMENT OF SERVITUDES DO FOR AN INSTITUTIONAL CONTROL?

Land-use controls for an environmental purpose may be appropriate in several instances. Included in this potential (but not all-encompassing) list, are the following:

- (1) a residential area in which soil is extensively contaminated. During remediation, surface soils are removed, but deeper contamination is allowed to remain in place;
- (2) remediation to a level not appropriate for unrestricted use, but more acceptable for a less intensive use. The most common example of this is when the remediation level is based on industrial or commercial exposure, but precludes any allowance of residential use and thereby does not consider exposure pathways in a residential setting;
- (3) remediation in which the level of required cleanup is to be evaluated in light of certain activities that might be anticipated at a site. Examples of these activities would be inclusion of residential or school use, or allowing a facility such as a daycare center to be included in what otherwise would be an industrial or commercial site;
- (4) circumstances when contaminated groundwater remains in place for an extended period of time, requiring the need to restrict access to the property for the duration; and
- (5) a situation when waste is left on a site and controls are put in place to prevent any damage to the contaminant barrier; an example of this would be use restrictions to limit any kind of excavations into an asphalt or clay barrier or cap.

All of these efforts to focus on current and future land use rely on institutional controls. Institutional controls, the term which EPA and state environmental agencies often use, is one which probably is even less familiar to real estate lawyers than the term brownfields has been until recently. EPA defines institutional controls as: “[N]on-engineered instruments, such as

administrative and/or legal controls, that help minimize the potential for human exposure to contamination . . . by limiting land or resource use.” The EPA explanation observes that these “are generally to be used in conjunction with, rather than in lieu of, engineering measures such as waste treatment or containment; can be used during all stages of the cleanup process to accomplish various cleanup-related objectives; and should be “layered” (i.e., use multiple [institutional controls]) or implemented in a series to provide overlapping assurances of protection from contamination.”

From this definition, evidently the term includes legal and administrative restrictions and constraints or mechanisms that limit human activities at, or access to, real property. In the environmental context, these restrictions are designed to ensure the actual use of a contaminated piece of property is maintained or restricted so the property is compatible with the assumptions underlying the approved level of cleanup. Institutional controls prevent, or at least restrict, exposure to levels of contamination thought by regulators to be unhealthy or otherwise harmful.

Even though the EPA’s definition of institutional controls does not encompass engineering controls, the two are often used together. Examples of engineering controls would include impermeable caps (which might also be nothing more than an impervious parking lot surface), trenches, or other physical barriers that could physically separate people from contact with contaminated materials. Such physical on-site limitations, just as paving or “capping” on a site, can prevent, or at least limit, access to contaminated soil beneath the cap. If the “potential receptors” —those people kept away from the contamination by the combination of the engineering and institutional controls—are thereby protected from potential exposure to the harmful effects of that contamination, higher levels of residual contamination can be permitted to remain in soils at a site.

Many states have similar definitions. In Florida for instance, as a part of the 2000 legislative changes to the state’s Brownfields Program, the term institutional controls was defined as follows: “Institutional controls” means the restriction on use of or access to a site to eliminate or minimize exposure to contaminants. Such restrictions may include, but are not limited to, deed restrictions, restrictive covenants, or conservation easements.”

In other states, such as Massachusetts, the term “institutional controls” is not used. Instead, as noted earlier, a comparable term, “activity and use limitations,” is a part of state statutory law and is defined as “a restriction,

covenant or notice concerning the use of real property which is imposed upon real property by a property owner or the department” in accordance with the state’s superfund law.

Institutional controls have been subdivided into a number of subcategories or different types of controls. For instance, EPA has published a brief report, termed a “Fact Sheet,” that lists the following four different types of controls, and comments on what the agency sees as the potential strengths and weaknesses of each type:

1. Proprietary Controls: This category includes traditional real property-based controls, such as restrictive covenants, intended to prohibit activities that could “compromise the effectiveness of the remedy” or that could “result in unacceptable risk to human health or the environment.” These controls can also provide access to a site for operation and maintenance of the remedial system. The EPA Site Manager’s Guide identifies easements and covenants as the most common examples of proprietary controls. Another type of proprietary control, although not covered by the EPA in the same detail as it gives covenants and easements, would be a reversionary or conditional right to the enjoyment of property currently owned or occupied by another person. Under this variation of the proprietary control, if the desired site use condition were violated, then the title to the property would revert.

2. Governmental Controls: This category includes state and locally imposed controls such as zoning, comprehensive plan limits, building codes and permits, and well-drilling permits or limits. This category imposes land or resource controls based on the authority of an existing unit of government. The EPA Site Manager’s Guide notes that in contrast to most of the privately created proprietary controls, which usually cannot be directly enforced by third parties such as governmental bodies, governmental controls are created by the government and can be enforced by those agencies.

3. Statutory Enforcement and Permit Tools: This category includes orders issued by regulatory agencies, consent orders or decrees between state and federal agencies and private parties. This category often will include sections that specify prohibited activities on the property covered by the order or decree permits issued by regulatory agencies, and can also specify permitted or precluded uses of a piece of property.

