The Benefits of A Uniform State Law for Institutional Controls

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Institutional controls are increasingly important tools in the kit of all parties who are fashioning environmental contamination cleanup. For this reason, they are often an invaluable asset in getting the property reused, and are often a critical part of implementing ecologically and economically sound risk based cleanup plans. Yet institutional controls can be effective only if they are legally and practically enforceable, and this is one of the problems that the Uniform Environmental Reuse Agreements Act[2] will address.

Institutional controls typically restrict the future use of the real estate in question, and they may also place affirmative duties on the present and future owners.[3] As such, their enforceability will depend on the real estate law of the state in which the contaminated property is located.

Current real estate law in this respect varies widely from state to state and is often uncertain. Two groups of questions arise about enforceability. One group of questions arise from older common law doctrines that restrict the application of these kinds of obligations, servitudes, covenants and easements in the common law of property. As we discuss more fully below, these common law doctrines present some potential enforceability problems which a state statute can remedy with certainty. The second group of enforceability questions grows principally out of the legal and political realities of the modern administrative state. Will state environmental regulators actually have the resources to enforce such restrictions, perhaps years after their creation, and will this enforcement then command the administrative priority needed to be effective? What role will other state and local governmental bodies play where such enforcement impacts local economic development? What enforcement measures may be taken by former owners of the property? Enforcement by private third parties is quite common in environmental matters but virtually unknown in property law; is it advisable in this situation? What impact will these controls have on the pre-existing interests of third parties such as existing mortgage holders, and what will be the consequences of foreclosure of encumbrances on the contaminated property, such as old mortgages or future unpaid municipal tax liens? This second group of enforceability problems is also discussed further below.

These concerns with the effective implementation and enforcement of institutional controls are not new, and a number of states have enacted statutes responding to them. Some states specifically regulate these controls under a separate act[4], while others have provided for these controls within a comprehensive statute dealing with brownfields or cleanups more generally.[5] While several states have made commendable statutory efforts, they are neither universal, nor are they all comprehensive.[6] At the federal level, both the Environmental

Protection Agency (EPA) and the Department of Defense (DOD), for example, also have quite robust institutional controls policies, but these do not address state property law issues.[7]

A well-conceived uniform act has the potential to fill these gaps. Further, a uniform act will be a particular asset in promoting the reuse of contaminated properties because it will reduce both the uncertainty and the considerable transaction costs of working within 50 different jurisdictions with potentially 50 different sets of regulatory outcomes. For both the developers who will in many cases undertake the reuse projects, and their investors and lenders, uniform legal rules, if achieved, should promote their willingness to participate in these reuse projects outside of the jurisdictions in which they have already developed familiarity with local rules.

This effort to prepare a uniform act is still in its early stages, and a completed draft is not expected to be proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL)[8] before August, 2003. The project began with a study committee meeting of the Joint Editorial Board on Real Property Acts (JEB) held on June 22-23, 2001, in Washington D.C.. In addition to members of the JEB, representatives of a large number of stakeholders with diverse interests were invited; about 35 attended and offered very useful insights. The unanimous view of those present was that a uniform act could make a valuable contribution. A report to that effect was prepared for consideration at the NCCUSL's annual meeting in August, 2001.

Based on that report, and encouraged by an generous offer of financial support for the drafting process by the US Department of Defense, the Executive Committee of the NCCUSL formed a drafting committee to consider a possible uniform act. This committee, together with approximately 25 invited representatives of stakeholder groups, held its first drafting meeting on November 16-18, 2001. The next drafting committee meeting is planned for April, 2002, and the committee anticipates presenting a draft uniform act to the National Conference for consideration at its annual meeting in August, 2002. Further drafting committee meetings would then be expected during fall 2002 and spring 2003, with submission of a proposed final draft to the National Conference in August, 2003. If the National Conference approves the proposal as a new uniform act, enactment in individual states will then be sought by the Conference. Of course, with any project of this scope and magnitude, there can be no assurance that events will unfold according to this tentative schedule.

At this early stage, our crystal ball is simply not able to predict confidently how the work of the drafting committee and the National Conference will proceed, nor to predict the terms of the proposed uniform act that may eventually emerge. However, the efforts to date have identified a group of problems the Act should address and, for some of these, at least a conceptual approach to the response. The remainder of this chapter will survey the problems and preliminary thinking on solutions, but always with the caveat that we are engaged in the risky task of predicting the decisions of lawyers and other policymakers.

