



95TH GENERAL ASSEMBLY

State of Illinois

2007 and 2008

SB2110

Introduced 2/14/2008, by Sen. A. J. Wilhelmi

SYNOPSIS AS INTRODUCED:

New Act

Creates the Uniform Environmental Covenants Act, proposed by the National Conference of Commissioners on Uniform State Laws. Creates an interest in real estate called an "environmental covenant" that assures a plan of rehabilitation for contaminated real property (brownfields) and controls the use of the property. An environmental covenant may be separately conveyed to and enforced by a relevant third person called a holder. An underlying plan between State or federal government and landowner for "remediation" of the property must be in place for an environmental covenant to be created and conveyed. The ultimate objective of this Act is to allow contaminated property to be returned to those uses consistent with prescribed clean-up, essentially making them marketable. The Act provides for the creation of such a covenant, its termination when appropriate, priority over other real estate interests, and enforcement over the time the covenant is in place. An environmental covenant is perpetual unless a specific term is prescribed in the instrument creating it. The interest will be recorded in the real estate records.

LRB095 16127 RCE 42146 b

FISCAL NOTE ACT
MAY APPLY

A BILL FOR

1 AN ACT concerning the environment.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 1. Short title. This Act may be cited as the
5 Uniform Environmental Covenants Act.

6 Section 2. Definitions. In this Act:

7 (1) "Activity and use limitations" means restrictions or
8 obligations created under this Act with respect to real
9 property.

10 (2) "Agency" means the Illinois Environmental Protection
11 Agency or any other State or federal agency that determines or
12 approves the environmental response project pursuant to which
13 the environmental covenant is created.

14 (3) "Common interest community" means a condominium,
15 cooperative, or other real property with respect to which a
16 person, by virtue of the person's ownership of a parcel of real
17 property, is obligated to pay property taxes or insurance
18 premiums, or for maintenance, or improvement of other real
19 property described in a recorded covenant that creates the
20 common interest community.

21 (4) "Environmental covenant" means a servitude arising
22 under an environmental response project that imposes activity
23 and use limitations.

1 (5) "Environmental response project" means a plan or work
2 performed for environmental remediation of real property and
3 conducted:

4 (A) Under a federal or State program governing
5 environmental remediation of real property, including
6 programs arising under the Illinois Environmental
7 Protection Act;

8 (B) Incident to closure of a solid or hazardous waste
9 management unit, if the closure is conducted with approval
10 of an agency; or

11 (C) Under a State voluntary clean-up program
12 authorized by Illinois Law.

13 (6) "Holder" means the grantee of an environmental covenant
14 as specified in Section 3(a).

15 (7) "Person" means an individual, corporation, business
16 trust, estate, trust, partnership, limited liability company,
17 association, joint venture, public corporation, government,
18 governmental subdivision, agency, or instrumentality, or any
19 other legal or commercial entity.

20 (8) "Record", used as a noun, means information that is
21 inscribed on a tangible medium or that is stored in an
22 electronic or other medium and is retrievable in perceivable
23 form.

24 (9) "State" means a state of the United States, the
25 District of Columbia, Puerto Rico, the United States Virgin
26 Islands, or any territory or insular possession subject to the

1 jurisdiction of the United States.

2 Section 3. Nature of rights; subordination of interests.

3 (a) Any person, including a person that owns an interest in
4 the real property, the agency, or a municipality or other unit
5 of local government, may be a holder. An environmental covenant
6 may identify more than one holder. The interest of a holder is
7 an interest in real property.

8 (b) A right of an agency under this Act or under an
9 environmental covenant, other than a right as a holder, is not
10 an interest in real property.

11 (c) An agency is bound by any obligation it assumes in an
12 environmental covenant, but an agency does not assume
13 obligations merely by signing an environmental covenant. Any
14 other person that signs an environmental covenant is bound by
15 the obligations the person assumes in the covenant, but signing
16 the covenant does not change obligations, rights, or
17 protections granted or imposed under law other than this Act
18 except as provided in the covenant.

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

22 (1) An interest that has priority under other law is
23 not affected by an environmental covenant unless the person
24 that owns the interest subordinates that interest to the
25 covenant.

1 (2) This Act does not require a person that owns a
2 prior interest to subordinate that interest to an
3 environmental covenant or to agree to be bound by the
4 covenant.

5 (3) A subordination agreement may be contained in an
6 environmental covenant covering real property or in a
7 separate record. If the environmental covenant covers
8 commonly owned property in a common interest community, the
9 record may be signed by any person authorized by the
10 governing board of the owners association.

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

16 Section 4. Contents of environmental covenant.

17 (a) An environmental covenant must:

18 (1) State that the instrument is an environmental
19 covenant executed pursuant to this Act.

20 (2) Contain a legally sufficient description of the
21 real property subject to the covenant.

