

SENATE CONSERVATION COMMITTEE SUBSTITUTE FOR
SENATE BILL 279

48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007

AN ACT

RELATING TO REAL PROPERTY; ENACTING THE UNIFORM ENVIRONMENTAL
COVENANTS ACT; PROVIDING FOR COVENANTS RESTRICTING USE OF REAL
PROPERTY SUBJECT TO ENVIRONMENTAL REMEDIATION; PROVIDING
PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. -- This act may be cited as the
"Uniform Environmental Covenants Act".

Section 2. DEFINITIONS. -- As used in the Uniform
Environmental Covenants Act:

A. "activity and land use limitations" means
restrictions or obligations created pursuant to the Uniform
Environmental Covenants Act with respect to real property;

B. "agency" means the department of environment or
any other state or federal agency that determines or approves

1 the environmental response project pursuant to which the
2 environmental covenant is created;

3 C. "common interest community" means a
4 condominium, cooperative or other real property with respect
5 to which a person, by virtue of the person's ownership of a
6 parcel of real property, is obligated to pay property taxes or
7 insurance premiums or for maintenance or improvement of other
8 real property described in a recorded covenant that creates
9 the common interest community;

10 D. "environmental covenant" means a servitude
11 arising under an environmental response project that imposes
12 activity and land use limitations, but does not include any
13 covenant or servitude that restricts the withdrawal or use of
14 ground water;

15 E. "environmental response project" means a plan
16 or work performed for environmental remediation of real
17 property and conducted:

18 (1) under a federal or state program
19 governing environmental remediation of real property;

20 (2) incident to closure of a solid or
21 hazardous waste management unit, if the closure is conducted
22 with approval of an agency; or

23 (3) under a state voluntary cleanup program
24 authorized in the Voluntary Remediation Act;

25 F. "holder" means the grantee of an environmental

1 covenant as specified in Subsection A of Section 3 of the
2 Uniform Environmental Covenants Act;

3 G. "person" means an individual; corporation;
4 business trust; estate; trust; partnership; limited liability
5 company; association; joint venture; public corporation;
6 government; governmental subdivision, agency or
7 instrumentality; or any other legal or commercial entity;

8 H. "record", when used as a noun, means
9 information that is inscribed on a tangible medium or that is
10 stored in an electronic or other medium and is retrievable in
11 perceivable form; and

12 I. "state" means a state of the United States, the
13 District of Columbia, Puerto Rico, the United States Virgin
14 Islands or any territory or insular possession subject to the
15 jurisdiction of the United States.

16 Section 3. NATURE OF RIGHTS--SUBORDINATION OF
17 INTERESTS.--

18 A. Any person, including a person who owns an
19 interest in real property, an agency or a municipality or
20 other unit of local government, may be a holder. An
21 environmental covenant may identify more than one holder. The
22 interest of a holder is an interest in real property.

23 B. A right of an agency pursuant to the Uniform
24 Environmental Covenants Act or pursuant to an environmental
25 covenant, other than a right as a holder, is not an interest

. 166880. 2

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1 in real property.

2 C. An agency is bound by any obligation it assumes
3 in an environmental covenant, but an agency does not assume
4 obligations merely by signing an environmental covenant. Any
5 other person who signs an environmental covenant is bound by
6 the obligations the person assumes in the environmental
7 covenant, but signing the environmental covenant does not
8 change obligations, rights or protections granted or imposed
9 under law other than the Uniform Environmental Covenants Act,
10 except as provided in the environmental covenant.

11 D. The following rules apply to interests in real
12 property in existence at the time an environmental covenant is
13 created or amended:

14 (1) an interest that has priority under other
15 law is not affected by an environmental covenant unless the
16 person that owns the interest subordinates that interest to
17 the environmental covenant;

18 (2) the Uniform Environmental Covenants Act
19 does not require a person who owns a prior interest to
20 subordinate that interest to an environmental covenant or to
21 agree to be bound by the environmental covenant;

22 (3) a subordination agreement may be
23 contained in an environmental covenant covering real property
24 or in a separate record. If the environmental covenant covers
25 commonly owned property in a common interest community, the

1 record may be signed by any person authorized by the governing
2 board of the owners' association; and

3 (4) an agreement by a person to subordinate a
4 prior interest to an environmental covenant affects the
5 priority of that person's interest but does not by itself
6 impose any affirmative obligation on the person with respect
7 to the environmental covenant.

