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Bullard/Nauman
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HOUSE CS FOR SENATE BILL NO. 64(RLS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE RULES COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR MICCICHE

REPRESENTATIVE Kito

A BILL

FOR AN ACT ENTITLED

"An Act adopting the Uniform Environmental Covenants Act; relating to environmental real property covenants and notices of activity and use limitation at contaminated sites to ensure the protection of human health, safety, and welfare, and the environment; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 46.04 is amended by adding new sections to read:

Article 2A. Uniform Environmental Covenants Act.

Sec. 46.04.300. Environmental covenant. (a) An environmental covenant is required if the department makes a remedial decision as part of an environmental response project and that environmental response project results in

(1) residual contamination remaining in the environment in concentrations that are safe for some, but not all, uses; or

(2) an engineered feature or structure that requires monitoring, maintenance, or operation, or that will not function as intended if disturbed.

(b) An environmental covenant may be held by one or more holders. A holder

may own an interest in the real property subject to an environmental covenant. The interest of a holder is an interest in real property.

(c) A right of the department under AS 46.04.300 - 46.04.390 or under an environmental covenant, other than a right as a holder, is not an interest in real property.

(d) The department is bound by any obligation it specifically assumes in an environmental covenant, but the department does not assume obligations merely by signing an environmental covenant. A person other than the department that signs an environmental covenant is bound by the obligations the person assumes in the environmental covenant, but signing the environmental covenant does not change obligations, rights, or protections granted or imposed under law other than under AS 46.04.300 - 46.04.390 unless otherwise provided in the environmental covenant.

(e) The following 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 environmental covenant;

(2) AS 46.04.300 - 46.04.390 do not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the environmental covenant;

(3) an environmental covenant may contain a subordination agreement, or a subordination agreement may be contained in a separate record;

(4) the department may decide not to sign an environmental covenant unless each person holding an interest in the land or any part of the land, including each mortgagee, lessee, lienor, and encumbrancer, irrevocably subordinates the interest to the environmental covenant; the department may waive the requirement in this paragraph;

(5) an agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant;

(6) 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.

Sec. 46.04.305. Contents of environmental covenant. (a) An environmental covenant must

(1) state that the interest is an environmental covenant executed under AS 46.04.300 - 46.04.390;

(2) contain a legally sufficient description of the real property subject to the environmental covenant;

(3) describe the activity and use limitations on the real property;

(4) identify every holder;

(5) be signed by the commissioner of the department, every holder, and, unless waived by the department, every owner of the fee simple of the real property subject to the environmental covenant except that for an environmental covenant affecting a land or mineral interest of the Department of Natural Resources, the signature of the commissioner of natural resources may not be waived; and

(6) identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(b) In addition to the information required under (a) of this section, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it or required by the department, including

(1) requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, applications for building permits for, or proposals for any site work affecting the contamination on, the property subject to the environmental covenant;

(2) requirements for periodic reporting describing compliance with the environmental covenant;

(3) rights of access to the property granted in connection with implementation or enforcement of the environmental covenant;

(4) 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;

(5) a limitation on the amendment or termination of the environmental covenant that is in addition to the limitations contained in AS 46.04.300 - 46.04.390; and

(6) rights of the holder in addition to the right of the holder to enforce the environmental covenant under AS 46.04.335.

(c) In addition to other conditions for the department's approval of an environmental covenant, the department may require a specified person who has an interest in the real property that is the subject of the environmental covenant to sign the environmental covenant.

Sec. 46.04.310. Validity of environmental covenant; effect on other instruments. (a) An environmental covenant entered into in accordance with AS 46.04.300 - 46.04.390 runs with the land.

(b) An environmental covenant is valid and enforceable even if

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to a person other than the original holder;

(3) it is not of a character that has been traditionally recognized at common law;

(4) it imposes a negative burden;

(5) it imposes an affirmative obligation on a person having an interest in the real property or on the holder;

(6) the benefit or burden does not touch or concern real property;

(7) there is no privity of estate or contract;

(8) the holder dies, ceases to exist, resigns, or is replaced; or

(9) the owner of an interest subject to the environmental covenant and the holder are the same person.

