

8

Land Use Planning And Control

Real Estate Planning

Public Land Use Control

Private Land Use Control

Environmental Controls

REAL ESTATE PLANNING

Goals of land use control

The master plan

Planning objectives

Plan development

Planning management

While the Constitution guarantees the right of individual ownership of real estate, it does not guarantee the uncontrolled sale, use, and development of real estate. As American history demonstrates, unregulated use of real estate has significant potential for eventual damage to property values as well as to the environment. Moreover, with the explosive urban growth in this century, it has become clear that regulation of land use is necessary to preserve the interests, safety, and welfare of the community.

Without a central authority to exert control, land use tends to be chaotic. For example, rapid growth can outpace the support capabilities of basic municipal services such as sewers, power, water, schools, roads and communications. On an aesthetic level, communities need controls to keep certain commercial and industrial land uses away from residential areas to avoid the undermining of property values by pollution, noise, and traffic congestion.

Goals of land use control

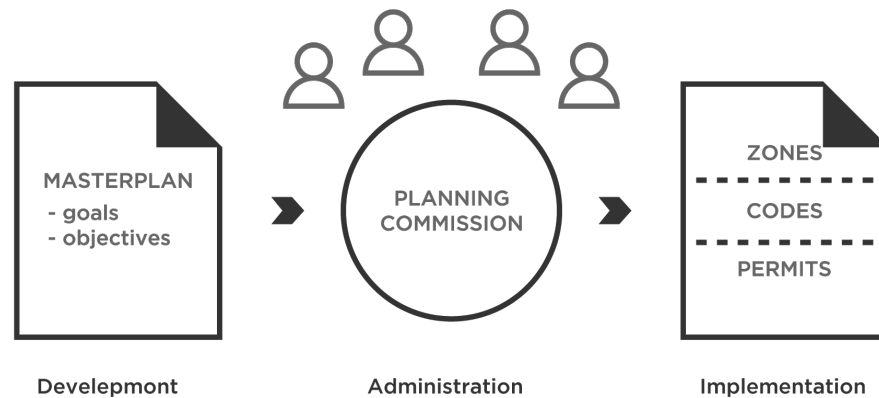
Over time, public and private control of land use has come to focus on certain core purposes. These are:

- ▶ preservation of property values
- ▶ promotion of the highest and best use of property
- ▶ balance between individual property rights and the public good, i.e., its health, safety and welfare
- ▶ control of growth to remain within infrastructure capabilities
- ▶ incorporation of community consensus into regulatory and planning activities

The optimum management of real property usage must take into account both the interests of the individual and the interests of the surrounding community. While maintaining the value of an individual estate is important, the owner of an estate must realize that unregulated use and development can jeopardize the value not only of the owner's estate but of neighboring properties. Similarly, the community must keep in mind the effect of government actions

on individual property values, since local government is largely supported by taxes based on the value of property.

Exhibit 8.1 Public Land Use Control



A community achieves its land usage goals through a three-phase process, as the exhibit illustrates:

- ▶ *development of a master plan* for the jurisdiction
- ▶ *administration of the plan* by a municipal, county, or regional planning commission
- ▶ *implementation of the plan* through public control of zoning, building codes, permits, and other measures

Municipal, county, and regional authorities develop comprehensive land use plans for a particular community with the input of property owners. A planning commission manages the master plan and enforces it by exercising its power to establish zones, control building permits, and create building codes.

In addition to public land use planning and control, some private entities, such as subdivision associations, can impose additional standards of land use on owners within the private entity's legal jurisdiction. Private controls are primarily implemented by deed restrictions.

The master plan

Public land use planning incorporates long-term usage strategies and growth policies in a **land use plan**, or **master plan**. In many states, the process of land use planning begins when the state legislature enacts laws *requiring all counties and municipalities to adopt a land use plan*. The land use plan must not only reflect the needs of the local area, but also conform to state and federal environmental laws and the plans of regional and state planning agencies. The state enforces its planning mandates by giving state agencies the power to approve county and local plans.

The master plan therefore fuses state and regional land use laws with local land use objectives that correspond to the municipality's social and economic conditions. The completed plan becomes the overall guideline for creating and enforcing zones, building codes, and development requirements.

Planning objectives The primary objectives of a master plan are generally to control and accommodate social and economic growth.

Amount of growth. A master plan *sets specific guidelines on how much growth the jurisdiction will allow*. While all communities desire a certain degree of growth, too much growth can overwhelm services and infrastructure.