Common Law Problems of Enforceability

The traditional common law of property presents a number of questions about the enforceability of institutional controls which should be addressed by a uniform act. Institutional controls will often impose two kinds of restrictions to address the environmental risks presented by residual contamination. First, the institutional controls will frequently restrict the future use of real estate; for example, one might prohibit residential use of the property or the use of groundwater under it. Second, they may require the owner to undertake future maintenance of specific waste containment devices installed at the site or to do future monitoring activities, or both. Both kinds of restrictions will need to run with the land, bind future owners, and provide continuing environmental protection. These restrictions are interests in real property known as servitudes, and in particular those subcategories of servitudes known as easements and covenants.[9] Traditional common law rules limit the enforeceablility of these servitudes.

The traditional common law doctrines at issue are both complex and obscure and only a brief summary here must suffice.[10] In this body of common law, covenants concerning real estate were enforceable only if they "touch and concern" the real estate in question. Similarly, easements were enforceable only if the holder of the easement held a "dominant estate", that is, an ownership or leasehold interest in a specific parcel of real property which was benefitted by the easement over the so-called 'servient estate" - that is, the real estate subject to the easement . In addition, a covenant was enforceable only if it served one of a limited number of purposes, and covenants for novel purposes were suspect. In a similar vein, only specified types of restrictions on an owner's use of his land–negative easements–were enforceable, and easements which imposed affirmative obligations were generally unenforceable. Finally, requirements of privity between estates, and sometimes their holders, were imposed.

This group of complicated property law doctrines presents real questions about the enforceability of institutional controls, as well as many other types of servitudes. The trend of modern property law, as reflected in the recently completed Restatement of the Law of Property (Servitudes) Third, is to do away with these doctrinal restrictions.[11] As this modern statement of the law of servitudes is embraced by the states, these enforceability concerns should gradually disappear. However, the process of incorporating this change into state common law may take some time and may be imperfectly completed. Cases will arise only sporadically in many jurisdictions, and judges may embrace the new rules only gradually. As a result, these common law doctrines will likely present some uncertainty concerning the enforceability of the restrictions for some time. The act will end this common law uncertainty.

Thus, as a first principle, the drafting committee has agreed unanimously that this Uniform Act will specifically reject the application of these traditional doctrines to institutional controls. In doing so, the act follows the the example of the Uniform Conservation Easements Act[12] and a number of specific state statutes implementing it.[13] By rejecting the application of these doctrines, the act would assure that the traditional common law questions of enforceability will not plague institutional controls or the reuse agreements which provide for them.

Effective Enforcement in the Environmental Regulatory World

The second group of enforcement concerns arise not from traditional property common law, but from the realities of environmental protection in today's administrative government. While institutional controls may be part of a voluntary cleanup, the controls will more typically be used as part of an environmental cleanup mandated by federal or state regulation, and these cleanups will be subject to close regulatory scrutiny. Thus, environmental regulators will have a central role in creating institutional controls, and there is a consensus that regulatory approval will be required for any controls to be enforceable under the new act. We presently expect that the act will also require regulatory approval of modifications and terminations of the initial controls. The hard question comes next: will the controls be effectively enforced, not just today, but into the indefinite future, for as long as the residual contamination presents environmental risks? Will those environmental regulators have the resources necessary to monitor and enforce the controls? Will enforcing these controls have the administrative priority to ensure that it actually gets done? What is the proper role for local governments in future enforcement? Private parties? In what ways can a uniform act contribute to the enforcement process and to what extent should a uniform act avoid detailed recitation of what have traditionally been matters of local administrative practice?

As a first step, regular periodic reporting by the property owner and the holder of the restrictions seems to be a good idea, and it is required in several of the existing state statutes.[14] In addition, some form of notice of transfers of the real estate, as well as notice of any changes in its uses is also provided for in several of the existing statutes.[15] At least one state requires the state environmental regulatory agency to report on the institutional controls every 5 years, and this appears to be one good way to keep the question from falling between the cracks in a busy administrative agency.[16] Where modification of the restrictions and obligations of the institutional controls is sought, the act is likely to benefit from a prescribed process, mandatory regulatory agency approval, and appropriate channels for participation that are consistent with existing federal and state requirements.

