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SENATE BILL NO. 686

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Finance
on February 11, 2010)

(Patron Prior to Substitute—Senator Reynolds)

A BILL to amend the Code of Virginia by adding in Title 10.1 a chapter numbered 12.2, consisting of sections numbered 10.1-1238 through 10.1-1250, relating to the Uniform Environmental Covenants Act.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 10.1 a chapter numbered 12.2, consisting of sections numbered 10.1-1238 through 10.1-1250, as follows:

CHAPTER 12.2.

UNIFORM ENVIRONMENTAL COVENANTS ACT.

§ 10.1-1238. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Activity and use limitations" means restrictions or obligations created under this chapter with respect to real property.

"Agency" means the Department of Environmental Quality or any other state or federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.

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

"Department" means the Department of Environmental Quality.

"Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations.

"Environmental response project" means a plan or work performed for environmental remediation of real property and conducted:

1. Under a federal or state program governing environmental remediation of real property;
2. Incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of an agency; or
3. Under a state voluntary clean-up program including the Brownfield Restoration and Land Renewal Act (§ 10.1-1230 et seq.).

"Holder" means the grantee of an environmental covenant as specified in subsection A of § 10.1-1239.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

"Record," used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

§ 10.1-1239. Nature of rights; subordination of interests.

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

B. A right of an agency under this chapter or under an environmental covenant, other than a right as a holder, is not an interest in real property.

C. An agency is bound by any obligation it assumes in an environmental covenant, but an agency does not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant is bound by the obligations the person assumes in the covenant, but signing the covenant does not change obligations, rights, or protections granted or imposed under law other than this chapter except as provided in the covenant.

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

1. An interest that has priority under other law is not affected by an environmental covenant unless the person that owns the interest subordinates that interest to the covenant.
2. This chapter does not require a person that owns a prior interest to subordinate that interest to

60 *an environmental covenant or to agree to be bound by the covenant.*

61 3. *A subordination agreement may be contained in an environmental covenant covering real property*
62 *or in a separate record. If the environmental covenant covers commonly owned property in a common*
63 *interest community, the record may be signed by any person authorized by the governing board of the*
64 *owners' association.*

65 4. *An agreement by a person to subordinate a prior interest to an environmental covenant affects the*
66 *priority of that person's interest but does not by itself impose any affirmative obligation on the person*
67 *with respect to the environmental covenant or affect that person's existing liability.*

68 § 10.1-1240. *Contents of environmental covenant.*

69 A. *An environmental covenant shall:*

70 1. *State that the instrument is an environmental covenant executed pursuant to the Uniform*
71 *Environmental Covenants Act (§ 10.1-1238 et seq. of the Code of Virginia);*

72 2. *Contain a legally sufficient description of the real property subject to the covenant;*

73 3. *Describe the activity and use limitations on the real property;*

74 4. *Identify every holder;*

75 5. *Be signed by the agency, every holder, and, unless waived by the agency, every owner of the fee*
76 *simple of the real property subject to the covenant; and*

77 6. *Identify the name and location of any administrative record for the environmental response project*
78 *reflected in the environmental covenant.*

79 B. *In addition to the information required by subsection A, an environmental covenant may contain*
80 *other information, restrictions, and requirements agreed to by the persons who signed it, including:*

81 1. *Any requirements for notice following transfer of a specified interest in, or concerning proposed*
82 *changes in use of, applications for building permits for, or proposals for any site work affecting the*
83 *contamination on, the property subject to the covenant;*

84 2. *Any requirements for periodic reporting describing compliance with the covenant, including a*
85 *requirement that the grantee retain and pay for a qualified and certified professional engineer to*
86 *inspect, investigate and report on the compliance with the covenant;*

87 3. *Any rights of access to the property granted in connection with implementation or enforcement of*
88 *the covenant;*

89 4. *A brief narrative description of the contamination and remedy, including the contaminants of*
90 *concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;*