To formulate a growth strategy, a plan initially forecasts growth trends, then estimates how well the municipality can keep pace with the growth forecast. The outcome is a policy position that limits building permits and development projects to desired growth parameters. A growth plan considers:

- ▶ nature, location and extent of permitted uses
- ▶ availability of sanitation facilities
- ▶ adequacy of drainage, waste collection, and potable water systems
- ▶ adequacy of utilities companies
- ▶ adequacy and patterns of thoroughfares
- ▶ housing availability
- ▶ conservation of natural resources
- ▶ adequacy of recreational facilities
- ▶ ability and willingness of the community to absorb new taxes, bond issues, and assessments

Growth patterns. In addition to the quantity of growth, a master plan also *defines what type of growth will occur, and where*. Major considerations are:

- ▶ the type of enterprises and developments to allow
- ▶ residential density and commercial intensity
- ▶ effects of industrial and commercial land uses on residential and public sectors, i.e., where to allow such uses
- ▶ effect of new developments on traffic patterns and thoroughfares
- ▶ effects on the environment and environmental quality (air, water, soil, noise, visual aspects)
- ▶ effect on natural resources that support the community
- ▶ code specifications for specific construction projects

Accommodating demand. As the master plan sets forth guidelines for how much growth will be allowed, it must also *make plans for accommodating expanding or contracting demand for services and infrastructure*. The plan must identify:

- ▶ facilities requirements for local government
- ▶ new construction requirements for streets, schools, and social services facilities such as libraries, civic centers, etc.
- ▶ new construction required to provide power, water and sewer services

Plan development In response to land use objectives, community attitudes, and conclusions drawn from research, the planning personnel formulate their plan. In the course of planning, they analyze

- ▶ population and demographic trends
- ▶ economic trends
- ▶ existing land use
- ▶ existing support facilities
- ▶ traffic patterns

**Planning
management**

Public land use management takes place within county and municipal **planning departments**. These departments are responsible for:

- ▶ long-term implementation of the master plan
- ▶ creating rules and restrictions that support plans and policies
- ▶ enforcing and administering land use regulation on an everyday basis

The planning commission. In most jurisdictions, a planning commission or board comprised of officials appointed by the government's legislative entity handles the planning function.

The commission oversees the operations of the department's professional planning staff and support personnel. In addition, the commission makes recommendations to elected officials concerning land use policy and policy administration.

The planning commission is responsible for:

- ▶ approving site plans and subdivision plans
- ▶ approving building permits
- ▶ ruling on zoning issues

PUBLIC LAND USE CONTROL

Zoning
Zoning administration
Subdivision regulation
Building codes
Public acquisition and ownership
Environmental restrictions

At the state level, the legislature enacts laws that control and restrict land use, particularly from the environmental perspective. At the local level, county and city governments control land use through the authority known as **police power**. The most common expressions of police power are county and municipal **zoning**. Other examples of public land use control are:

- ▶ subdivision regulations
- ▶ building codes
- ▶ eminent domain
- ▶ environmental restrictions
- ▶ development requirements

Governments also have the right to **own** real property for public use and welfare. In exercising its ownership rights, a municipality may **annex** property adjacent to its existing property or purchase other tracts of land through conventional transfers. Where necessary, it may force property owners to sell their property through the power of **eminent domain**.

Zoning

Zoning is the primary tool by which cities and counties regulate land use and implement their respective master plans. The Constitution grants the states the legal authority to regulate, and the states delegate the authority to counties and municipalities through legislation called **enabling acts**.

The zoning ordinance. The vehicle for zoning a city or county is the **zoning ordinance**, a regulation enacted by the local government. The intent of zoning ordinances is to specify land usage for every parcel within the jurisdiction. In some areas, state laws permit zoning ordinances to apply to areas immediately beyond the legal boundaries of the city or county.

Zoning ordinances implement the master plan by regulating density, land use intensity, aesthetics, and highest and best use. Ordinances typically address:

- ▶ the nature of land use-- office, commercial, residential, etc.
- ▶ size and configuration of a building site, including setbacks, sidewalk requirements, parking requirements, and access
- ▶ site development procedures
- ▶ construction and design methods and materials, including height restrictions, building-to-site area ratios, and architectural styles
- ▶ use of space within the building
- ▶ signage

Ordinance validity. Local planners do not have unlimited authority to do whatever they want. Their zoning ordinances must be clear in import, apply to all parties equally, and promote health, safety, and welfare of the community in a reasonable manner.

Building permits. Local governments enforce zoning ordinances by issuing building permits to those who want to improve, repair, or refurbish a property. To receive a permit, the project must comply with all relevant ordinances and codes. Further zoning enforcement is achieved through periodic inspections.

