

CHAPTER 92

(HB 472)

AN ACT relating to uniform environmental covenants.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. SUBCHAPTER 80 OF KRS CHAPTER 224 IS ESTABLISHED AND A NEW SECTION THEREOF IS CREATED TO READ AS FOLLOWS:

As used in this subchapter:

- (1) *"Activity and use limitations" means restrictions or obligations created under Sections 1 to 12 of this Act.*
- (2) *"Applicant" means a person applying to the cabinet for approval of an environmental covenant.*
- (3) *"Cabinet" means the Natural Resources and Environmental Protection Cabinet.*
- (4) *"Common interest community" means a condominium, cooperative, or other real property owned by a person as part of a parcel of real property for which there is an obligation to pay property taxes, insurance premiums, or maintenance, or to make improvements to the real property as described and established in a recorded environmental covenant.*
- (5) *"Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations.*
- (6) *"Environmental response project" means a plan or work performed for the environmental remediation of real property conducted:*
 - (a) *Under a federal or state program governing environmental remediation of real property including programs established pursuant to KRS 224.01-400, 224.01-405, 224.46-530, and 224.01-450 to 224.01-465;*
 - (b) *Incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of the cabinet; or*
 - (c) *Under a Commonwealth voluntary cleanup program authorized under KRS 224.01-510 to 224.01-532.*
- (7) *"Holder" means the grantee of an environmental covenant.*
- (8) *"Indexing" means the practice or method kept by a county clerk's office to record legal property transactions.*
- (9) *"Interest" means all or part of a legal equitable claim to a right in real property which shall include both possessory and nonpossessory interests.*
- (10) *"Owner" means a person that owns a fee simple interest or any other interest in real property that is subject to an environmental covenant.*
- (11) *"Person" shall have the meaning specified in KRS 224.01-010(17).*
- (12) *"Public Notice" means the publication of required information in a daily or weekly newspaper of major circulation located in the county or counties where the property subject to the proposed environmental covenant is located. If there is no daily or weekly newspaper of major circulation in the county or counties where the property is located,*

public notice shall mean publication of required information in a daily or weekly newspaper of major circulation in a county adjacent to the county or counties where the property is located.

- (13) *"Subordination agreement" means an agreement affecting priority of interests in a real property that is subject to an environmental covenant.*
- (14) *"Servitude" means a right, burden, or restriction on the use of real property that passes from the current owner or tenant to any owners or tenants in succession.*

SECTION 2. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *Any person that owns an interest in a real property subject to an environmental response project as defined in subsection (6) of Section 1 of this Act as of July 1, 2005, may utilize an environmental covenant as part of a corrective action plan submitted to the cabinet for review and approval.*
- (2) *The cabinet shall review and shall approve or deny the environmental covenant, or request additional information as part of its review of a corrective action plan submitted pursuant to KRS 224.01-400, 224.01-405, 224.46-530 and 224.01-450 to 224.01-465. The cabinet shall review the environmental covenant and determine whether:*
- (a) *The real property is eligible for an environmental covenant under Sections 1 to 12 of this Act;*
- (b) *The environmental covenant is complete;*
- (c) *The environmental covenant is protective of human health, safety, and the environment under KRS 224.01-400, 224.01-405, 224.01-510 to 224.01-532, 224.46-530, and 224.01-450 to 224.01-465; and*
- (d) *The person proposing the environmental covenant has published, through public notice, a notification identifying by legal description and address the property that is being considered for an environmental covenant, the intent to place an environmental covenant on the property, and a list of interest holders of record.*
- (3) *In addition to other conditions for the approval of an environmental covenant, the cabinet may require those persons specified by the cabinet who have an interest in the real property to sign the covenant.*
- (4) *The cabinet may deny an environmental covenant for reasonable grounds, including a determination that the covenant does not protect human health or the environment. The cabinet shall specify in writing, the grounds for denying the environmental covenant.*
- (5) *Any person, including the cabinet, that signs an environmental covenant or amendment thereto shall be required to fulfill the obligations and responsibilities prescribed to him or her in the environmental covenant or amendment. The cabinet's act of signing the environmental covenant shall be deemed an approval of an environmental covenant. Nothing contained in this subsection shall modify or deny any existing duties, rights, or protections granted under law, except as explicitly and legally provided for in the environmental covenant.*
- (6) *If the environmental covenant is approved and signed in accordance with this subchapter, those parties meeting the requirements in subsection (7) of this section shall be deemed holders. The environmental covenant shall be deemed created.*

- (7) *A holder may be:*
- (a) *Any person, including a person that owns an interest in the real property; or*
 - (b) *A governmental body empowered to hold an interest in real property under the laws of this state or of the United States.*