91 5. *Any limitations on amendment or termination of the covenant in addition to those contained in*
92 *§§ 10.1-1245 and 10.1-1246; and*

93 6. *Any rights of the holder in addition to its right to enforce the covenant pursuant to § 10.1-1247.*

94 C. *In addition to other conditions for approval of an environmental covenant, the agency may*
95 *require those persons specified by the agency who have interests in the real property to sign the*
96 *covenant.*

97 § 10.1-1241. *Effect on other instruments; validity.*

98 A. *An environmental covenant that complies with this chapter runs with the land.*

99 B. *An environmental covenant that is otherwise effective is valid and enforceable even if:*

100 1. *It is not appurtenant to an interest in real property;*

101 2. *It can be or has been assigned to a person other than the original holder;*

102 3. *It is not of a character that has been recognized traditionally at common law;*

103 4. *It imposes a negative burden;*

104 5. *It imposes an affirmative obligation on a person having an interest in the real property or on the*
105 *holder;*

106 6. *The benefit or burden does not touch or concern real property;*

107 7. *There is no privity of estate or contract;*

108 8. *The holder dies, ceases to exist, resigns, or is replaced; or*

109 9. *The owner of an interest subject to the environmental covenant and the holder are the same*
110 *person.*

111 C. *An instrument that creates restrictions or obligations with respect to real property that would*
112 *qualify as activity and use limitations except for the fact that the instrument was recorded before the*
113 *effective date of this chapter is not invalid or unenforceable because of any of the limitations on*
114 *enforcement of interests described in subsection B or because it was identified as an easement,*
115 *servitude, deed restriction, or other interest. This chapter does not apply in any other respect to such an*
116 *instrument.*

117 D. *This chapter does not invalidate or render unenforceable any interest, whether designated as an*
118 *environmental covenant or other interest, that is otherwise enforceable under the law of the*
119 *Commonwealth.*

120 § 10.1-1242. *Relationship to other land use law.*

121 *This chapter does not authorize a use of real property that is otherwise prohibited by zoning, by law*

122 other than this chapter regulating use of real property, or by a recorded instrument that has priority
123 over the environmental covenant. An environmental covenant may prohibit or restrict uses of real
124 property that are authorized by zoning or by law other than this chapter.

125 § 10.1-1243. Notice.

126 A. A copy of an environmental covenant shall be provided by the persons and in the manner
127 required by the agency to:

- 128 1. Each person that signed the covenant;
- 129 2. Each person holding a recorded interest in the real property subject to the covenant;
- 130 3. Each person in possession of the real property subject to the covenant;
- 131 4. Each municipality or other unit of local government in which real property subject to the covenant
132 is located; and
- 133 5. Any other person the agency requires.

134 B. The validity of a covenant is not affected by failure to provide a copy of the covenant as required
135 under this section.

136 § 10.1-1244. Recording.

137 A. An environmental covenant and any amendment or termination of the covenant shall be recorded
138 in every locality in which any portion of the real property subject to the covenant is located. For
139 purposes of indexing, a holder shall be treated as a grantee.

140 B. Except as otherwise provided in § 10.1-1245, an environmental covenant is subject to the laws of
141 the Commonwealth governing recording and priority of interests in real property.

142 § 10.1-1245. Duration; amendment by court action.

143 A. An environmental covenant is perpetual unless it is:

- 144 1. By its terms limited to a specific duration or terminated by the occurrence of a specific event;
- 145 2. Terminated by consent pursuant to § 10.1-1246;
- 146 3. Terminated pursuant to subsection B;
- 147 4. Terminated by foreclosure of an interest that has priority over the environmental covenant; or
- 148 5. Terminated or modified in an eminent domain proceeding, but only if:
 - 149 a. The agency that signed the covenant is a party to the proceeding;
 - 150 b. All persons identified in subsections A and B of § 10.1-1246 are given notice of the pendency of
151 the proceeding; and
 - 152 c. The court determines, after hearing, that the termination or modification will not adversely affect
153 human health or the environment.