Types of zones. One of the primary applications of zoning power is the separation of residential properties from commercial and industrial uses. Proper design of land use in this manner preserves the aesthetics and value of neighborhoods and promotes the success of commercial enterprises through intelligently located zones.

Six common types of zone are

- ▶ residential
- ▶ commercial
- ▶ industrial
- ▶ agricultural
- ▶ public
- ▶ planned unit development (PUD)

Residential. Residential zoning restricts land use to private, non-commercial dwellings. Sub-zones in this category further stipulate the types of residences allowed, whether single-family, multi-unit complexes, condominiums, publicly subsidized housing, or other form of housing.

Residential zoning regulates:

- ▶ *density*, by limiting the number and size of dwelling units and lots in an area
- ▶ values and aesthetics, by limiting the type of residences allowed. Some areas adopt **buffer zones** to separate residential areas from commercial and industrial zones.

Commercial. Commercial zoning regulates the location of office and retail land usage. Some commercial zones allow combinations of office and retail uses on a single site. Sub-zones in this category may limit the type of retail or office activity permitted, for example, a department store versus a strip center.

Commercial zoning regulates:

- ▶ intensity of usage, by limiting the area of store or office per site area. Intensity regulation is further achieved by minimum parking requirements, setbacks, and building height restrictions.

Industrial. Industrial zoning regulates:

- ▶ intensity of usage
- ▶ type of industrial activity
- ▶ environmental consequences

A municipality may not allow some industrial zones, such as heavy industrial, at all. The industrial park is a relatively recent concept in industrial zoning.

Agricultural. Agricultural zoning restricts land use to farming, ranching, and other agricultural enterprises.

Public. Public zoning restricts land use to public services and recreation. Parks, post offices, government buildings, schools, and libraries are examples of uses allowed in a public zone.

Planned Unit Development (PUD). planned unit development zoning restricts use to development of whole tracts that are designed to use space efficiently and

Zoning administration

maximize open space. A PUD zone may be for residential, commercial, or industrial uses, or combinations thereof.

Zoning Board of Adjustment. A county or local board, usually called the zoning board of adjustment or zoning appeals board, administers zoning ordinances. The board rules on interpretations of zoning ordinances as they apply to specific land use cases presented by property owners in the jurisdiction. In effect, the zoning board is a court of appeals for owners and developers who desire to use land in a manner that is not entirely consistent with existing ordinances.

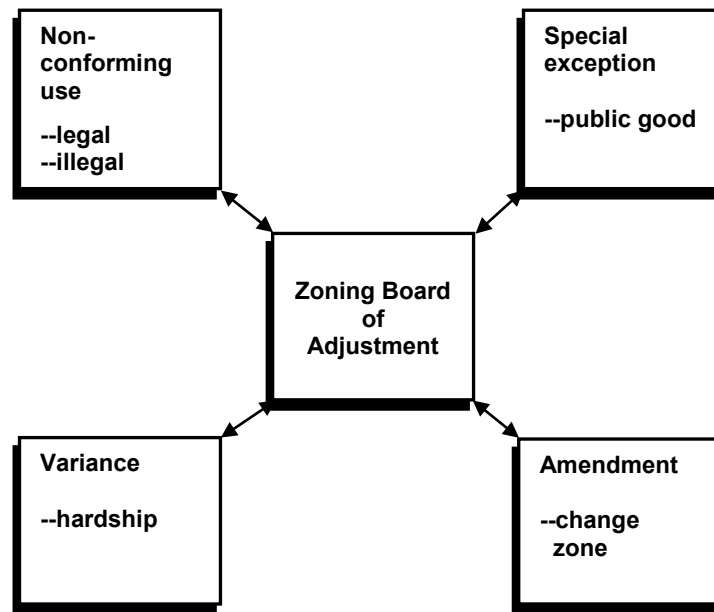
The board conducts hearings of specific cases and renders official decisions regarding the land use based on evidence presented.

A zoning board generally deals with such issues and appeals as:

- ▶ nonconforming use
- ▶ variance
- ▶ special exception or conditional use permit
- ▶ zoning amendment

If the board rejects an appeal, the party may appeal the ruling further in a court of law.

Exhibit 8.2 Zoning Appeals



Nonconforming use. A nonconforming use is one *that clearly differs from current zoning*. Usually, nonconforming uses result when a zoning change leaves existing properties in violation of the new ordinance. This type of nonconforming use is a **legal** nonconforming use. A board usually treats this kind of situation by allowing it to continue either

- ▶ indefinitely
- ▶ until the structures are torn down
- ▶ only while the same use continues, or
- ▶ until the property is sold

For instance, a motel is situated in a residential area that no longer allows commercial activity. The zoning board rules that the motel may continue to operate until it is sold, destroyed or used for any other commercial purpose.

