HB 516

Ohio Environmental Covenants Act

Ohio Environmental Covenants Act

- OECA

- Amended Substitute House Bill 516

- Effective: December 22, 2004

Ohio EPA Programs

- Remedial Response program (CERCLA)

- Closure, Post-Closure, and Corrective Action (RCRA)

- Voluntary Action Program (VAP)

- Wetlands mitigation, etc. (CWA)

Remedial Response (CERCLA)

- No state "Superfund" statute

- Chapter 3734 (solid & hazardous waste)
- Chapter 6111 (water pollution abatement)

- Program follows CERCLA, NCP

- RI/FS, PP, DD, RD/RA, O&M

- Cost Recovery & NRD

Closure, Post-Closure & Corrective Action

- Chapter 3734

- Hazardous Waste Law ("RCRA" rules)
- "Restrictive Covenants"

- RCRA authorization

VAP: SB 221 (1994)

- Chapter 3746
- Certified Professionals (licensed)
- No Further Action Letter (affidavit)
- Applicable Standards (rules)
- Covenant Not to Sue
- Engineering Controls (O&M Agreement)
- Institutional Controls (deed restriction)

- 3746.01   definition of "remedy" (IC)
- 3746.04   rule authority (IC; UR)
- 3746.05   remedy; applicable stds. (IC)
- 3746.10   NFA letter (UR)
- 3746.13   CNS (IC)
- 3746.14   recording requirement (UR)
- 3746.171   records; inspections (IC; UR)

Wetlands Mitigation, etc.

- Chapter 6111
- Water Pollution Control Law (CWA)

- CWA 401 water quality certification: wetlands mitigation program
- Isolated Wetlands Program
- Grants and Loan: water resources program
- Supplemental Environmental Projects

- 5301.67 et seq. Conservation Easements

Statutory Need

- Statutes (3734 & 3746) did not specify how to create institutional controls
- Hazardous Waste statute (3734) did not specify that restrictive covenants would "run with the land" and bind future owners
- State enforcement not certain
- No authority to record

Common Law: Real Property

Restrictive Covenant:

- intent to bind successors
- in writing (statute of frauds)
- "privity" between:
  - promissor and promissee (horizontal)*
  - promissor and successor (vertical)
- promise must "touch and concern" land
- successor must have actual or constructive notice

Perrysburg v. Koenig (1995)

- 1986: subdivision developers needed water/sewer
- City's policy: annexation
- subdivision was not contiguous to City; therefore, not eligible for annexation
- City agreed to provide water/sewer; and
- developers agreed to seek annexation when legally possible, and to include "restrictive covenants" in any deeds
- "service agreements" recorded

Perrysburg v. Koenig (1995)

- service agreements between City and property owners:

    - agreed to abide by all "rules and regulations . . . and other Service-related regulations as adopted by City"

    - but, did not contain an express reference to annexation

Perrysburg v. Koenig (1995)

- Purchase agreements and deeds between developers and property owners did not contain "restrictive covenants" developers agreed to include

- 1992: City asked property owners to sign petitions for annexation

- property owners declined

- City filed suit, seeking declaration and injunction

Perrysburg v. Koenig (1995)

- Trial court granted property owners' motion for summary judgment, holding that the 1986 service agreements were not:

  - restrictive covenants

  - equitable servitudes

- City appealed

- Court of Appeals reversed trial court

Perrysburg v. Koenig (1995)

- Court of Appeals held:

- 1986 service agreements were <u>not restrictive covenants</u> because:

  no horizontal privity, i.e.,

  no conveyance of an interest between developers and City

Perrysburg v. Koenig (1995)

- However, Court of Appeals also held:

- 1986 service agreements <u>were equitable servitudes</u> because:

  intent to bind developers' successors to seek annexation,

     i.e., horizontal privity not a required element of an equitable servitude

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HB 516 (OECA)

- Ohio EPA authority to issue ECs (DAS)
- Amended recording statute (ECs)
- Restrictive covenants, etc.   ->   ECs

- Definition of "holder" ("property interest")
- Did not include federal property exemption

- Property code: 5301.80 - .92 (OECA)

HB 516 (OECA)

- 5301.80   definitions
- 5301.81   ECs, holder, etc.
- 5301.82   EC: elements (agency /s/)
- 5301.83   copy of EC
- 5301.84   EC, agency obligations
- 5301.85   EC runs with the land; valid
- 5301.86   priority interests;
                            subordination

HB 516 (OECA)

- 5301.87   property use - zoning, etc.
- 5301.88   recording ECs
- 5301.89   EC is perpetual; exceptions
- 5301.90   EC amendment, termination
- 5301.91   enforcement
- 5301.92   Electronic Signatures in Global and National Commerce Act

HB 516 (OECA)

Includes the key elements of UECA:

- Activity and use limitations
- Elements of an EC (required; optional)
- Priority of prior interests (subordination)
- Perpetual nature of EC ("run with the land")
- Enforcement of EC

- Did not include section 12 (Registry), section 13 (Uniformity), or section 15 (Severability)

HB 516 (OECA)

Key difference:

Definition of **"environmental response project"**

- Specifies environmental remediation programs "subject to agency review and approval"

- Includes not only plans or work performed for environmental remediation purposes, but also for natural resource protection purposes

HB 516 (OECA)

- First aspect clarifies that so-called "quiet remediation" projects, i.e., those without government oversight, do not require statutory environmental covenants – but may use the common law instruments – to restrict land use.

- Second aspect allows the use of environmental covenants for wetlands mitigation projects, natural resource restoration plans, etc.

HB 516 – Implementation

- Concurrent review:

  - Remedial Response (DERR) – w/ RD/RA F&Os
  - Closure, Post-Closure, and Corrective Action (DHWM) – w/ Closure Plan approval; CA F&Os
  - VAP (DERR) – w/ NFA review, request for CNS
  - Clean Ohio Fund (DERR) – w/ NFA review
  - Wetlands mitigation, etc. (DSW) – w/ 6111 orders, loan agreement, etc.

HB 516 – Implementation

"Agency"

- Ohio EPA
- US EPA
- Ohio Department of Commerce (BUSTR), i.e., Bureau of Underground Storage Tank Regulation

HB 516 – Implementation

- Identification of prior interests
- Compliance monitoring (resources)
- No enforcement issues yet

HB 516 – Implementation

- Environmental Covenant template

- VAP Guidance for Environmental Covenants

UECA & HB 516 (OECA)

- UECA: www.environmentalcovenants.org

- HB 516: www.legislature.state.oh.us/
  BillText125/125_HB_516_EN_N.html