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Commentary

Editor's Note: Just as there are two sides to every coin, there are at least two sides to most commentaries published in Planning & Environmental Law. *In the February 2005 issue, we ran a commentary drafted by Paul Stanton Kibel about the relatively new Uniform Environmental Covenants Act. Although Mr. Kibel found the general goal of UECA laudable, he shared his concerns about the potential misuse of environmental covenants and suggested that the National Conference of Commissioners on Uniform State Laws reopen the drafting process. Naturally, this elicited a strong opinion from the original drafters of UECA, Professors Strasser and Breetz. In the interest of fairness, we include their response to Mr. Kibel's commentary and thank all parties for this spirited debate.*

Why the Uniform Environmental Covenants Act Makes Sense: A Reply to Paul Kibel

Kurt A. Strasser and William Breetz[1]

The Uniform Environmental Covenants Act (UECA) was recently approved by the National Conference of Commissioners on Uniform State Laws (the "conference") and proposed for adoption by the states.[2] UECA provides needed legal reform to make sure that when environmental covenants are recorded as part of the remediation of brownfields property, they are valid and likely to be enforced for as long as the property presents environmental risks.

In the February 2005 issue of *Planning & Environmental Law*, Paul Kibel criticized UECA for what it doesn't do as well as for some of the things it does do, and the process by which UECA was drafted.[3] We believe the author failed to grasp the limited role that UECA plays in the brownfields regulatory scheme and ignored the importance of robust community participation in the local regulatory process—a process UECA does not change. We also reject any suggestion that the drafting committee's integrity was compromised because the conference received a grant to fund the expenses of that volunteer committee.

The Problem UECA Solves

When remediating contaminated property, sometimes it makes sense to perform a so-called "risk-based" cleanup—to leave some contamination in the ground and control the environmental risk of exposure to that contamination. UECA is critical in implementing that decision; it makes it possible to put long-term, enforceable restrictions on the use of real property, and to oblige future owners to maintain environmental remediation and monitoring facilities.

Why are such restrictions needed? In a world of unlimited cleanup and enforcement resources, ideal science and technology, and no environmental impact tradeoffs, one would always choose to leave no contamination. Yet the real world has limited enforcement resources, limited cleanup resources, imperfect cleanup technology, and often difficult environmental tradeoffs. In response, many enforcement agencies use risk-based cleanups for economic reasons, or because the process of cleaning up the contamination may itself have undesirable environmental impacts.

1. The authors are professors at the University of Connecticut Law School. Professor Breetz chaired the UECA drafting committee and Professor Strasser served as its reporter.

2. As of this writing, UECA has been adopted in Ohio, West Virginia, Maryland, Iowa, Nebraska, Kentucky, and South Dakota. It has been proposed in 10 additional states and is under study in approximately 15 others. Current information on pending legislation and adoptions is available at www.nccusl.org and www.environmentalcovenants.org

3. Paul S. Kibel, *A Shallow Fix: The Uniform Environmental Covenants Act Leaves Hard Brownfield Questions Unanswered*, Planning & Environmental Law, February 2005, American Planning Association.

UECA does not specify when or where a risk-based cleanup remedy is appropriate, and it does not prescribe a process for making this determination.

Risk-based cleanups can get the property back in use, back on the tax rolls, and contributing to the local economy. Indeed, funding for the cleanup will often be feasible solely because government or a private developer—or a partnership between the two—have identified an economically viable reuse for the property, where the cleanup costs have been factored into the overall development costs. As the large numbers of unremediated properties show,[4] the only real alternative to a partial cleanup is often a long-delayed cleanup of any kind, causing the continued risk of exposure to contaminants as well as blighted properties which detract from their communities.

Traditional real property law, however, is hostile to such long-term use restrictions on land, and a number of legal doctrines limit such restrictions. UECA overrides all these doctrines.[5] Under existing law, a number of legal events, such as a tax foreclosure or eminent domain proceeding, could prove fatal to an environmental covenant. UECA makes specific provision for each of these.[6]

UECA has a Limited Role

UECA does not specify when or where a risk-based cleanup remedy is appropriate, and it does not prescribe a process for making this determination. Its sole purpose is to provide certainty for environmental covenants. One criticism is that UECA will facilitate "widespread use of environmental covenants which may be putting the cart before the horse."[7]

This criticism completely ignores the regulatory context in which risk-based remedies are determined. Environmental covenants are only used to implement the land use restrictions and ongoing maintenance requirements of risk-based cleanups. They arise only at the end of the decision making process. The decision to use a risk-based cleanup and an environmental covenant rather than imposing a cleanup to "background" or "unrestricted" use is thus part of a larger determination process.