An **illegal nonconforming use** is one that conflicts with ordinances that were in place before the use commenced. For instance, if the motel in the previous example is sold, and the new owner continues to operate the property as a motel, the motel is now an illegal, nonconforming use.

Variance. A zoning variance allows a use that differs from the applicable ordinance for a variety of *justifiable* reasons, including that:

- ▶ compliance will cause unreasonable hardship
- ▶ the use will not change the essential character of the area
- ▶ the use does not conflict with the general intent of the ordinance

For example, an owner mistakenly violates a setback requirement by two feet. His house is already constructed, and complying with the full setback now would be extremely expensive, if not impossible. The zoning board grants a variance on the grounds that compliance would cause an unreasonable hardship.

A grant of a zoning variance may be unconditional, or it may require conditions to be fulfilled, such as removing the violation after a certain time.

Special exception. A special exception grant authorizes a use that is not consistent with the zoning ordinance in a literal sense, yet is clearly *beneficial or essential to the public welfare* and does not materially impair other uses in the zone.

A possible example is an old house in a residential zone adjacent to a retail zone. The zoning board might grant a special exception to a local group that proposes to renovate the house and convert it to a local museum, which is a retail use, since the community stands to benefit from the museum.

Amendment. A current or potential property owner may petition the zoning board for an outright change in the zoning of a particular property. For example, a property zoned for agricultural use has been idle for years. A major employer desires to develop the property for a local distribution facility, which would create numerous jobs, and petitions for an amendment. The board changes the zoning from agricultural to light industrial to permit the development. Since a change in zoning can have significant economic and social impact, an appeal for an amendment is a difficult process that often involves public hearings.

Subdivision regulation

In addition to complying with zoning ordinances, a developer of multiple properties in a subdivision must meet requirements for subdivisions.

Subdivision plat approval. The developer submits a plat of subdivision containing surveyed plat maps and comprehensive building specifications. The plat, as a minimum, shows that the plan complies with local zoning and building ordinances. The project can commence only after the relevant authority has approved the plat.

Subdivision requirements typically regulate:

- ▶ location, grading, alignment, surfacing, street width, highways
- ▶ sewers and water mains
- ▶ lot and block dimensions
- ▶ building and setback lines
- ▶ public use dedications
- ▶ utility easements
- ▶ ground percolation
- ▶ environmental impact report
- ▶ zoned density

Concurrency. Many states have adopted policies that require developers, especially of subdivisions, to take responsibility for the impact of their projects on the local infrastructure by taking corrective action. Concurrency is a policy that requires the developer to make accommodations *concurrently* with the development of the project itself, not afterwards. For example, if a project will create a traffic overload in an area, the developer may have to widen the road while constructing the project.

FHA requirements. In addition to local regulation, subdivisions must meet FHA (Federal Housing Authority) requirements to qualify for FHA financing insurance. The FHA sets standards similar to local ordinances to ensure an adequate level of construction quality, aesthetics, and infrastructure services.

Building codes

Building codes allow the county and municipality to protect the public against the hazards of unregulated construction. Building codes establish standards for virtually every aspect of a construction project, including offsite improvements such as streets, curbs, gutters, drainage systems, and onsite improvements such as the building itself.

Building codes typically address:

- ▶ architectural and engineering standards
- ▶ construction materials standards
- ▶ building support systems such as life safety, electrical, mechanical, and utility systems

Certificate of occupancy. Building inspectors inspect a new development or improvement for code compliance. If the work complies, the municipality or county issues a **certificate of occupancy** which officially clears the property for occupation and use.

Public acquisition and ownership

If efforts to regulate privately owned property are inadequate or impractical in a particular situation, or if there is a compelling public need, a county or local government may acquire property by means of direct purchase.

A government body might acquire land because of the public need for:

- ▶ thoroughfares and public rights-of-way
- ▶ recreational facilities
- ▶ schools
- ▶ essential public facilities
- ▶ urban renewal or redevelopment

In many cases, public acquisition of property is a voluntary transaction between the government entity and the private owner. However, if the private party is unwilling to sell, the government may purchase the property anyway. The power to do this is called **eminent domain**.

Eminent domain. Eminent domain allows a government entity to purchase a fee, leasehold, or easement interest in privately owned real property for the **public good** and for **public use**, regardless of the owner's desire to sell or otherwise transfer any interest. In exchange for the interest, the government must pay the owner "just compensation."

