Supreme Court of Ohio Clerk of Court - Filed June 08, 2020 - Case No. 2020-0031

IN THE SUPREME COURT OF OHIO

SILTSTONE RESOURCES, LLC,

Plaintiff/Appellant,

v.

STATE OF OHIO, PUBLIC WORKS COMMISSION,

Defendant/Appellee

v.

PATRIOT LAND COMPANY, LLC, et al.,

Crossclaim Defendants/Appellants.

Ohio Supreme Court Case No. 2020-0031

On Appeal from the Belmont County Court of Appeals, Seventh Appellate District

Court of Appeals Case No: 18 BE 0042

MERIT BRIEF OF EAGLE CREEK FARM PROPERTIES, INC.

Scott M. Zurakowski (0069040) (COUNSEL OF RECORD)
Matthew W. Onest (0087907)
William G. Williams (0013107)
Krugliak, Wilkins, Griffiths & Dougherty Co., LPA
4775 Munson Street N.W.
P. O. Box 36963
Canton, OH 44735-6963
Phone No.: 330-487-0700
Fax No. : 330-497-4020
Email: szurakowski@kwgd.com; monest@kwgd.com; bwilliams@kwgd.com

COUNSEL FOR APPELLANT EAGLE CREEK FARM PROPERTIES, INC.

James Patterson
Rachel O. Huston
Christie Limbert
Leigh Bayer
Jennifer S.M. Croskey
Ohio Attorney General's Office
30 East Broad Street, 26th Floor
Columbus, OH 43215
Phone No.: 614-728-0768
Fax No.: 866-909-3632
Email:
rachel.huston@ohioattorneygeneral.gov;
christie.limbert@ohioattorneygeneral.gov;
james.patterson@ohioattorneygeneral.gov;
leigh.bayer@ohioattorneygeneral.gov;
jennifer.croskey@ohioattorneygeneral.gov

COUNSEL FOR APPELLEE STATE OF OHIO, PUBLIC WORKS COMMISSION

Andrew P. Lycans (COUNSEL OF RECORD)
Critchfield, Critchfield & Johnston, Ltd.
225 North Market Street, P.O. Box 599
Wooster, OH 44691
Phone No: 330-264-4444
Fax No.: 330-263-9278
Email: lycans@ccj.com

Manmeet S. Walia
Siltstone Services, LLC
1801 Smith Street, Suite 2000
Houston, Texas 77002
Phone No: 713-375-9208
Email: mani.walia@siltstone.com

COUNSEL FOR APPELLANT SILTSTONE RESOURCES, LLC

Kevin L. Colosimo
Christopher W. Rogers (COUNSEL OF RECORD)
Daniel P. Craig
Frost Brown Todd LLC
501 Grant Street, Suite 800
Pittsburgh, PA 15219
Phone No.: 412-513-4300
Fax No.: 412-513-4299
Email: kcolosimo@fbtlaw.com; crogers@fbtlaw.com; dcraig@fbtlaw.com

COUNSEL FOR APPELLANT AMERICAN ENERGY – UTICA MINERALS, LLC

William B. Benson
Maribeth Meluch
Isaac, Wiles, Burkholder & Teetor, LLC
Two Miranova Place, Suite 700
Columbus, OH 43215
Phone No.: 614-221-2121
Fax No.: 614-365-9516
Email: wbenson@isaacwiles.com; mmeluch@isaacwiles.com

COUNSEL FOR APPELLANT GUERNSEY COUNTY COMMUNITY DEVELOPMENT CORPORATION

William J. Taylor
Scott D. Eickelberger
Ryan H. Linn
David J. Tarbert
Kincaid, Taylor & Geyer
50 North Fourth Street, P. O. Box 1030
Zanesville, OH 43701
Phone No : 740-454-2591
Fax No. : 740-454-6975
Email: wjt@kincaidlaw.com; scotte@kincaidlaw.com; rlinn@kincaidlaw.com; dtarbert@kincaidlaw.com

COUNSEL FOR APPELLANT BANK OF NOVA SCOTIA

Richard V. Zurz, Jr.
Slater & Zurz, LLP
One Cascade Plaza
Akron, OH 44308
Phone No: 330-762-0700
Fax No.: 330-762-3923
Email: rzurz@slaterzurz.com

COUNSEL FOR APPELLANTS PATRIOT LAND CO. AND JAMES COFFELT

Matthew W. Warnock
Christine Rideout Schirra
Aaron M. Bruggeman
Daniel C. Gibson
Kara Herrnstein
Bricker & Eckler, LLP
100 South Third Street
Columbus, OH 43215
Phone No: 614-227-2300
Fax No.: 614-227-2390
Email: mwarnock@bricker.com; abruggeman@bricker.com; kherrnstein@bricker.com; cschirra@bricker.com; dgibson@bricker.com

Zachary M. Simpson
Gulfport Energy Corporation
3001 Quail Springs Parkway
Oklahoma City, Oklahoma 73134
Phone No.: 405-242-8807
Email: zsimpson@gulfportenergy.com

COUNSEL FOR APPELLANT GULFPORT ENERGY CORPORATION

John Kevin West
Steptoe & Johnson PLLC
41 South High Street, Suite 2200
Columbus, OH 43215
Phone No: 614-221-5100
Fax No.: 614-221-0952
Email: kevin.west@steptoe-johnson.com

COUNSEL FOR APPELLANT WINDSOR OHIO, LLC

David K. Schaffner
Schaffner Law Offices Co., LPA
132 Fair Avenue N.W.
New Philadelphia, OH 44663
Phone No.: 330-364-9070
Fax No.: 330-364-9073
Email: schaffner@schaffnerlaw.com

COUNSEL FOR APPELLANT WHISPERING PINES, LLC

Erik A. Schramm
Kyle W. Bickford
HANLON, ESTADT, MCCORMICK & SCHRAMM CO., LPA
46457 National Road West
St. Clairsville, OH 43950
Phone No.: 740-695-1444
Fax No.: 740-695-1563
Email: easchramm@ohiovalleylaw.com; kbickford@ohiovalleylaw.com