The reason UECA "does not set forth criteria or procedures to determine when it is appropriate for an environmental agency to reduce cleanup costs by approving less comprehensive cleanups . . ."[8] is because such standards would have to reach the whole remediation process, and not just the small piece of the process dealt with under UECA. A large body of federal law articulates the standards for environmental cleanups as well as the required notice and consultation in the process; they are extensive and detailed.[9] Those federal procedures also require extensive notice and opportunity to comment in the remedy selection process.[10] Many states have similar laws.[11] However, the article criticizing UECA fails to even acknowledge that these laws exist; indeed, it implies that somehow the public is presently excluded from the regulatory process.

Finally, if current cleanup standards and procedures are insufficient to protect the public and interested stakeholders, a critic of those procedures should provide either supporting data or specific instances of cleanups that exposed the public to continuing environmental risk. No such evidence is cited in the article that criticizes UECA, and we are unaware of any that might have been cited.

UECA's Impact on Zoning

UECA makes clear that it "does not authorize a use of real property that is otherwise prohibited by zoning. . .";[12] thus, by its terms, it does not displace zoning. Nevertheless, UECA's critic insists first, that an environmental covenant may prohibit a land use that is permitted under local zoning law,[13] and second, that UECA interferes with the ability of local zoning officials and planners to design their community by planning future land use and land use changes.[14]

The first criticism is factually accurate but misguided.[15] Zoning patterns are presumably based on local officials' conclusions regarding the appropriate "best" uses for neighborhoods. Those patterns do not mandate the "highest and best" use of each property in the zone and they do not consider environmental risks from exposure to contaminants. Environmental regulators, however, must consider environmental exposure risks that result from risk-based cleanups, and must restrict specific parcels of land to uses—consistent with existing zoning regulations—that will guard against such risks. This is hardly unique. The interrelationship of zoning ordinances and restrictive covenants is a common issue, is dealt with extensively in the legal literature, and poses no special legal challenge.[16] The more restrictive provision governing the parcel—whether through the legislative enactment of a zoning ordinance or a contractual restriction in the form of an environmental covenant—will prevail. Thus, the suggestion that somehow an environmental covenant might improperly "trump" a municipal zoning ordinance is simply without merit.

The City of Oakland's Estuary Policy Plan is raised as an example of how environmental covenants will limit that city's, and presumably, any city's, practical ability to implement its plan for the future. Oakland's waterfront is currently used for industrial and commercial purposes, while the plan envisions residential and parkland uses. The alleged concern is that once covenants are in place that limit residential use and allow for current industrial and commercial uses, it will be harder for the city to change them.[17]

4. The EPA estimates there are more than 450,000 brownfields in the U.S. *See* www.epa.gov/brownfields/about/htm

5. UECA §5(b)

6. UECA §9

7. Kibel, *supra* note 3 at p. 8

8. Kibel, *supra* note 3 at p. 2

9. E.g., CERCLA, 42 U.S.C. §9621 (2004).

10. E.g., CERCLA, 42 U.S.C. §9617 (2004).

11. ENVTL. L. INST., *An Analysis of State Superfund Programs 50 State Study, 2001 Update* (2002) at 100. For state statutes on cleanup policies and criteria, as well as public participation requirements, *see, e.g.* CONN. GEN. STAT. §22A-133K; ME. REV. STATE ANN. TIT 38, §343-E; R.I. GEN LAWS §23-19.1-6; VT. STAT. ANN. TIT. 10 §§6615A, 6615b; N.J. STAT. ANN. §58: 10B-12; MD. CODE ANN. Envr. §§70509, 510; PA. STAT. ANN. §§6020.504, 6020.1115; W. VA. CODE §§22-22-4.

12. UECA §6

13. Kibel, *supra* note 3, at p. 8

14. Kibel, *supra* note 3, at p. 3

15. "An environmental covenant may prohibit or restrict uses of real property which are authorized by zoning . . . ". UECA §6.

16. YOUNG, ANDERSON. AMERICAN LAW OF ZONING §3.04 at 88 (4th Ed.1995); JUERGENSMEYER AND ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW, §15.14 at 775.

