# Section C: CREATING AND USING INSTITUTIONAL CONTROLS

Important to consider in evaluating an Institutional Control (IC) is whether it is sufficiently durable and protective.  Durability is built into a recorded IC (e.g., a Declaration of Restrictive Covenant (DRC)) because of real estate law concepts including the Florida Marketable Record Title Act,[[1]](#footnote-2) which ensures that a recorded DRC lasts in perpetuity. In almost all cases, a DRC[[2]](#footnote-3) will qualify as an acceptable IC under Section 376.301(22), F.S., and subsections 62-780.680(2) and (3), F.A.C. (RMO II and RMO III). A DRC is created and recorded by the owner of the property to limit his or her own actions as well as those of subsequent owners of the property and is enforceable by third party beneficiaries named in the covenant (for example, the FDEP).

In order to establish a DRC on a property, several documents must be prepared and submitted to FDEP for both technical and legal review. Once assembled, the IC package is submitted to the site manager who will forward it to OGC for legal review after the technical issues are resolved. The IC package should include: a draft DRC, legal description of the property, contact information for all parties involved, applicable notices, title work (property information report, deeds, liens, easements), property appraiser screenshot, and sometimes, surveys and engineering control maintenance plans (ECMPs). The ICPG contains checklists (See [Attachment 5](https://floridadep.gov/sites/default/files/Attachment_5-IC_Checklist_May2021.docx) and [Attachment 6](https://floridadep.gov/sites/default/files/Attachment%206%20-%20IC%20Legal%20Referral%20and%20Checklist%20-%20March2020.docx)) to assist the preparer in assembling the IC package.

When drafting the DRC, the preparer should refer to [Attachment 3](https://floridadep.gov/sites/default/files/Attachment_3-SampleDeclarationRestrictiveCovenant_11Dec19.docx) of the ICPG which contains two sample DRCs (Forms [A](https://floridadep.gov/sites/default/files/Attachment-3_Form-A_10Jan20.docx) and [B](https://floridadep.gov/sites/default/files/Attachment-3_Form-B_10Jan20.docx)). Form A should be used when the entirely owned parcel will be encumbered, and Form B should be used when only a portion of the parcel will be encumbered. Deviations from the standard DRC language should be explained.

However, a DRC is not the only acceptable form of an IC. FDEP will consider other types of ICs so long as they meet the definition of “institutional control” in Section [376.301, F.S.](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0300-0399/0376/Sections/0376.301.html), and comply with subsections 62-780.680(2) and (3), F.A.C., which require the control to be protective of human health, public safety, and the environment. [Attachment 38](https://floridadep.gov/sites/default/files/Att38-IC_Quick_Ref-082818_0.docx) includes examples of non-recorded ICs that could potentially be sufficient for closure under RMO II or III. In some instances, “layering” various ICs may be necessary to ensure the controls are durable and protective of human health, public safety, and the environment.[[3]](#footnote-4)

After the IC package is deemed complete and the DRC language has been agreed upon, the DRC should be signed and recorded. Additional information on each step of the process and for each required item of the IC package is provided in the sections that follow.

1. Section 712.03(8), F.S., prevents the extinguishment of a restrictive covenant recorded pursuant to chapter 376 or chapter 403, F.S., after 30 years when most other encumbrances are extinguished. [↑](#footnote-ref-2)
2. DRCs and deed restrictions are similar. The differences lie in the type of document the restriction is recorded in (i.e., DRC or deed of conveyance) and who is permitted to enforce it. In either case, the owner of the property must impose the restriction. A deed restriction is a restriction included in the deed of conveyance created and recorded by the seller of real property to control the buyer’s and subsequent owner’s use of the property and may be enforceable by the seller against the buyer and successive owners. [↑](#footnote-ref-3)
3. 2 “Layered” ICs are used if a proposed control, alone, is insufficient to provide the necessary protections, but multiple controls, together, may provide the desired level of protection. These controls may include notices that are warnings to the public that a hazard may exist at the property. Examples of such notices include: warning signs posted at a property; legal notices in newspapers of general circulation; “Deed Notices” that contain information but impose no obligations; and government advisories. [↑](#footnote-ref-4)