8 Section 4. CONTENTS OF ENVIRONMENTAL COVENANT. --

9 A. An environmental covenant shall:

10 (1) state that the instrument is an
11 environmental covenant executed pursuant to the Uniform
12 Environmental Covenants Act;

13 (2) contain a legally sufficient description
14 of the real property subject to the environmental covenant;

15 (3) describe the activity and land use
16 limitations on the real property;

17 (4) identify every holder;

18 (5) be signed by every holder and, unless
19 waived by the agency, every owner of the fee simple of the
20 real property subject to the environmental covenant;

21 (6) be approved and signed by the agency in
22 its discretion;

23 (7) if the agency is not a state agency, be
24 approved and signed by the department of environment in its
25 discretion;

. 166880. 2

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1 (8) indicate whether ground water is
2 contaminated;

3 (9) describe the former activity that caused
4 contamination and whether residual contamination, including
5 contamination of ground water, may still be present that could
6 be harmful to human health and the environment;

7 (10) contain, if the environmental covenant
8 prohibits the unrestricted use of the real property, the
9 possible penalties and the notice and right of rescission
10 requirements provided in Section 8 of the Uniform
11 Environmental Covenants Act;

12 (11) contain requirements for periodic
13 reporting to the agency that describe compliance with the
14 environmental covenant; and

15 (12) identify the name and location of any
16 administrative record for the environmental response project
17 reflected in the environmental covenant.

18 B. In addition to the information required by
19 Subsection A of this section, an environmental covenant may
20 contain other information, restrictions and requirements
21 required by the agency, including:

22 (1) requirements for notice following
23 transfer of a specified interest in, or concerning proposed
24 changes in use of, applications for building permits or
25 proposals for any site work affecting the contamination on the

1 property subject to the environmental covenant;

2 (2) rights of access to the property granted
 3 in connection with implementation or enforcement of the
 4 environmental covenant;

5 (3) a brief narrative description of the
 6 contamination and remedy, including the contaminants of
 7 concern, the pathways of exposure, limits on exposure and the
 8 location and extent of the contamination;

9 (4) limitation on amendment or termination of
 10 the environmental covenant in addition to those contained in
 11 Sections 10 and 11 of the Uniform Environmental Covenants Act;
 12 and

13 (5) rights of the holder in addition to the
 14 holder's right to enforce the environmental covenant pursuant
 15 to Section 12 of the Uniform Environmental Covenants Act.

16 C. In addition to other conditions for the
 17 agency's approval of an environmental covenant, the agency may
 18 require those persons specified by the agency who have
 19 interests in the real property to sign the environmental
 20 covenant.

21 Section 5. VALIDITY--EFFECT ON OTHER INSTRUMENTS. --

22 A. An environmental covenant that complies with
 23 the Uniform Environmental Covenants Act runs with the land.

24 B. An environmental covenant that is otherwise
 25 effective is valid and enforceable even if:

. 166880. 2

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1 (1) it is not appurtenant to an interest in
2 real property;

3 (2) it can be or has been assigned to a
4 person other than the original holder;

5 (3) it is not of a character that has been
6 recognized traditionally in common law;

7 (4) it imposes a negative burden;

8 (5) it imposes an affirmative obligation on a
9 person having an interest in the real property or on the
10 holder;

11 (6) the benefit or burden does not touch or
12 concern real property;

13 (7) there is no privity of estate or
14 contract;

15 (8) the holder dies, ceases to exist, resigns
16 or is replaced; or

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

19 C. An instrument that creates restrictions or
20 obligations with respect to real property that would qualify
21 as activity and land use limitations, except for the fact that
22 the instrument was recorded before the effective date of the
23 Uniform Environmental Covenants Act, is not invalid or
24 unenforceable because of any of the limitations on enforcement
25 of interests described in Subsection B of this section or

1 because it was identified as an easement, servitude, deed
 2 restriction or other interest. The Uniform Environmental
 3 Covenants Act does not apply in any other respect to such an
 4 instrument.

5 D. The Uniform Environmental Covenants Act does
 6 not invalidate or render unenforceable any interest, whether
 7 designated as an environmental covenant or other interest,
 8 that is otherwise enforceable under the law of New Mexico.

9 Section 6. RELATIONSHIP TO OTHER LAW. --

10 A. The Uniform Environmental Covenants Act does
 11 not authorize a use of real property that is otherwise
 12 prohibited by zoning, by a law other than the Uniform
 13 Environmental Covenants Act regulating use of real property or
 14 by a recorded instrument that has priority over the
 15 environmental covenant. An environmental covenant may
 16 prohibit or restrict a use of real property that is authorized
 17 by zoning or by a law other than the Uniform Environmental
 18 Covenants Act.

