

Drafting Assignment #7
Contract Drafting

Due Tuesday 9/29/20

The Jigsaw Puzzle Contract

The law firm you work for deals primarily with environmental litigation.

A settlement has been reached in which your client as new owner of the land is required to provide an agreement with the prior owner of the land restricting future use of the land.

An agreement was drafted by a senior lawyer in your firm, but it had no page numbers and no paragraph numbers. It was printed on paper but not stapled. Then the computer crashed and there is no backup of the electronic document. All you have is the printed paper pages. Someone dropped them, and they scattered out of order on the floor. Somehow even the paragraph headings were lost. All that is left is a bunch of paragraphs, each on a separate page.

You've been handed the pieces of paper and tasked with reassembling them into the draft agreement that the senior lawyer drafted to present to the other side as a complete form of agreement, with title, headings, paragraph numbers, page numbers, paragraphs listed in order of importance and meaning and relevance, and subparagraphs as make sense to the deal.

In other words, you are to reassemble the draft into a good-looking, working contract as close to what the senior lawyer drafted as possible

You must use all of the text, but you need to add headings, numbers, etc.

The 28 paragraphs of text that you are to use are on the following pages of this assignment.

Oh, and the senior lawyer is, as they say, out of the country with limited access to email or cell service, so you must do this on your own.

Your file name: “[your last name] Environmental agreement [date]”

Send to: jwmartin@law.stetson.edu

WHEREAS, this Agreement will be recorded with the [county] County Recorder's Office for the purpose of protecting the public health, safety and welfare and the environment within ten days of the final signature on this Agreement; and

This instrument does not convey any right of access or use by the general public to any portion of the Site.

WHEREAS, the Grantor holds title to the approximately acres of real property located in [county] County, [state], the legal description of which is attached hereto as Exhibit A (the "Site"); and

This Agreement shall continue until the Grantee, U.S. EPA and its assigns and successors, agree to approve the modification or rescission of this Agreement. To the extent that these parties approve a modification of this Agreement, all terms not specifically modified shall remain in full force and effect.

WHEREAS, the Grantor and the Grantee, entered into an Administrative Order on Consent, attached hereto as Exhibit B (“AOC”), with the United States Environmental Protection Agency (“U.S. EPA”), pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9606(a), to conduct certain actions at the Site to abate a possible imminent and substantial endangerment to the public health, welfare or the environment presented by the release or threatened release of hazardous substances at or from the Site; and

Grantor shall include in any instrument conveying any interest in any portion of the Site, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

NOTICE:

THE INTEREST CONVEYED HERE IS SUBJECT TO AN AGREEMENT FOR COVENANTS AND RESTRICTIONS TO CREATE AN EQUITABLE SERVITUDE, DATED , , RECORDED IN THE DEED RECORDS ON , , IN BOOK , PAGE [check with the Recorder's Office re: whether the "book, page" system is correct], IN FAVOR OF, AND ENFORCEABLE BY EP, LTD. AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.

Within 30 days of the date of execution of any such instrument of conveyance, the Grantor shall provide the Grantee and the U.S. EPA with a certified true copy of the instrument and, if it has been recorded in the deed records, its recording reference.

WHEREAS, the Grantee is the former owner of the Site; and

It is the purpose of this instrument to create equitable servitudes that will run with the land in order to facilitate the completion of work under the AOC and protect human health and the environment by reducing the risk of exposure to contaminants. The equitable servitudes created herein touch and concern the Site in that they are intended to limit the use of the Site, restrict certain activities, and/or require certain operation and/or maintenance activities to occur on the Site. It is the intent of the Grantor that the covenants, terms, conditions, and restrictions of this Agreement operate as servitudes running in perpetuity with the Site. It is also the purpose of this Agreement that the Third Party Beneficiary, the U.S. EPA and its assigns and successor agencies, shall have the right to enforce the terms of this Agreement.

WHEREAS, the most recent deed of record for the Site is recorded at Volume , Page of the real property record for [county] County, [state]; and

NOW, THEREFORE, intending to be legally bound, the Grantor and Grantee, for and in consideration of the covenants and conditions set forth and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, do covenant and agree to grant a permanent right of access to the Site to the Grantee, and its representatives and contractors for purposes of implementing, facilitating, maintaining and monitoring any response actions selected by U.S. EPA; impose on the Site use restrictive covenants and intend to create an equitable servitude that will run with the land for the purpose of protecting human health and the environment; and perform certain maintenance activities to prevent exposure to waste and contaminated soils that will be left in place at the Site.

WHEREAS, the Grantor and Grantee, now wish to restrict the use of the Site and perform certain activities to justify a proposal to limit the scope of the selected response action for certain limited portions of the Site; and

WHEREAS, the U.S. EPA subsequently selected a response action for the Site through its Enforcement Action Memorandum dated [month] [day], [year], including the removal of waste and soils contaminated above specified cleanup levels based upon current and reasonably anticipated future land use; and

Grantor waives any defense of laches, estoppel, or prescription.