4. Informational Devices: This category includes mechanisms intended to provide notice to the public, including future owners or users of a site, that contamination remains at the site. Such notices usually would not impose affirmative obligations on the owners of the site, but instead would require that notices of the perceived risks be disclosed to potential site users. The EPA Site Manager's Guide identifies governmental registries and deed notices as examples of this type of institutional control. Other examples might include legal notices published in local papers or actual signs on the premises.

Under the informational device approach, instruments such as non-enforceable deed notices, registries, or advisories of contaminated property could be used to advise the public that a particular piece of property has been affected by environmental contamination. Some regulatory agencies have questioned the apparent lack of enforceability of such informational techniques and believe that this type of institutional control would be less acceptable as permanent institutional controls for remediation purposes. Landowners are generally more prone to accept such an informal informational approach rather than a public, recorded deed restriction and notice that would survive forever and could affect the future value of the property.

As already noted, particularly with certain types of institutional controls, the enforcement of the contemplated control often is thwarted by centuries of traditional real property law. Traditional real property law favors the free alienability of land, disfavoring restrictions that cloud the ability to convey, disfavoring enforcement of deed restrictions against parties who took title long after the restriction was imposed (especially if the character of the property's neighborhood has changed since that time), and imposing strict requirements that controls must be tied to the land.

Easements and covenants are two different types of land use restriction servitudes that can be used in connection with environmental remediation through their abilities to create rights, obligations, or limitations on the use of land.

Classic real estate doctrines limited the long-term enforceability of these types of easements in gross. One of the earliest observations of this limitation was the following commentary on the problems of reliance on servitudes law:

“The law in this area is an unspeakable quagmire. The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier like the income taxation of trusts and estates. Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again.”

Before the new Restatement, the traditional common law approaches and doctrines in this area were both complex and obscure. Under this body of common law, covenants concerning real estate generally had been considered enforceable only if they touched and concerned the real estate in question. Similarly, easements were enforceable only if the holder of the easement held a dominant estate (as opposed to a servient estate where the real estate is subject to the easement).

Although the Restatement now reaffirms that concepts such as these more properly should be used to ascertain whether King Arthur could lawfully restrict the use and access to Camelot than to determine if a restrictive covenant prohibiting any pumping of groundwater is valid, unfortunately courts may take a while longer to be convinced.

A recent decision from the United States Court of Appeals for the Fifth Circuit illustrates this problem. In *Refinery Holding Co. v. TRMI Holdings, Inc. (In re El Paso Refinery, L.P.)*, 302 F. 3d 343 (5th Cir. 2002) the parties asked the court to interpret the validity of a restrictive covenant in a deed purporting to bar the purchaser and all future owners of a contaminated oil refinery site from seeking any contribution or indemnification from the original seller. Writing for the panel, Circuit Judge Garza applied what the court saw as the applicable Texas law to determine whether a covenant would run with the land and bind subsequent owners.

The court first reviewed the history of the transaction. The case involved an oil refinery that the owner, a subsidiary of Texaco, had conveyed through a deed containing the following covenant:

Grantee [El Paso Ltd.] covenants and agrees that it shall never, directly or indirectly, attempt to compel Grantor [TRMI] to clean

up, remove or take remedial action or any other response with respect to any of the buried sludge sites, the waste pile site, the Active Hazardous Waste Storage Sites, the underground liquid petroleum and petroleum vapors (including, without limitation, any leaching therefrom or contamination of the air, ground or the ground water thereunder or any effects related thereto), or any and all waste water treatment ponds or treatment systems on or in the vicinity of said premises or seek damages therefor. *This covenant shall run with the land and shall bind Grantee's successors, assigns and all other subsequent owners of the property.*

In 1992, El Paso filed for bankruptcy, and after foreclosure and acquisition of the refinery by the major creditor, placed the site into a holding company, Refinery Holding Company, L.P. ("RHC"). RHC announced that it intended to assert contribution and environmental claims against Texaco and its subsidiary. Both the bankruptcy court and the district court held that the covenants in the deed to El Paso did not bind RHC. On appeal, the Fifth Circuit Court of Appeals agreed. There was no dispute that the original parties intended the covenant to run with the land and that RHC had acquired the property with notice of the covenant. So the court had only to determine (under Texas law) whether the covenant touched and concerned the land. The court did not discuss whether the benefit or the burden of this restriction touched the land, or whether the benefit of the restriction could be held in gross. Instead, the court found that neither the benefit nor the burden touched or concerned the land. The court viewed the restriction to be a "continuing and noncontingent contractual agreement" under which El Paso had agreed to refrain from requiring its grantor to remediate the property or to pay damages. In the opinion of the court, under Texas law such a contract could not qualify as a covenant.

The opinion does indicate that the Fifth Circuit was aware of the Restatement and the potential changes that adherence to a Restatement approach could bring to the outcome. However, while noting its awareness of the Restatement and of the fact that in its latest form the Restatement has abandoned the touch and concern requirement in favor of a policy consideration list, the Fifth Circuit seemed not to care, noting that "[b]ecause Texas has not yet adopted this approach, we do not address in this opinion the numerous policy arguments advanced by both parties."