To acquire a property, the public entity initiates a condemnation suit. Transfer of title extinguishes all existing leases, liens, and other encumbrances on the property. Tenants affected by the condemnation sale may or may not receive compensation, depending on the terms of their agreement with the landlord.

Public entities that have the power of eminent domain include:

- ▶ all levels of government
- ▶ public districts (schools, etc.)
- ▶ public utilities
- ▶ public service corporations (power companies, etc.)
- ▶ public housing and redevelopment agencies
- ▶ other government agencies

To acquire a property, the public entity must first adopt a formal resolution to acquire the property, variously called a "resolution of necessity." The resolution must be adopted at a formal hearing where the owner may voice an opinion. Once adopted, the government agency may commence a condemnation suit in court. Subsequently, the property is purchased and the title is transferred in exchange for just compensation. Transfer of title extinguishes all existing leases, liens, and other encumbrances on the property. Tenants affected by the condemnation sale may or may not receive compensation, depending on the terms of their agreement with the landlord.

In order to proceed with condemnation, the government agency must demonstrate that the project is necessary, the property is necessary for the project, and that the location offers the greatest public benefit with the least detriment.

As an eminent domain proceeding is generally an involuntary acquisition, the condemnation proceeding must accord with due process of law to ensure that it does not violate individual property rights. Further, the public entity must justify its use of eminent domain in court by demonstrating the validity of the intended public use and the resulting "public good" or "public purpose" ultimately served.

The issue of eminent domain versus individual property rights has recently come under scrutiny in light of a 2005 Supreme Court ruling that affirmed the rights of state and local governments to use the power of eminent domain for urban re-development and revitalization. The ruling allowed that private parties could undertake a project for profit without any public guarantee that the project would be satisfactorily completed. The ruling brought the issue of “public use” into question, as the use of the re-development could well be private and even a private for-profit enterprise. The winning argument was that the “public purpose” is served when redevelopment creates much needed jobs in a depressed urban area. As a result of this decision, many see the power of eminent domain and the definition of public good as being in conflict with the constitutional rights of private property ownership. New and different interpretations of the public’s right to pre-empt private property ownership by eminent domain may be expected.

PRIVATE LAND USE CONTROL

Deed restriction
Declaration restriction
Deed condition
HOA regulation

Property owners in the private sector can regulate land use to some extent through deed restrictions and deed conditions.

Deed restriction

A restriction expressed in a conveyance (deed or lease) of a residential, commercial, or industrial property places limits on the use of the property. Such restrictions are also referred to as "covenants, conditions, and restrictions," or CCRs. A quitclaim deed can terminate a private deed restriction.

Typical restrictions concern:

- ▶ required minimum area of a residence
- ▶ setback
- ▶ prohibition against construction of sheds or secondary buildings
- ▶ prohibition against conducting certain commercial activities

Deed restrictions may not be discriminatory by restricting ownership or use on the basis of race, religion, marital status, or gender.

Restrictions on commercial property use may not violate fair trade and anti-trust laws.

Declaration restriction

The declaration of a subdivision, Planned Unit Development, condominium, and commercial or industrial park contains private use restrictions. These have the same legal effect as a deed restriction, as the declaration attaches to the rights in the property. A private party cannot, however, extinguish a declaration restriction by agreement or quitclaim deed.

The kinds of restrictions found in declarations are much the same as those found in deeds: construction restraints, aesthetics standards, etc.

The underlying purpose of restrictions is to preserve the value and quality of the neighborhood, commercial center, or industrial park.

Injunction. A private usage restriction can be enforced by filing for a court injunction. A court can order the violator to cease and desist, or to correct the infraction. If, however, owners in a subdivision or park allow a violation to continue for a sufficient length of time, they can lose their right to legal recourse.

Deed condition

A deed condition may restrict certain uses of a property, much like a deed restriction. However, violation of a deed condition gives the grantor the right to re- take possession of the property and file suit for legal title.

HOA regulation

Homeowners' associations (HOAs) are bodies, usually established by developers, that determine rules and regulations for the operation of a housing development. The rules are presented in a Declaration of Covenants, Conditions, and Restrictions (CC&Rs) for the development and in association by-laws. Common regulations include:

- ▶ fee obligations
- ▶ pet restrictions
- ▶ rental guidelines
- ▶ maintenance standards
- ▶ occupancy limits
- ▶ parking
- ▶ noise
- ▶ required insurance

An HOA may not impose a rule that conflicts with the law or violates homeowner rights. Infringements of rules and regulations may be enforced by the action of a civil court.