The Grantor hereby grants Grantee, their successors, assigns, representatives and agents, a perpetual nonexclusive easement for access to the Site, without cost, to determine compliance with the restrictions set forth in this Agreement and for performing any cure or remediation on the Site deemed necessary or desirable by Grantee. Grantor acknowledges and agrees that Grantee will incur or suffer certain liabilities, damages, fines, fees, costs and expenses if Grantor fails to observe and perform all of the conditions and covenants set forth in this Agreement. Grantor shall indemnify, defend and hold Grantee harmless against and from any and all liabilities, damages, fines, fees, costs, and expenses arising, directly or indirectly, from Grantor's failure to maintain the integrity of Site pavement and concrete floors in the centrifugal casting area and compressor building, including but not limited to, removal of Site pavement and concrete floors in the centrifugal casting area and compressor building, or structures, equipment or improvements on or about Site pavement and concrete floors in the centrifugal casting area and compressor building, and/or from any act by Grantor or its Permittees which is expressly prohibited under this Agreement, including, without limitation, costs of investigation and remediation, costs of all third-party consultants and professionals, all legal fees and expenses and other costs and expenses incurred by Grantee in defending or processing any legal or administrative proceedings occasioned by such act(s) and in enforcing its rights hereunder.

The Grantor shall record this Agreement in the Recorder's Office of [county] County, [state] and shall provide Grantee and U.S. EPA a certified copy of the original recorded instrument showing the Recorder's recording stamps.

Grantor agrees for itself and its successors and assigns that any deed, easement, lease, license, or other grant or conveyance of the Site or any portion thereof or interest therein, which is executed after the date of this Agreement shall include a recital of the restrictive covenants set forth above. The grants, covenants, and other provisions set forth in this Agreement shall run with the land and shall be binding upon all owners and respective successors and assigns, including holders of any leasehold interests in the Site. The terms, covenants, restrictions and conditions shall, in any event, and without regard to technical classification or designation, legal or otherwise, be binding to the fullest extent permitted by law and equity, for the benefit and in favor of the Grantee against the Grantor and its successors in interest to the Site and each part therefor and interest therein, and it shall not be necessary for the enforceability hereof by Grantee, or their respective successors in interest, that the provisions of this Agreement or a recital thereof or thereto be included by the Grantor in any succeeding conveyance of the Site. It is also the purpose of this instrument that the Third Party Beneficiary, U.S. EPA and its assigns and its successor agencies, shall have the right to enforce the terms of this Agreement.

WHEREAS, in order to implement the response action selected for the Site, including operation and maintenance of the remedy, it is necessary for the U.S. EPA, its assigns, successor agencies, representatives and contractors, the Grantee, its representatives, and contractors, to have access to the Site; and

Any notice, demand, request, consent, approval, or other communication that any Party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class certified mail, return receipt requested, postage prepaid, or by express mail with delivery confirmation and addressed as follows:

AGREEMENT AND DECLARATION OF COVENANTS AND RESTRICTIONS OF USE OF
CERTAIN REAL ESTATE

WHEREAS, the Grantor wishes to cooperate fully with the Grantee, and the U.S. EPA in implementing the response action selected by U.S. EPA at the Site, to ensure the protectiveness of the response action, and to protect human health and the environment.

This Land Use Restriction Agreement to Create an Equitable Servitude, herein called the “Agreement,” is made this [day] of [month], [year], by and between the BB CORP., a(n) [state] corporation (“Grantor”), and EP, LTD., a(n) [state] corporation (“Grantee”).

Grantor on its own behalf and the behalf of its successors, transferees, assigns and heirs, and the Grantee on its own behalf its successors, transferees, assigns and heirs, in consideration of the terms of the AOC, hereby agree that the U.S. EPA and its assigns, and its successors and assigns shall be the Third Party Beneficiary of all the benefits and rights conveyed to the Grantee under this instrument. The agency having administrative control, care and custody of actions under this Agreement is the U.S. EPA.

In addition to the access rights set forth in Paragraph _____ above, the U.S. EPA, and its representatives, contractors, assigns and successor agencies, may enter the Site from time to time for the purposes of performing inspections, overseeing remedy implementation or enforcing the covenants and restrictions set forth in Paragraph 4, above. The Grantee and the U.S. EPA, as Third Party Beneficiary, shall be entitled to enforce the terms of this Agreement by resorting to specific performance or legal process. The Grantee acknowledges their affirmative obligation to enforce the Agreement. The covenants and other provisions set forth in this Agreement may be enforced against the Grantor by an action for injunctive relief for any violation or threatened violation thereof brought in a court of competent jurisdiction by Grantee or by the U.S. EPA, as Third Party Beneficiary. The court may award not only injunctive relief, but damages and reasonable attorneys' fees. All remedies available here shall be in addition to any other remedies at law or in equity, including CERCLA. Any forbearance, delay or omission to exercise their rights under this Agreement in the event of a breach of any term of this Agreement shall not be deemed a waiver by the Grantee or the U.S. EPA of such terms, or any other term, or any rights of the Grantee or the U.S. EPA under this Agreement.