SECTION 3. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *An environmental covenant may identify more than one (1) holder, and the interest of a holder is an interest in real property.*
- (2) *A right of the cabinet pursuant to Sections 1 to 12 of this Act or under an environmental covenant shall not be deemed an interest in real property. The obligations imposed on a property and holders of a property subject to an environmental covenant shall be considered as ongoing obligations in furtherance of protection of public health and the environment and are not intended to be obligations that are reducible to a monetary claim or dischargeable under bankruptcy law.*
- (3) *The following rules apply to persons with interests in real property in existence at the time an environmental covenant is created or modified:*
 - (a) *A person with an interest that has priority under other law shall not be affected by an environmental covenant, except when the owner of the interest is a party to the covenant or subordinates his or her interest to the environmental covenant in a subordination agreement.*
 - (b) *Nothing contained in Sections 1 to 12 of this Act shall require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by an environmental covenant.*
 - (c) *The cabinet shall have the authority to disapprove an environmental covenant if all prior interests to the real property are not subordinated to the environmental covenant.*
 - (d) *A subordination agreement may be contained in the environmental covenant covering real property or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the record may be signed by any person authorized by the governing board of the owners' association.*
 - (e) *A person's act of subordinating his or her prior interest in a real property to an environmental covenant shall affect the priority of that person's interest. The act of subordinating a prior interest in a real property subject to an environmental covenant shall not be presumed to impose any affirmative obligation on the person with respect to the environmental covenant.*

SECTION 4. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *An environmental covenant shall:*
 - (a) *State that the instrument is an environmental covenant executed pursuant to Sections 1 to 12 of this Act;*
 - (b) *Contain a legal description of the real property and a metes and bounds description of the portion of the real property;*

- (c) *Describe the activity and use limitations imposed on the real property;*
 - (d) *Identify every holder;*
 - (e) *Be signed by the cabinet, by every holder, and, unless waived by the cabinet, by every owner of an interest in the real property subject to the environmental covenant; and*
 - (f) *Identify the name and location of any administrative record for the environmental response project.*
- (2) *In addition to the information required under subsection (1) of this section, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it, including:*
- (a) *Requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, application for building permits for, or proposals for any site work affecting the contamination on, the property subject to the covenant;*
 - (b) *Requirements for periodic reporting describing compliance with the covenant;*
 - (c) *Rights of access to the property granted in connection with implementation or enforcement of the covenant;*
 - (d) *A brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;*
 - (e) *Limitation on amendment or termination of the covenant in addition to those contained in Sections 9 and 10 of this Act; and*
 - (f) *Rights of the holder in addition to the holder's right to enforce the covenant pursuant to Section 11 of this Act.*

SECTION 5. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *An environmental covenant in compliance with the provisions of Sections 1 to 12 of this Act shall run with the land.*
- (2) *An environmental covenant that is otherwise effective shall be deemed valid and shall be enforceable even if:*
 - (a) *The environmental covenant is not appurtenant to an interest in real property;*
 - (b) *The environmental covenant can be or has been assigned to a person other than the original holder;*
 - (c) *The environmental covenant is not of a character that has been recognized traditionally in common law;*
 - (d) *The environmental covenant imposes a negative burden;*
 - (e) *The environmental covenant imposes an affirmative obligation on a person having an interest in the real property or on the holder;*
 - (f) *The benefit or burden does not touch or concern real property;*
 - (g) *There is no privity of estate or contract;*
 - (h) *The holder dies, ceases to exist, resigns, or is replaced; or*

- (i) *The owner of an interest subject to the environmental covenant and the holder are the same person.*
- (3) *An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded before the effective date of this Act shall not be invalidated or deemed unenforceable due to:*
 - (a) *Any of the limitations on enforcement of interests described in paragraphs (a) to (i) of subsection (2) of this section; or*
 - (b) *The identification of the instrument as an easement, servitude, deed restriction, or other interest.*
- (4) *Sections 1 to 12 of this Act shall not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law.*

SECTION 6. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

Sections 1 to 12 of this Act shall not be construed to authorize a use of real property that is otherwise prohibited by zoning, by law other than is prescribed for the regulating of real property in Sections 1 to 12 of this Act, or by a recorded instrument that has priority over the environmental covenant. An environmental covenant may prohibit or restrict uses of real property authorized by zoning or by law that are not prescribed in Sections 1 to 12 of this Act.