COUNSEL FOR APPELLANT AXEBRIDGE ENERGY, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE FACTS 1

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 5

I. PROPOSITIONS OF LAW NOS. II AND III: "The legislature's express provision for grant repayment and liquidated damages in R.C. 164.26(A) in the event that a grant recipient fails to comply with long-term ownership requirements does not allow for additional equitable relief fashioned by the courts." 5

"Because R.C. 164.26(A) expressly provides for grant repayment and liquidated damages in the event that long-term control requirements are not met, the OPWC director cannot ignore or contradict the policy embodied by the statute by requesting equitable relief or providing for equitable relief for violation of control requirements in deeds conveying properties purchased with a Clean Ohio Fund grant." 5

A. PRELIMINARY STATEMENT 6

B. LAW AND ARGUMENT 7

1. Based on today's oil and gas technology, production of a green space's subterranean oil and gas can co-exist with the preservation of the green space's natural beauty and aesthetic. 7

2. The OPWC is constrained in how it develops remedial policies associated within the Clean Ohio Fund. 7

3. The OPWC exceeded its legal authority by using deed restrictions which seem to permit it to seek injunctive relief. 10

4. Because R.C. 164.26 is unambiguous, courts must apply, not interpret, R.C. 164.26. 17

5. The Seventh District's decision cannot stand because it interprets an unambiguous statute to give the OPWC more authority than permitted by the Ohio Constitution 17

C. CONCLUSION 21

II. PROPOSITION OF LAW NO. I: "Courts may not enforce a restrictive covenant in a deed barring the grantee from alienating the property without consent of some other party, unless the legislature has clearly allowed for such restraint on alienation in a statute by express terms or unmistakable implication." 21

A. PRELIMINARY STATEMENT 21

B. LAW AND ARGUMENT 22

C. CONCLUSION 27

CONCLUSION 27

PROOF OF SERVICE 28

Appendices

Appendix A-001

Appendix 1 – November 25, 2019 Opinion and Judgment Entry from the
Seventh District Court of Appeals A-002

Appendix 2 – Relevant Judgments, Orders, and Opinions from
Belmont County Court of Common Pleas A-027

Appendix 3 – R.C. 164.26 .... A-041

Appendix 4 – Ohio Constitution, Article VIII, Section 2o A-043

Appendix 5 – R.C. 921.25 .... A-047

Appendix 6 – R.C. 1345.07 .... A-050

Appendix 7 – R.C. 1349.34 .... A-054

Appendix 8 – R.C. 1707.23 .... A-058

Appendix 9 – R.C. 1707.261 .... A-062

Appendix 10 – R.C. 3709.21 .... A-065

Appendix 11 – R.C. 3901.221 .... A-067

Appendix 12 – R.C. 3961.08 .... A-069

Appendix 13 – R.C. 4165.03 .... A-073

Appendix 14 – R.C. 4549.48 .... A-075

Appendix 15 – R.C. 4719.16 .... A-078

Appendix 16 – R.C. 4722.07 .... A-080

Table of Authorities

Page(s)

Cases

"Automatic" Sprinkler Corp. of America v. Kerr,
1986 WL 7307 (11th Dist. Lake No. 11-017).....22

State ex rel. A. Bentley & Sons Co. v. Pierce,
96 Ohio St. 44, 117 N.E. 6 (1917).....9, 10

Anderson v. Cary,
36 Ohio St. 506 (1881).....22, 23

Ayers v. City of Cleveland,
2020-Ohio-1047 (Ohio).....11

Baur v. United Foundation,
9th Dist. Summit No. 15341, 1992 WL 98858.....22

Bragdon v. Carter,
4th Dist. Scioto No. 2017-Ohio-8257.....23

Burger Brewing Co. v. Thomas,
42 Ohio St.2d 377, 329 N.E.2d 693 (1975).....8

Cowans v. Ohio State Racing Comm.,
2014-Ohio-1811, 11 N.E.3d 1215 (10th Dist.).....21

State ex rel. Cromwell v. Myers,
80 Ohio App. 357, 49 Ohio Law Abs. 148, 73 N.E.2d 218 (2nd Dist.1947).....13

D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health,
96 Ohio.St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536.....19, 20

Durbin v. Durbin,
106 Ohio App. 155 (3rd Dist. 1957).....23

Foureman v. Foureman,
79 Ohio App. 351, 70 N.E.2d 780 (2nd Dist. 1946).....23

State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.,
39 Ohio St.3d 108, 529 N.E.2d 443 (1988).....17

Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9,
59 Ohio St. 3d 167, 572 N.E.2d 87 (1991).....12

Frederickson v. Nye,
110 Ohio St. 459, 144 N.E. 299, 2 Ohio Law Abs. 390 (1924)..16

Garono v. State,
37 Ohio St.3d 171, 524 N.E.2d 496 (1988) 12

GM Gas Expl., Inc. v. McClain,
4th Dist. Athens No. 1438, 1991 WL 163644 (Aug. 13, 1991)..2

Hamilton v. Link-Hellmuth, Inc.,
104 Ohio App. 1, 146 N.E.2d 615 (2nd Dist.1957) 22, 23

Henley v. Youngstown Bd. of Zoning Appeals,
90 Ohio St.3d 142, 735 N.E.2d 142 (2000) 22

Huber Homes, Inc. v. Oberer,
2nd Dist. Montgomery No. CA4484, 1974 WL 184620 (Dec. 3, 1974) 22

Kirsheman v. Paulin,
155 Ohio St. 137, 98 N.E.2d 26 (1951) 14

Lorence v. Goeller,
9th Dist. Lorain No. C.A.98CA007193, 2000 WL 988760 8

State ex rel. McCann v. Delaware Cty. Bd. of Elections,
155 Ohio St.3d 14, 2018-Ohio-3342, 118 N.E.3d 224 9

McFee v. Nursing Care Mgt. of Am., Inc.,
126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069 8

Mesarvey, Russell & Co. v. Boyer,
10th Dist. Franklin No. 91AP-974, 1992 WL 185656 (July 30, 1992) 13

Methodist Episcopal Church v. Gamble,
26 Ohio C.C. 295, 1904 WL 633 (Ohio Cir. Ct. Feb. 1904) 23

Midwestern College of Massotherapy v. Ohio Med. Bd.,
102 Ohio App.3d 17, 656 N.E.2d 963 (10th Dist.1995) 8, 9