(c) 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 AS 46.04.300 - 46.04.390 is not invalid or unenforceable because of any of the limitations on enforcement of interests

described in (b) of this section or because it was identified as an easement, servitude, deed restriction, or other interest. Except as provided in this section, AS 46.04.300 - 46.04.390 do not apply to an instrument described in this subsection.

(d) AS 46.04.300 - 46.04.390 do not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of this state.

Sec. 46.04.315. Notice of environmental covenant. (a) A copy of the environmental covenant shall be provided by the persons and in the manner required by the department to

(1) each person that signed the environmental covenant;

(2) each person holding a recorded interest in the real property subject to the environmental covenant;

(3) each person in possession of the real property subject to the environmental covenant;

(4) each municipality or other unit of local government in which real property subject to the environmental covenant is located; and

(5) any other person the department requires.

(b) The validity of an environmental covenant is not affected by failure to provide a copy of the environmental covenant as required under this section.

Sec. 46.04.320. Recording of environmental covenant. (a) An environmental covenant and an amendment or termination of the environmental covenant must be recorded in every recording district in which any portion of the real property subject to the environmental covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) An owner of land may not record an environmental covenant unless the owner simultaneously records any subordination documentation required under AS 46.04.300(e).

(c) Except as otherwise provided in AS 46.04.325(f), an environmental covenant is subject to state law governing recording and priority of interests in real property.

(d) A holder shall provide a copy of the final recorded environmental

covenant, an amendment made to the environmental covenant, termination documentation, and documentation of other matters related to the environmental covenant to the department.

Sec. 46.04.325. Duration; modification or termination of environmental covenant by administrative or court action. (a) An environmental covenant is perpetual unless it is

(1) by its terms, limited to a specific duration or terminated by the occurrence of a specific event;

(2) terminated by consent under AS 46.04.330;

(3) terminated under (b) or (e) of this section;

(4) terminated by foreclosure of an interest that has priority over the environmental covenant; or

(5) terminated or modified in an eminent domain proceeding, but only if

(A) the department is a party to the proceeding;

(B) every person whose consent is required under AS 46.04.330(a) is given notice of the pendency of the proceeding; and

(C) the court determines, after hearing, that the activity and use limitations subject to termination or modification are no longer required to protect human health, safety, or welfare, or the environment.

(b) The department may terminate or reduce the burden on the real property of an environmental covenant if the department finds that some or all of the activity and use limitations under the environmental covenant are no longer required to protect human health, safety, or welfare, or the environment, or modify the environmental covenant if the department determines that modification is required adequately to protect human health, safety, or welfare, or the environment.

(c) The department shall provide notice of any proposed action under (b) of this section to each person with a current recorded interest in the real property subject to the environmental covenant, each holder, all other persons who originally signed the environmental covenant, or their successors or assigns, and any other person with rights or obligations under the environmental covenant. The department shall provide

60 days for comment on the proposed action by parties entitled to notice. A determination by the department under this subsection is a final agency decision. Any person entitled to notice under this subsection may request an adjudicatory hearing under the procedures established by the department under AS 46.04.890.

(d) A person entitled to notice under (c) of this section may apply in writing to the department for a determination under (b) of this section that an existing environmental covenant be terminated, that the burden of an environmental covenant be reduced, or that an environmental covenant be modified. The application must specify the determination sought by the applicant, the reasons why the department should make the determination, and the information that would support it. If the department fails to begin a proceeding under (b) of this section within 90 days after receiving the application, the applicant may bring a civil action in superior court for termination, reduction of burden, or modification of the environmental covenant under (e) of this section.