154 B. If the agency that signed an environmental covenant has determined that the intended benefits of
155 the covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an
156 action in which all persons identified in subsections A and B of § 10.1-1246 have been given notice,
157 may terminate the covenant or reduce its burden on the real property subject to the covenant. The
158 agency's determination or its failure to make a determination upon request is subject to review pursuant
159 to the Administrative Process Act (§ 2.2-4000 et seq.).

160 C. Except as otherwise provided in subsections A and B, an environmental covenant may not be
161 extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or
162 application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of
163 enforcement, or acquiescence, or a similar doctrine.

164 § 10.1-1246. Amendment or termination by consent.

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

- 167 1. The agency;
- 168 2. Unless waived by the agency, the current owner of the fee simple of the real property subject to
169 the covenant;
- 170 3. Each person that originally signed the covenant, unless the person waived in a signed record the
171 right to consent or a court finds that the person no longer exists or cannot be located or identified with
172 the exercise of reasonable diligence; and
- 173 4. Except as otherwise provided in subdivision D 2, the holder.

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

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

179 D. Except as otherwise provided in an environmental covenant:

- 180 1. A holder may not assign its interest without consent of the other parties;
- 181 2. A holder may be removed and replaced by agreement of the other parties specified in subsection
182 A; and

183 3. A court of competent jurisdiction may fill a vacancy in the position of holder.
184 § 10.1-1247. Enforcement of environmental covenant.
185 A. A civil action for injunctive or other equitable relief for violation of an environmental covenant
186 may be maintained by:
187 1. A party to the covenant;
188 2. The agency or, if it is not the agency, the Department;
189 3. Any person to whom the covenant expressly grants power to enforce;
190 4. A person whose interest in the real property or whose collateral or liability may be affected by
191 the alleged violation of the covenant; or
192 5. A municipality or other unit of local government in which the real property subject to the
193 covenant is located.
194 B. This chapter does not limit the regulatory authority of the agency or the Department under law
195 other than this chapter with respect to an environmental response project.
196 C. A person is not responsible for or subject to liability for environmental remediation solely
197 because he has the right to enforce an environmental covenant.
198 § 10.1-1248. Fees; Environmental Covenants Fund established.
199 A. The Department shall establish fees, to be paid by the holder, which shall be assessed for the
200 purpose of funding the costs of administering the provisions of this chapter and shall be used solely for
201 the purposes specified in this chapter.
202 B. There is hereby created in the state treasury a special nonreverting fund to be known as the
203 Environmental Covenants Fund, hereafter referred to as "the Fund." The Fund shall be established on
204 the books of the Comptroller. Notwithstanding the provisions of § 2.2-1802, all moneys collected
205 pursuant to this section shall be paid into the state treasury and credited to the Fund. Interest earned
206 on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the
207 Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but
208 shall remain in the Fund. Moneys in the Fund shall be used solely for the purposes described in
209 subsection A. Expenditures and disbursements from the Fund shall be made by the State Treasurer on
210 warrants issued by the Comptroller upon written request signed by Director. The Fund shall be exempt
211 from statewide indirect costs charged and collected by the Department of Accounts.
212 § 10.1-1249. Relation to Electronic Signatures in Global and National Commerce Act.
213 This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National
214 Commerce Act (15 U.S.C. § 7001 et seq.) but does not modify, limit, or supersede § 101 of that Act (15
215 U.S.C. § 7001(c)) or authorize electronic delivery of any of the notices described in § 103 of that Act
216 (15 U.S.C. § 7003(b)).
217 § 10.1-1250. Regulations.
218 The Department may, as necessary, adopt regulations to implement the provisions of this chapter.
219 **2. That the actions of the Department of Environmental Quality relating to the adoption of**
220 **regulations necessary to implement the provisions of this act shall be exempt from the provisions**
221 **of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). However, the**
222 **Department shall provide an opportunity for public comment on any such regulations prior to**
223 **their adoption.**