INSTITUTIONAL CONTROLS AND THE EFFECTIVE REUSE OF CONTAMINATED PROPERTIES IN OREGON: A REVIEW OF THE OREGON LAW COMMISSION'S PROPOSED LEGISLATION

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In both urban and rural areas throughout the nation, environmental contamination can interfere with the effective use of real property. Given the risk of environmental liability connected with the cleanup of contamination and the limited resources available to most regulatory agencies charged with initiating and

risk of future liability, and these properties are left to languish without any significant attention. The result is a blighted "brownfield."[1]

A significant effort has been made over the last fifteen years to help ensure that brownfields can be converted to productive use.[2] One of the more important mechanisms for achieving this goal has been the use of risk-based cleanup practices in which some residual contamination is left on the property, but public health and the environment are protected through the use of "institutional controls."

Institutional controls generally take the form of legal limitations on the ability of a property owner to use a contaminated property.[3] The controls might

Statutes ("ORS"), through its "Easements and Equitable Servitudes" ("EES") program.[4] As of 2011, the Oregon Environmental Cleanup Site Information Database ("ECSI") reflected 292 properties on which Oregon has approved engineering or institutional controls.[5]

The problem, however, is that these agreements are only effective if they stay in place well into the future. Because these agreements are implemented in order to control residual contamination, a failure of an institutional control will likely lead to a further release of contamination into the environment. And, unfortunately, there is a likelihood that these kinds of controls will fail. Property owners can ultimately ignore the controls; the property can be sold (or taken, via adverse possession, eminent domain, or foreclosures); or limits can simply be forgotten over time, even when property owners act with the best possible intentions.

Even when parties are alert to the possible failure of an institutional control, certain common law principles may interfere with their effectiveness. For instance, common law frowns upon indefinite burdens on property when those burdens are not directly connected to the land.[6] In particular, when a limitation on the use of property is intended to benefit mot merely an adjoining landowner, but instead the public at large, serious questions may arise about the enforceability of those property interests, and the degree to which they pass from owner to owner. Even DEQ has acknowledged the potential risks associated with common law principles; in its 1998 Guidance Document regarding the use of institutional

Group developed proposed legislation that would have incorporated many of the most important ideas from UECA into Oregon law. While the bill implementing these ideas moved out of the Senate Judiciary committee, where it was introduced, it did not come to a vote on the floor in the 2011 legislative session.

through the use of engineering and institutional controls, as well as other mechanisms.[11] In the period before hazardous waste management statutes allowed this kind of risk-based management analysis, property had to be cleaned to near-pristine standards – a level of cleanliness that was not merely expensive, but often impossible. Institutional controls avoid this burdensome cost, and allow the regulator and the regulated to take a middle pathway that lets landowners avoid expensive cleanup while still protecting public health and the environment.

Whether a given institutional control limits property use to particular purposes, restricts activities on a property, requires the maintenance of engineering controls, or obliges a property owner to monitor (or allow access to monitor) the state of the property, the institutional controls in question are only effective if they apply to the property itself in the long term, binding both current and future owners as long as the risk of hazardous substances continues on the property. Given the inherent connection between property and institutional controls, the chosen mechanism in many jurisdictions for implementing these controls has been through a transfer of interests in real property. While this approach is a natural one, it poses two problems. First, the relevant regulator must have the necessary authority to enter into such transfers. Second, and more important for purposes of this article, many traditional common law property principles can undermine the ability to impose indefinite limitations on real property, particularly when those limits impose obligations that do not directly benefit the landowner. Because institutional controls are only effective if they are enforced a) on a long-term basis, and b) against subsequent owners of the property, many regulators were concerned that traditional common law principles might undermine the effectiveness of institutional controls. In 2003, in response to this concern, the National Conference of Commissioners on Uniform State Laws drafted and approved the Uniform Environmental Covenants Act.

UECA provided states with a model statutory process for forming, amending, enforcing, and terminating real property agreements that implemented institutional controls on contaminated property. If it was adopted throughout the nation, states would have a uniform mechanism allowing state agencies and other regulatory bodies to enter into "environmental covenants" – grants of long term

challenges; and it granted enforcement under the covenants to regulators, parties, and even some third parties.