19 B. For the purpose of preserving and protecting
 20 water resources and notwithstanding any provision of the
 21 Uniform Environmental Covenants Act, the county or municipal
 22 zoning authority may require water use limitations and water
 23 quality protections pursuant to Section 3-21-1 NMSA 1978.

24 C. A person shall not submit an environmental
 25 covenant as evidence supporting the approval of an alternative

1 abatement standard for ground water at a hearing held pursuant
2 to the Water Quality Act.

3 D. The Uniform Environmental Covenants Act
4 supplements and does not displace the Voluntary Remediation
5 Act, the New Mexico Mining Act, the Surface Mining Act, the
6 Oil and Gas Act, the Water Quality Act or any other law
7 governing an environmental response project.

8 Section 7. NOTICE. --

9 A. A copy of an environmental covenant shall be
10 provided by the holder to the following persons and in the
11 manner required by the agency:

12 (1) each person who signed the environmental
13 covenant;

14 (2) each person holding a recorded interest
15 in the real property subject to the environmental covenant;

16 (3) each person in possession of the real
17 property subject to the environmental covenant;

18 (4) the agency;

19 (5) the state engineer, if the covenant
20 indicates that ground water is contaminated or that residual
21 contamination of ground water may be present;

22 (6) all owners of property adjoining the
23 property subject to the environmental covenant;

24 (7) each municipality or other unit of local
25 government in which real property subject to the environmental

1 covenant is located; and

2 (8) any other person the agency requires.

3 B. The validity of an environmental covenant is
4 not affected by failure to provide a copy of the environmental
5 covenant as required under this section.

6 Section 8. ENVIRONMENTAL COVENANT THAT PROHIBITS
7 UNRESTRICTED USE OF REAL PROPERTY--NOTICE--RIGHT OF
8 RESCISSION.--

9 A. An owner of real property subject to an
10 environmental covenant that prohibits the unrestricted use of
11 the property shall provide to the purchaser, lessee or other
12 person acquiring an interest in the property:

13 (1) a recorded copy of the environmental
14 covenant;

15 (2) written notice that the person has the
16 right to rescind the conveyance within ten business days after
17 receiving the notice required by this subsection; and

18 (3) written notice that an owner of real
19 property subject to an environmental covenant that prohibits
20 the unrestricted use of the property is subject to civil and
21 criminal penalties pursuant to the Uniform Environmental
22 Covenants Act for failing to comply with the provisions of
23 this section.

24 B. A purchaser, lessee or other person acquiring
25 an interest in real property subject to an environmental

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1 covenant that prohibits the unrestricted use of the property
2 shall have the right to rescind the conveyance within ten
3 business days after receiving the required copy of the
4 environmental covenant and the notice from the owner pursuant
5 to Subsection A of this section.

6 C. An environmental covenant that prohibits the
7 unrestricted use of the property shall explicitly contain, in
8 addition to the requirements of Section 4 of the Uniform
9 Environmental Covenants Act, a description of the possible
10 penalties and of the right of rescission and notice
11 requirements provided in this section.

12 Section 9. RECORDING. --

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

18 B. Except as otherwise provided in Subsection C of
19 Section 10 of the Uniform Environmental Covenants Act, an
20 environmental covenant is subject to the laws of New Mexico
21 governing recording and priority of interests in real
22 property.

23 Section 10. DURATION--AMENDMENT BY COURT ACTION. --

24 A. An environmental covenant is perpetual unless
25 it is:

1 (1) by its terms, limited to a specific
 2 duration or terminated by the occurrence of a specific event;

3 (2) terminated by consent pursuant to Section
 4 11 of the Uniform Environmental Covenants Act;

5 (3) terminated pursuant to Subsection B of
 6 this section;

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

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

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

13 (b) all persons identified in
 14 Subsections A and B of Section 11 of the Uniform Environmental
 15 Covenants Act are given notice of the pendency of the
 16 proceeding; and

17 (c) the court determines, after
 18 hearing, that the termination or modification will not
 19 adversely affect human health or the environment.

20 B. If the agency that signed an environmental
 21 covenant has determined that the intended benefits of the
 22 environmental covenant can no longer be realized, a court,
 23 under the doctrine of changed circumstances, in an action in
 24 which all persons identified in Subsections A and B of Section
 25 11 of the Uniform Environmental Covenants Act have been given

1 notice, may terminate the environmental covenant or reduce its
2 burden on the real property subject to the environmental
3 covenant. The agency's determination or its failure to make a
4 determination upon request is subject to review pursuant to
5 the Administrative Procedures Act.