ENVIRONMENTAL CONTROLS

Areas of concern

Major legislation

Responsibilities and liabilities

In recent years, federal and state legislatures have enacted laws to conserve and protect the environment against the hazards of growth and development, particularly in terms of air, water, and soil quality.

Regional, county, and local planners must integrate environmental laws into their respective land use plans and regulations. Private property owners are responsible for complying with these laws.

Areas of concern

Air. Air quality, both indoor and outdoor, has been a matter of concern since the 1960's. With today's construction methods creating airtight, energy-efficient structures, attention to sources of indoor air pollution is more important than ever. Off-gassing from synthetic materials and lack of ventilation can lead to such consequences as Sick Building Syndrome (SBS) and Building-Related Illness (BRI) as well as other health problems. Among the significant threats are:

- ▶ *asbestos*, a powdery mineral once commonly used as a fireproof insulating material around pipes, in floor tiles and linoleum, in siding and roofing, in wallboard, joint compound, and many other applications.

When airborne, it is a health hazard. Its use today is highly restricted, and removal can be expensive and dangerous. Inspection by a certified asbestos inspector is the best way to determine whether a building needs treatment.

- ▶ *carbon monoxide*, a colorless, odorless, poisonous gas that may result from faulty heating equipment. Home and commercial detection devices are available.
- ▶ *formaldehyde*, a chemical used in building materials and in other items such as fabrics and carpeting. As it ages, formaldehyde gives off a colorless, pungent gas.

Its use in urea-formaldehyde foam insulation (UFFI) was banned 1982 (ban later reduced to a warning) but the material is still present in many structures. *Other substances known in general as volatile organic compounds (VOCs)* and used in construction materials such as adhesives emit toxic fumes. Professional testing can identify levels and, in some cases, sources of formaldehyde gas and other VOCs.

- ▶ *lead*, a heavy metal once widely used in paints and plumbing materials. It has been banned in paint since 1978 and in new plumbing since 1988.

It continues to be a health threat, particularly to children, as it occurs in airborne paint particles, paint chips, and soil and groundwater polluted by various external sources of emission. Inspection should be performed by licensed lead inspectors.

- ▶ *mold*, a fungus that grows in the presence of moisture and oxygen on virtually any kind of organic surface.

It often destroys the material it grows on and emits toxic irritants into the air. Tightly sealed structures with inadequate ventilation are most susceptible. Roof leaks, improper venting of appliances, runoff from gutters and downspouts, and flood damage are common contributors. In recent years, mold- and mildew-related lawsuits and claims have become substantial.

- ▶ *radon*, a colorless, odorless, radioactive gas that occurs naturally in the soil throughout the United States.

It enters buildings through foundation and floor cracks, wall seams, sump pits, and windows, among other ways. At accumulations above certain levels, it is suspected of contributing to cancer. Excessive radon can be

removed by special ventilation systems. Professional and home inspections are available.

Soil and water. Soil, groundwater, and drinking water supplies are vulnerable to pollution from leaking landfills; improper waste disposal; agricultural runoff; industrial dumping in waterways; highway and rail spills; industrial emissions; internal combustion emissions; and underground tanks leaking fuels and chemicals, to mention but a few sources. Some of the problems subject to controls are:

- ▶ dioxins, a family of compounds produced as a byproduct of manufacturing and incinerating materials that contain chlorine
- ▶ lead and *mercury*
- ▶ MTBE, Methyl Tertiary Butyl Ether, a gasoline additive
- ▶ PCB, Polychlorinated Biphenyl, a substance formerly widely used as an electrical insulation
- ▶ *Underground Storage Tanks* (USTs), regulated since 1984
- ▶ *Wetlands*, considered part of the natural water filtering system as well as special habitats, subject to restrictions on development and use.

Other ambient and natural conditions. Other regulated and controlled environmental conditions include:

- ▶ *Electromagnetic Fields* (EMFs) created by powerlines
- ▶ *noise* created by airports, air, rail and highway traffic
- ▶ *earthquake and flood hazards* that affect hazard insurance, lending practices, and construction requirements for buildings in designated flood and earthquake zones.