As of early 2011, UECA had been adopted, largely in its original form, in 23 states (including Washington, Idaho, and Nevada), as well as in the District of Columbia and the U.S. Virgin Islands. In many of those states (such as Washington and Illinois), existing programs were already using real property interests to implement institutional controls, and UECA was perceived as unnecessary in light of existing programs. At the same time, however, several other states (including New Jersey, California, and Colorado) have considered but decided not to adopt UECA, generally because existing programs were perceived as an adequate basis for addressing the problems that UECA was intended to solve.

Similarly, in Oregon, the Law Commission Work Group did not have a *tabula rasa* upon which UECA could be imposed without change. Although there was very little statutory language regarding the use of institutional controls in Oregon, there was an extensive existing program that DEQ and many regulated parties viewed as more than sufficient for Oregon's needs. The Work Group, the

A. *Long-term effectiveness of institutional controls*. Throughout the Work Group process, DEQ pointed out that its residual authority to protect health, welfare, and the environment would serve as a backstop in any circumstance in which an institutional control is later found to be ineffective. If a property owner (whether the original or a subsequent owner) is not complying with an institutional control, even if the agreement implementing that control is deemed invalid for some reason, DEQ retains the ability under current law to take any steps necessary to ensure the necessary protections for health, welfare, and the environment. Nothing in the proposed legislation affects DEQ's ongoing authority to take steps necessary to protect against risks posed by hazardous substances. Thus, even if

law, real covenants could not be formed unless the parties that created the covenant had privity of estate – which DEQ and a private property owner would not have had – and that the only remaining traditional property interest – equitable servitudes – could only be enforced as long as there was a reasonable relationship to the land at issue.[14] For some kinds of obligations imposed in an agreement implementing institutional controls, a property owner might argue that certain conditions did not, in fact, "touch and concern the land," or that the benefit connected to the agreement was not "reasonably related to the burden and [did not] relates either to the occupation, use, or enjoyment of the promisor's land or the promisee's land."[15] This might be particularly true for conditions like payment obligations, which are very common in these kinds of agreements given DEQ's obligation to recover costs of remedial actions.

To be sure, these traditional limits on the validity of equitable servitudes have been liberalized over the years, and for that reason, the Work Group and DEQ were not overly concerned that existing agreements might be suspect.[16] In addition, as noted above, DEQ would always retain authority to protect the public interest in a case w4 0 0 01 (n) (ts g) (e) -1 (w) -2 (4 0 0 01 (n) (ts g) (e) in) -gJ ET Q(4 0 0 0 w) -

2. Binding effect on future property owners. The second significant area of concern when implementing institutional controls comes from the need to ensure that future property owners hold land subject to the institutional controls in the relevant agreement. If the initial agreement is viewed simply as a contract, or if terms within the agreement are viewed as primarily contractual, and not tied specifically to the land, there is a risk that subsequent owners may have a claim that they are not obligated to comply with conditions of the agreement.

This problem is substantially addressed by the requirement in Or. S.B. 867 to include within the agreement a description of the land involved, and to record the agreement with the relevant county clerk. In treating these agreements like traditional interests in real property for purposes of transfers of ownership (but simultaneously excusing them from most common law limits on the creation and enforcement of servitudes), many of the concerns associated with transfers of land

legislation therefore leaves to DEQ and those property owners entering into these agreements the ultimate responsibility for identifying all current holders of an interest in the property whose consent will be necessary to grant to DEQ the full scope of the interests it seeks to take under the agreement.

B. *Clarifying scope of statutory authority.* Under existing law, DEQ has the authority to use institutional controls as a means of carrying out removals and remedial actions on contaminated properties. Although ORS 465.315 does not specifically define the nature of "institutional controls," the term has been interpreted by DEQ to permit it to enter into the kind of long-term property arrangements that would be formalized through this legislation. While DEQ believed that it had been working within the scope of its authority to implement institutional controls, the proposed legislation clarifies that DEQ may enter into these real property agreements. As discussed in further detail in the next section, the work group was particularly concerned that nothing in the legislation would be construed as suggesting that DEQ lacked authority to enter into preexisting agreements. The institutional control language in 465.315 left the mechanism for implementing institutional controls wide open; the proposed legislation merely clarifies the scope of DEQ's associated authority.