Beyond these questions of notice and process, the act will likely address the question of who can bring an action to enforce the restrictions. While the relevant environmental regulator is an obvious person to hold enforcement power, there are conflicting policies with respect to how broadly that power ought to be shared. If others wish to join the actions, should they have the power to do so?[17] Local governments are particularly concerned with protecting their residents from the environmental risks that institutional controls seek to contain, and they will surely seek a role in the enforcement process.[18] However, local governments are also quite properly interested in local economic development, and this interest may influence their view of these controls, particularly as the controls are applied over time. While institutional controls may initially promote reuse of otherwise vacant real estate, over time their restrictions on use of the real estate may discourage future development and provoke the displeasure of local governments. Local governments are clearly interested parties in enforcement, but the extent of that role will surely be the subject of committee discussion.[19]

Other parties, including former owners of the property, may well have residual regulatory liability for cleanup if the environmental risks change, either because more contamination is found, because better scientific understanding of the contamination leads to a reevaluation of

those risks, or because a new use changes the potential for exposure. These parties are quite interested in enforcement of the institutional controls and their representatives will likely advocate for the authority to protect that interest.

The role of third parties, including members of the general public and environmental organizations or their members, in the enforcement process is also likely to be the subject of discussion. The tradition of real property law is that such third party enforcement is unwarranted and potentially officious; if the parties to the controls do not seek enforcement, presumably it is not needed.[20] However, the tradition of environmental law is quite different. Modern environmental law generally authorizes enforcement actions by any person, and the tradition of citizen's suits is well established even though it is sometimes controversial.[21] Some accommodation between these two traditions will surely be discussed, since all interests in this subject will need to be satisfied if the statute is to be widely supported in the states.

There are a number of alternative approaches. Some states designate specific third party beneficiaries at the time institutional controls are created, and then give these designated third parties the rights to bring an enforcement suit.[22] Another possibility is to give enforcement rights to any "person aggrieved", thereby adopting the parameters of this well known administrative law standard.[23] Yet another alternative is to be silent, and rely on the existing state of the law. At present, the drafting committee continues to work on the question of which private parties should be authorized to sue, and how their actions will interface with governmental enforcement efforts.

Finally, what remedies? Injunctive remedies are among the traditional means of protecting the public health. While at least one state authorizes civil penalties[24], this is another controversial issue. This is particularly true in view of the fact that institutional controls typically exist in the larger regulatory context governing the waste cleanup, with the full panoply of regulatory penalties available.

Further Issues

The uniform act might potentially resolve several other issues related to institutional controls and the reuse agreements which give rise to them. One such issue is the question of how to provide the public with general information about the residual contamination and the resulting environmental risks that the institutional controls seek to address. The public will likely benefit from a convenient, accessible and comprehensible statement describing the contaminants, the likely exposure pathways, and the extent of exposure that would give rise to environmental risks.

We currently contemplate that the act will provide for such a summary, specifying what it must contain, and also create a registry or other system that makes it available. Many states now require that institutional controls provisions be recorded in a special registry kept in the environmental regulator's office, in addition to being recorded in the land records.[25] Such a

special registry may offer a suitable solution to the question of where to put this information. Ideally, such a registry will eventually be available and searchable electronically.

There are a number of other specific technical questions on which uniform resolution would be particularly useful, even though the questions themselves will not be particularly controversial. Certainly these include the details of creating the real estate interests called for by the institutional controls, as well as authorization to record them in the land records. There appears to be widespread consensus that regulator approval should be required to create or modify these interests, so as to guarantee protection of the public health and the environment. In any event, a specified, regular process for proposing modifications and terminations is clearly appropriate, as well as such a process for regulators to evaluate the proposals.

There are other issues, each potentially more controversial, which are no less in need of resolution. One of the most difficult is the priority of prior recorded interests in the real estate. Suppose, for example, there is a pre-existing mortgage on the real estate. Should the restrictions and obligations in the institutional controls survive foreclosure? Environmental protection policy says they must, but fundamental property law notions insist that the rights of prior interests can not be changed without their consent.[26] Some resolution of this issue will be essential. Of course, the real estate in question is presumably burdened with environmental contamination, and may well not be in current use, making the prior interest less valuable than it would otherwise be. In this situation, holders of prior interests may well be willing to agree to subordination in order to get the institutional controls needed for reuse of the property.[27]

A second controversial question is the application of the Uniform Record Marketable Title Act.[28] In general, Marketable Title Acts specify that interests which are more than a certain number of years old - often, 40 or 60 years - must be re-recorded to remain in force, subject to a group of enumerated exceptions. This makes life easier for title searchers, particularly in jurisdictions with a long history of land records and no electronic recording or searching capacity. However, application of the Marketable Title Act would potentially terminate land use restrictions and other institutional controls even though the environmental risk they address is still present. At least one state has made an exception to the Act for institutional controls,[29] and the Restatement of Servitudes supports an exception for these kinds of restrictions.[30] If such an exception is made, then creation of the specialized registry for institutional controls restrictions discussed above, together with other practical means of learning about these restrictions, will be particularly useful for title searchers, investors and potential owners of that real estate, and others who have an interest in securing actual notice of contamination.