Exhibit 8.3 Environmental Concerns

	Indoors	Outdoors
Air	asbestos, BRI, carbon monoxide, formaldehyde, lead-based paint, mold, radon, SBS, VOCs	airborne lead, carbon dioxide, mercury, sulfur, dioxins
Soil		dioxins, lead, PCBs, waste, hazardous materials
Water	dioxins, lead plumbing, lead-paint, mercury, MTBE, PCBs	dioxins, lead, mercury, MTBE, PCBs, USTs, waste, hazardous materials
Ambience		EMFs, noise
Structure	UFFI	flood, earthquake

BRI: Building-Related Illness
 SBS: Sick Building Syndrome
 VOC: Volatile Organic Compound
 MTBE: Methyl Tertiary Butyl Ether

PCB: Polychlorinated Biphenyl
 UST: Underground Storage Tank
 EMF: Electromagnetic Field
 UFFI: Urea-Formaldehyde Foam Insulation

Major legislation

National Environmental Policy Act (1969). This act created the Environmental Protection Agency (EPA) and the Council for Environmental Quality, giving them a mandate to establish environmental standards for land use planning. The act also required environmental impact surveys on large development projects.

Clean Air Amendment (1970). This act authorized the EPA to establish air quality standards for industrial land uses as well as for automobile and airplane emissions.

Water Quality Improvement Act (1970), the Water Pollution Control Act amendment (1972), the Clean Water Act Amendment (1977). These acts addressed standards to control water pollution and industrial wastes from the standpoints of future prevention as well as remediation of existing pollution.

Resource Recovery Act (1970), the Resource Conservation and Recovery Act (1976), the Comprehensive Environmental Response, Compensation and Liability Act (Superfund) (1980), the Superfund Amendment and Reauthorization Act (1986). These acts addressed disposal of solid and toxic wastes and measures for managing waste. In addition, the Superfund act provided money for hazardous waste disposal and the authority to charge cleanup costs to responsible parties.

Lead-based paint ban (1978) and Residential Lead-based Paint Hazard Reduction Act (1992, 1996). These regulations banned lead in the manufacture of paint and established disclosure requirements and guidelines for testing and remediation.

Exhibit 8.4 Landmarks in Environmental Control Legislation

Legislation	Date	Regulated
Solid Waste Disposal Act (later part of RCRA)	1965 (1976, 1999, 2002)	landfills
Air Quality Act, Clean Air Act	1967 (1970)	air quality standards
National Environmental Policy Act (NEPA)	1969 (1970)	created EPA
Flood Control Act	amended 1969	building in flood zones; flood insurance
Resource Recovery Act	1970	solid waste disposal
Water Quality Improvement Act	1970	dumping in navigable waters; wetlands
Water Pollution Control Act amendment	1972	dumping in navigable waters; wetlands
Marine Protection Research and Sanctuaries Act	1972	offshore waste dumping
Noise control legislation	1972	airport- and transportation-related noise
Coastal Zone Management Act	1972	beaches, marine habitats
Clean Water Act	1972 (1977)	dumping in navigable waters; wetlands
Safe Drinking Water Act	1974	public water supply, lead
Resource Conservation and Recovery Act (RCRA)	1976	hazardous waste, solid waste
Toxic Substances Control Act	1976	industrial chemicals
Lead-based paint ban (US Consumer Product Safety Commission rule)	1978	lead-based paint in residences
PCB ban (EPA rule)	1979	polychlorinated biphenyls
RCRA amendment	1984	underground storage tanks
Comprehensive Environmental Response, Compensation and Liability Act	1980	hazardous waste disposal
UFFI ban	1982	formaldehyde in insulation materials
Superfund Amendment and Reauthorization Act	1986	hazardous waste cleanup costs
Asbestos ban (EPA rule)	1989	asbestos in building materials
Residential Lead-based Paint Hazard Reduction Act (EPA and HUD rule)	1992 (1996)	lead-based paint disclosure and treatment
Flood Insurance Reform Act	1994	flood insurance in flood zones
Brownfields legislation	2002	industrial site cleanup

Responsibilities & liabilities

Licensees are expected to be aware of environmental issues and to know where to look for professional help. They are not expected to have expert knowledge of environmental law nor of physical conditions in a property. Rather, they must treat potential environmental hazards in the same way that they treat other material facts about a property: disclosure.

In sum, for their own protection, licensees should be careful to:

- ▶ be aware of potential hazards
- ▶ disclose known material facts
- ▶ distribute the HUD booklet (below)
- ▶ know where to seek professional help.

Lead. The Lead-based Paint Act of 1992 requires a seller or seller's agent to disclose known lead problems in properties built before 1978. The licensee must give the buyer or lessee a copy of the EPA-HUD-US Consumer Product Safety Commission booklet, "Protect Your Family from Lead in your home."

Further, the 1996 lead-based paint regulation requires sellers or lessors of almost all residential properties built before 1978 to disclose known lead-based paint hazards and provide any relevant records available. The seller is not required to test for lead but must allow the buyer a ten-day period for lead inspection. Only a licensed lead professional is permitted to deal with testing, removal or encapsulation. It is the real estate practitioner's responsibility to ensure compliance.

