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OFFICE WEST VIRGINIA
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WEST VIRGINIA LEGISLATURE

Regular Session, 2005

ENROLLED

SENATE BILL NO. 406

(By Senators Dempsey and Unger)

PASSED April 9, 2005

In Effect 90 days from Passage

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Senate Bill No. 406

(BY SENATORS DEMPSEY AND UNGER)

[Passed April 9, 2005; in effect ninety days from passage.]

AN ACT to amend of the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §22-22B-1, §22-22B-2, §22-22B-3, §22-22B-4, §22-22B-5, §22-22B-6, §22-22B-7, §22-22B-8, §22-22B-9, §22-22B-10, §22-22B-11, §22-22B-12, §22-22B-13 and §22-22B-14, all relating to the Uniform Environmental Covenants Act generally; defining certain terms; explaining rights and responsibilities of persons who sign environmental covenant; providing for subordination of interests; establishing requirements of environmental covenant; providing that environmental covenant runs with the land and is valid if meets requirements of act; setting forth effect of environmental covenant on other instruments; establishing relationship between environmental covenants and other land-use law; requiring environmental covenants be provided to certain persons; requiring environmental covenant amendments and terminations be recorded; providing environmental covenant is perpetual unless certain conditions met; authorizing amendment or termination by court or by

consent; providing for enforcement of environmental covenant; providing for uniformity of application and construction of act; authorizing modification or application of certain parts of federal Electronic Signatures in Global and National Commerce Act; and providing for severability.

Be it enacted by the Legislature of West Virginia:

That the code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §22-22B-1, §22-22B-2, §22-22B-3, §22-22B-4, §22-22B-5, §22-22B-6, §22-22B-7, §22-22B-8, §22-22B-9, §22-22B-10, §22-22B-11, §22-22B-12, §22-22B-13 and §22-22B-14, all to read as follows:

ARTICLE 22B. UNIFORM ENVIRONMENTAL COVENANTS ACT.

§22-22B-1. Short title.

- 1 This article may be cited as the Uniform Environmental
- 2 Covenants Act.

§22-22B-2. Definitions.

- 1 As used in this article and insofar as they are not in
- 2 conflict with article twenty-two of this chapter, the
- 3 following terms shall mean:

- 4 (1) "Activity and use limitations" means restrictions or
- 5 obligations created under this article with respect to real
- 6 property.

- 7 (2) "Agency" means the Department of Environmental
- 8 Protection or any federal agency that determines or
- 9 approves the environmental response project pursuant to
- 10 which the environmental covenant is created.

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

18 (4) "Environmental covenant" means a servitude arising
19 under an environmental response project that imposes
20 activity and use limitations.

21 (5) "Environmental response project" means a plan or
22 work performed for environmental remediation of real
23 property and conducted:

24 (A) Under a federal or state program governing environ-
25 mental remediation of real property, including article
26 twenty-two of this chapter;

27 (B) Incident to closure of a solid or hazardous waste
28 management unit, if the closure is conducted with ap-
29 proval of an agency; or

30 (C) Under a state voluntary clean-up program autho-
31 rized in article twenty-two of this chapter.

32 (6) "Holder" means the grantee of an environmental
33 covenant as specified in subsection (a), section three of this
34 article.

35 (7) "Person" means an individual, corporation, business
36 trust, estate, trust, partnership, limited liability company,
37 association, joint venture, public corporation, government,
38 governmental subdivision, agency or instrumentality or
39 any other legal or commercial entity.

40 (8) "Record" means information that is inscribed on a
41 tangible medium or that is stored in an electronic or other
42 medium and is retrievable in perceivable form.

43 (9) "State" means a state of the United States, the
44 District of Columbia, Puerto Rico, the United States
45 Virgin Islands or any territory or insular possession
46 subject to the jurisdiction of the United States.

§22-22B-3. Nature of rights; subordination of interests.

1 (a) Any person, including a person that owns an interest
2 in the real property, the agency, or a municipality or other
3 unit of local government, may be a holder. An environ-

4 mental covenant may identify more than one holder. The
5 interest of a holder is an interest in real property.

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

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

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

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

25 (2) This article does not require a person that owns a
26 prior interest to subordinate that interest to an environ-
27 mental covenant or to agree to be bound by the covenant.

28 (3) A subordination agreement may be contained in an
29 environmental covenant covering real property or in a
30 separate record. If the environmental covenant covers
31 commonly owned property in a common interest commu-
32 nity, the record may be signed by any person authorized by
33 the governing board of the owners' association.

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

§22-22B-4. Contents of environmental covenant.

1 (a) An environmental covenant must:

2 (1) State that the instrument is an environmental
3 covenant executed pursuant to this article;

4 (2) Contain a legally sufficient description of the real
5 property subject to the covenant;

6 (3) Describe the activity and use limitations on the real
7 property;

8 (4) Identify every holder;

9 (5) Be signed and notarized by the agency, every holder,
10 and unless waived by the agency every owner of the fee
11 simple of the real property subject to the covenant; and

12 (6) Identify the name and location of any administrative
13 record for the environmental response project reflected in
14 the environmental covenant.

15 (b) In addition to the information required by subsection
16 (a) of this section, an environmental covenant may contain
17 other information, restrictions and requirements agreed to
18 by the persons who signed it, including any:

19 (1) Requirements for notice following transfer of a
20 specified interest in, or concerning proposed changes in
21 use of, applications for building permits for, or proposals
22 for any site work affecting the contamination on, the
23 property subject to the covenant;

24 (2) Requirements for periodic reporting describing
25 compliance with the covenant;

26 (3) Rights of access to the property granted in connection
27 with implementation or enforcement of the covenant;

28 (4) A brief narrative description of the contamination
29 and remedy, including the contaminants of concern, the
30 pathways of exposure, limits on exposure and the location
31 and extent of the contamination;

32 (5) Limitation on amendment or termination of the
33 covenant in addition to those contained in sections nine
34 and ten of this article; and

35 (6) Rights of the holder in addition to its right to enforce
36 the covenant pursuant to section eleven of this article.

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

§22-22B-5. Validity; effect on other instruments.

1 (a) An environmental covenant that complies with this
2 article runs with the land.

3 (b) An environmental covenant that is otherwise effec-
4 tive is valid and enforceable even if:

5 (1) It is not appurtenant to an interest in real property;

6 (2) It can be or has been assigned to a person other than
7 the original holder;

8 (3) It is not of a character that has been recognized
9 traditionally at common law;

10 (4) It imposes a negative burden;

11 (5) It imposes an affirmative obligation on a person
12 having an interest in the real property or on the holder;

13 (6) The benefit or burden does not touch or concern real
14 property;

15 (7) There is no privity of estate or contract;

16 (8) The holder dies, ceases to exist, resigns or is replaced;
17 or

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

20 (c) An instrument that creates restrictions or obligations
21 with respect to real property that would qualify as activity
22 and use limitations except for the fact that the instrument
23 was recorded before the effective date of the enactment of
24 this article during the regular session of the Legislature in
25 two thousand five is not invalid or unenforceable because
26 of any of the limitations on enforcement of interests
27 described in subsection (b) of this section or because it was
28 identified as an easement, servitude, deed restriction or
29 other interest. This article does not apply in any other
30 respect to such an instrument.

31 (d) This article does not invalidate or render unenforce-
32 able any interest, whether designated as an environmental
33 covenant or other interest, that is otherwise enforceable
34 under the law of this state.

§22-22B-6. Relationship to other land-use law.

1 This article does not authorize a use of real property that
2 is otherwise prohibited by zoning, by law other than this
3 article regulating use of real property, or by a recorded
4 instrument that has priority over the environmental
5 covenant. An environmental covenant may prohibit or
6 restrict uses of real property which are authorized by
7 zoning or by law other than this article.

§22-22B-7. Notice.

1 (a) A copy of an environmental covenant shall be pro-
2 vided by the persons and in the manner required by the
3 agency to:

4 (1) Each person that signed the covenant;

5 (2) Each person holding a recorded interest in the real
6 property subject to the covenant;

7 (3) Each person in possession of the real property subject
8 to the covenant;

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

12 (5) Any other person the agency requires.

13 (b) The validity of a covenant is not affected by failure
14 to provide a copy of the covenant as required under this
15 section.

§22-22B-8. Recording.

1 (a) An environmental covenant and any amendment or
2 termination of the covenant must be recorded in every
3 county in which any portion of the real property subject to
4 the covenant is located. For purposes of indexing, a holder
5 shall be treated as a grantee.

6 (b) Except as otherwise provided in subsection (c),
7 section nine of this article, an environmental covenant is
8 subject to the laws of this state governing recording and
9 priority of interests in real property.

§22-22B-9. Duration; amendment by court action.

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

2 (1) By its terms limited to a specific duration or termi-
3 nated by the occurrence of a specific event;

4 (2) Terminated by consent pursuant to section ten of this
5 article;

6 (3) Terminated pursuant to subsection (b) of this section;

7 (4) Terminated by foreclosure of an interest that has
8 priority over the environmental covenant; or

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

11 (A) The agency that signed the covenant is a party to the
12 proceeding;

13 (B) All persons identified in subsections (a) and (b),
14 section ten of this article are given notice of the pendency
15 of the proceeding; and

16 (C) The court determines, after hearing, that the termi-
17 nation or modification will not adversely affect human
18 health or the environment.

19 (b) If the agency that signed an environmental covenant
20 has determined that the intended benefits of the covenant
21 can no longer be realized, a court, under the doctrine of
22 changed circumstances, in an action in which all persons
23 identified in subsections (a) and (b), section ten of this
24 article have been given notice, may terminate the covenant
25 or reduce its burden on the real property subject to the
26 covenant. The agency's determination or its failure to
27 make a determination upon request is subject to review
28 pursuant to article five, chapter twenty-nine-a of this
29 code.

30 (c) Except as otherwise provided in subsections (a) and
31 (b) of this section, an environmental covenant may not be
32 extinguished, limited or impaired through issuance of a
33 tax deed, foreclosure of a tax lien, or application of the
34 doctrine of adverse possession, prescription, abandonment,
35 waiver, lack of enforcement, or acquiescence, or a similar
36 doctrine.

37 (d) An environmental covenant may not be extinguished,
38 limited, or impaired except as authorized by this article.

§22-22B-10. Amendment or termination by consent.

1 (a) An environmental covenant may be amended or
2 terminated by consent only if the amendment or termina-
3 tion is signed by:

4 (1) The agency;

5 (2) Unless waived by the agency, the current owner of
6 the fee simple of the real property subject to the covenant;

7 (3) Each person that originally signed the covenant,
8 unless the person waived in a signed record the right to
9 consent or a court finds that the person no longer exists or

10 cannot be located or identified with the exercise of reason-
11 able diligence; and

12 (4) Except as otherwise provided in subdivision (2),
13 subsection (d) of this section, the holder.

14 (b) If an interest in real property is subject to an environ-
15 mental covenant, the interest is not affected by an amend-
16 ment of the covenant unless the current owner of the
17 interest consents to the amendment or has waived in a
18 signed record the right to consent to amendments.

19 (c) Except for an assignment undertaken pursuant to a
20 governmental reorganization, assignment of an environ-
21 mental covenant to a new holder is an amendment.

22 (d) Except as otherwise provided in an environmental
23 covenant:

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

26 (2) A holder may be removed and replaced by agreement
27 of the other parties specified in subsection (a) of this
28 section; and

29 (e) A court of competent jurisdiction may fill a vacancy
30 in the position of holder.

§22-22B-11. Enforcement of environmental covenant.

1 (a) A civil action for injunctive or other equitable relief
2 for violation of an environmental covenant may be main-
3 tained by:

4 (1) A party to the covenant;

5 (2) The agency or, if it is not the agency, the Department
6 of Environmental Protection;

7 (3) Any person to whom the covenant expressly grants
8 power to enforce;

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

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

14 (b) This article does not limit the regulatory authority of
15 the agency or the Department of Environmental Protection
16 under law other than this article with respect to an
17 environmental response project.

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

§22-22B-12. Uniformity of application and construction.

1 In applying and construing this uniform act, consider-
2 ation must be given to the need to promote uniformity of
3 the law with respect to its subject matter among states
4 that enact it.

§22-22B-13. Relation to Electronic Signatures in Global and National Commerce Act.

1 This article modifies, limits or supersedes the federal
2 Electronic Signatures in Global and National Commerce
3 Act (15 U. S. C. Section 7001, *et seq.*) but does not modify,
4 limit or supersede Section 101 of said Act (15 U.S.C.
5 Section 7001(a)) or authorize electronic delivery of any of
6 the notices described in Section 103 of said Act (15 U. S. C.
7 Section 7003(b)).

§22-22B-14. Severability.

1 If any provision of this article or its application to any
2 person or circumstance is held invalid, the invalidity does
3 not affect other provisions or applications of this article
4 which can be given effect without the invalid provision or
5 application, and to this end the provisions of this article
6 are severable.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Randolph White
.....
Chairman Senate Committee

D. Leha Brun
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

David E. Blum
.....
Clerk of the Senate

Gregg D. Bell
.....
Clerk of the House of Delegates

Carl Ray Tomblin
.....
President of the Senate

David B. DeLoach
.....
Speaker House of Delegates

The within *is approved* this the *28th*
Day of *April*, 2005.

[Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

APR 27 2005

Time 2:10 pm