



Law Section Feature

Environmental Land Use Controls, Deed Restrictions and Institutional Controls

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Many rail development projects involve properties which may have environmental impacts from prior industrial or rail use. The requirement to remediate these properties in the context of redevelopment may hinge on these properties remaining in industrial or commercial use. In most jurisdictions, cleanup levels may be determined by the property use. Environmental agencies recognize risk based cleanup standards as part of a “brownfields” redevelopment of property. Many of these programs require some form of a land use restriction in order to obtain an agency approved closure, usually in the form of a “no further action” or other similar determination. This article will explain the land use restrictions and identify legal issues they present.

When environmental cleanup standards are approved for commercial or industrial use, environmental agencies are concerned about a change in property use. Commercial or industrial uses assume that people spend less time on the property which affects the exposure to toxins. It also assumes that more vulnerable populations, such as children or elderly, are not present on the property for long periods of time, if at all. A land use restriction manages the risk of a change in property use.

A land use restriction provides notice to a prospective purchaser; sets forth assumptions on which the remediation standard was derived; and may impose certain obligations on current and future landowners. The obligations may range from not doing something, such as prohibiting groundwater use, to taking positive action, such as maintaining engineered barriers or other features of the remediation.

Why not rely on zoning?

Agencies do not typically rely on zoning because the zoning can be changed. If the zoning is changed, then the use can change potentially to residential, which could expose people on the property longer. Similarly, some cities and counties with their own drinking water well supply have prohibitions on drilling groundwater wells. Some environmental agencies will accept this provided there is a memorandum of understanding between the agency and the city. While these can be used to support site closure, they are not always a sufficient substitute for a land use restriction.

Is there a standard form?

Land use restrictions are governed by state law. Many states now have a form for an environmental land use restriction. Generally, these forms are derived from state laws enacted to provide the legal basis to record a covenant to “run with the land.” Without such laws, a land use restriction may be interpreted as

a contractual promise between the two parties and not be binding on a subsequent purchaser. Land use restrictions are not generally favored by public policy. In fact, some states have laws which limit the duration of a land use covenant. Common law required that there be both benefited and burdened parcels and a covenant that “touches and concerns” the land before it could be enforced against a subsequent owner. Most states that have enacted laws may have modeled it on the Uniform Environmental Covenants Act. These forms can and should be adapted to the particular environmental condition of the property.

Access

Typically, there is a provision for access for environmental agencies and other governmental parties. If possible, access should be limited to the environmental agency regulating the remediation and not extend access to a municipality or other entity, which could invite regulatory attention which may otherwise be preempted. The terms of access should be negotiated or modified to include advance notice, provisions for a flagman, if necessary, and compliance with reasonable railroad safety standards. In addition, some limitations may be placed on access so that it is specifically tied to compliance with the deed restriction and not other matters. Reserving preemption rights in the restriction is also recommended.

Tailoring the Scope

Take care to limit the scope of the deed restriction to the geographic area of the environmental concern. Too often, agencies and consultants will include the entire area initially enrolled in the remediation program. Limiting the geographic scope may call for a separate survey or subdivision.

Give thought also to the duration of the environmental covenants. If the duration is in perpetuity, crafting conditions which would modify or revisit the need for the restriction may outline a process to follow. Be aware that some state laws prohibit land use restrictions in perpetuity. In such states, the restriction may be unenforceable after the prescribed period of time, depending on the applicable state law.

Other Issues with Environmental Agencies

Although the purpose of the deed restriction is to place subsequent owners on notice of the environmental condition and any obligations with respect to that condition, some states will require notice to be given to the state environmental agency in the deed restriction. For example, Colorado requires advance notice of any conveyance to its Department of Public Health and Environment as well as simultaneous notice of applications for building permit of land use change to both a local government and the Department.

Some states are requiring post-closure obligations in the land use restrictions which may include monitoring and reporting or additional contingent remediation measures. If the property was in a state program requiring financial assurance, these obligations may be required in the deed restriction as well.

Dealing with Vapor Intrusion

Recording a land use restriction or institutional control on property does not always prevent its redevelopment by a subsequent owner. Lately, concerns over vapor intrusion have led agencies to prohibit construction of buildings on vacant property with contaminants that may volatilize through the soil into basements. These types of restrictions may be removed if a soil gas study is accepted by the environmental agency. If you are selling property and have similar concerns, you may also voluntarily place building restrictions on the deed. While you don't want to take on liability for specific construction or design requirements, a general requirement to exercise due care in such design, and even to require

certification of the design by a licensed environmental professional, in order to prevent vapor intrusion may be included in the deed restriction.

Who Can Enforce the Restrictions?

The deed restriction should clearly state who can enforce the covenants. There have been cases where an environmental group or neighboring landowners seek to enforce environmental covenants, claiming that they are the intended beneficiaries of the covenant. The courts will weigh whether a third party outside the chain of ownership has standing under applicable state law.

States with legislation authorizing environmental institutional controls and land use restrictions generally provide for the agency to enforce the restrictions. Some also include a delegation to the local municipality or county. As with the access provisions, you may not wish to extend the enforcement authority to a local governmental entity which may otherwise be preempted.

Protecting the Seller from Future Liability

In a sale of impaired property, a land use restriction may protect the seller, whether required by an environmental agency or not. The land use restriction puts subsequent landowners on notice and can be worded so that they assume the risk of contamination. This may bar some tort claims to recover cleanup costs. In addition, a carefully worded land use restriction can require the subsequent owner to exercise due care with respect to the hazardous substances and take measures to maintain remediation features, such as a “cap” or engineered barrier. While these requirements won’t necessarily absolve the seller from potential liability to a government environmental agency, they do provide useful context and benchmark the environmental condition for a future dispute over liability or allocation.

It behooves the seller then to describe the environmental condition. Depending on the property, including the environmental reports would be impractical. Referencing the environmental reports or the environmental file maintained by the environmental agency overseeing the remediation is helpful.

A covenant not to sue or indemnity recorded on title in the land use restriction may be construed as a contractual promise and not be binding on subsequent owners unless they were privy to the sale.

Summary

Developing environmentally impaired property for a rail project often calls for institutional controls governing the environmental condition in the future. These should be reviewed and negotiated to fit the projects and protect the railroad. In addition, land use restrictions can protect the railroad from future environmental liability when sold to a third party.

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