CERCLA/Superfund. Under CERCLA and the Superfund Amendment of 1986, current landowners as well as previous owners of a property may be held liable for environmental violations, even if "innocent" of a violation. Sellers often carry the greatest exposure, and real estate licensees may be held liable for improper disclosure.

A real property owner can be held liable for the entire cost of remediating soil, groundwater, or indoor air contamination. A tenant can be held liable for cleanup costs as an "operator" if tenant operations are linked to contamination

Sale of a contaminated property. Selling a property with an environmental problem does not avoid liability for the seller, although seller and buyer may agree to share or transfer some liability. If there is a concern, a Phase I audit or Environmental Site Assessment (ESA) should be conducted before proceeding with the transaction. A Phase I audit identifies

- ▶ prior uses
- ▶ presence of hazardous materials

The Phase I ESA reviews environmental documents; conducts a title search for environmental liens and restrictions; and includes a visual inspection of the site and surrounding properties. There is no sampling or testing. Fannie Mae, Freddie Mac, and HUD require special Phase I ESAs on certain properties.

A Phase II audit (ESA) is conducted if a site is considered contaminated. This is a more detailed investigation using chemical analysis to uncover hazardous

substances and/or petroleum hydrocarbons in samples of soil, groundwater or building materials.

A Phase III audit (ESA) involves remediation. Intensive testing, sampling, monitoring, and modeling are applied to design plans for remediation, cleanup, and follow-up monitoring. Remediation may use a variety of techniques and technologies, such as excavation and removal, dredging, chemical treatment, pumping, and solidification. Major remediation efforts usually require extensive consultation with the surrounding community. Federal funding may be available.

See Chapter 20 for further discussion. For more information, also check these sources:

asbestos	https://www.epa.gov/asbestos
carbon monoxide	https://www.epa.gov/indoor-air-quality-iaq/what-carbon-monoxide
formaldehyde	https://www.epa.gov/formaldehyde
lead	https://www.epa.gov/lead https://www.hud.gov/program_offices/healthy_homes/enforcement/disclosure https://www.epa.gov/lead/real-estate-disclosure
mold	https://www.epa.gov/mold/mold-and-your-home
radon	https://www.epa.gov/radon https://www.hud.gov/program_offices/healthy_homes/healthyhomes/radon
CERCLA	https://www.epa.gov/superfund

8

Land Use Planning and Control Snapshot Review

REAL ESTATE PLANNING

Goals of land use control

- preserve property values; promote highest and best use; safeguard public health, safety and welfare; control growth; incorporate community consensus
- process: develop plan; create administration; authorize controls

The master plan

- long term growth and usage strategies; often required by state law
- local plans fuse municipal goals and needs with state and regional laws

Planning objectives

- control growth rates: how much growth will occur and at what rate
- control growth patterns: type of growth desired, where it should be located
- accommodate demand for services and infrastructure

Plan development

- research trends and conditions; blend local and state objectives into master plan

Planning management

- commission makes rules, approves permits, codes, and development plans

PUBLIC LAND USE CONTROL

Zoning

- "police power" granted by state-level enabling acts; zoning ordinance: creates zones, usage restrictions, regulations, requirements

Types of zone

- residential, commercial, industrial, agricultural, public, PUD

Zoning administration

- Zoning Board of Adjustment oversees rule administration and appeals
- nonconforming use: legal if use prior to zone creation; variance: exception based on hardship; special exception: based on public interest; amendment: change of zones; rezoning

Subdivision regulation

- plat of subdivision and relevant requirements must be met and approved; must meet FHA requirements for insured financing

Building codes

- comprehensive onsite and offsite construction and materials standards; must be met to receive certificate of occupancy

Public acquisition and ownership

- eminent domain: public power to acquire property for public use

PRIVATE LAND USE CONTROL

Deed restriction

- single-property use restriction as stipulated in a deed; may not be discriminatory

Declaration restriction

- use restriction in multiple-property declarations; enforced by court injunction

Deed condition

- usage restriction that can trigger repossession by a previous owner if violated

HOA regulation

- homeowner's association rules require conformity to CCRs

ENVIRONMENTAL CONTROLS

Areas of concern

- air, soil, water quality; ambient health hazards; natural hazards

Major legislation

- limits damage to environment; standards for air, land, water, materials use

Responsibilities & liabilities

- disclosure and information for practitioners; remediation for owners; lead disclosure; CERCLA/Superfund exposure; Phase I, II, III Environmental Site Assessments to detect and mitigate contamination