

Client newsletter

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Mississippi Uniform Environmental Covenants Act

On March 31, 2008, Governor Haley Barbour signed the Mississippi Uniform Environmental Covenants Act (the “Act”) into law. The Act, which became effective July 1, 2008, provides for a statutorily-defined, voluntary agreement known as an environmental covenant (“Environmental Covenant”)

The goal of the Act is to promote the revitalization of inner cities and other areas where vacant and underused property prevent vital redevelopment or other productive use of the land. It does so by removing legal impediments to the long-term enforcement of various clean-up controls, such as restrictions on certain uses, prohibitions on using wells, or the maintenance of monitoring equipment, which in turn reduces the risk of unacceptable human exposure to contamination left on-site and the consequential environmental liabilities and cleanup costs.

While federal or state regulatory approval of the underlying cleanup plan and notice to all appropriate parties is still be required, compliance with the Act should serve to lessen liability concerns of sellers and lenders associated with the redevelopment and sale of “brownfield” sites.

Contents

In order to be effective, an instrument purporting to be an Environmental Covenant must contain:

(1) a statement that the instrument is an

environmental covenant executed pursuant to the Act;

- (2) a legal description of the real property subject to the covenant;
- (3) a description of the activity and use limitations on the real property;
- (4) the identity of every Holder;
- (5) the name and location of any administrative record for the environmental response project reflected in the environmental covenant;

In addition, an Environmental Covenant must be signed by every grantee of the Environmental Covenant (the “Holder”), the Mississippi Department of Environmental Quality (the “Agency”), the Mississippi Commission on Environmental Quality (the “Commission”), unless the Commission waives participation, and unless waived by the Agency, every owner of the fee simple of the real property subject to the covenant.

An Environmental Covenant may also contain other information, restrictions, and requirements agreed to by the persons who signed it, including:

- (1) a requirement for notice upon a transfer of interest, a proposed change of use, applications for building permits, or proposals for site work affecting the contamination on the property;

- (2) a requirement for periodic reporting describing compliance with the covenant;
- (3) rights of access to the property granted in connection with implementation or enforcement of the covenant;
- (4) a brief narrative description of the location and nature of contamination, pathways or limits of exposure, and remedies;
- (5) limitations on amendment or termination of the covenant, in addition to those otherwise contained in the Act; and
- (6) rights of the Holder in addition to its right to enforce the covenant under the Act.

Notice Requirements

A copy of an Environmental Covenant must be provided, in the manner required by the Agency to:

- (1) each person that signed the covenant;
- (2) each person holding a recorded interest in the real property subject to the covenant;
- (3) each person in possession of the real property subject to the covenant;
- (4) each municipality or other unit of local government in which real property subject to the covenant is



located; and

(5) any other person the Agency requires.

In addition, an Environmental Covenant must be recorded in every county in which any portion of the real property subject to the Environmental Covenant is located. As with other instruments recorded in the official land records, an Environmental Covenant must comply with Mississippi law governing recording and priority of interests in real property.

Duration, Amendment or Termination

An Environmental Covenant that is properly executed and recorded is binding on all subsequent purchasers and tenants of the property. In addition, unless terminated or amended, an Environmental Covenant is perpetual and

can not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

In order to terminate or amend an Environmental Covenant, the written consent of each Holder, the Agency, and Commission, unless otherwise waived, is required. The terminating or amending instruments must also be recorded in the official land records of each county in which the Environmental Covenant is recorded.

Enforcement

A civil action for injunctive or other equitable relief for violation of an

environmental covenant may be maintained by:

- (1) a party to the covenant;
- (2) any person to whom the covenant expressly grants power to enforce or whose interest, collateral or liability may be affected by an alleged violation of the covenant;
- (3) a municipality or other unit of local government in which the real property subject to the covenant is located; and
- (4) the Agency or Commission.

Liability for environmental remediation can not be attributed to a person solely because they have the right to enforce an Environmental Covenant.

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