C. *Ensuring effectiveness of existing agreements.* A primary concern during the process of drafting Or. S.B. 867 was the desire on the part of the Work Group to ensure that the legislation did not in any way cast doubt on the validity and enforceability of the hundreds of existing agreements between DEQ and owners of contaminated properties. Early in the Work Group discussions, the group considered the possibility of not recommending any legislation at all, based on the concern that any action clarifying the enforceability of these agreements in the future would necessarily carry with it the implication that existing agreements were in some manner subject to challenge or invalid.

Ultimately, the Work Group concluded that the benefit of avoiding any risk of future challenge would outweigh any negative implication from legislation – particularly if the legislation and accompanying report made it clear that it was being proposed simply to place existing programs on a firmer footing. There was no general sense that existing agreements were likely to be invalid in any way, whether because of a lack of clearly stated DEQ authority or because of the operation of common law doctrines. The work group considered a retroactivity clause that would have sought to make the provisions of Or. S.B. 867 applicable to preexisting agreements; work group members believed, however, that such a clause would be constitutionally suspect, and that if it were struck down, its absence would cast even more doubt on the validity of existing agreements. The work group concluded, in short, that it was best to let existing agreements stand on their own merits, and to simply make clear that no negative implication should be drawn from the current legislation.

Section 8(2) of the proposed legislation attempted to make this point clear, providing that the legislation "[d]oes not affect any interest in real property that involves the implementation of an institutional control granted before the effective date of this 2011 Act." The legislation should have no bearing on any future challenge to whether an interest in real property was granted by an agreement entered into before 2011; if anything, it should emphasize the degree to which the legislature believes that even the preexisting agreements are a valuable part of DEQ's existing regulatory program and should be enforced to the degree possible under current law.

D. *Promotion of uniformity and clarity in law.* The impetus for the work group was consideration of the Uniform Environmental Covenants Act. Because of Oregon's well-established EES program, however, the proposed legislation did not adopt UECA in significant part. It would, however, implement UECA in spirit, and borrows some language (particularly provisions in sections 6 and 8 of Or. S.B. 867). It is, therefore, difficult to characterize the statute as an implementation of UECA itself. There is value in placing a program like this into written law. DEQ's current EES program is not defined by regulations or statute, and so having the program explicit in the Oregon Revised Statutes promotes transparency in the law and notice to regulated parties both in the state, as well as to those outside of Oregon who might be seeking to invest in the state.

Because the Work Group was formed with UECA in mind, it is worth addressing some significant differences between UECA and the program that would be established under Or. S.B. 867. First, the provisions of UECA allowed a wide range of regulatory entities (including federal agencies or local governments) to take an interest in an environmental covenant. By contrast, Or. S.B. 867 is applicable solely to DEQ. In work group discussions on this issue, DEQ reasonably noted that it is, as a statutory matter, involved in some form or another with every contaminated property in the state, and that under current law, it is unlikely to cede control to other entities. Even if a point came in the future where another entity needed authority to enter into this kind of agreement, legislative change would be relatively straightforward.

Second, UECA's enforcement provisions intentionally allowed a very broad range of parties to enforce environmental convenants. Under UECA section 11, injunctive relief for violations of the covenants could be sought, for instance, not only by parties to the agreement, but by any person "whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant," or by the local "municipality or other unit of local government." Although the Work Group acknowledged that having more entities paying attention to enforcement would, in theory, be beneficial to the ultimate success of the agreements, Work G

Notably, Washington State reached the same conclusion when it adopted UECA in 2007.[21]

This does not mean that third parties are irrelevant to enforcement. To the

The Work Group considered defining institutional control within the broader definitions section of the hazardous substance law, but that would have required renumbering a broad swath of commonly-used definitions in the hazardous substance statutes, and risked confusion or costs in making the necessary changes to existing DEQ programs. The alternative in the legislation avoids that problem, though it does require referencing the new definition in any location where it is subsequently used. ORS § 465.200 (2011); S.B. 867 § 3(1)(b), 4–6.