22 (3) Describe the activity and use limitations on the
23 real property.

24 (4) Identify every holder.

25 (5) Be signed by the agency, every holder, and unless

1 waived by the agency every owner of the fee simple of the
2 real property subject to the covenant.

3 (6) Identify the name and location of any
4 administrative record for the environmental response
5 project reflected in the environmental covenant.

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

10 (1) Requirements for notice following transfer of a
11 specified interest in, or concerning proposed changes in
12 use of, applications for building permits for, or proposals
13 for any site work affecting the contamination on, the
14 property subject to the covenant.

15 (2) Requirements for periodic reporting describing
16 compliance with the covenant.

17 (3) Rights of access to the property granted in
18 connection with implementation or enforcement of the
19 covenant.

20 (4) A brief narrative description of the contamination
21 and remedy, including the contaminants of concern, the
22 pathways of exposure, limits on exposure, and the location
23 and extent of the contamination.

24 (5) Limitation on amendment or termination of the
25 covenant in addition to those contained in Sections 9 and
26 10.

1 (6) Rights of the holder in addition to its right to
2 enforce the covenant pursuant to Section 11.

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

7 Section 5. Validity; effect on other instruments.

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

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

12 (1) It is not appurtenant to an interest in real
13 property.

14 (2) It can be or has been assigned to a person other
15 than the original holder.

16 (3) It is not of a character that has been recognized
17 traditionally at common law.

18 (4) It imposes a negative burden.

19 (5) It imposes an affirmative obligation on a person
20 having an interest in the real property or on the holder.

21 (6) The benefit or burden does not touch or concern
22 real property.

23 (7) There is no privity of estate or contract.

24 (8) The holder dies, ceases to exist, resigns, or is
25 replaced.

1 (9) The owner of an interest subject to the
2 environmental covenant and the holder are the same person.

3 (c) An instrument that creates restrictions or obligations
4 with respect to real property that would qualify as activity
5 and use limitations except for the fact that the instrument was
6 recorded before the effective date of this Act is not invalid
7 or unenforceable because of any of the limitations on
8 enforcement of interests described in subsection (b) or because
9 it was identified as an easement, servitude, deed restriction,
10 or other interest. This Act does not apply in any other respect
11 to such an instrument.

12 (d) This Act does not invalidate or render unenforceable
13 any interest, whether designated as an environmental covenant
14 or other interest, that is otherwise enforceable under the law
15 of this State.

16 Section 6. Relationship to other land-use law. This Act
17 does not authorize a use of real property that is otherwise
18 prohibited by zoning, by law other than this Act regulating use
19 of real property, or by a recorded instrument that has priority
20 over the environmental covenant. An environmental covenant may
21 prohibit or restrict uses of real property which are authorized
22 by zoning or by law other than this Act.

23 Section 7. Notice.

24 (a) A copy of an environmental covenant shall be provided

1 by the persons and in the manner required by the agency to:

2 (1) Each person that signed the covenant.

3 (2) Each person holding a recorded interest in the real
4 property subject to the covenant.

5 (3) Each person in possession of the real property
6 subject to the covenant.

7 (4) Each municipality or other unit of local government
8 in which real property subject to the covenant is located.

9 (5) Any other person the agency requires.

10 (b) The validity of a covenant is not affected by failure
11 to provide a copy of the covenant as required under this
12 Section.

13 Section 8. Recording.

14 (a) An environmental covenant and any amendment or
15 termination of the covenant must be recorded in every county in
16 which any portion of the real property subject to the covenant
17 is located. For purposes of indexing, a holder shall be treated
18 as a grantee.

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

22 Section 9. Duration; amendment by court action.

23 (a) An environmental covenant is perpetual unless it is:

24 (1) By its terms limited to a specific duration or

1 terminated by the occurrence of a specific event.

2 (2) Terminated by consent pursuant to Section 10.

3 (3) Terminated pursuant to subsection (b).

4 (4) Terminated by foreclosure of an interest that has
5 priority over the environmental covenant.

6 (5) Terminated or modified in an eminent domain
7 proceeding, but only if:

8 (A) The agency that signed the covenant is a party
9 to the proceeding.

10 (B) All persons identified in Section 10(a) and (b)
11 are given notice of the pendency of the proceeding.

12 (C) The court determines, after hearing, that the
13 termination or modification will not adversely affect
14 human health or the environment.

15 (b) If the agency that signed an environmental covenant has
16 determined that the intended benefits of the covenant can no
17 longer be realized, a court, under the doctrine of changed
18 circumstances, in an action in which all persons identified in
19 Section 10(a) and (b) have been given notice, may terminate the
20 covenant or reduce its burden on the real property subject to
21 the covenant. The agency's determination or its failure to make
22 a determination upon request is subject to review pursuant to
23 the Administrative Review Law.

