Restrictive Covenant/Environmental Remediation: Michigan Appellate Court Addresses Property Owner Challenge to Presence of Equipment Housing

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

09/15/2021

The Court of Appeals of Michigan ("Appellate Court") addressed in a September 9th Opinion a challenge by a property owner to the presence of a shed and equipment associated with environmental remediation that had been used to address onsite contamination. See *OK Auto Sale, Inc. v. Arcadis of Michigan, LLC,* 2021 WL 4143046.

The property owner had filed a Complaint in the lower court against an environmental remediation firm that had utilized the shed and equipment.

OK Auto Sale, Inc. ("OK") leased property to operate a used car dealership. The property had apparently suffered subsurface environmental contamination in the past from an underground storage tank leak due to a prior owner (Amoco Oil Company ["Amoco"]).

As part of its remediation activities, Amoco executed a restrictive covenant ("Covenant") with the then-named Michigan Department of Environmental Quality. The Covenant provided for the implementation of a Corrective Action Plan at the property. Amoco subsequently sold the property to another entity.

Delta Environmental Consultants ("Delta") constructed a shed on the property that houses equipment associated with the environmental remediation. The equipment included:

- Groundwater pump and treatment system
- Soil vapor extraction system

The groundwater pump and treatment system was discontinued by Delta in 2004. The soil vapor extraction system is stated to have remained in use until at least 2010.

While disputed, the groundwater pump and treatment system was removed at least by 2019. Arcadis of Michigan, LLC ("Arcadis") took over the remediation from Delta in 2009.

OK filed suit against Arcadis arguing that the shed housing the equipment:

. . . took up valuable space on the property that could have otherwise been used for selling cars.

The dealership contended that since remediation was no longer being undertaken the shed and equipment should have been removed and OK was entitled to damages from Arcadis.

The Opinion reviews the Covenant which by way of summary contains elements which include:

- Titleholder is required to restrict activities on the property that could interfere with corrective action, etc.
- Titleholder is required to restrict activities that could result in exposure to regulated substances above levels established in the Corrective Action Plan
- Titleholder is required to grant to the Michigan Department of Environmental Quality and its designated representatives the right to enter the property at reasonable times for actions related to the Corrective Action Plan
- Covenant runs with the land and is binding on the titleholders, successors, assigns, etc., until the Michigan Department of Environmental Quality determines that regulated substances no longer present an unacceptable risk to the public health, safety, or welfare to the environment
- No amendments, modifications or covenants could be undertaken without agreement of the titleholder and the Michigan Department of Environmental Quality

Arcadis argued that the Covenant's plain language authorized the placement of the shed and equipment as part of its Corrective Action Plan. It further argued that the Covenant contained no requirement for equipment or structures to be removed until the end of the entire remediation process. As there was argued to be no evidence that the Michigan Department of Environmental Quality had determined there was no longer an acceptable risk, the continuing presence of the shed and the equipment were not in violation of the Covenant.

The lower court granted summary disposition to Arcadis and the Appellate Court affirmed.

The Appellate Court notes that while unambiguous covenants should be enforced as written, any uncertainty or doubt must be resolved in favor of the free use of property. Nevertheless, the Covenant's language was noted to grant the Michigan Department of Environmental Quality and its designated representatives a right to undertake these activities until it was determined that regulated substances no longer presented an unacceptable risk.

OK's Complaint was noted to have relied on the proposition that it was legally improper to keep the shed and its equipment in place beyond the date they were being used or served a purpose in relation to the corrective action. Further, the shed and equipment are stated to have been removed in 2019 less than two months after OK requested removal.

The Appellate Court in upholding the lower court noted:

- There was no evidence that the Michigan Department of Environmental Quality had made a determination that regulated substances no longer presented an unacceptable risk
- The Covenant does not contain language mandating the removal of remediation structures and equipment from the property as soon as use of those structures and equipment is discontinued when remediation has not been fully completed
- Inferring a "reasonable" requirement into the Covenant is improper because of the document's plain language and overall purpose to effectuate remediation

A copy of the Opinion can be downloaded here.