(e) The superior court for a recording district in which the real property subject to an environmental covenant is located may, in a de novo action, under the doctrine of changed circumstances, terminate an environmental covenant, reduce an environmental covenant's burden on the real property, or modify the terms of an environmental covenant if the department fails to begin a proceeding within 90 days as provided under (d) of this section. The applicant under (d) of this section, a holder of the environmental covenant, or another person identified in (c) of this section may begin an action under this subsection. The person beginning the action shall serve notice of the action on the department and any person entitled to notice under (c) of this section. The person bringing the action shall make the department a party to the action. The court shall terminate, reduce the burden of, or modify an environmental covenant if the court determines that the person bringing the action shows that some or all of the activity and use limitations under the environmental covenant do not or are no longer required to protect human health, safety, or welfare, or the environment.

(f) An environmental covenant may 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,

acquiescence, or a similar doctrine.

Sec. 46.04.330. Amendment or termination of environmental covenant by consent. (a) An environmental covenant may be amended or terminated if the amendment or termination is consented to and signed

(1) by the department;

(2) unless waived by the department, by the current owner of the fee simple of the real property subject to the environmental covenant;

(3) by each person that originally signed the environmental covenant, unless the person

(A) waived the right to consent to termination or modification in the environmental covenant or in another signed and acknowledged instrument recorded with the recording district;

(B) fails to object to the amendment or termination within 60 days after a party to the covenant mails, by certified mail, return receipt requested, to the person's last known address, a notice requesting the person's consent to amendment or termination and the return receipt is signed by the person; or

(C) cannot be found, as determined by a court, because the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and

(4) except as otherwise provided in (d)(2) of this section, by the holder.

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

(c) Except for an assignment undertaken under a governmental reorganization, assignment of an environmental covenant to a new holder is an amendment.

(d) Except as otherwise provided in an environmental covenant,

(1) a holder may not assign its interest without consent of the other parties specified in (a) of this section;

(2) a holder may be removed and replaced by agreement of the other

parties specified in (a) of this section; and

(3) a court of competent jurisdiction may fill a vacant holder position.

Sec. 46.04.335. Enforcement of environmental covenant. (a) The department is the administrating agency for AS 46.04.300 - 46.04.390 and is empowered to administer and enforce AS 46.04.300 - 46.04.390 using the civil or administrative authority granted to it in AS 46.03. However, the department may, but is not required to, assume any administration or enforcement functions other than those directly related to the environmental covenant.

(b) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by

(1) a party to the environmental covenant;

(2) the department;

(3) a person that the environmental covenant expressly grants the power to enforce the environmental covenant;

(4) 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

(5) a municipality or other unit of government that governs the real property subject to the environmental covenant.

(c) AS 46.04.300 - 46.04.390 do not limit the regulatory authority of the department in an environmental response project.

(d) A person is not responsible for or subject to liability for environmental remediation solely because the person has the right to enforce an environmental covenant.

Sec. 46.04.340. Notice of activity and use limitation. (a) If a legal impediment prevents an environmental covenant from being entered into, an owner of real property shall, after receiving authorization from the department, record a notice of an activity and use limitation into the appropriate public land records. Failure to record a notice of an activity and use limitation may result in disapproval of the environmental response project.

(b) Once the owner or other person assumes an obligation under a notice of activity and use limitation, that owner or person shall comply with those obligations in

accordance with AS 46.04.300 - 46.04.390.

(c) The enactment, modification, or termination of a notice of activity and use limitation is not valid until it is approved by the department.

(d) A notice of activity and use limitation must remain in place for current and subsequent landowners unless it is terminated under (e) of this section.

(e) A person who proposes to create, modify, or terminate a notice of activity and use limitation shall provide written notice of the person's intention to the department, to all persons holding an interest of record in the real property that will be subject to the notice of activity and use limitation, to all persons known to the person to have an unrecorded interest in the property, and to all affected persons in possession of the property before the creation, modification, or termination, and shall provide the department with

(1) a copy of the notice provided;

(2) a list of the persons to whom notice was given and the address or other location to which the notice was directed; and

(3) title information required by the department.

