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FISCAL AND POLICY NOTE
Revised

House Bill 679

(Delegate McIntosh)

Environmental Matters

Education, Health, and Environmental Affairs

Maryland Uniform Environmental Covenants Act

This bill establishes provisions governing the creation, applicability, maintenance, and enforcement of “environmental covenants.”

Fiscal Summary

State Effect: To the extent the bill results in additional transfers of ownership and reuse of contaminated properties, State property and transfer tax revenues could increase.

Local Effect: Local revenues from recordation taxes and fees would likely increase; local property and transfer tax revenues could also increase to the extent the bill results in additional transfers of ownership and reuse of contaminated properties.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: An “environmental covenant” is a servitude arising under an environmental response project that imposes activity and use limitations on the property. The bill establishes specified requirements for a covenant. Among other things, a covenant must contain a legally sufficient description of the real property subject to the covenant, describe the activity and use limitations on the real property, and identify every holder of the covenant. An environmental covenant may contain other information, restrictions, and requirements agreed to by the signatories.

Any person may be a holder of an environmental covenant, and a covenant may identify more than one holder. The interest of a holder is an interest in real property. The bill

establishes provisions regarding the rights and obligations of agencies and other signatories. The bill also establishes provisions governing an interest in real property in existence at the time a covenant is created or amended.

An environmental covenant runs with the land. The bill establishes provisions regarding the validity and enforceability of a covenant and its relation to zoning and other laws. The bill does not displace other restrictions on land use laws, but a covenant may prohibit or restrict uses of real property which are authorized by zoning or other laws.

The bill establishes notice requirements and requires that a covenant and any amendment or termination of a covenant must be recorded in every county in which any portion of the real property subject to the covenant is located.

The Maryland Department of the Environment (MDE) must establish and maintain a registry that contains all environmental covenants and any amendment or termination. After a covenant, amendment, or termination is filed in the registry, a notice that meets specified requirements may be recorded in the land records in lieu of recording the entire covenant.

An environmental covenant is perpetual, except under specified conditions. A covenant may be amended or terminated by consent under specified conditions. Assignment of a covenant to a new holder is considered an amendment, except under specified conditions. The bill establishes provisions regarding the assignment of a holder's interest and the ability of a court to fill a vacancy in the position of a holder.

The bill establishes provisions regarding enforcement of environmental covenants.

The provisions of the bill are severable.

Current Law: Brownfields are abandoned or underutilized industrial or commercial sites, located primarily in urban areas, which are either contaminated or perceived to be contaminated by hazardous substances. Chapters 1 and 2 of 1997 established the Voluntary Cleanup Program (VCP) within MDE to encourage the investigation of eligible brownfields properties, to protect public health and the environment, to accelerate the cleanup of eligible properties, and to provide predictability and finality to the cleanup process. VCP works in conjunction with the Brownfields Remediation Incentive Program (BRIP), a program administered by the Department of Business and Economic Development (DBED) that provides economic incentives such as loans, grants, and property tax credits to clean up and develop certain properties.

Chapter 73 of 2004, the Brownfields Redevelopment Reform Act, in an effort to encourage participation, expanded eligibility to participate in VCP, provided a more

predictable process for prospective owners of eligible properties, reduced the costs of redevelopment, and decreased departmental turnaround times. Chapter 73 also broadened eligibility for BRIP.

In addition to VCP, MDE also administers the State's superfund program, which assesses suspected hazardous waste sites, including federal facilities, to control and remove environmental and public health threats through site cleanups and remedial actions.

Background: Environmental covenants are increasingly being used as part of the remediation process for contaminated real property. They are typically used when the real property is to be cleaned up to a level determined by the potential environmental risks posed by a particular use, rather than to unrestricted use standards. Chapter 73 of 2004 required MDE to convene a workgroup to review the Uniform Environmental Covenants Act proposed by the National Conference of Commissioners on Uniform State Laws. The workgroup included representatives of the Maryland Department of Planning, DBED, various sectors of local government, real estate professionals, the business community, the banking industry, and the environmental community.

In a 2003 report, the National Conference of Commissioners on Uniform State Laws highlighted two principal policies served by confirming the validity of environmental covenants. First, it ensures that land use restrictions, mandated environmental monitoring requirements, and common engineering controls designed to control the potential risk of residual contamination will be reflected on the land records and effectively enforced over time as valid real property servitudes. Second, it encourages the return of previously contaminated property to the stream of commerce. The uniform legislation was designed to encourage transfer of ownership and property reuse by offering a clear and objective process for creating, modifying, or terminating environmental covenants and for recording those actions so that they are reflected in the title abstract of the property in question. This bill is based on the uniform legislation adopted by the National Conference of Commissioners on Uniform State Laws in 2003 and approved by the American Bar Association in 2004.

According to MDE, some states have already adopted the model legislation and several states are anticipated to introduce the legislation this year. Although nearly half of all states have some sort of law providing for land-use restrictions, the model legislation includes a number of provisions absent from most statutes. Adoption of the model legislation is designed to overcome various common law obstacles that could otherwise impair the long-term viability of environmental covenants by establishing the legal infrastructure for creating, modifying, terminating, and enforcing environmental covenants.

MDE's Environmental Restoration and Redevelopment Program conducts assessments and cleanups or performs oversight on 874 sites throughout the State. As of January 31, 2005, 90 sites have one or more land use controls in place, requiring some form of inspection or oversight by MDE.

State Fiscal Effect: According to MDE, the bill is expected to improve the efficiency with which its Environmental Restoration and Development Program is able to ensure that property owners are complying with land use controls. The bill is not anticipated to have a significant impact on MDE's finances, however. MDE advises that it could establish and maintain the required registry with existing budgeted resources.

To the extent the bill results in the additional transfer of ownership and reuse of contaminated properties, State property and transfer tax revenues could increase.

The District Court could likely handle any increase in workload with existing resources.

Local Fiscal Effect: This bill would provide local jurisdictions with greater control in ensuring that appropriate land use controls are implemented and maintained on properties for which residual contamination remains. Local governments could benefit as owners of property upon which land use controls have been imposed or as regulators enforcing such covenants on other properties.

Local revenues from recordation taxes and fees would likely increase as a result of the bill, since the bill requires a covenant and any amendment or termination of a covenant (or a notice of the covenant, amendment, or termination) to be recorded in affected counties. Local property and transfer tax revenues could also increase to the extent the bill results in the additional transfer of ownership and reuse of contaminated properties.

The circuit courts could likely handle any increase in workload with existing resources.

Small Business Effect: Real estate transaction costs could increase as a result of the bill. However, small businesses that own or purchase land subject to land use controls could benefit from the legal process established by the bill. To the extent the bill results in additional transfers of ownership and reuse of contaminated properties, small businesses in the surrounding areas could benefit.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland Department of the Environment; Maryland Department of Planning; State Department of Assessments and Taxation; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Allegany County; Montgomery County; Prince George's County; Talbot County; Town of Elkton; Town of Thurmont; City of Annapolis; Department of Legislative Services

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