State ex rel. Moore Oil Co. v. Dauben,
99 Ohio St. 406, 124 N.E. 232 (1919) 22

Morris v. Gulfport Energy Corp.,
No. 2:15-CV-1342, 2015 WL 4365498 (S.D. Ohio July 16, 2015)...2

Morris v. Morris,
148 Ohio St.3d 138, 2016-Ohio-5002, 69 N.E.3d 664 8

Mulvey v. Mobil Producing Tex. & N.M., Inc.,
147 S.W.3d 594 (Tex. App. 2004) 2

Estate of Mundy v. Comm'r,
35 T.C.M. (CCH) 1778 (T.C. 1976) 24

N. Point Patio Offices Venture v. United Ben. Life Ins. Co.,
672 S.W.2d 35 (Tex. App. 1984) 24

New Boston Coke Corp. v. Tyler,
32 Ohio St.3d 216, 513 N.E.2d 302 (1987) 17

State ex rel. Ohio Academy of Trial Lawyers v. Sheward,
86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062 6

State ex rel. Ohio Democratic Party v. Blackwell,
111 Ohio St. 3d 246, 2006-Ohio-5202, 855 N.E.2d 1188 12

Ohio Soc. for Crippled Children & Adults, Inc. v. McElroy,
175 Ohio St. 49, 191 N.E.2d 543 (1963) 23

Pelletier v. Campbell,
153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210 17

Penix v. Ohio Real Estate Appraiser Board,
5th Dist. Fairfield No. 09-CA-14, 2009-Ohio-6439 21

Samkel, Inc. v. Creasy,
7 Ohio St.3d 17, 55 N.E.2d 493 (1983) 9

San Allen, Inc. v. Buehrer,
2014-Ohio-2071, 11 N.E.3d 739 (8th Dist.) 14

Schwren v. Falls,
170 N.C. 251, 87 S.E. 49 (1915) 24

Siltstone Resources, LLC v. Ohio Pub. Works Commission,
7th Dist. No. 18 BE 0042, 2019-Ohio-4916, 137 N.E.3d 144 .....3, 19

State v. Anderson,
138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23 .....12, 23

State v. DiBiase,
11th Dist. Lake No. 2017-L-027, 2018-Ohio-2250, appeal not allowed, 153 Ohio St.3d 1476, 2018-Ohio-3637, 106 N.E.3d 1261 (2018) 14

State v. Kelley,
3rd Auglaize Nos. 2-05-34 and 2-05-35, 2006-Ohio-605 14

Symmes Twp. Bd. of Trs. v. Smyth,
87 Ohio St. 3d 549, 721 N.E.2d 1057 (2000) 23

Talmage as Tr. of Ralph W. Talmage Tr. v. Bradley,
377 F.Supp.3d 799 (S.D.Ohio 2019) 2

Terry v. Born,
24 Wash. App. 652, 604 P.2d 504 (1979).....24

Wayne Lakes Park, Inc. v. Warner,
104 Ohio App. 167, 147 N.E.2d 269 (2nd Dist.1957) 22

Statutes

R.C. 164.26 ..... *passim*

R.C. 164.26(A)..... *passim*

R.C. 921.25(D).....15

R.C. 1345.07(H).....15

R.C. 1349.34(H).....16

R.C. 1707.23(I) 15

R.C. 1707.261(A).....15

R.C. 3709.21 20

R.C. 3901.221 16

R.C. 3961.08 16

R.C. 4165.03(C).....15

R.C. 4549.48(C).....16

R.C. 4719.16(B).....15

R.C. 4722.07(H).....16

Other Authorities

Ohio Constitution, Article II.....7

Ohio Constitution, Article II, Section 1 7

Ohio Constitution, Article VIII, Section 2o.....25

Ohio Constitution, Article VIII, Section 2o(A) 2

Ohio Constitution, Article VIII, Section 2o(A)(2)..25

Ohio Constitution, Article VIII, Section 2o(B) 2

PRELIMINARY STATEMENT

In 2000, Ohioans created a tax-exempt bond fund to be used to promote environmental and natural resource conservation and revitalization. Thereafter, the General Assembly enacted the statutory framework for that tax-exempt bond fund. The General Assembly charged the Ohio Public Works Commission ("OPWC") with developing the necessary policies for administering the tax-exempt bond fund. Specifically, the General Assembly directed the OPWC to establish "proper liquidated damages and grant repayment" as the remedies for violations of the fund's policies. The OPWC created policies (through use of deed restrictions) which provided for those monetary damages authorized by the statute. However, the OPWC also created equitable remedies, i.e. injunctions, that were **NOT** authorized by the statute.

Ohio law provides that administrative agencies, like the OPWC, are creatures of limited power and authority. The OPWC's authority to craft policies is strictly limited by the General Assembly's enactments. The statute at issue makes monetary damages the sole remedy for violations of the tax-exempt bond fund's policies. Did the OPWC act outside the authority given to it by the General Assembly when the OPWC created deed restrictions providing for both monetary and equitable remedies?

STATEMENT OF THE FACTS

A. Eagle Creek's Non-Operational Interest

Appellant, Eagle Creek Farm Properties, Inc. ("Eagle Creek"), was not involved in the purchase or leasing of the real property and associated mineral rights at issue in this case. Instead, Eagle Creek became entangled with this dispute by happenstance. Specifically, Appellant, Gulfport Energy Corporation, Inc. ("Gulfport"), assigned Eagle Creek a 1.7639% overriding royalty interest in certain producing acreage in several oil and gas leases, including the lease at issue in this case. (Exh. M to OPWC's May 25, 2017 Ans., Crossclaim, and

Counterclaim; Appellants' Supp., Vols. 2-5, ¶ 92 of pleading).

