
ENVIRONMENTAL DEED RESTRICTIONS

*Public Rights-of-Ways and City-owned
Properties*

Business and Commerce Committee
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Purpose

- Across the nation, cities and towns are grappling with the challenge of contaminated soil and groundwater, which are often barriers to economic development. Additionally, cities were often overlooked as landowners in the past. Now applicants are required to obtain deed restrictions from all owners, including cities, when deed restrictions may be used as a remedy in lieu of removal of contaminated soil and groundwater.
- This briefing proposes one remedy by establishing procedures to evaluate and value requests for deed restrictions related to environmental issues on city-owned properties and public rights-of-way

Introduction

- Those involved in an environmental investigation or cleanup are required to provide notice to adjacent property owners if the impact extends beyond their boundaries
- State law allows contamination to remain in place if an applicant can demonstrate the contamination levels do not adversely impact human health or the environment by either an engineering, institutional or a risk control

Institutional Controls

- Institutional controls are administrative or legal as opposed to physical or engineering mechanisms used to protect public health and the environment from residual contamination at superfund sites, former Brownfield sites or other contaminated sites.
- Examples of institutional controls are deed restrictions or a local ordinance
 - A deed restriction, as the name implies, restricts the use of the impacted land or ground water
 - A local ordinance may be adopted by a municipality which bans groundwater use

Engineering Controls

- Engineering controls are physical or engineering mechanisms for managing risks to human health and the environment.
- Examples of engineering controls are slurry walls, caps, waste control units, landfills, etc.

Risk Controls

- Risk controls allow contamination to remain in place if it has been determined that there is no risk to human health or the environment.

Deed Restrictions

- Deed restrictions may be requested from landowners, in lieu of cleanup, if there is no threat to human health or the environment. Property owners may agree to the filing of a deed restriction on their property.
- If the applicant is unable to obtain a deed restriction from an affected property owner, a new remedy must be proposed (removal of contaminants)
- If the state determines that cleanup is technically impracticable, the state can impose deed restrictions with just compensation paid by applicant.

Local Ordinance

- In addition to deed restrictions, a municipality may pass an ordinance restricting groundwater use

Current Options

- Current options are limited:
 - Licenses – sites which are suspected to have impacted adjacent properties may apply for license to install monitoring wells in the public rights-of-way. This is part of the investigative process and is not a remedy
 - Abandonment – sites which are suspected to have impacted ground water on city property may abandon subsurface portions of the property if the contamination is deep and below 15 feet. Abandonments work in very few situations.

Need for Environmental Deed Restriction Process

- Several requests to place deed restrictions or environmental deed notices on city-owned property and/or public rights-of-way
- Numerous inquiries have been received for city process to place deed restrictions or environmental deed notices on city-owned property and/or public rights-of-way

Recommended Process

- We are recommending a two-phase process for deed restrictions as follows:
 - Phase I:
 - Applicant submits a letter which includes the following:
 - Details of the type and extent of the restriction or notice required (groundwater, soil, both)
 - Disclosure of any monitoring well license or other agreements with the city on the affected area
 - Legal description and drawing describing and depicting the affected area plus an impact summary
 - Summary of regulatory programs, comments and reviews
 - Summary of impact to other owners, along with any remedies considered and reason for rejection, if applicable

Recommended Process (continued)

- Request to be reviewed by a panel composed of Public Works, DWU, Streets, Environmental Quality, Real Estate and if applicable, Parks, EBS, Fire
- If panel does not object, request will proceed to Phase 2 of the process
- Phase 2
 - Applicant will:
 - Apply for and obtain, through the Innocent Owner/Operator Program, a certificate on behalf of the City prior to deed restriction and/or Notice
 - Obtain an independent appraisal of the affected area
 - Pay for the deed restriction pursuant to an established fee structure
 - Staff will prepare a resolution for council approval authorizing the execution of a deed restriction

Recommended Fee Calculation

- Total fee structure will be based on the following:
 - 3% of fair market value for loss of groundwater rights
 - plus either**
 - 3% of fair market value for groundwater located greater than a depth of 15 feet below the ground surface; or
 - 10% of fair market value for groundwater located within a depth of 15 feet below the ground surface

Rationale for Fee Calculation

- 3% of fair market value for loss of groundwater right **and** for groundwater located greater than 15 feet below the ground surface:
 - In Texas, groundwater is a recognized property right. The owner has no actual title to the water but only a right to use that water. This right is being given up by the execution of a deed restriction. However, the city does not permit individuals to install water wells in public rights-of-way or on public property, therefore the loss is minimal.
 - Typically the city does not place its utilities below 15 feet.

Rationale for Fee Calculation (continued)

- Groundwater located within a depth of 15 feet below the ground surface
 - This depth has the greatest impact on the city since utilities are located within this area. Ten percent of fair market value is the recommended charge for deed restricting this area. Ten percent is not an attempt to capture all of the impact on deed restrictions by any one applicant but to spread the risk among applicants so as not to make deed restrictions cost prohibitive.

Current Applicant

- Aviall Services, Inc.
 - Request for groundwater deed restrictions on certain streets in the Love Field area
 - Aviall has completed the recommended process, compensated the city pursuant to the recommended fee structure and is now ready for council action

Avial Fee Calculation

Street Name	Affected Area (sf)	Fair Market Value (\$6.00 psf)	Applicable % of Fair Market Value	Payment Due
Shorecrest Drive	134,341	\$806,046	13%	\$104,786
Reeves Street	41,277	\$247,662	6%	\$14,860
Wylie Drive	53,628	\$321,768	6%	\$19,306
Putnam Street	7,430	\$44,580	6%	\$2,675
Love Field Drive	2,387	\$14,322	6%	\$859
Weiss Street	32,660	\$195,960	6%	\$11,758
Totals				\$154,244

Desired Outcome

- Approval of the recommended deed restriction process and fee structure
- The Aviall request and other requests for deed restrictions are permitted to proceed to council action