

# KAZMAREK GEIGER & LASETER LLP

## ENVIRONMENTAL ADVISORY

### Georgia HB 1132: Environmental Covenants (February 25, 2008)

One of the most important developments in environmental law within the past decade has been the use of various “institutional controls” (or “land use controls” or “LUCs”) to effect safe and economically sound environmental cleanups. These controls are often necessary because the reasonable cleanups can leave some degree of contamination in place. Although the type and condition of such permitted contamination will not pose a threat to human health or the environment under the allowed circumstances, it is often important that appropriate measures be implemented to assure that circumstances do not change in a way that would cause a threat to materialize. One of the most common of such controls is the restrictive covenant (which in some cases is referred to as an easement).

Environmental restrictive covenants take a number of different forms: they may restrict property to certain uses (such as non-residential uses only), they may require that certain protective measures are not disturbed (such as protective barriers under the soil), or they may prohibit certain activities on property (such as extraction and use of groundwater). Sometimes covenants include affirmative obligations, such as the duty to monitor environmental conditions and provide notices or reports.

These kinds of measures are especially important for “brownfield” properties—contaminated properties that are being restored to productive use. However, environmental restrictive covenants have uses in contexts other than brownfields. For example, cleanups to non-residential standards are quite common in industrial or commercial areas, and therefore restrictive covenants can

be used to assure that no residential uses are placed on the property. Likewise, where cleanups would be unduly expensive or technically infeasible, a responsible party will often seek to do a lesser degree of cleanup and supplement the cleanup with an appropriate land use control. Any of these circumstances, brownfield cleanups, cleanups to use-specific standards, or reduced cleanups due to technical or economic impracticability, could call for an appropriate land use control.

At this point, however, environmental law runs into the mind-numbingly complex nuances of real property law. As any first-year law student can attest, American property law derives from hoary and obtuse medieval legal principles that not only could not have anticipated the modern environmental era, but in many ways are opposed to and undermine otherwise sensible environmental practices. At the risk of boring the uninitiated, it is not at all clear, for example, how modern environmental LUCs should be treated under property law concepts such as whether the restrictions “run with the land,” or “touch and concern” the land, or are “appurtenant to” the property interests of the holder. All of which is to say nothing about the bane of property law, the justly despised “rule against perpetuities.”

In addition, land use controls may not be as desirable or effective as the parties would like due to the realities of the modern world. It is one thing to impose a covenant that prohibits the use of underground water for drinking purposes, but by whom and how are such restrictions enforced? How are future owners supposed to know of these restrictions? What happens to those persons (such as lenders)

who hold interests in the now-burdened property?

For these reasons, there has been increasing interest in the “Uniform Environmental Covenants Act” (“UECA”). As of January 2008, UECA had been enacted in about 21 states, and had been or was supposed to be introduced in an equal number of states.

In Georgia, UECA has been introduced in the form of HB 1132, sponsored by Representatives Lindsey (R-54<sup>th</sup>), Tumlin (R-38<sup>th</sup>), Teilhet (D-40<sup>th</sup>), Willard (R-49<sup>th</sup>), and others. HB 1132 is essentially identical to UECA, with minor changes to conform to Georgia statutes.

HB 1132 has several key provisions:

- It clarifies the relationship between environmental covenants and other principles of real property law. For example, it makes it clear that prior interests are not subordinated or otherwise affected by the imposition of an environmental covenant.
- It specifies the necessary content for an enforceable covenant, and allows other information to be included, if so desired.
- It resolves (or at least addresses) a number of tensions between the content of environmental covenants and real property law, including making it clear that an environmental covenant is valid and enforceable even though it is not appurtenant to an interest in real property, has been assigned, imposes a negative burden, it does not “touch or concern” the land, it was made by one without privity of estate or contract, and the holder of the interest and of the covenant are the same person.
- States that an environmental covenant is perpetual unless it is limited by its terms or, among other things, terminated by consent, or terminated by eminent domain. Importantly, an environmental covenant cannot be terminated by adverse possession, prescription, waiver, or other similar means.

- The act provides for ways in which environmental covenants can be amended or terminated by consent.
- The act allows civil actions for enforcement of an environmental covenant to be brought by a wide range of interested persons, including the parties, the state EPD, or the affected municipality.
- Finally, the act requires EPD to establish and maintain a registry of restrictive covenants throughout the state and specifies the form and content of that registry.

It is not entirely clear how some aspects of HB 1132 will be implemented. For example, an effective covenant has to be signed by, in addition to every holder of the covenant and the fee owner of the property, EPD itself. How EPD will handle this administrative burden remains to be seen. Similarly, we will have to see how EPD establishes and maintains the registry of covenants. Funding the creation and operation of the registry will be, of course, an issue, although in theory the registry could be made to be self-supporting through “recording” fees.

Despite these uncertainties, HB 1132 validates and simplifies the use of environmental covenants, which are valuable tools in implementing safe and cost-effective environmental cleanups. The Georgia Chamber of Commerce recommends support of HB 1132. We agree.

For further information about HB 1132, or environmental covenants generally, or the cleanup or redevelopment of contaminated properties, please feel free to contact any of the attorneys at Kazmarek, Geiger & Laseter LLP. Further information about the firm is available at our web site: <http://www.kglattorneys.com>