

No Pa. Case Has Ever Adjudicated a Claim to Enforce an Environmental Covenant Imposed Under ‘Act 2’—Does That Matter?

By David G. Mandelbaum | [January 6, 2025](#) | [The Legal Intelligencer](#)

Pennsylvania allows voluntary cleanups of contaminated sites under the Land Recycling and Environmental Remediation Standards Act (Act 2), 35 Pa. Stat. Ann. Sections 6026.101 to .908. When contamination remains at or under a property even after cleanup, the Land Recycling Program frequently requires a restrictive covenant to be recorded on the property that satisfies the Uniform Environmental Covenants Act (UECA), 27 Pa. Cons. Stat. Sections 6501-17. A UECA covenant imposes an activity and use limitation on the property enforceable not only by the remediator but also by the Department of Environmental Protection.

Act 2 has been on the books since 1995. UECA was adopted in Pennsylvania at the end of 2007. More than a few UECA covenants have been recorded as parts of Act 2 cleanups. Nevertheless, research has not revealed any decision of any Pennsylvania state or federal court or of the Environmental Hearing Board deciding whether a UECA covenant should be enforced or interpreting its terms.

Pennsylvania law disfavors “restrictive covenants on the use of land” because they “interfere with an owner’s free use and enjoyment of real property.” See *Vernon Township Volunteer Fire Department v. Connor*, 855 A.2d 873, 879 (Pa. 2004). However, they are enforceable as a matter of contract, although the contract will be read strictly against the restriction. A landowner subject to the restriction may obtain relief from the restriction if that landowner can prove that changed conditions render the original purpose of the restriction has been altered or destroyed by changed conditions and that the restriction no longer confers a substantial benefit on the dominant landowners, or, in the case of a UECA covenant, the “holder” and the DEP.

To take two nonenvironmental examples, *Vernon Volunteer Fire Department (VVFD)* was an action by VVFD to obtain relief from a 1946 covenant prohibiting the sale of alcohol in a subdivision where VVFD had purchased land for a new fire hall. VVFD claimed that at the time of trial three establishments were selling alcohol within two miles of the subdivision, including VVFD’s own old social hall that the new building would replace, and all but a few owners of houses in the subdivision had consented. The trial court would have enforced the restriction, the Pennsylvania Superior Court reversed based upon the nearby establishments, and the Pennsylvania Supreme Court again reversed because the Superior Court should not have substituted its judgment for the trial court’s fact-finding. Arguably, then, the continued enforceability of a covenant becomes more litigable over time.

Ruffed Grouse Ridge Owners’ Association v. Hura, 317 A.3d 665 (Pa. Commw. Ct. 2024), more recently applied that rule that covenants are to be read narrowly. Charles Hura owned a lake house and rented it for weekends on AirBnB. The owners’ association sought to enforce against Hura a 1987 covenant limiting homes to “residential” use and prohibiting “commercial” activities. The Pennsylvania Commonwealth Court interpreted the covenant narrowly. “Residential use” included short-term rental use and having a

house available for weekend rentals was not a “commercial” activity. The lesson here is that interpretation of each activity and use limitation may be arguable based upon circumstances.

UECA covenants help assure that a party cleaning up a site under Act 2 in a way that relies on “engineering controls” or “institutional controls” to meet a cleanup standard can maintain achievement of that standard over time. Particularly under the “site-specific” cleanup standard, if a remediator can eliminate the pathways between contamination and any receptor then the remediator can leave contamination at the site that meets neither the background standard nor the statewide standard. In other words, the soil or the groundwater at such a site will be “dirty,” but will be isolated from people, animals, or plants by pavement, a building, or a prohibition on groundwater use. Alternatively, industrial or commercial use may not result in unacceptable exposure to the contamination even though the site is not clean enough for residential use, so a use restriction may allow the site to meet a cleanup standard.

The UECA covenant seeks to assure that any engineering controls (like the pavement or building) or institutional controls (like a prohibition on groundwater use or residential use) remain in place for the indefinite future after completion of the cleanup and the end of the Act 2 process. Indeed, the DEP’s 2021 Technical Guidance Manual for the Land Recycling Program appears to call for a UECA covenant whenever an engineering control or an institutional control is necessary to attain an Act 2 standard. See TGM at III-105. DEP provides a form of UECA covenant for Act 2 sites that require one.

Other mechanisms exist to maintain activity and use limitations, such as municipal ordinances. In addition, both the Solid Waste Management Act and the Hazardous Sites Cleanup Act require notices to be placed in deeds for sites used to dispose of hazardous waste or hazardous substances. See 35 Pa. Stat. Ann. Sections 6018.405(c), 6020.512(b). Indeed, the Environmental Hearing Board has held that Section 512 of HSCA authorizes the DEP to impose a groundwater use restriction. See *Barron v. DEP*, EHB Dkt. No. 2011-142-L (Pa. Env’tl. Hearing Bd. Jan. 29, 2013). One might reasonably ask how one can know in any given circumstance that the restrictive covenant will be more reliable than any other mix of measures. Reliance on the UECA covenant requires confidence that a generalist judge years or decades after the covenant is recorded will enforce that covenant just in the way the environmental regulators at that later time may want it to be enforced.

Litigation experience would, of course, help answer that question. One might expect someone at some time to have sought to enforce one of these covenants. Parties under Act 2 devote more effort than they might like to put UECA covenants on the title to properties being cleaned up and neighboring properties that are underflowed by contaminated groundwater, for example. The DEP thereby acquires enforcement rights. Yet, there appear to be no reported cases in Pennsylvania in which either a private plaintiff or the DEP has in fact sought to enforce those rights.

Now, to be sure, there are cases about other issues presented by imposition of environmental covenants. See *Johnson v. Walsh*, 2011 Phila. Ct. Com. Pl. LEXIS 317 (Dec. 2, 2011), certified two classes of purchasers of homes in Philadelphia built on contaminated property the developers of which had failed to disclose the contamination. The DEP required imposition of a restrictive covenant on each, and the plaintiffs sued for loss of the value of their properties as a result. See also, e.g., *West Virginia State University Board of Governors v. Dow Chemical*, 23 F.4th 288 (4th Cir. 2022)(claim for diminution in property value for imposition of restrictive covenant on entire campus); *Marmik v. Packer*, 240 N.E.3d 795 (Mass. App. 2024)(agreement of sale on required the seller to clean up to nonresidential standard and purchaser must accept an activity and use limitation).

At least one court in Pennsylvania has considered whether a remedy adopted under Act 2 that included imposition of a UECA covenant sufficed to make futile a claim by a private citizen suit plaintiff for further injunctive relief under the federal Resource Conservation and Recovery Act. See *PennEnvironment v. PPG Industries*, Civil Action No. 12-342 (W.D. Pa. May 22, 2019). The RCRA relief claim was not futile because the plaintiff claimed the Act 2 remedy was inadequate.

But none of these cases answers the fundamental questions of how a UECA covenant's restrictions will be read by a later court, whether they will be enforced at all, and whether they can serve as sufficiently nimble tools to address changes in circumstances over decades. Should that matter in deciding whether a UECA covenant is necessary to assure continued maintenance of an Act 2 cleanup standard?

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