24 (c) Except as otherwise provided in subsections (a) and
25 (b), an environmental covenant may not be extinguished,
26 limited, or impaired through issuance of a tax deed,

1 foreclosure of a tax lien, or application of the doctrine of
2 adverse possession, prescription, abandonment, waiver, lack of
3 enforcement, or acquiescence, or a similar doctrine.

4 (d) An environmental covenant may not be extinguished,
5 limited, or impaired by application of any Illinois Law
6 concerning marketable title or dormant mineral interests.

7 Section 10. Amendment or termination by consent.

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

10 (1) The agency.

11 (2) Unless waived by the agency, the current owner of
12 the fee simple of the real property subject to the
13 covenant.

14 (3) Each person that originally signed the covenant,
15 unless the person waived in a signed record the right to
16 consent or a court finds that the person no longer exists
17 or cannot be located or identified with the exercise of
18 reasonable diligence.

19 (4) Except as otherwise provided in subsection (d)(2),
20 the holder.

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

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

4 (d) Except as otherwise provided in an environmental
5 covenant:

6 (1) A holder may not assign its interest without
7 consent of the other parties.

8 (2) A holder may be removed and replaced by agreement
9 of the other parties specified in subsection (a).

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

12 Section 11. Enforcement of environmental covenant.

13 (a) A civil action for injunctive or other equitable relief
14 for violation of an environmental covenant may be maintained
15 by:

16 (1) A party to the covenant.

17 (2) The agency or, if it is not the agency, the
18 Illinois Environmental Protection Agency.

19 (3) Any person to whom the covenant expressly grants
20 power to enforce.

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

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

1 (b) This Act does not limit the regulatory authority of the
2 agency or the Illinois Environmental Protection Agency under
3 law other than this Act with respect to an environmental
4 response project.

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

8 Section 12. Registry; substitute notice.

9 (a) The Illinois Environmental Protection Agency shall
10 establish and maintain a registry that contains all
11 environmental covenants and any amendment or termination of
12 those covenants. The registry may also contain any other
13 information concerning environmental covenants and the real
14 property subject to them which the Illinois Environmental
15 Protection Agency considers appropriate. The registry is a
16 public record for purposes of the Freedom of Information Act.

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

23 (1) A legally sufficient description and any available
24 street address of the real property subject to the
25 covenant.

1 (2) The name and address of the owner of the fee simple
2 interest in the real property, the agency, and the holder
3 if other than the agency.

4 (3) A statement that the covenant, amendment, or
5 termination is available in a registry at the Environmental
6 Protection Agency at its office in Springfield, which
7 discloses the method of any electronic access.

8 (4) A statement that the notice is notification of an
9 environmental covenant executed pursuant to this Act.

10 (c) A statement in substantially the following form,
11 executed with the same formalities as a deed in this State,
12 satisfies the requirements of subsection (b):

13 (1) This notice is filed in the land records of (insert
14 name of county in which the real property is located)
15 pursuant to Section 12 of the Uniform Environmental
16 Covenants Act.

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

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

24 (4) The name and address of the owner of the fee simple
25 interest in the real property on the date of this notice is
26 (insert name of current owner of the property and the

1 owner's current address as shown on the tax records of the
2 jurisdiction in which the property is located).

3 (5) The environmental covenant, amendment or
4 termination was signed by (insert name and address of the
5 agency).

6 (6) The environmental covenant, amendment, or
7 termination was filed in the registry on (insert date of
8 filing).

9 (7) The full text of the covenant, amendment, or
10 termination and any other information required by the
11 agency is on file and available for inspection and copying
12 in the registry maintained for that purpose by the Illinois
13 Environmental Protection Agency at (insert address and
14 room of buildings in which the registry is maintained). The
15 covenant, amendment or termination may be found
16 electronically at (insert web address for covenant).

17 Section 13. Uniformity of application and construction. In
18 applying and construing this uniform Act, consideration must be
19 given to the need to promote uniformity of the law with respect
20 to its subject matter among states that enact it.

21 Section 14. Relation to Electronic Signatures in Global and
22 National Commerce Act. This Act modifies, limits, or supersedes
23 the federal Electronic Signatures in Global and National
24 Commerce Act (15 U.S.C. Section 7001 et seq.) but does not

1 modify, limit, or supersede Section 101 of that Act (15 U.S.C.
2 Section 7001(a)) or authorize electronic delivery of any of the
3 notices described in Section 103 of that Act (15 U.S.C. Section
4 7003(b)).

5 Section 15. Severability. If any provision of this Act or
6 its application to any person or circumstance is held invalid,
7 the invalidity does not affect other provisions or applications
8 of this Act which can be given effect without the invalid
9 provision or application, and to this end the provisions of
10 this Act are severable.