The Fifth Circuit's unwillingness to pursue a Restatement-based analysis in this case may have been appropriate due to federal court deference

to these issues until state courts in Texas had an opportunity to declare whether it was now willing to follow the Restatement direction and abandon the touch and concern requirement. However, the unwillingness even to consider the impact of the Restatement, other than in the footnote noted, illustrates that environmental covenants, such as the one here or similar to those imposed as a part of an institutional control, will need the benefit of acts such as the Uniform Environmental Covenants Act.

As states began the implementation and evolution of brownfields and voluntary cleanup programs, they often recognized that they generally did not have existing statutory authority to require any imposition of land-use controls as a part of a remediation program. Instead, in many cases they were forced to solicit voluntary donations and contributions of use restrictions, with the consequent problems of enforceability. Unless the state has special statutory authority, which few states now have, regulatory remediation institutional controls could either be established under such proprietary contractual arrangement or perhaps through some type of relationship to authorized categories of land-use restriction, building permit requirements, or zoning controls.

Although they may have approved site remediation predicated on their assumption that there would be continued property compliance with the restrictions contained in an institutional control, federal and state environmental regulatory agencies also increasingly recognize that if that institutional control is based on governmental controls imposed by a landuse plan or a zoning limit, these environmental agencies usually have no ability to enforce those zoning and land-use controls. The environmental regulator has no authority to make or enforce zoning decisions. Those decisions are made by the local government, which, unlike the environmental regulatory agency, does not have that agency's depth of technical expertise concerning contamination or that agency's statutory mandate to protect human health and the environment. Instead, local governments base their zoning decisions on a completely different set of considerations, including a desired variety in geographic district densities, economic development impacts, education, transportation, tax consequences, compatibility with surrounding land uses, and community desires regarding pace and direction of growth.

The new Uniform Environmental Covenants Act attempts to deal with this issue by striking a balance between allowing environmental regulatory agencies to intrude into the realm of changing and enforcing general governmental land use, planning and zoning, and requiring local zoning and

planning agencies to monitor all institutional controls so that those local agencies never allow a plan or zoning change inconsistent with the use limits in the control. Existing state law in this area also attempts to deal with the problem. The Colorado statute that served as the basis for many of the provisions in the UECA, Senate Bill 1-145, goes further than the drafters of the UECA thought most states would accept.

As part of the increased use and development of state remediation programs, new legislation has been adopted to supplement existing state law. For instance, according to a recent Environmental Law Institute study, thirty-nine states now reserve a right to require additional site remediation if a change in land use or a violation of or failure to maintain an institutional control exists. Most states are also allowed to sue if a party violates an institutional control at a site. Twenty states reported that they attempted to use a layered pattern involving different types of institutional controls, creating less risk that a single control will fail. Seventeen states have procedures involving the use of either private landowner or state agency site audits to ensure that institutional controls remain in place and effective; one of the most detailed audit programs for these purposes is underway in Massachusetts.

IV. LONG-TERM STEWARDSHIP AND INSTITUTIONAL CONTROL ENFORCEMENT ISSUES

It may seem to be either a truism or so basic that it need not be stated, but one of the most fundamental aspects of long-term reliance on institutional controls is the realization that “legal instruments do not enforce themselves; they require someone to monitor compliance and take legal action if necessary.” Fundamental jurisdiction and motivation issues need to be considered when institutional controls are considered.

Environmental agencies such as the EPA and a state departments of environmental regulation customarily lack the jurisdictional authority to enforce private controls that are incorporated into deeds, easements, zoning limitations, and similar types of institutional controls. The EPA has clear statutory authority under CERCLA to enforce a control that is a part of a consent decree or that is the subject of a section 106 order. However, this CERCLA enforcement mechanism is of limited utility in the case of brownfields sites. Most state and local brownfields development enabling

statutes, rules and policies carve out and generally do not contemplate the development of an NPL-listed CERCLA site through these programs.

In response to these concerns, a number of states have adopted statutes or regulations specifically providing for land-use or similar controls to be established in the context of site remediation. These will usually address at least some of the legal (although rarely the practical and pragmatic) concerns previously noted. For instance, often they will specifically override otherwise applicable common law limitations on long-term enforcement of in gross land-use restrictions.

Among the techniques adopted by states in these new legislative efforts are statutory authorization for deed notices, enforceable land-use restrictions, unilateral agency orders, and contingent releases. Such statutory use restrictions can be found in Iowa, Massachusetts, Michigan, Connecticut, California, Colorado and many other states.

The Colorado statute (Senate Bill 1-145) served as the basis for many of the provisions in the new Uniform Environmental Covenants Act. It became effective on July 1, 2001, and in detail outlines the nature, use, and application of environmental covenants. It created a statutory environmental covenant that is directly enforceable by the Colorado Department of Public Health and the Environment (the "Colorado Department"). The statutory covenant runs with the land and is enforceable against subsequent owners as well as tenants. The Colorado Department takes the position that the statute does not create a property interest in the affected land, but instead creates a regulatory interest in the land.