WHEREAS, the Site has been and is being operated, as of the date of this Agreement, as a brass foundry; and

In addition, U.S. EPA and its assigns, as Third Party Beneficiary, shall have all of the rights of access as granted by the Grantor to the Grantee for the purposes listed below:

Performing or implementing any activity relating to any response actions selected by U.S. EPA for the Site;

Verifying any data or information submitted to U.S. EPA or [state] EPA;

Verifying that no action is being taken on the Site in violation of the terms of this Agreement or of any federal or state environmental laws or regulations;

Monitoring response actions on the Site and conducting investigations relating to contamination on or near the Site, including, without limitation, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples;

Conducting periodic reviews of the remedial action, including but not limited to, reviews required by applicable statutes and/or regulations; and

Implementing additional or new response actions if U.S. EPA, in its sole discretion, determines that such actions are necessary to protect human health or the environment.

Nothing in this Agreement shall limit or otherwise affect the U.S. EPA's rights of entry and access or limit the U.S. EPA's authority to take response actions selected by U.S. EPA under CERCLA, the National Contingency Plan, and its successor provisions or other federal or State law.

WHEREAS, the Grantor and Grantee were required to perform pursuant to the AOC an Engineering Evaluation/Cost Analysis (“EE/CA”) to develop removal action alternatives to address the actual or threatened release of hazardous substances at or from the Site, and implement a removal action from the alternatives presented as selected by U.S. EPA; and

Grantor, on its own behalf, and the behalf of its successors, assigns and heirs, in consideration of the terms of the AOC, covenant and declare that the Site shall be subject to the restrictions on use set forth below, and quit, grant and convey to the Grantee, and its assigns, the perpetual right to enforce the restrictions, and for the purposes set forth here, with respect to the Site. All rights and obligations of the parties to the AOC are incorporated into this Agreement.

Grantor, for itself and its successors and assigns as owners of fee simple title to the Site, whether through grant, conveyance, foreclosure or judicial process, agrees as follows:

There shall be no excavating, landscaping, grading, filling, drilling, mining, constructing, trenching, driving pilings, livestock grazing, use of explosives or construction, placement, installation or use of any fences, ditches, roads, pipes, wells, buildings or structures of any manner or description, whether permanent, temporary or mobile, specifically including a permanent or mobile residential home, or any other activity which may disturb: (1) the waste or contaminated soil remaining on the Site, (2) any existing or constructed cover over the waste or contaminated soil, or (3) access to those portions of the Site necessary to operate and maintain any Site remedy, including monitoring activities, unless specifically reviewed and not prohibited by U.S. EPA in writing, or approved pursuant to subparagraph E, below.

Groundwater use on or from the Site in any manner is prohibited. There shall be no extraction wells constructed, repaired or maintained on the Site. This prohibition does not apply to wells specifically approved by U.S. EPA. Surface waters on the Site shall not be used or permitted to be used for any human, animal or agricultural purposes.

Grantor shall maintain the integrity of the Site pavement and concrete floors in the centrifugal casting area and compressor building, to assure that no exposure to the underlying lead-contaminated soil occurs and that the remedy continues to be protective of human health and safety and the environment. This maintenance shall be performed in accordance with a post removal site control plan approved by U.S. EPA. Grantor and Grantee shall submit the post removal site control plan no later than [month] [day] [year], to U.S. EPA for review and approval or disapproval in whole or in part. Grantee shall pay the costs and expenses incurred by Grantor in performing such maintenance activities as set forth in the Agreement for Design and Construction Services dated [month] [day] [year], by and between Grantor, Grantee and Civil & Environmental Consultants, Inc., attached hereto as Exhibit C.

Notwithstanding the prohibitions on the construction, placement, installation or use of fences, ditches, roads, pipes, wells, buildings or structures in paragraph 4.A., above, such construction, placement, installation or uses are not prohibited if they are specifically deemed necessary by U.S. EPA in writing for:

Conducting periodic reviews of any response action, including but not limited to, reviews required by any applicable statutes and/or regulations.

The Site shall not be used in any manner that would interfere with or adversely affect the integrity or protectiveness of any response actions implemented pursuant to the AOC. The Site may be used only in a manner which is consistent with any obligations or restrictions that U.S. EPA determines are necessary to implement, and insures non-interference with or insures protectiveness of any response actions taken pursuant to the AOC.

Grantor shall maintain site security (i.e., fencing, locked gates and entry doors, and security guards), and the integrity of all Site pavement and concrete floors in the centrifugal casting area and compressor building to prevent exposure to underlying contaminated soils and waste.

Grantor shall promptly seal any cracks in Site pavement and concrete floors in the centrifugal casting area and compressor building.