Third, the process of modifying restrictions and duties in institutional controls will present difficult practical questions in dealing with current and former owners and other parties with residual regulatory liability. As a result of both federal and state regulatory schemes, former owners and many other parties typically will be liable for the costs associated with contamination on the property. While that liability will initially have been resolved in the action that lead to the creation of the institutional controls, a future contingent liability remains with

respect to further regulatory cleanup if it becomes necessary. To address that possibility, the regulator approving a cleanup claim will likely seek to include some kind of re-opener provision in the cleanup agreement that calls for future liability if more contamination is discovered. Further, violation of the institutional controls will likely lead regulators to insist on more cleanup. In either case, the parties previously liable under the regulatory scheme are quite legitimately interested in effective enforcement of the institutional controls so they can avoid this future contingent liability. To the extent that future liability will be imposed on future owners of that property who may not have been the party responsible for causing the contamination, the reopener possibility may well discourage parties from purchasing the property, at least without some sort of indemnity agreement from the regulator, an insurance company or the party causing the contamination. Modification of the controls could trigger future regulatory liability and thus these parties have a real and legitimate interest in any modifications. The drafters of the Uniform Act will likely consider ways to address these conflicting policy goals.

Fourth is the question of application of the uniform act to institutional controls that predate it. To the extent the act can resolve common law enforceability problems for these pre-act controls, the benefits of such certainty are clear. Beyond this, application of the act's other provisions may well change the terms of those restrictions and obligations. It may be that such application of the act would be appropriate only when the parties to those prior agreements choose to opt into the uniform act's coverage.

Conclusion

Institutional controls offer great promise to improve environmental cleanup and the reuse of contaminated property. These controls make risk based cleanups possible by protecting against the risks presented by the residual contamination. Yet to achieve this protection, the terms of the controls must be clearly established and their enforcement must be realistically assured. This chapter presents a brief sketch of the issues that the uniform act will address to do so. Comments, suggestions and questions are most welcome as the drafting process continues.

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[1] Dirk Bender and Ben Bare, students at the University of Connecticut School of Law, have provided invaluable research help on this chapter, and on the overall project.

[2] A note on semantics may be useful here. Institutional controls are established in an agreement between the real estate owner and the relevant environmental regulatory agency. In many states that agreement is called an "Environmental Covenant", although "Environmental Land Use Restriction" and other names are also used. The NCCUSL project was originally called the Uniform Environmental Covenants Act, but several members of the drafting committee have expressed reservations about this technically inaccurate use of the term covenant to refer to what is in fact a property law servitude, one containing both covenants and easements. (The definitions of covenant and other relevant property law terms are discussed below.) The current draft uses the term "Environmental Reuse Agreement" although the drafting committee has not made a final determination of the term to be used.

[3] *See*, *e.g.*, the types of restrictions and affirmative obligations that are discussed in chapters contained elsewhere in this book, including "Colorado's Senate Bill 01-145: The "Environmental Covenants" Law"; "Activity and Use Limitations Applied to Risk-Based Corrective Action"; "The Guardian Trust"; and "Using Information

Technology to Provide Long-Term Management of Environmentally Impaired Properties: A Web-Based Tracking System That Uses Local Permitting Processes to Signal Changes to Land and Water Use".

[4]See, e.g., Mont. Code Anno. § 75-10-727 (2000), 2001 Colo. SB 145 (Colorado), A.R.S. § 49-158 (2000) (Arizona).

[5] See, e.g. MCLS §324.20120b (2001) (Michigan), N.C. Gen. Stat. § 130A-310.30 et. seq. (2000), N.J. Stat § 58:10B-1 et. seq. (2001).

[6]For example, only Indiana has dealt with the question of whether the environmental land use restrictions will be exempt from the Marketable Title Act provisions. Burns Ind. Code Ann. § 32-1-5-2(f) 2000.

[7] Department of Defense Policy on Land Use Controls Associated with Environmental Restoration Activities (Jan. 17, 2001) and Responsibility for Additional Environmental Cleanup after Transfer of Real Property, July 25, 1997. Federal Facilities Branch Land Use Assurance at Federal Facilities, April 13, 1998. (EPA Region 4). EPA, Institutional Controls and Transfer of Real Property under CERCLA Section 120(h)(3)(A), (B) or (C), February, 2000.