SECTION 7. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *A copy of the environmental covenant shall be provided to the following persons in a manner prescribed by the cabinet:*
 - (a) *Each person signing the environmental covenant;*
 - (b) *Each person holding a recorded interest in the real property subject to the environmental covenant;*
 - (c) *Each person in possession of the real property subject to the environmental covenant;*
 - (d) *Each municipality or other unit of local government in which real property subject to the environmental covenant is located; and*
 - (e) *Any other person that the cabinet requires.*
- (2) *An environmental covenant shall not be deemed invalid due to a failure to provide a copy of the environmental covenant to a person as required in subsection (1) of this section.*

SECTION 8. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *An environmental covenant and any amendment to or termination of that environmental covenant shall be recorded in the county clerk's office in each county that contains any portion of the real property subject to the environmental covenant. For the purposes of indexing, a holder shall be treated as a grantee.*

- (2) *Except as otherwise provided in subsection (3) of Section 9 of this Act, an environmental covenant shall be subject to the laws of the Commonwealth governing the recording and priority of interests in real property.*

SECTION 9. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *An environmental covenant shall be perpetual except under the following circumstances:*
- (a) *By its terms, the environmental covenant is limited to a specific duration or is terminated by the occurrence of a specific event;*
 - (b) *The environmental covenant is terminated pursuant to Section 10 of this Act;*
 - (c) *The environmental covenant is terminated by foreclosure of an interest that has priority over the environmental covenant; or*
 - (d) *The environmental covenant is terminated or modified in an eminent domain proceeding and the following conditions exist:*
 - 1. *The cabinet is a party to the eminent domain proceeding;*
 - 2. *All persons identified in subsections (1) and (2) of Section 10 of this Act are given notice of the pendency of the eminent domain proceeding; and*
 - 3. *A court of competent jurisdiction determines, after hearing, that the termination or modification of the environmental covenant will not adversely affect human health or the environment.*
- (2) *If the cabinet or if any holder determines that the intended benefits of an environmental covenant can no longer be realized, Franklin Circuit Court, under the doctrine of changed circumstances, in an action in which all persons identified in subsections (1) and (2) of Section 10 of this Act have been given notice, may terminate the environmental covenant or reduce its burden on the real property subject to the environmental covenant.*
- (3) *Except as otherwise provided in subsections (1) and (2) of this section, an environmental covenant may not be extinguished, limited, or impaired through the issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, acquiescence, or a similar doctrine.*

SECTION 10. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *An environmental covenant may be amended or terminated by consent only if the amendment or termination is requested as a modification to the corrective action plan approved by the cabinet, and only if the amendment or termination is signed by:*
- (a) *The cabinet;*
 - (b) *The current owner of the fee simple of the real property subject to the covenant;*
 - (c) *Each person that originally signed the environmental covenant or that person's heirs, assigns, or transferees unless:*
 - 1. *The person or the person's heirs, assigns, or transferees waived in a signed document the right to consent; or*

2. *A court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and*
- (d) *The holder, except as otherwise provided in subsection (4)(b) of this section.*
- (2) *If an interest in real property is subject to an environmental covenant, the interest shall not be affected by an amendment of the environmental covenant unless:*
- (a) *The current owner of the interest consents to the amendment; or*
- (b) *The current owner of the interest has waived in a signed record the right to consent to the amendments.*
- (3) *Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder shall be deemed an amendment of the environmental covenant.*
- (4) *Except as otherwise provided in an environmental covenant:*
- (a) *A holder may not assign its interest without consent of the other parties to the environmental covenant specified in subsection (1) of this section; and*
- (b) *A holder may be removed and replaced by agreement of the other parties specified in subsection (1) of this section.*
- (5) *A court of competent jurisdiction may fill a vacancy in the position of the holder.*

SECTION 11. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

- (1) *A civil action for injunctive or other equitable relief for violation of an environmental covenant may be brought by:*
- (a) *A party to the environmental covenant;*
- (b) *The cabinet;*
- (c) *Any person to whom the environmental covenant expressly grants power to enforce;*
- (d) *A person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the environmental covenant; or*
- (e) *A municipality or other unit of local government in which the real property subject to the environmental covenant is located.*
- (2) *Sections 1 to 12 of this Act shall not limit the cabinet's exercise of regulatory authority under law with respect to an environmental response project unless the environmental covenant expressly prohibits the cabinet from undertaking specified actions.*
- (3) *A person shall not be responsible for or subject to liability for environmental remediation solely because the person has the right to enforce an environmental covenant.*

SECTION 12. A NEW SECTION OF SUBCHAPTER 80 OF KRS CHAPTER 224 IS CREATED TO READ AS FOLLOWS:

The cabinet shall establish and maintain a registry that contains all environmental covenants and any amendments to or terminations of those environmental covenants. The registry also may contain any other information concerning environmental covenants and the real property subject to those environmental covenants that the cabinet deems appropriate. The registry shall be deemed a public record under KRS 61.872 to 61.884.

Approved March 16, 2005.