(f) Before unilaterally issuing a notice of activity and use limitation, the department shall provide a copy of the proposed notice of activity and use limitation to all persons holding an interest of record in the real property subject to the notice of activity and use limitation, all persons known to the department to have an unrecorded interest in the property, and all affected persons in possession of the property, and shall offer the persons a minimum of 30 days to comment on the proposed notice of activity and use limitation, unless notice has already been provided under (e) of this section. In determining whether to issue the notice of activity and use limitation unilaterally, the department shall consider any comments received. For a notice of activity and use limitation affecting a land or mineral interest of the Department of Natural Resources, concurrence from the Department of Natural Resources is required.

(g) The department shall review and make a determination regarding all requests to create, modify, or terminate a notice of activity and use limitation within 90 days after receiving a request that includes all the information described in (a) of

this section.

(h) Upon issuance or approval of a notice of activity and use limitation, the department shall record the notice in every recording district in which a portion of the real property that is subject to the activity and use limitation is located. For approved notices, the department may allow the owner of the property to record the notice. A person may not record a notice without the department's written approval.

(i) Unless there is a legal impediment that prevents entering into an environmental covenant, the department may authorize that any notice of activity and use limitation created in accordance with this section be replaced by an environmental covenant on the property that is subject to the notice of activity and use limitation. The department may condition its authorization and approval of the termination of the notice of activity and use limitation on the terms of the notice of activity and use limitation, department approval and acceptance, and the effective recording of the environmental covenant.

(j) Modification or termination of a notice of activity and use limitation shall be recorded as provided in (h) of this section. A person may not record a modification or termination of a notice of activity and use limitation without the department's written approval.

(k) A determination by the department to issue, approve, modify, or terminate a notice of activity and use limitation is subject to appeal under the procedures described in AS 46.04.890.

(*l*) A notice of activity and use limitation, whether recorded or unrecorded, is not

(1) a servitude arising from an environmental response project; or

(2) an interest in real property.

Sec. 46.04.345. Relationship to other land-use law. AS 46.04.300 - 46.04.390 do not authorize a use of real property that is otherwise prohibited under AS 29.40 or AS 38.05.037, by law other than AS 46.04.300 - 46.04.390 regulating use of real property, or by a recorded instrument that has priority over the environmental covenant or a notice of activity and use limitation. An environmental covenant or a notice of activity and use limitation may prohibit or restrict uses of real property that

are authorized by zoning or by law other than AS 46.04.300 - 46.04.390.

Sec. 46.04.350. Registry. The department shall maintain a registry that contains all environmental covenants and notices of activity and use limitation and any amendment or termination of those instruments. The registry may also contain any other information concerning environmental covenants and notices of activity and use limitation and the real property subject to them that the department considers appropriate.

Sec. 46.04.355. Uniformity of application and construction. In applying and construing AS 46.04.300 - 46.04.390, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact similar provisions.

Sec. 46.04.390. Definitions. In AS 46.04.300 - 46.04.390,

(1) "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, or pay for maintenance, or improvement of other real property described in a recorded environmental covenant that creates the common interest community;

(2) "environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations;

(3) "environmental response project" means a plan or work performed or maintenance of work performed under a federal or state program

(A) including this chapter, AS 46.03, AS 46.09, 42 U.S.C. 9601 - 9675 (Comprehensive Environmental Response, Compensation and Liability Act), as amended, and 42 U.S.C. 6901 - 6992k (Resource Conservation and Recovery Act), as amended, governing environmental remediation and management of contaminated real property; or

(B) governing maintenance, closure, or corrective action of a solid waste disposal facility or hazardous waste management unit;

(4) "holder" means the grantee of an environmental covenant as specified in AS 46.04.300(b);

(5) "notice of activity and use limitation" means a notice of a

restriction on or obligation concerning an activity on or use of real property, in accordance with AS 46.04.300 - 46.04.390;

(6) "record" has the meaning given in AS 40.17.900.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: REGULATIONS. The Department of Environmental Conservation and the Department of Natural Resources may adopt regulations necessary to implement this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date of the law implemented by the regulation.

*** Sec. 3.** Section 2 of this Act takes effect immediately under AS 01.10.070(c).