An overriding royalty interest is "a fractional interest in the gross production of oil and gas under a lease in addition to usual royalties paid to the lessor, free of any expense for exploration, drilling, development, operating, marketing and other costs incident to the production and sale of oil and gas produced from the lease." *GM Gas Expl., Inc. v. McClain*, 4th Dist. Athens No. 1438, 1991 WL 163644, at *8 (Aug. 13, 1991). *See Talmage as Tr. of Ralph W. Talmage Tr. v. Bradley*, 377 F.Supp.3d 799, 809 (S.D.Ohio 2019), reconsideration denied, S.D.Ohio No. 2:17-CV-5442020 WL 64008. An overriding royalty interest is a non-operating interest, meaning the owner of the override has no say in how the leasehold is developed. *See Morris v. Gulfport Energy Corp.*, No. 2:15-CV-1342, 2015 WL 4365498, at *1 (S.D. Ohio July 16, 2015); *Mulvey v. Mobil Producing Tex. & N.M., Inc.*, 147 S.W.3d 594, 606 (Tex. App. 2004) ("The non-operator in a farmout retains an overriding royalty interest, which is not a tangible or real property interest, and cannot dictate the actions of the operator."). The non-operational nature of Eagle Creek's interest means Eagle Creek has no say over how the oil and gas rights at issue are developed. Eagle Creek cannot, for instance, enter the property at issue and drill its own well and produce the oil and gas rights under the surface of the property.

B. The Clean Ohio Conservation Program

In 2000, the Ohio Constitution was amended to create a certain tax-exempt bond fund to be used to promote environmental and natural resource conservation and revitalization (the "Clean Ohio Fund"). Ohio Constitution, Article VIII, Section 2o(A). The General Assembly was tasked with enacting statutes relating to the amendment. Ohio Constitution, Article VIII, Section 2o(B). The General Assembly enacted the statutory framework for the Clean Ohio Fund at R.C. 164.20-27. At R.C. 164.26, the General Assembly empowered the OPWC to develop policies for

and to administer the Clean Ohio Fund.

Section 164.26 of the Revised Code is the critical statute in this appeal because it creates and defines the OPWC's authority to develop the administrative rules regarding the Clean Ohio Fund. While it gives OPWC broad authority to develop policies to promote and further the program's general public policies, it specifically restricts the enforcement mechanisms:

> The director of the Ohio public works commission shall establish policies related to the need for long-term ownership, or long-term control through a lease or the purchase of an easement, of real property that is the subject of an application for a grant under sections 164.20 to 164.27 of the Revised Code and establish requirements for documentation to be submitted by grant applicants that is necessary for the proper administration of this division. ***The policies shall provide for proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements established under this division.***

R.C. 164.26(A) (emphasis added).The OPWC enacted a policy which falls outside the statute's narrowly defined remedial mechanism. Specifically, the OPWC went beyond the mandate to create a monetary damages policy-enforcement mechanism by placing language within the conveyance instrument at issue which, arguably, permitted the OPWC to seek and obtain monetary ***and*** equitable relief.

C. The Purchase of the Real Estate

In 2005, Appellee, Guernsey County Community Development Corporation, applied for and received a $430,200 grant from the Clean Ohio Fund for the Leatherwood Creek Riparian Project. *Siltstone Resources, LLC v. Ohio Pub. Works Commission*, 7th Dist. No. 18 BE 0042, 2019-Ohio-4916, 137 N.E.3d 144, ¶ 4, reconsideration denied sub nom. *Siltstone Resources, LLC v. Ohio Pub. Works Commission*, 7th Dist. Belmont No. 18 BE 0042, 2020-Ohio-729, ¶ 4, and appeal allowed sub nom. *Siltstone Resources, L.L.C. v. Ohio Pub. Works Comm.*, 158 Ohio St.3d 1443, 2020-Ohio-1032, ¶ 4 (2020). The grant was used to purchase approximately 228

acres located in Belmont County and adjacent to Leatherwood Creek (the "Real Estate"). *Id*. The Real Estate was to be restored to a natural state, i.e. a green space. *Id*.

The Real Estate had been strip mined for coal and was in the process of being reclaimed by Capstone Holding Company (the party who conveyed the Real Estate to Guernsey County Community Development Corporation). *Id*. at ¶¶ 5-7. The OPWC approved the grant application and the Real Estate was thus conveyed. *Id*.

Because the purchase was made under the Clean Ohio Fund, the OPWC was involved in drafting and approving the conveyance documents, including the deed at issue (the "Deed"). The OPWC made sure the Deed contained the liquidated damages and grant repayment damages clause, as required by R.C. 164.26:

> If Grantee, or its successors or assigns as owner of the Property, should fail to observe the covenants and restrictions set forth herein, the Grantee or it is successors or assigns, as the case may be, shall pay to OPWC upon demand, as liquidated damages, an amount equal to the rate of (a) two hundred percent (200%) of the amount of the Grant received by Grantee, together with interest accruing at the rate of six percent (6%) per annum from the date of Grantee's receipt of the Grant, or (b) two hundred percent (200%) of the fair market value of the Property as of the date or demand by OPWC. Grantee acknowledges that such sum is not intended as, and shall not be deemed, a penalty, but is intended to compensate for damages suffered in the event a breach or violation of the covenants and restrictions set forth herein, the determination of which is not readily ascertainable.

Id. at ¶ 7.

However, the OPWC went beyond the confines of R.C. 164.26 and insisted the Deed contain the following language: "OPWC shall have the right to enforce by any proceedings at law or in equity, all restrictions, conditions, and covenants set forth herein." *Id*. There is nothing within R.C. 164.26 which delegates OPWC with the authority to create the remedial structure of the Clean Ohio Fund. Quite the contrary, the General Assembly limited the statute's enforcement mechanism to monetary relief.

D. The Oil and Gas Lease

In 2011, Guernsey County Community Development Corporation leased the Real Estate's oil and gas rights to Appellee, Patriot Land Company, LLC (the "Lease"). *Id*. at ¶ 9. The Lease was assigned to Gulfport. *Id*. at ¶ 10. In 2013, Gulfport assigned Eagle Creek its non-operating overriding royalty interest in the portion of the Lease which was then included in the following oil and gas well unit – the Shugert #1-1H unit. (Exh. M to OPWC's May 25, 2017 Ans., Crossclaim, and Counterclaim).

