



STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Final Report

Relating to

Uniform Environmental Covenants Act

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INTRODUCTION

Overview of the UECA

The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) drafted and approved UECA in 2003. It has now been enacted in 24 jurisdictions. UECA was enacted to develop a system of recording “environmental covenants” for contaminated real properties known as “Brownfields” (see footnote 1 below), when such properties are remediated to a level determined by their use but retain contamination in excess of the level that would permit unrestricted use of the property. The Uniform Law’s stated purpose is to ensure that land use restrictions, environmental monitoring requirements, and common engineering controls designed to control the potential environmental risk of residual contamination will be reflected on the land records and “effectively enforced over time as a valid real property servitude”, thereby facilitating the transfer of ownership and re-introduction into the stream of commerce of the contaminated sites.

UECA does not disrupt or supplant the clean-up standards or remediation methodologies imposed by regulatory agencies. Instead, it is an adjunct or complement to these regulatory tools. The drafters of UECA expressly intended the environmental covenant to be the “crucial end result” of the process of governmental environmental remediation. The Prefatory Note states that the covenant “may be used to ensure that the activity and use limitations imposed in the agency’s remedial decision process remain effective, and thus protect the public from contamination that remains, while also permitting re-use of the site in a timely and economically valuable way.” Thus, the *Brownfield and Contaminated Site Remediation Act*¹ (“the *Brownfield Act*”), as well as other state and federal environmental regulations still would set standards for such contaminated sites. UECA contemplates that covenants would be the main enforcement tool through which the engineering controls are monitored and protected from actions that compromise their integrity.

UECA also elevates the legal status of environmental covenants so that they will survive despite tax lien foreclosure, adverse possession, and marketable title statutes. Designed to protect interests commonly absent in existing state laws, UECA confers grantors of environmental covenants the right to enforce the covenants and requires their consent to any termination or modification. Also, following traditional real property principles, UECA validates the interests of lenders who hold a prior mortgage on the contaminated property, absent voluntary subordination.

¹ The *Brownfield and Contaminated Site Remediation Act*, N.J.S.58:10B-1 *et seq.*, governs underused and abandoned properties that were formerly used for commercial and industrial purposes and are now contaminated with hazardous substances and pose a health risk to nearby residents and a threat to the environment. Regulations have been adopted pursuant to the Administrative Procedure Act (N.J.S. 52:14B-1 *et seq.*) that establish criteria for the submission, evaluation and approval of plans for remediation of these environmentally hazardous sites.

NCCUSL further recommends that in addition to fully integrating environmental covenants into the real property system by providing constructive notice of those covenants to the world through land recording, governments should also provide the mechanism for actual notice of the contaminated sites. Actual notice can be achieved by providing maps in recorders' offices, by the use of on-site signage and monuments, or by making computer databases with relevant information accessible to the public. Actual notice mechanisms, however, are not part of UECA.

Current New Jersey Law

Although no New Jersey statute yet provides for an environmental covenant per se, New Jersey has enacted significant legislation regulating Brownfields and other contaminated properties that provides for the use of notice and institutional controls as part of the remediation of contaminated properties.

In 1993, New Jersey adopted the *Brownfield Act*, N.J.S. 58:10B-1 *et seq.*, since amended in 1997 and 2002, which regulates contaminated sites once used for commercial and industrial purposes but currently abandoned or underused in order to ensure protection to the public and the environment while promoting the cost effective cleanups and reuse of such properties. The *Brownfield Act* includes remediation standards, financial incentives, cleanup procedures and liability protection for innocent parties who clean up Brownfields.

Specifically, section 58:10B-13(a)(2) requires, in part, that when real property is either remediated to a nonresidential soil remediation standard, or engineering or institutional controls² are used in lieu of remediation to an unrestricted standard, the Department of Environmental Protection ("DEP") shall, as a condition of the use of the standard or control, require the recording of a notice indicating that contamination exists on the property at a level that may statutorily restrict certain uses of or access to the property. The notice is recorded in the same manner as a deed and includes (i) delineation of the use restrictions; (ii) description of all specific engineering or institutional controls; and (iii) the property owner's written consent to the notice. Section 58:10B-13(a)(3) requires that notice of the existence of contaminants be provided to the governing body of each municipality in which the property is located, and section 58:10B-13(a)(4) requires the posting of signs at any site where access is restricted or areas must be maintained in a prescribed manner.

