



THE UNIFORM ENVIRONMENTAL COVENANTS ACT

- A Summary -

Virtually everywhere in America, state and local governments are struggling with the problem of brownfields – vacant, abandoned and underused sites with various forms and degrees of environmental contamination. Reclaiming many of these sites for beneficial uses is very difficult and very expensive. Total cleanup, if possible, would often cost much more than the market value of the property. However, if a legal mechanism can be developed for long term control of use and clean-up or remediation (the current term of art), some properties may be safely returned to use and may be bought and sold. Current real property law is inadequate. Various common-law doctrines and other legal rules often work against such long-term controls, a situation which undermines the use and marketability of contaminated property.

In 2003, the Uniform Law Commission promulgated the Uniform Environmental Covenants Act (UECA) to overcome the inadequate common law rules. The statutory legal mechanism it creates is called an “environmental covenant.” Covenants are generally recognized in the common law as a means of conveying restrictions on use of land. The environmental covenant relies on the common law base, but re-creates it for the specific purpose of controlling the use of contaminated real estate, perpetually if necessary, while allowing that real estate to be conveyed from one person to another subject to those controls.

An environmental covenant is a specific recordable interest in the real estate. It arises from an environmental response project that imposes activity and use limitations. Such a project must arise under an appropriate federal or state program or approval for cleanup of the property or closure of a waste management site. No environmental covenant is effective without the relevant agency signature. The interest is created in a specific instrument for the purpose. The instrument recites the controls and remediation requirements imposed upon the property. The rights under the covenant must be granted to a party or parties called the holders. The covenant is perpetual unless limited in time within the instrument. It runs with the land and does not have to be “appurtenant.” This means it cannot be extinguished when one owner transfers rights or interests in the property to another, no matter who the holders are.

Two principal policies are served by confirming the validity of environmental covenants. One is to ensure that land use restrictions, mandated environmental monitoring requirements, and a wide range of common engineering controls designed to control the potential environmental risk of residual contamination will be recorded in the land records and effectively enforced over time as a valid real property servitude. UECA reverses the variety of common law doctrines that cast doubt on such enforceability.

A second important policy served by UECA is the return of previously contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties do not attract interested purchasers and therefore remain vacant, blighted and unproductive. This is an undesirable

outcome for communities seeking to return once important commercial sites to productive use. Large numbers of contaminated sites, often known as brownfields, are unlikely to be successfully recycled until regulators, owners, responsible parties, affected communities, and prospective purchasers and their lenders become confident that environmental covenants will be properly drafted, implemented, monitored and enforced for so long as needed. UECA should encourage transfer of ownership and property re-use by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these instruments which will appear in any title abstract for the property in question.

At the time UECA was promulgated, approximately half the states had laws providing for land use restrictions in some real estate form pertaining to environmental contamination. Those existing laws varied greatly in scope – some simply noted the need for land use restrictions, while others created tools similar to many of the legal structures envisioned by UECA. Most such acts applied only to cleanups under a state program. In contrast, UECA includes a number of provisions absent from most of those outdated state laws, including the act's applicability to both federal and state-led cleanups. It ensures that a covenant will survive despite tax lien foreclosure, adverse possession, and marketable title statutes. UECA also provides detailed provisions regarding termination and amendment of covenants, and includes important provisions on dealing with recorded interests that have priority over the new covenant. There is broad enforcement authority to make sure a covenant does govern the property. Holders are expected to enforce, but any party to the covenant and appropriate agencies may enforce as well. Further, UECA offers guidance to courts confronted with a proceeding that seeks to terminate such a covenant through eminent domain or the doctrine of changed circumstances.

Under UECA, the governmental regulators who sign an environmental covenant will serve to ensure that the risk assessments and control mechanisms are based on sound science and that affected third parties have notice of the covenant and associated controls. The act specifies that persons with a recorded interest in the property or who are in possession of the property, together with local governments in which the property is located and any other person the agencies require, must be given notice of the covenant. Environmental covenants, and any associated amendments or terminations, must be recorded in the local land records.

It is important to note UECA does not supplant or impose substantive clean-up standards, either generally or in a particular case. The act assumes those standards will be developed in the prior regulatory process. Rather, UECA validates site-specific, environmental use restrictions that result from the environmental response project which an environmental covenant helps implement. Implicit in use controls is the fact that, despite best efforts, total cleanups of many contaminated sites are not possible, but property may be put to limited uses without risk to others, nonetheless. UECA also does not affect the liability of principally responsible parties for the cleanup or any harm caused to third parties by the contamination – rather it provides a method for minimizing the exposure of third parties to such risks and for owners and responsible parties to engage in long-term cleanup mechanisms.

The Uniform Environmental Covenants Act is an important tool in revitalizing inner cities and other areas where vacant and underused properties are preventing vital redevelopment and economic expansion. It was drafted with the active participation of federal and state

environmental regulators, public and private land holders, banking interests, environmentalists, and land use experts. Its uniform enactment nationwide will provide owners, especially owners with properties in multiple states, with the confidence to engage in long-term remediation strategies and use controls, and bring economic growth back to blighted sites and areas.

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