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DELAWARE STATE SENATE

143rd GENERAL ASSEMBLY

SENATE BILL NO. 112
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND CHAPTER 79, TITLE 7, OF THE DELAWARE CODE, RELATING TO THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL AS IT ADOPTS THE UNIFORM ENVIRONMENTAL COVENANTS ACT. THIS ACT WILL MAKE THESE COVENANTS ENFORCEABLE OVER THE LONG TERM AND BE ENFORCEABLE AGAINST SUCCESSIVE OWNERS OF THE PROPERTY AND AGAINST PARTIES LIABLE FOR MAINTAINING INSTITUTIONAL CONTROL OF THE PROPERTY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 79, Title 7 of the Delaware Code by adding a new subchapter as follows:

“§ 7907. Definitions.

As used in this subchapter:

- (1) ‘Activity and use limitations’ means restrictions or obligations with respect to real property created under this Act.
- (2) ‘Common interest community’ means a condominium or other real property with respect to which a person, by virtue of his ownership of a parcel of real property, is obligated to pay for property taxes, insurance premiums, maintenance, or improvement of other real property described in a recorded covenant that creates the common interest community.
- (3) ‘Department’ means the Department of Natural Resources and Environmental Control (DNREC).
- (4) ‘Environmental covenant’ means a servitude arising under an environmental response project that imposes activity and use limitations.
- (5) ‘Environmental response project’ means a plan or work performed for environmental remediation of real property, conducted:
 - a. under a federal or state program governing environmental remediation of real property, including Chapter 91, Title 7, Delaware Hazardous Substance Cleanup Act (HSCA);
 - b. incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of the Department; or
 - c. under a state voluntary clean-up program authorized in Chapters 60, 63, 74, 74A and 91, Title 7 Del. Code.

- (6) 'Holder' means a person that is the grantee of an environmental covenant.
- (7) 'Owner' means a person that owns a fee simple interest in real property that is subject to an environmental covenant.
- (8) 'Person' means any individual, trust, firm, joint stock company, federal agency, partnership, corporation (including a government corporation or authority), limited liability company, association, state, municipality, commission, political subdivision of a state or any interstate body.
- (9) 'Record', when used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (10) 'Secretary' means the Secretary of the Department of Natural Resources and Environmental Control or the Secretary's duly authorized designee.
- (11) 'State' means the state of Delaware, in the United States.

§ 7908. Nature of Rights; Subordination of Interests.

(a) The interest of a holder is an interest in real property. The rights of the Department under this Act or under an approved environmental covenant, other than as a holder, are not interests in real property.

(b) The Department is bound by the obligations it assumes in an environmental covenant, but the Department does not assume obligations merely by approving an environmental covenant.

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

(1) A prior interest is not affected by an environmental covenant unless the owner of the interest is a party to the covenant or subordinates its interest to the covenant.

(2) This Act does not require an owner of a prior interest 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 or, if the environmental covenant covers commonly owned property in a common interest community, in a record signed by any person authorized by the governing board of the owners' association.

(4) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

§ 7909. Contents of Environmental Covenant.

(a) An environmental covenant must:

- (1) state that the instrument is an environmental covenant executed pursuant to Title 7, Del. Code Chapter 79 Subtitle II.

(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) identify the holder which may be an owner or agency;

(5) be signed by the Department, all owners of the real property subject to the covenant and the holders with the formalities for a deed; and

(6) 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 any:

(1) requirements for notice following transfer of a specified interest in, or concerning proposed changes in use, applications for building permits, or 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) restriction or limitation on amendment or termination of the covenant in addition to those contained in § 7913 and 7914; and

(6) rights of the holder in addition to its right to enforce the covenant pursuant to §7915(c) The Department may refuse to sign an environmental covenant for any reason.

§ 7910. Validity.

(a) An environmental covenant that complies with this Act runs with the land.

(b) An environmental covenant that is otherwise effective is 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 any 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 persons identified as owner and holders in the environmental covenant are the same person.

(c) An instrument that creates activity and use limitations designed to protect human health or the environment and that was agreed to before the effective date of this Act is not invalid or unenforceable by reason 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 Act does not apply in any other respect to such an instrument.

(d) This Act does 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.

§ 7911. Relationship to other Land Use Law.

This Act does not authorize a use of real property that is otherwise prohibited by zoning or by law other than this Act 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 which are authorized by zoning or by law other than this Act.

§ 7912. Notice.

(a) The owner or another person designated by the Department shall provide a copy of a signed environmental covenant as required by the Department to:

(1) all persons who signed the covenant;

(2) all persons holding a recorded interest in the real property subject to the covenant;

(3) all persons in possession of the real property subject to the covenant;

(4) each municipality or other unit of local government in which real property subject to the covenant is located; and

(5) any other persons the Department requires.

(b) Failure to provide a copy of the covenant as required by the Department does not affect the covenant's validity.

§ 7913. Recording.

(a) An environmental covenant and any amendment or termination of the covenant must be recorded in every county in which any portion of the real property subject to the covenant is located. A recorded environmental covenant or a notice recorded pursuant to §7916 must be indexed in the grantor's index in the names of the owners of the real property subject to the covenant and in the grantee's index in the name of the holder.