² "Nonresidential soil remediation standards" are explained (in section 58:10B-12) as remediation standards set at levels or concentrations of contaminants "that recognize the lower likelihood of exposure to contamination on property that will not be used for residential or similar uses, which allow for the unrestricted use of that property for nonresidential purposes, and that can be met without the need of engineering controls." "Institutional controls" are defined as "a mechanism used to limit human activities at or near a contaminated site, or to ensure the effectiveness of the remedial action over time, when contaminants remain at a contaminated site in levels or concentrations above the applicable remediation standard that would allow unrestricted use of that property. Institutional controls may include, without limitation, structure, land, and natural resource use restrictions, well restriction areas, and deed notices." NCCUSL considers an environmental covenant to be a form of institutional control.

The thrust of the *Brownfield Act* is substantially different from that of UECA. While the *Brownfield Act* uses deed notices, its power is not based on the common law surrounding deed restrictions and covenants but on the police power to require any landowner to abate a situation inimical to the public welfare. Enforcement under the *Brownfield Act* is done by the DEP, and violations may result in criminal liability.

In addition, as part of the regulatory scheme, New Jersey's Brownfields redevelopment and reuse efforts involve numerous agencies and focus groups.³ One such group, the New Jersey Brownfields Redevelopment Task Force, recommends Brownfields policy and statewide strategy for promoting Brownfields redevelopment while maintaining a Brownfields inventory.⁴ The Task Force maintains a New Jersey Brownfields Site Mart which is the official inventory database for all properties identified as Brownfields properties pursuant to N.J.S. 58:10B-23.

The recently enacted *Site Remediation Reform Act*, P.L. 2009, c. 60, ("SRRA") creates a site remediation professional licensing board that oversees licensing, continuing education, and professional conduct of site remediation professionals, known as LSPs. Although SRRA further enforces and regulates remediation of contaminated sites and the discharge of hazardous substances -- not just Brownfields -- approximately 40 pages of SRRA amend and strengthen portions of the *Brownfield Act*, while continuing the practice of requiring a deed notice in the form prescribed by the DEP.

The SRRA also requires the establishment of a database that is more extensive than the information presently included in the Brownfields Site Mart. This new database is required to provide information regarding remediated properties, including the status of the remediation, the contaminants of concern, and whether institution or engineering controls are in use at the site. Public access to reports from the database will be provided on the DEP's website. This new database satisfies the recommendation by NCCUSL for a database or registry that provides information regarding engineering and institutional controls.

Commission Recommendation

The Commission finds no reason to replace the regulatory approach of the *Brownfield Act* with the covenant approach of UECA. Even if it were convinced that the UECA approach were preferable, at this time there is no constituency for any change of this kind in Brownfields regulation in New Jersey.

It has been suggested that UECA can be added to the New Jersey laws without displacing the *Brownfield Act*. However, the effect of such an enactment would be

³ These agencies include the Department of Community Affairs, under which six separate groups operate regarding various aspects of the Brownfields redevelopment, the New Jersey Redevelopment Authority, the New Jersey Commerce Commission (Department of the Treasury), and the DEP.

⁴ The 13-member Task Force consists of seven representatives from State agencies and six public members appointed by the Governor with the advice and consent of the Senate.

limited. Under UECA, any covenant must be approved by the DEP. In any event, a covenant would not prevent the State from taking a stricter approach from that of other parties. The only additional effect of UECA is to empower the private parties that are parties to the covenant to enforce it. That is the key aspect of UECA, and the ability of parties other than the State to enforce environmental restrictions of Brownfields sites would be an improvement to the law of New Jersey. Notwithstanding the initial determination not to recommend UECA as a whole, the Commission supports incorporation of that basic principle. The best way to implement this change is to further amend the *Brownfield Act*.

The amendments below would make the deed notice required by the *Brownfield Act* function like a restrictive covenant and allow enforcement by any person who is injured, or if the DEP fails to enforce the restrictions, by any person. The amendments achieve the basic purpose of UECA, and they go further, in that any person may enforce a restriction whether or not the person was a party to a restrictive covenant. This additional aspect is derived from N.J.S. 2A:35A-4 which allows any person to commence an action in court to enforce any environmental law, regulation or ordinance. The proposed amendment follows 2A:35A-4 in providing that if the DEP is acting on the problem, a private citizen must defer.

Proposed New subsection (i) to 58:10B-13

i. The restrictions and affirmative obligations set forth in a recorded deed notice and required pursuant to this act run with the land and continue in perpetuity and may be enforced by any person who has suffered injury from their violation, and if the Department of Environmental Protection fails to enforce the restrictions and obligations, by any person acting as authorized by N.J.S. 2A:35A-1 et seq. The restrictions and affirmative obligations may be enforced against any person with an interest in the land however derived.

Proposed Amendment to subsection (a)(2)

The notice shall indicate at the head, with specificity and in conspicuous format, that restrictions and affirmative obligations on the property run with the land and continue in perpetuity and may be enforced by any person, and that any person who acquires an interest in this property accepts responsibility for compliance with both the restrictions and affirmative obligations imposed.