[8] The purpose of the NCCUSL is to promote uniformity in state law on all subjects where uniformity is desirable and practical. To accomplish this, the Commissioners participate in drafting Acts on various subjects and endeavor to secure enactment of proposed Acts in every State. Organized in 1892, the Conference has drafted and often redrafted hundreds of Acts in response to changing social and commercial circumstances. Many of those Acts, such as the Uniform Commercial Code, have been universally enacted, or nearly so.

The Commissioners are appointed pursuant to the appointment process of each State as well as the District of Columbia, the Virgin Islands and Puerto Rico. The governors and other appointing authorities have appointed lawyers from every field of legal practice, as well as judges, legislators and law professors. All Commissioners are members of the Bar, and serve without compensation. Many commissioners have served for more than 20 years. A small administrative staff assists the Commissioners from its Chicago headquarters.

[9] For definitions, see Restatement of the Law of Property (Servitudes) Third (ALI, 2000) (hereinafter Restatement of Servitudes) §§1.1 (Servitudes) 1.2 (Easement) and 1.3(Covenant).

[10] For a fuller discussion, see Restatement of Servitudes § 1.6 and Comments; Uniform Conservation Easements Act, § 4 and Comments.

[11] See Restatement of Servitudes § 1.6, and Chapters 2 and 3 generally. For specific doctrines, see §§ 2.4 (horizontal privity), 2.5 (benefitted or burdened estates), 2.6 (benefits in gross and third party benefits), 3.2 (touch and concern doctrine), 3.3 (rule against perpetuities), 3.5 (indirect restraints on alienation).

[12] Uniform Conservation Easements Act § 4 has been adopted in 22 states. All but three states have some form of conservation easements act. Restatement of Servitudes § 1.6, Comments.

[13] AL, AK, AZ, AR, DE, DC, IO, IN, KS, KY, ME, MN, MI, NV, NM, OR, SC, SO, TX, VA, WV, WI.

[14]See, e.g., A.R.S. § 45-152(H) (2000) (Arizona), N.J. Stat. § 58:10B-13(a)(2) (2001)

[15] See, e.g., C.R.S. 25-15-319(c) (2001) (Colorado), C.R.S. 25-15-321(5), MCLS § 324.20120b(4)(c) (2001) (Michigan).

[16] N.J. Stat. § 58:10B-13 (5).

[17] Connecticut authorizes such intervention. Conn. Gen. Stat. § 22a-133P (2001).

[18] C.R.S. 25-15-322(5) (2001) (Colorado), N.C. Gen. Stat. § 130A-310.35(f) (2000).

[19] For example, at Love Canal, the local School Board was under great pressure to build new schools for an expanding student population and chose to build a school on land known to contain waste, with the following notice in its deed: "Prior to the delivery of this instrument of conveyance, the grantee herein has been advised by the grantor that the premises above described have been filled, in whole or in part, to the present grade level thereof with waste products resulting from the manufacturing of chemicals by the grantor. . . and the grantee assumes all risk and liability incident to the use thereof. . . . It is further agreed as a condition hereof that each subsequent conveyance of the aforesaid lands shall be made subject to the foregoing provisions and conditons" Quoted in Zuesse, "Love Canal, The Truth Seeps Out", Reason, Feb. 1981, p. 1.

[20] Clark on Covenants, at 91 notes that privity of contract required for enforcement.

[21] See Novick, Law of Environmental Protection, (1987 with 2001 Supp.) §12.08.3.

[22] C.R.S. 25-15-322(4) (2001) Colorado.

[23] Pierce, Administrative Law Treatise § 16.3 (1994).

[24] Conn. Gen. Stat. § 22a-133p (2001).

[25] See, e.g., C.G.S. § 25-15-323 (2001) (Colorado), A.R.S. § 49-152(D) 2000, (Arizona).

[26] Only a few state laws have addressed this problem to date.

[27] Connecticut requires that all prior interests be subordinated at the time of creating the institutional controls. Conn. Gen. Stat. 22a-133o(b) (2001).

[28] See generally, 31 A.L.R. 4th 11.

[29] Only Indiana has provided an exception to the Marketable Title Act for its institutional controls. Burns Ind. Code Ann. § 32-1-5-2(f) (2000).

[30] Restatement of Servitudes § 7.16.