Gulfport considers the Lease to be a non-surface lease, meaning it will not and cannot utilize the Real Estate's surface for purposes of developing the Real Estate's oil and gas rights. (Appellants' Supp., Vol. 5, pp. 1341-60, ¶ 53 of pleading). Instead, the Real Estate's oil and gas rights will be produced solely through the use of oil and gas well laterals located thousands of feet below the surface of the Earth. (*Id*.). Indeed, no surface activity under the Lease has occurred on the Real Estate. *Id*. at ¶ 14. As a result, the Real Estate's natural, green space will be preserved throughout the production of the Real Estate's oil and gas rights.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. **PROPOSITIONS OF LAW NOS. II AND III: "**The legislature's express provision for grant repayment and liquidated damages in R.C. 164.26(A) in the event that a grant recipient fails to comply with long-term ownership requirements does not allow for additional equitable relief fashioned by the courts."

"Because R.C. 164.26(A) expressly provides for grant repayment and liquidated damages in the event that long-term control requirements are not met, the OPWC director cannot ignore or contradict the policy embodied by the statute by requesting equitable relief or providing for equitable relief for violation of control requirements in deeds conveying properties purchased with a Clean Ohio Fund grant."

A. **PRELIMINARY STATEMENT**

Propositions of Law Nos. II and III should be considered together because each involves the same general issue – the General Assembly enacts statutes and sets public policy and the executive and judicial branches are restrained by those enactments. As will be discussed in detail below, the OPWC (the administrative agency tasked with overseeing the Clean Ohio Fund) is permitted to develop and administer the legislative policy, but must develop the policies based upon and confined within the enacting statute.

A similar rule constrains the judiciary's function. Because the General Assembly is the sole governmental body tasked with enacting legislation, the courts' role is to apply the enactments and the courts cannot enlarge, shrink, or otherwise modify the statute, even if the courts' goal is laudable.

These precepts are the bedrock of Ohio's separation of powers. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 462-67, 1999-Ohio-123, 715 N.E.2d 1062 (discussing the importance of separation of powers in Ohio).

The OPWC is granted specific, limited power to administer the Clean Ohio Fund. The General Assembly gave the OPWC broad power to create policies and guidelines for the program, but specifically limited the program's enforcement mechanism. The General Assembly has spoken on this issue (R.C. 164.26) and has said the OPWC may seek and the courts may grant only monetary relief for the violation of any of the OPWC's policies related to the need for long-term ownership or long-term control of property acquired under the program. As a result, the OPWC and the courts may not fashion remedies in excess of the enumerated monetary relief and any extra-statutory remedies are void *ab initio*, even under circumstances where we praise the OPWC and courts' goal of preserving and conserving Ohio's natural spaces and resources.

B. **LAW AND ARGUMENT**

1. **Based on today's oil and gas technology, production of a green space's subterranean oil and gas can co-exist with the preservation of the green space's natural beauty and aesthetic.**

Based on today's oil and gas technology, the policy of maintaining the Real Estate's green space and natural beauty can co-exist with the production of the Real Estate's oil and gas rights. Gulfport (the lessee) considers the Lease to be a non-surface lease, meaning it will not and cannot utilize the Real Estate's surface for purposes of developing the Real Estate's oil and gas rights. (Gulfport's Sep. 8, 2017 Ans. to Second. Amend. Compl., ¶ 53). Instead, the Real Estate's oil and gas rights will be produced solely through the use of oil and gas well laterals located thousands of feet below the surface of the Earth. (*Id.*). Indeed, no surface activity under the Lease has occurred (or will ever occur) on the Real Estate. *Id.* at ¶ 14. Thus, the natural, green space nature of the Real Estate will be preserved throughout the production of the Real Estate's oil and gas rights. As a result, there should not be any concerns about whether the Real Estate will continue to be a green space in the event the Court prohibits the OPWC from obtaining the injunctive relief sought in this case.

2. **The OPWC is constrained in how it develops remedial policies associated within the Clean Ohio Fund.**

The separation of powers between the three branches of Ohio government is the bedrock of Ohio's constitutional framework. The Ohio Constitution, much like the United States Constitution, creates three branches of government through three separate articles. Article II of the Ohio Constitution creates the General Assembly, which is given the greatest amount of power. For instance, the General Assembly is given the sole authority for enacting Ohio's substantive law. Ohio Constitution, Article II, Section 1. And while numbers may not always

tell the full story, the General Assembly's powers are presently described within 42 separate sections, whereas the executive and judiciary branches have a combined 45 sections.

Because the General Assembly has the sole and exclusive power to enact substantive law, the courts and executive agencies cannot enlarge, lessen, or modify the enacted substantive law. *Morris v. Morris*, 148 Ohio St.3d 138, 2016-Ohio-5002, 69 N.E.3d 664, ¶ 32.

While the General Assembly is permitted to delegate rule-making responsibility to administrative agencies, the delegated power is not unbounded. Instead, the administrative agency tasked with making the rules must operate explicitly within the pertinent statutory authority. *Burger Brewing Co. v. Thomas*, 42 Ohio St.2d 377, 384–385, 329 N.E.2d 693 (1975) (holding that the General Assembly may not delegate lawmaking power).

Any rule which exceeds the pertinent statute's text is *per se* unconstitutional because it usurps the General Assembly's exclusively held law-making authority. *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶¶ 24-26.

Administrative agencies and courts are constrained by the same principle of legislation interpretation – they must interpret and apply a statute as it is written. *Lorence v. Goeller*, 9th Dist. Lorain No. C.A.98CA007193, 2000 WL 988760, *1-2. This constraint is based upon the fact that the General Assembly's intent is presumed to be within the statute's language and that the General Assembly is presumed to have intentionally chosen the words used in its enactments. *Id.*, *citing Stewart v. Trumbull Cty. Bd. Of Elections*, 34 Ohio St.2d 129, 296 N.E.2d 676 (1973). Administrative agencies and courts "cannot expand an otherwise narrowly drawn statute." *Id.*

A law which delegates broad discretion to an administrative agency without mandating guidelines for the creation of administrative rules is an unconstitutional delegation of legislative authority. *Midwestern College of Massotherapy v. Ohio Med. Bd.*, 102 Ohio App.3d 17, 22–23,

656 N.E.2d 963 (10th Dist.1995), *citing Matz v. J.L. Curtis Cartage Co.*, 132 Ohio St. 271, 8 O.O. 41, 7 N.E.2d 220 (1937). This is why it is paramount that one properly interprets and constrains the statute's text when deciding whether the agency exceeded its authority.

Moreover, an administrative agency cannot enact rules which expand the delegated powers. *Id*. Therefore, all administrative rules must fall specifically within the statutory grant of authority. *Id*., *citing DDDJ, Inc. v. Ohio Liquor Control Comm.*, 64 Ohio App.3d 828, 582 N.E.2d 1152 (10th Dist.1990). *See Samkel, Inc. v. Creasy*, 7 Ohio St.3d 17, 55 N.E.2d 493 (1983).

When deciding whether an administrative rule falls within the statutory grant of authority, one must keep in mind that the General Assembly's intent to grant the specific authority, as well as the scope of the grant, must be absolutely clear and easily gleaned from the statute's text. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917). To that end, if there is any doubt that the agency was delegated the particular authority, a court must resolve that issue against the agency, i.e. the rule is unconstitutional. *Id*. ("[T]he extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it.").

A Justice of this Court very recently expressed the need to examine how much deference Ohio courts should give to administrative agencies like the OPWC. There should be heightened doubt about an agency's authority to make specific rules due to the separation of powers principle. *State ex rel. McCann v. Delaware Cty. Bd. of Elections*, 155 Ohio St.3d 14, 2018-Ohio-3342, 118 N.E.3d 224 (DeWine, J., concurring in judgment only). The deference given to administrative agencies in deciding what a statute really means is antithetical to Ohio's constitutional framework because it gives the judiciary's power to the executive branch. *Id*.,

citing Michigan v. E.P.A., 135 S.Ct. 2699, 2712, 192 L.Ed.2d 674 (2015) (Thomas, J., concurring). The fear of an unaccountable administrative state is not a new phenomenon, considering this Court attempted to reign in administrative agencies' powers back in 1917. *See State ex rel. A. Bentley & Sons Co*, 96 Ohio St. 44.

3. **The OPWC exceeded its legal authority by using deed restrictions which seem to permit it to seek injunctive relief.**

OPWC's request for injunctive relief against the Appellants is not based on the statute granting it the authority to develop and administer the Clean Ohio Fund. The statute at issue (R.C. 164.26) explicitly limits the remedial mechanism for the fund to awards of significant monetary relief. The OPWC created extra-statutory remedies through its mandate that the Deed contain the following provision: "OPWC shall have the right to enforce by any proceedings at law *or in equity*, all restrictions, conditions, and covenants set forth herein." (Emphasis added.). Absent that three-word phrase, the OPWC could not claim that it was permitted under the Deed's terms to seek injunctive and legal relief. However, because R.C. 164.26 does not grant the OPWC the authority to develop and administer non-monetary remedies, the OPWC's actions are invalid, *ab initio*.

At the outset, Eagle Creek lauds the OPWC's intent to maintain green spaces. However, Ohio's separation of powers prevents the OPWC from carrying out that intent through injunctive relief, including unwinding numerous transactions which themselves do not undercut the goal of maintaining green space.

Section 164.26(A) of the Revised Code grants the OPWC the authority to develop and administer policies relating to the long-term ownership and control of real property acquired using funds from the Clean Ohio Fund. For instance, the OPWC could set policies on how long the grantee must hold the property and whether third parties who later acquire the property are

bound by the restrictions. The OPWC could also promulgate rules prohibiting certain types of conduct which are antithetical to the green space's natural characteristics, such as by preventing the erecting of structures or conducting activities which, by their very nature, repurpose the surface estate.

On the other hand, the OPWC is strictly limited on the remedies it may seek as part of the Clean Ohio Fund's policies. The General Assembly identified only two remedies which are to be part of the OPWC's policies – liquidated damages and grant repayment. R.C. 164.26(A). The General Assembly did not provide additional authority for expanding the enforcement mechanism relating to the long-term ownership and control policies. When the General Assembly wanted to provide additional authority, it explicitly stated as much. For instance, the General Assembly gave the OPWC the power to establish the documentation that the grantee would need to submit prior to receiving funding. *Id*. ("E]stablish requirements for documentation to be submitted by grant applicants ***that is necessary for the proper administration of this division***.") *Id*. (Emphasis added.). Additionally, the General Assembly permitted the OPWC to use "any authority and use any procedures ***granted or established under sections 164.02 and 164.05*** of the Revised Code that are necessary for that purpose." *Id*. (Emphasis added.). Neither of those statutes gives the OPWC or its director the authority to expand the remedies beyond monetary damages.

The statute (R.C. 164.26) is clear – the remedies to be included within the OPWC's policies are to be liquidated damages and grant repayment. The General Assembly's intent is presumed to reside within the words it chose. *Ayers v. City of Cleveland*, 2020-Ohio-1047 (Ohio) ("The primary goal of statutory construction is to give effect to the legislature's intent, and in determining the legislature's intent, we first look to the plain language of the statute."). The

General Assembly did not provide room for the OPWC to insert additional remedies, such as through use of the phrase "including but not limited to." *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 45, *quoting State v. Muncie*, 91 Ohio St.3d 440, 2001-Ohio-93, 746 N.E.2d 1092 (2001) ("The statutory phrase 'including, but not limited to' means that the examples expressly given are 'a nonexhaustive list of examples.'").

"'If the General Assembly has provided a remedy for the enforcement of a specific new right, a court may not on its own initiative apply another remedy it deems appropriate.'" *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167, 169, 572 N.E.2d 87 (1991), *quoting Fletcher v. Coney Island, Inc.,* 165 Ohio St. 150, 155, 134 N.E.2d 371; *see also State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St. 3d 246, 2006-Ohio-5202, 855 N.E.2d 1188, ¶ 37, *quoting Fletcher* at 154 ("'Where the General Assembly by statute creates a new right and at the same time prescribes remedies or penalties for its violation, the courts may not intervene and create an additional remedy.'"). Where the General Assembly establishes the right asserted and definitively fixes the method whereby the violator of that right might be punished, any contention that the remedies provided for by statute are inadequate must be directed to the legislature. *Franklin Cty. Law*, 59 Ohio St. 3d at 154. Thus, where the statute provides for monetary relief but not injunctive relief, the administrative agency, and the courts, cannot ignore the statute and find alternative means for imposing equitable relief. *Id.* at 154-155.