6 C. Except as otherwise provided in Subsections A
7 and B of this section, an environmental covenant may not be
8 extinguished, limited or impaired through issuance of a tax
9 deed, foreclosure of a tax lien or application of the doctrine
10 of adverse possession, prescription, abandonment, waiver, lack
11 of enforcement, acquiescence or a similar doctrine.

12 Section 11. AMENDMENT OR TERMINATION BY CONSENT. --

13 A. An environmental covenant may be amended or
14 terminated by consent only if the amendment or termination is
15 signed by:

16 (1) the agency;

17 (2) the current owner of the fee simple of
18 the real property subject to the environmental covenant,
19 unless waived by the agency;

20 (3) each person who originally signed the
21 environmental covenant, unless the person waived in a signed
22 record the right to consent or a court finds that the person
23 no longer exists or cannot be located or identified with the
24 exercise of reasonable diligence; and

25 (4) the holder, except as otherwise provided

1 in Paragraph (2) of Subsection D of this section.

2 B. If an interest in real property is subject to
3 an environmental covenant, the interest is not affected by an
4 amendment of the environmental covenant unless the current
5 owner of the interest consents to the amendment or has waived
6 in a signed record the right to consent to amendments.

7 C. Except for an assignment undertaken pursuant to
8 a governmental reorganization, assignment of an environmental
9 covenant to a new holder is an amendment.

10 D. Except as otherwise provided in an
11 environmental covenant:

12 (1) a holder may not assign its interest
13 without consent of the other parties;

14 (2) a holder may be removed and replaced by
15 agreement of the other parties specified in Subsection A of
16 this section; and

17 (3) a court of competent jurisdiction may
18 fill a vacancy in the position of holder.

19 Section 12. ENFORCEMENT OF ENVIRONMENTAL COVENANT. --

20 A. A civil action for injunctive or other
21 equitable relief for violation of an environmental covenant
22 may be maintained by:

23 (1) a party to the environmental covenant;

24 (2) the agency;

25 (3) if the agency is not a state agency, the

1 department of environment;

2 (4) any person to whom the environmental
3 covenant expressly grants power to enforce;

4 (5) a person whose interest in the real
5 property or whose collateral or liability may be affected by
6 the alleged violation of the environmental covenant; or

7 (6) a municipality or other unit of local
8 government in which the real property subject to the
9 environmental covenant is located.

10 B. The Uniform Environmental Covenants Act does
11 not limit the regulatory authority of the agency or, if the
12 agency is not a state agency, the department of environment
13 under law other than the Uniform Environmental Covenants Act
14 with respect to an environmental response project.

15 C. A person is not responsible for or subject to
16 liability for environmental remediation solely because that
17 person has the right to enforce an environmental covenant.

18 Section 13. CIVIL PENALTY. --

19 A. Whenever on the basis of any information the
20 secretary of environment determines that an owner has failed
21 to comply with the provisions of Section 8 of the Uniform
22 Environmental Covenants Act regarding notice and right of
23 rescission requirements for environmental covenants that
24 prohibit the unrestricted use of real property, the secretary
25 shall issue an order imposing on the owner a civil penalty not

1 to exceed five thousand dollars (\$5,000) for each day during
2 any portion of which a violation occurs. The amount shall be
3 deposited in the state treasury and credited to the hazardous
4 waste emergency fund.

5 B. An order issued pursuant to Subsection A of
6 this section shall become final unless, no later than thirty
7 days after the order is served, the owner named in the order
8 submits a written request to the secretary for a public
9 hearing. Upon that request, the secretary shall promptly
10 conduct a public hearing. The secretary shall appoint an
11 independent hearing officer to preside over the public
12 hearing. The hearing officer shall make and preserve a
13 complete record of the proceedings and shall forward
14 recommendations based on the record to the secretary, who
15 shall make the final decision. In connection with a hearing
16 under this section, the secretary may issue subpoenas for the
17 attendance and testimony of witnesses and the production of
18 relevant papers, books and documents and may promulgate rules
19 for discovery procedures.

20 Section 14. JUDICIAL REVIEW. --

21 A. A person who is or may be affected by any final
22 administrative action of the secretary of environment may
23 appeal to the court of appeals for further relief within
24 thirty days after the action. All appeals shall be upon the
25 record before the secretary.

. 166880. 2

1 B. For appeals of rules, the date of the action
2 shall be the date of filing of the rule pursuant to the State
3 Rules Act.

4 C. Upon appeal, the court of appeals shall set
5 aside the action only if it is found to be:

- 6 (1) arbitrary, capricious or an abuse of
7 discretion;
8 (2) not supported by substantial evidence in
9 the record; or
10 (3) otherwise not in accordance with law.