(b) Except as otherwise provided in §7913(c), an environmental covenant is subject to the laws of this state governing recording and priority of interests in real property. Recording of a covenant pursuant to the law of this state provides the same constructive notice of the covenant as the recording of a deed provides of an interest in real property.

§ 7914. Duration.

(a) An environmental covenant is perpetual unless:

- (1) limited by its terms to a specific duration or the occurrence of a specific event;
- (2) terminated by consent pursuant to §7914;[or]
- (3) terminated pursuant to §7914 (b) or
- (4) terminated or modified by judicial decree in an eminent domain proceeding, if:

a. the Department consents to the judicial action; and

b. all persons identified in § 7914 (a) and (b) are given notice of the pendency of the eminent domain proceeding.

(b) A judicial decree terminating an environmental covenant or reducing its burden on the real property subject to the covenant under the doctrine of changed circumstances may be rendered only after:

(1) all persons identified in §7914(a) and (b) are given notice of the pendency of the judicial proceeding in which the determination is sought; and

(2) the Department has filed a determination with the court that the intended benefits of the original covenant can no longer be realized.

(c) Notwithstanding anything to the contrary contained in this Chapter, an environmental covenant may be amended or terminated if the environmental covenant:

- (1) no longer serves its intended purpose;
- (2) no longer provides the intended benefits;
- (3) no longer or does not provide for protection of human health or the environment; or
- (4) becomes unnecessary because of changed circumstances, including changes in law, regulation or ordinances.

Any person having an interest in real property subjected to an environmental covenant shall be entitled to apply to the Department for amendment or termination of the environmental covenant in accordance with the procedures set forth in Section 6004 of this title. Any decision of the Secretary regarding an amendment or termination of an environmental covenant shall be subject to appeal in accordance with the procedures provided for appeals under Subchapter II of Chapter 60 of this title. If an environmental covenant is amended or terminated the amended environmental covenant or notice of termination shall be recorded in accordance with requirements set forth in Section 7913 of this Subchapter.

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

§ 7915. Amendment or Termination by Consent.

(a) An environmental covenant may be amended or terminated by consent only if the amendment or termination is signed by:

(1) the Department Secretary;

(2) the current owner;

(3) each person that originally signed the covenant unless (i) the person waived the right to consent in a signed record; (ii) the person fails to respond to a notice, requesting their consent to amendment or termination, delivered by certified mail to their last known address, as obtained from the U.S. Postal Service, within 45 days after delivery of such notice; or (iii) unless 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), the holder.

(b) A person that subordinates its interest to an environmental covenant is not affected by an amendment of the covenant unless the person consents to the amendment or waives the right to consent to future amendments in a signed record.

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

(d) Except as otherwise provided in the covenant:

(1) a holder may not assign its interest without consent of the other parties;

(2) a holder may be removed and replaced by agreement of the other parties specified in subsection (a); and

(3) a court of competent jurisdiction may fill a vacancy in the position of holder.

§ 7916. 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,

(3) any other 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; and

(5) a municipality or other unit of local government in which the real property subject to the covenant is located.

(b) This Act does not limit the regulatory authority of the Department under law other than respect to an environmental response project.

(c) A person is not subject to liability for environmental remediation solely because it has the right to enforce an environmental covenant.

§ 7917. Registry; Substitute Notice.

(a) The Department shall establish and maintain 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 which the Department considers appropriate. The registry is a public record for purposes of Freedom of Information Act.

(b) After an environmental covenant or an amendment or termination of a covenant is filed in the registry pursuant to subsection (a), a notice of the covenant, amendment, or termination that complies with this section may be recorded in the land records in lieu of recording the entire covenant. Any such notice must contain:

(1) a legally sufficient description and any available street address of the real property;

(2) the name and address of the owner of the real property, the Department, and the holder if other than the Department;

(3) a statement that the covenant, amendment, or termination is available in a registry at the Department, and disclosing the method of any electronic access; and

(4) a statement that the notice is notification of an environmental covenant executed pursuant to Title 7, Del. Code Chapter 79, Subtitle II, this Act.

(c) A statement in executed with the same formalities as a deed in this state satisfies the requirements of subsection (b):

(1) This notice is filed in the land records of the deeds of county of jurisdiction in which the real property is located pursuant to §7916 of the Act.

(2) This notice and the covenant, amendment or termination to which it refers may impose significant obligations with respect to the property described below.

(3) A legal description of the property is attached as Exhibit A to this notice. The address of the property that is subject to the environmental covenant is [insert address of property].

(4) The name and address of the owner of the real property on the date of this notice is [insert name of current legal owner of the property and the owner's current address as shown on the tax records of the jurisdiction in which the property is located].

(5) The environmental covenant, amendment or termination was signed by [insert name and address of the Department].

(6) The environmental covenant, amendment, or termination was filed in the registry on [insert date].

(7) The full text of the covenant, amendment, or termination and any other information required by the Department is on file and available for inspection and copying in the site files by the Department of Natural Resources and Environmental Control (DNREC) at a building in which the files are maintained.

§ 7918. Uniformity of Application and Construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 7919. Relation to Electronic Signatures in Global and National Commerce Act.

This Act modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does 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)).

§ 7920. Severability.

If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.”