The lack of reference to remedies other than monetary relief is important for other reasons. For instance, it must be presumed the General Assembly knew at the time it enacted R.C. 164.26 that when damages adequately compensate for a breach, equitable relief is not appropriate. *See*, *e.g.*, *Garono v. State*, 37 Ohio St.3d 171, 174, 524 N.E.2d 496 (1988). *See also*

Mesarvey, Russell & Co. v. Boyer, 10th Dist. Franklin No. 91AP-974, 1992 WL 185656 (July 30, 1992), *5, cause dismissed sub nom. *Mesarvey, Russel & Co. v. Boyer*, 65 Ohio St.3d 1447, 601 N.E.2d 42 (1992) (in dealing with a contract which contained a liquidated damages clause, the appellate court stated: "It is difficult to conceive how damages can be irreparable when the parties have agreed to the amount of damages."). *State ex rel. Cromwell v. Myers*, 80 Ohio App. 357, 368, 49 Ohio Law Abs. 148, 73 N.E.2d 218, 223 (2nd Dist.1947) ("In our consideration of the provisions of this section, and the ascertainment of the legislative intent, we recognize and apply the well-established principle of law that the legislature are presumed to know the existing statutes, and the state of the law, relating to the subjects with which they deal.").

The General Assembly chose to limit the available remedies to significant monetary damages, which can be recurring for each violative act. For example, in this case, if the original grantee breached its agreement with the OPWC, then it could be responsible to pay the OPWC the amount of $860,400 (200% of the grant ($430,200)). That amount could be even higher if 200% of the Real Estate's fair market value is greater than $860,400. These are not trivial sums of money and any claim the OPWC will not be adequately compensated for the grantee's breach of alienation restriction is intrinsically unreasonable. As a result, it must be presumed the General Assembly understood that such large sums would represent adequate compensation to the OPWC and would therefore preclude, as a matter of law, injunctive relief by the courts.

Perhaps realizing the significant sums at issue, the OPWC has indicated that injunctive relief is more important than monetary relief. (*See* Appellants' Supp., Vol. 8, at pp. 2347-48 (stating that injunctive relief is "necessary" and sole recourse of monetary damages inadequate)). However, the OPWC cannot close its eyes to the remedies expressly provided for by statute in favor of the relief the OPWC prefers. In fact, the Eighth District Court of Appeals rejected a

similar argument made by the Bureau of Workers Compensation in *San Allen, Inc. v. Buehrer,* 2014-Ohio-2071, 11 N.E.3d 739, ¶ 81 (8th Dist.). In *San Allen,* the statute provided that the Bureau's administrator "shall consider an employer group as a single employing entity for the purposes of retrospective rating." 2014-Ohio-2071, ¶ 79. Despite the statutory language, the Bureau adopted a prospective rating plan. *Id.* Like the OPWC in this case, the Bureau argued that the explicit statutory direction mandating one approach did not preclude it from adopting another approach. *Id.* at ¶ 80. However, the Eighth District rejected this argument, noting that "there is no language" in the statute authorizing the Bureau's actions and held that the agency's actions were "in direct and clear violation" of the statute. *Id.* at ¶¶ 79, 82.

Additionally, a separate statutory construction maxim dictates that the Court conclude the General Assembly intended to limit the types of enforcement remedies for the Clean Ohio Fund. The negative-implication canon ("*expression unius est exclusion alterius*") provides that the drafter's, such as the General Assembly, "inclusion of one thing implies the exclusion of another." *Kirsheman v. Paulin*, 155 Ohio St. 137, 146, 98 N.E.2d 26 (1951); *State v. Kelley*, 3rd Auglaize Nos. 2–05–34 and 2–05–35, 2006–Ohio–605, ¶ 10; *State v. DiBiase*, 11th Dist. Lake No. 2017-L-027, 2018-Ohio-2250, ¶ 16, appeal not allowed, 153 Ohio St.3d 1476, 2018-Ohio-3637, 106 N.E.3d 1261, ¶ 16 (2018). The General Assembly specifically included liquidated damages and grant repayment (legal remedies) as the proscribed remedies under the Clean Ohio Fund. The identification of legal remedies implies that the General Assembly intended to exclude the use of equitable remedies.

The General Assembly's intent to limit the scope of remedies under the Clean Ohio Fund is further supported by the fact that the General Assembly is well aware of how to give executive agencies broad powers in developing remedies. There are numerous examples in statutory law

wherein the General Assembly has expressly empowered executive agencies to seek different and broad remedies for statutory violations:

Statute	Statutory Language Giving Broad and Multiple Types of Remedies
R.C. 4165.03(C) (Deceptive Trade Practices)	"The civil relief provided in this section is in addition to civil or criminal remedies otherwise available against the same conduct under the common law or other sections of the Revised Code."
R.C. 1345.07(H) (Consumer Sales Practices)	"The remedies available to the attorney general under this section are cumulative and concurrent, and the exercise of one remedy by the attorney general does not preclude or require the exercise of any other remedy. The attorney general is not required to use any procedure set forth in section 1345.06 of the Revised Code prior to the exercise of any remedy set forth in this section."
R.C. 1707.23(I) (Securities Act)	"The remedies provided by this section are cumulative and concurrent with any other remedy provided in this chapter, and the exercise of one remedy does not preclude or require the exercise of any other remedy."
R.C. 1707.261(A) (Securities Act)	"If a court of common pleas grants an injunction pursuant to section 1707.26 of the Revised Code, after consultation with the attorney general the director of commerce may request that court to order the defendant or defendants that are subject to the injunction to make restitution or rescission to any purchaser or holder of securities damaged by the defendant's or defendants' violation of any provision of sections 1707.01 to 1707.45 of the Revised Code."
R.C. 4719.16(B) (Telephone Solicitors)	"The remedies and powers available to the attorney general under division (B) of section 4719.03 and sections 4719.11 to 4719.13 of the Revised Code are cumulative and concurrent, and the exercise of one remedy or power by the attorney general does not preclude or require the exercise of any other remedy or power. the attorney general is not required to use any procedure set forth in division (B) of section 4719.03 or section 4719.11 of the Revised Code prior to the exercise of a remedy or power set forth in section 4719.12 or 4719.13 of the Revised Code."
R.C. 921.25(D) (Pesticides)	"The remedies available to the director and to the attorney general under this chapter are cumulative and concurrent, and the exercise of one remedy by either the director or the attorney general, or by both, does not preclude or require the exercise of any other remedy by the director, the attorney general, or a prosecutor as defined in section 2935.01 of the Revised Code, except that no person shall