11 D. A stay of enforcement of the action being
12 appealed may be granted after hearing and upon good cause
13 shown:

- 14 (1) by the secretary; or
15 (2) by the court of appeals if the secretary
16 denies a stay or fails to act upon an application for a stay
17 within sixty days after receipt of the application.

18 Section 15. CRIMINAL PENALTY. -- An owner who knowingly
19 violates the provisions of Section 8 of the Uniform
20 Environmental Covenants Act regarding notice and right of
21 rescission requirements for environmental covenants that
22 prohibit the unrestricted use of real property is guilty of a
23 fourth degree felony and upon conviction shall be sentenced
24 pursuant to the provisions of Section 31-18-15 NMSA 1978.

25 Section 16. REGISTRY-- SUBSTITUTE NOTICE. --

1 A. The department of environment shall establish
2 and maintain a registry that contains all environmental
3 covenants and any amendment or termination of those covenants.
4 The registry may also contain any other information concerning
5 environmental covenants and the real property subject to them
6 that the department of environment considers appropriate. The
7 registry is a public record.

8 B. After an environmental covenant or an amendment
9 or termination of a covenant is filed in the registry
10 established pursuant to Subsection A of this section, a notice
11 of the covenant, amendment or termination that complies with
12 this section may be recorded in the land records in lieu of
13 recording the entire covenant. Any such notice shall contain
14 the following:

15 (1) a legally sufficient description and any
16 available street address of the real property subject to the
17 covenant;

18 (2) the name of the owner of the fee simple
19 interest in the real property, the agency and the holder if
20 other than the agency;

21 (3) a statement that the covenant, amendment
22 or termination is available in the registry at the department
23 of environment and that discloses the method of any electronic
24 access; and

25 (4) a statement that the notice is

. 166880. 2

1 notification of an environmental covenant executed pursuant to
2 the Uniform Environmental Covenants Act.

3 C. A statement in substantially the following
4 form, executed with the same formalities as a deed in this
5 state, satisfies the requirements of Subsection B of this
6 section:

7 "1. This notice is filed in the land records of the
8 county in which the real property is located pursuant to
9 Section 12 of the Uniform Environmental Covenants Act.

10 2. This notice and the covenant, amendment or
11 termination to which it refers may impose significant
12 obligations with respect to the real property described below.

13 3. A legal description of the real property is attached
14 as Exhibit A to this notice. The address of the real property
15 that is subject to the environmental covenant is [insert
16 address of real property][not available].

17 4. The name and address of the owner of the fee simple
18 interest in the real property on the date of this notice is
19 [insert name of current owner of the real property].

20 5. The environmental covenant, amendment or termination
21 was signed by [insert name and address of agency].

22 6. The environmental covenant, amendment or termination
23 was filed in the registry on [insert date of filing].

24 7. The full text of the environmental covenant,
25 amendment or termination and any other information required by

1 the agency is on file and available for inspection and copying
 2 in the registry maintained for that purpose by the department
 3 of environment at [insert address and room of building in
 4 which the registry is maintained]. The environmental
 5 covenant, amendment or termination may be found electronically
 6 at [insert web address for covenant]."

7 Section 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION. -
 8 -In applying and construing the Uniform Environmental
 9 Covenants Act, consideration shall be given to the need to
 10 promote uniformity of the law with respect to its subject
 11 matter in states that enact it.

12 Section 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
 13 AND NATIONAL COMMERCE ACT. --The Uniform Environmental
 14 Covenants Act modifies, limits or supersedes the federal
 15 Electronic Signatures in Global and National Commerce Act but
 16 does not modify, limit or supersede 15 USCA Section 7001(a) or
 17 authorize electronic delivery of any of the notices described
 18 in 15 USCA Section 7003(b).

19 Section 19. SAVING CLAUSE. --The Uniform Environmental
 20 Covenants Act does not affect an action commenced, proceeding
 21 brought or right accrued before the effective date of that
 22 act.

23 Section 20. SEVERABILITY. --If any part or application of
 24 the Uniform Environmental Covenants Act is held invalid, the
 25 remainder or its application to other situations or persons

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1 shall not be affected.

2 Section 21. APPLICABILITY. -- The provisions of the
3 Uniform Environmental Covenants Act apply to environmental
4 covenants arising before or after the effective date of that
5 act, but shall not apply to lands held in trust by the state
6 pursuant to the act of congress of June 20, 1910, entitled "An
7 act to enable the people of New Mexico to form a constitution
8 and state government and be admitted into the union on an
9 equal footing with the original states".

10 Section 22. EFFECTIVE DATE. -- The effective date of the
11 provisions of this act is July 1, 2007.

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