Section 2: Places Section three in its appropriate place within the Oregon Revised Statutes. The Work Group discussed whether there might be other entities, or circumstances other than properties contaminated with hazardous waste in which DEQ might need to use agreements implementing institutional controls, and whether the relevant provisions regarding these agreements should be located somewhere other than in the hazardous waste chapters of the ORS. DEQ concluded that the vast majority of these agreements would be entered into in connection with properties contaminated by hazardous waste, and that as a result

agreements. The only specific requirements are that the Director of DEQ (or a designee) sign the agreement along with all grantors of the interest in the property. As noted in Part I(A)(3) above, it remains DEQ's responsibility, along with that of the grantors, to identify all concurrent holders of an interest in the real property in order to ensure the effectiveness of the agreement. If, for some reason, a current interest holder believes that there is no need to enter into an agreement, they may choose not to, although DEQ retains other powers regarding the implementation of remedial actions on the property (including direct imposition of institutional controls). It will often be to the benefit of concurrent interest holders (such as mortgage holders) to enter into these agreements in order to clarify the status of the property, but that assessment is left to the individual entities in light of DEQ's other powers.

As discussed *supra*, the agreements may either explicitly or implicitly create third party beneficiaries entitled to enforce the agreement. This matter is left to DEQ, the grantor, and the operation of the common law of contract regarding third party beneficiaries.

The legislation also requires that the agreement include a description of the real property in order to facilitate the recording of the agreement.[23]

§ 3(4): In order to ensure that future owners of the property are on notice of the agreement, the legislation requires that the agreement be filed in the deed records of the county in which the property is located. The default rule is that responsibility for filing is in the hands of the grantor, although this is a point that can be subject to negotiation at the time the parties enter into the agreement.

The recording of these agreements is already done by DEQ as a matter of course; the legislation simply makes clear that such recording is critical to the enforceability of the act against future property owners. *See* Section 6(b) (making agreement valid and enforceable against owners taking an interest that vests after the recording of the agreement).

§ 3(5): Of particular importance to DEQ is the ability to recover costs incurred during its work on a parcel of contaminated property. *See, e.g.*, ORS §§ 465.210(b), .255–.260, .330–.335 (2011). Agreements implementing institutional controls will typically include provisions that require the grantor of the agreement to cover costs (whether incurred by the grantor or by DEQ) associated with the limits on the property, and the Work Group wanted to be sure that these kinds of obligations were explicitly permitted under the legislation.

[23]S.B. 867 at § 3(3)(b), 4, 76th Leg. (Or. 2011).

Because cost recovery requirements are, to some degree, different from the institutional control itself, the provision makes clear that the department may, in an agreement implementing an institutional control, impose other conditions that are reasonably related to carrying out remedial action on the property. This language should make it clear that the agreement can include a wide range of conditions, as long as those conditions are sufficiently connected to remedial actions on the property.

§ 3(6)

affirmative easement, illustrated by a right of way, which empowered the

III. Conclusion

Although Or. S.B. 867 did not pass in the 2011 Legislative Session, the bill, as engrossed in the Senate, should be resubmitted to a future Legislative Assembly and enacted by the Legislature. Although it is of modest scope, the bill promises

SECTION 2. Section 3 of this 2011 Act is added to and made a part of ORS 465.200 to 465.545.

SECTION 3.

(1) As used in this section:

[SECTIONS 4-6 were conforming amendments making clear that the above definition of “institutional control” applied in other appropriate contexts.]

SECTION 7. The Oregon Law Commission shall post on the website maintained by the commission a copy of the commentary approved by the commission for the provisions of sections 3 and 8 of this 2011 Act and the amendments to ORS 465.315 by section 1 of this 2011 Act.

SECTION 8. Section 3 of this 2011 Act:

(1) Applies to any agreement entered into on or after the effective date of this 2011 Act; and

(2) Does not affect any interest in real property that involves the implementation of an institutional control granted before the effective date of this 2011 Act.

SECTION 9. This 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage.