

ACT 279

H.B. NO. 1706

A Bill for an Act Relating to the Uniform Environmental Covenants Act.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that there has been a growing reliance on risk-based environmental cleanup of contaminated property when removal of contamination to unrestricted levels is infeasible, impracticable, or unnecessary. In such cases, certain controls are required to protect the public and the environment from the contamination that remains on the property. Currently, there exists no clear authority nor any process for ensuring that these controls remain valid and enforceable as the properties change ownership.

The purpose of this Act is to:

- (1) Ensure that land use restrictions, environmental monitoring requirements, and common engineering controls designed to control the potential environmental risk of residual contamination are reflected in the land records and effectively enforced over time as a real property servitude; and
- (2) Encourage the transfer of ownership of contaminated properties, and property re-use, by establishing a clear and objective procedure to create, modify, or terminate environmental covenants and to record these actions in instruments that will be reflected in the title abstract of the contaminated property.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
UNIFORM ENVIRONMENTAL COVENANTS ACT**

§ -1 **Short title.** This chapter may be cited as the Uniform Environmental Covenants Act.

§ -2 **Definitions.** As used in this chapter, unless the context otherwise requires:

“Activity or use limitations” means restrictions or obligations created under this chapter with respect to real property.

“Agency” means the department of health or any other state or federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.

“Common interest community” means a condominium property regime, cooperative, planned community association, or other community with respect to which a person, by virtue of the person’s ownership of a parcel of real property within the community is obligated to pay property taxes or insurance premiums, or fees for maintenance or improvement of other real property described in a recorded covenant that creates the common interest community.

“Department” means the department of health.

“Director” means the director of health.

“Environmental covenant” means a servitude arising under an environmental response project that imposes activity and use limitations.

“Environmental response project” means a plan or work performed for environmental remediation of real property and conducted:

- (1) Under a federal or state program governing environmental remediation of real property, including chapter 128D;
- (2) Incident to closure of a solid or hazardous waste management unit; provided that the closure is conducted with approval of an agency; or
- (3) Under the state voluntary response program authorized in part II of chapter 128D.

“Holder” means a grantee of an environmental covenant as specified in section -3(a) who, by virtue of the covenant, holds an interest in the real property subject to the covenant, and who accepts certain rights and obligations as stated in the covenant.

“Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, instrumentality, or any other legal or commercial entity.

“Record” means information that is inscribed on a tangible medium or that is stored in any medium and is retrievable in perceivable form.

“State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

§ -3 Nature of rights; subordination of interests. (a) Any person, the agency, or a county may be a holder. An environmental covenant may identify more than one holder. The interest of a holder shall be an interest in real property.

(b) A right of an agency under this chapter or under an environmental covenant, other than a right as a holder, shall not be an interest in real property.

(c) An agency shall be bound by any obligation the agency assumes in an environmental covenant; provided that an agency shall not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant shall be bound by the obligations the person assumes in the covenant; provided that signing the covenant shall not change obligations, rights, or protections granted or imposed under law other than this chapter except as provided in the covenant.

(d) The following rules apply to interests in real property in existence at the time an environmental covenant covering that real property is created or amended:

- (1) An interest that has priority under other law shall not be affected by an environmental covenant, unless the person that owns the interest subordinates that interest to the covenant;
- (2) A person that owns a prior interest shall not be required to subordinate that interest to an environmental covenant or to agree to be bound by the covenant;
- (3) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record. If the environ-

mental covenant covers commonly-owned property in a common interest community, the record may be signed by any person authorized by the governing board of the common interest community; and

- (4) An agreement by a person to subordinate a prior interest to an environmental covenant shall affect the priority of that person's interest; provided that it shall not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

§ -4 Contents of environmental covenant. (a) An environmental covenant shall:

- (1) State that the instrument is an environmental covenant executed pursuant to this chapter;
- (2) Contain a legally sufficient description of the real property subject to the covenant;
- (3) Describe the activity and use limitations on the real property;
- (4) Include at least one holder to be effective;
- (5) Identify every holder;
- (6) Be signed by the agency, every holder, and unless waived by the agency, every owner of the fee simple interest of the real property subject to the covenant; and
- (7) Identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(b) In addition to the information required by subsection (a), an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it, including:

- (1) Requirements for notice:
 - (A) Following transfer of a specified interest in;
 - (B) Concerning proposed changes in use of;
 - (C) Of applications for building permits for; or
 - (D) Of proposals for any site work affecting the contamination on, the property subject to the covenant;
- (2) Requirements for periodic reporting describing compliance with the covenant;
- (3) Rights of access to the property granted in connection with implementation or enforcement of the covenant;
- (4) A brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;
- (5) Limitation on amendment or termination of the covenant in addition to those contained in sections -9 and -10; and
- (6) Rights of the holder in addition to the right to enforce the covenant pursuant to section -11.

(c) In addition to other conditions for its approval of an environmental covenant, the agency may require the persons specified by the agency who have interests in the real property to sign the covenant.

§ -5 Validity; effect on other instruments. (a) An environmental covenant that complies with this chapter shall run with the land.

(b) An environmental covenant that is otherwise effective shall be valid and enforceable even if:

- (1) It is not appurtenant to an interest in real property;
- (2) It can be or has been assigned to a person other than the original holder;
- (3) It is not of a character that has been recognized traditionally at common law;

- (4) It imposes a negative burden;
- (5) It imposes an affirmative obligation on a person having an interest in the real property or on the holder;
- (6) The benefit or burden does not touch or concern real property;
- (7) There is no privity of estate or contract;
- (8) The holder dies, ceases to exist, resigns, or is replaced; or
- (9) The owner of an interest subject to the environmental covenant and the holder are the same person.

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity or use limitations except for the fact that the instrument was recorded before the effective date of this chapter shall not be invalid or unenforceable because of any of the limitations on enforcement of interests described in subsection (b), or because it was identified as an easement, servitude, deed restriction, or other interest. This chapter shall not apply in any other respect to such an instrument.

(d) This chapter shall not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest that is otherwise enforceable under the law of this State.

§ **-6 Relationship to other land use law.** This chapter shall not authorize a use of real property that is otherwise prohibited by zoning, by law other than this chapter regulating use of real property, or by a recorded instrument that has priority over the environmental covenant. An environmental covenant may prohibit or restrict uses of real property that are authorized by zoning or by law other than this chapter.

§ **-7 Notice.** (a) A copy of an environmental covenant shall be provided by the person determined by the agency and in the manner required by the agency to:

- (1) Each person that signed the covenant;
- (2) Each person holding a recorded interest in the real property subject to the covenant;
- (3) Each person in possession of the real property subject to the covenant;
- (4) Each county or other subdivision of county government in which real property subject to the covenant is located; and
- (5) Any other person the agency determines should receive notice.

(b) The validity of a covenant shall not be affected by failure to provide a copy of the covenant as required under this section.

§ **-8 Recording.** (a) An environmental covenant and any amendment or termination of the covenant shall be recorded by the grantor of the covenant with the registrar of conveyances. For purposes of indexing, a holder shall be treated as a grantee.

(b) Except as otherwise provided in section -9(c), an environmental covenant is subject to the laws of this State governing recording and priority of interests in real property.

(c) A holder shall provide a copy of the final recorded covenant, any amendment made to the covenant, any termination documentation, and documentation of any other matters related to the covenant to the department of health.

§ **-9 Duration; amendment by court action.** (a) An environmental covenant shall be considered perpetual unless it is:

- (1) By its terms limited to a specific duration or terminated by the occurrence of a specific event;
- (2) Terminated by consent pursuant to section -10;

- (3) Terminated pursuant to subsection (b);
- (4) Terminated by foreclosure of an interest that has priority over the environmental covenant; or
- (5) Terminated or modified in an eminent domain proceeding; provided that:
 - (A) The agency that signed the covenant is a party to the proceeding;
 - (B) All persons identified in section -10(a) and (b) are given notice of the pendency of the proceeding; and
 - (C) The court determines, after hearing, that the termination or modification will not adversely affect human health or the environment.

(b) If the agency that signed an environmental covenant determines that the intended benefits of the covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an action in which all persons identified in section -10(a) and (b) have been given notice, may terminate the covenant or reduce its burden on the real property subject to the covenant. The agency's determination or its failure to make a determination upon request is subject to review pursuant to chapter 91.

(c) Except as otherwise provided in subsections (a) and (b), an environmental covenant shall not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrines of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

§ -10 Amendment or termination by consent. (a) An environmental covenant may be amended or terminated by consent; provided that the amendment or termination is signed by:

- (1) The agency;
- (2) Unless waived by the agency, the current owner of the fee simple of the real property subject to the covenant;
- (3) Each person that originally signed the covenant, unless the person waived in a signed record the right to consent or a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and
- (4) Except as otherwise provided in subsection (d)(2), the holder.

(b) If an interest in real property is subject to an environmental covenant, the interest shall not be affected by an amendment of the covenant unless the current owner of the interest consents to the amendment or has waived in a signed record the right to consent to amendments.

(c) Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder shall be considered an amendment.

- (d) Except as otherwise provided in an environmental covenant:
 - (1) A holder may not assign the holder's interest without consent of the other parties specified in subsection (a); and
 - (2) A holder may be removed and replaced by agreement of the other parties specified in subsection (a).
- (e) A court of competent jurisdiction may fill a vacancy in the position of a holder.

§ -11 Enforcement of environmental covenant. (a) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:

- (1) A party to the covenant;
- (2) The department or any other agency specified in the covenant;
- (3) Any person to whom the covenant expressly grants power to enforce;

(4) A person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; or

(5) A county in which the real property subject to the covenant is located.

(b) This chapter shall not limit the regulatory authority of the department or any governmental unit under law other than this chapter with respect to an environmental response project.

(c) A person shall not be responsible for or subject to liability for environmental remediation solely because the person has the right to enforce an environmental covenant.

§ -12 **Registry.** The department shall establish a registry that contains all environmental covenants and any amendment or termination of those covenants. The registry may also contain any other information concerning environmental covenants and the real property subject to them that the department considers appropriate. The department shall make the registry available for public access electronically on its web-site or at another appropriate place. The registry is a public record for purposes of chapter 92F.

§ -13 **Relation to Electronic Signatures in Global and National Commerce Act.** This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.; provided that it shall not modify, limit, or supersede Section 101 of that Act, 15 U.S.C. Section 7001 (a), or authorize electronic delivery of any of the notices described in Section 103 of that Act, 15 U.S.C. Section 7003(b).”

SECTION 3. This Act shall take effect upon its approval.

(Approved July 6, 2006.)