17. Kibel also notes Professor Kirsten Engel's accurate observation that there may often be substantial environmental justice implications in the current industrial and commercial uses, in that those uses often expose nearby residents to a higher degree of environmental risk, and that those nearby residents are more likely to be members of minority groups and poor people. Kibel, *supra* note 3, at p. 6, citing Kirsten H. Engel, *Brownfields Initiatives and Environmental Justice: Second-Class Cleanups or Market-Based Equity*, 12 J. NAT. RESOURCES. & ENVTL. L. 317, 359 (1998).

Traditional zoning law is a hopelessly ineffective tool to command the change of a current use to one that is more highly valued socially but not economically.

We recognize that there will be cases where a possible land use is authorized by zoning but is not allowed by the covenant because it presents environmental risks. In all likelihood, that use is not more highly valued than the ones authorized in the covenant, or at least not enough to finance cleaning up additional contamination. If it were, we might expect that the landowner and other liable parties would have been willing to pay for the additional cleanup in order to take advantage of the higher valued use.

It may also be that the alternative use, or some other theoretical use that might some day be authorized by a future zone change, would have greater social utility than the uses presently authorized by the environmental covenant. However, that is not a problem that UECA, or any change to zoning law, can fix. Traditional zoning law is a hopelessly ineffective tool to command the change of a current use to one that is more highly valued socially but not economically. To criticize UECA because it relies on traditional private covenant practices widely misses the mark. It was clear to us during the UECA drafting process that the policy issue of how much additional cleanup cost should be demanded in order to facilitate a use not currently contemplated by the legally liable parties was not a matter in the drafting committee's jurisdiction.

We agree that it would be difficult for the City of Oakland to change existing uses to new ones in order to implement its plan, if the new uses are not more highly valued economically, but we do not understand how UECA limits Oakland's ability to accomplish the city's plan. It seems likely that the city will be able to effectively implement its plan only if the residential and parkland uses can pay for buying out the existing industrial and commercial uses, or if a public subsidy can be attracted for the project. In either case, the existence of environmental covenants on the property is not an important limiting factor.

Regardless of whether UECA were the law in California, Oakland's environmental regulators could simply command a complete cleanup rather than a risk-based one. In this situation, the property would then be fully cleaned up and presumably available for any use authorized by the city's zoning. Under the existing remedy determination process, both community and environmental interests will have an ample opportunity to make the case for this outcome. The history of brownfields cleanups to date indicates that this will be a long, slow process, and many properties will await this level of attention from regulators and liable parties for a long time. But UECA imposes no barrier to such an outcome.

UECA's Drafting Process

The final criticism concerns UECA's drafting process, alleging that it was somehow tainted because the drafting committee's work was partially funded by the United States Department of Defense. Although the Defense Department provided funding both for the initial study committee meeting and to support the drafting process, it did so because the department will soon be required to dispose of many contaminated military bases across the country. As a result, it understood firsthand the importance of having an enforceable uniform act adopted by as many states as possible. These funds paid for the travel, hotel, and meal expenses of the drafting committee and conference staff but did not pay any money to any member of the drafting committee.

Kibel implies that the process was biased by this funding source. More specifically, he infers that the DOD controlled the selection of advisors to the drafting committee and, through this control, biased the selection of issues and proposed solutions. The grant agreement did not grant any such control to the department and the outcome of the final draft does not suggest that any such control existed.

The inference of exclusion of specific interests from the process[18] is similarly incorrect. Several national environmental groups were specifically invited, as were representatives of local government interests. The latter offered commentary on drafts but had limited attendance, while several of the former chose not to participate for unknown reasons.

Conclusion

Environmental covenants are being used today. Most knowledgeable observers expect that use to grow, and there is widespread consensus that there are problems with their permanence and likely enforcement. UECA was drafted simply to make them effective when they are used. There was no agenda to foist their use on the environment, local communities, and local zoning officials when the circumstances make such use inappropriate. UECA presumes that the current practice of using risk-based cleanups and environmental covenants will continue and expects that it will grow. The place for UECA's critics to address their concerns is in the remedy selection process, site by site, in individual determinations for each site. That is the only venue where decisions about the use of risk-based cleanups in environmental regulation will be made.

18. Kibel, *supra* note 3, at p. 5.