	pay both a civil penalty under division (A) of this section and a civil penalty under division (B) of this section for the same violation.”
R.C. 4549.48(C) (Odometer Rollback and Disclosure Act)	“The remedies prescribed by this section are cumulative and concurrent with any other remedy, and the existence or exercise of one remedy does not prevent the exercise of any other remedy.”
R.C. 4722.07(H) (Home Construction Service Law)	“The remedies available to the attorney general under this section are cumulative and concurrent, and the exercise of one remedy by the attorney general does not preclude or require the exercise of any other remedy.”
R.C. 3901.221 (Insurance - Unfair and Deceptive Acts)	“The remedy under this section is cumulative and concurrent with the remedies available under section 3901.22 of the Revised Code and may be enforced by the attorney general at the request of the superintendent as provided in division (E) of that section.”
R.C. 3961.08 (Discount Medical Plan Organizations)	“The remedy described in division (C) of this section is cumulative and concurrent with other remedies available under this section.”
R.C. 1349.34(H) (Consumer Credit Mortgage Loans)	“The remedies available to the superintendent under this section are cumulative and concurrent, and the exercise of one remedy by the superintendent does not preclude or require the exercise of any other remedy.”

The statutes referenced above highlight two critical facts: (1) the General Assembly will identify specific civil remedies available to an executive agency under a particular statutory scheme and (2) if there are different types of permitted remedies, the General Assembly will make clear that the executive agency can seek some or all of the enacted remedies without running afoul of an the election of remedies rule. *See Frederickson v. Nye*, 110 Ohio St. 459, 144 N.E. 299, 2 Ohio Law Abs. 390 (1924), at syllabus (discussing the election-of-remedies rule).

The General Assembly did not include similar language in R.C. 164.26. Instead, it deliberately chose to limit the OPWC’s policies to monetary damages. The OPWC was not given the broader authority to pursue non-monetary relief or to insert that right into conveyance instruments. Based on the foregoing, the OPWC’s placement of the provision within the Deed which allegedly gives it the right to seek both legal and equitable relief was not authorized under

R.C. 164.26. Since the OPWC did not have the legal authority to seek equitable relief under the Clean Ohio Fund, the OPWC could not craft a policy or rule which permits said equitable relief. This means the OPWC could not seek to enact such a policy through use of a deed restriction. The OPWC had no authority to develop equitable remedies for the Clean Ohio Fund.

Based on the foregoing, the OPWC's placement of the phrase "or in equity" in the Deed was inconsistent with the authority granted to it by the General Assembly. As a result, that action was unconstitutional and was therefore void, as a matter of law.

4. **Because R.C. 164.26 is unambiguous, courts must apply, not interpret, R.C. 164.26.**

Courts, like administrative agencies, are limited in their power to interpret and apply statutes, albeit for different reasons. "Where the language of a statute is clear, this court has a duty to enforce it." *State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.*, 39 Ohio St.3d 108, 111, 529 N.E.2d 443 (1988). When a statute is unambiguous, a court must simply apply the statute to the facts at hand and cannot, as a matter of law, interpret the statute. *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 222–23, 513 N.E.2d 302 (1987), *quoting Sears v. Weimer*, 143 Ohio St. 312, 28 O.O. 270, 55 N.E.2d 413 (1944). "[A] court may not rewrite the plain and unambiguous language of a statute under the guise of statutory interpretation." *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 20, *citing Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706.

5. **The Seventh District's decision cannot stand because it interprets an unambiguous statute to give the OPWC more authority than permitted by the Ohio Constitution.**

The Seventh District exceeded the scope of the judiciary's power to review and interpret statutes. In our case, R.C. 164.26 does not leave open the possibility for a court to craft an

injunctive relief enforcement mechanism. As discussed above, R.C. 164.26 provides the OPWC is limited to imposing monetary damages for violations of the Clean Ohio Fund's policies. However, the Seventh District permitted the OPWC to enforce the Deed's restriction pertaining to injunctive relief. It justified its holding on two grounds: (1) that R.C. 164.26 does not explicitly prohibit equitable relief and (2) the Deed's express provisions permit injunctive relief. Both justifications violate Ohio law and usurp the General Assembly's sole legislative power.

As to the first justification, it was necessarily erroneous to create extra-statutory remedies because the statute says what is says. The only remedy permitted under R.C. 164.26 is monetary relief (liquidated damages and grant repayment). While the statute did not expressly prohibit the use of injunctive relief, a court is constrained in how it applies the statute because the statute empowered an administrative agency to carry out the program. As discussed above, an administrative agency must act within the authority the statute actually gives to the agency. Because R.C. 164.26 gives the OPWC the right to pursue only monetary damages, the statute necessarily limits the agency's authority to craft equitable remedies, even within contracts such as purchase agreements or deeds. The Seventh District went beyond its authority by essentially rewriting the statute to read as follows: "The policies shall provide for proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements established under this division [*and any other relief or remedies the Ohio public works commission deems necessary*]."

Moreover, the Seventh District's interpretation of the unambiguous R.C. 164.26 ignored a critical fact – the General Assembly explicitly stated when it wanted to give the OPWC discretion in how to craft the program's policies. The General Assembly gave the OPWC the additional power to establish the documentation that the grantee would need to submit prior to

receiving funding. R.C. 164.26. ("E]stablish requirements for documentation to be submitted by grant applicants ***that is necessary for the proper administration of this division***.") *Id*. (Emphasis added.). Additionally, the General Assembly permitted the OPWC to use "any authority and use any procedures ***granted or established under sections 164.02 and 164.05*** of the Revised Code that are necessary for that purpose." *Id*. (Emphasis added.). Neither of those statutes gives the OPWC or its director the authority to expand the remedies beyond monetary damages. And a court is not permitted to rewrite the statute to include additional remedies, even based upon the statute's alleged silence on the issue of equitable relief.

Additionally, the judicially created equitable enforcement mechanism appears to have been based on the OPWC's erroneous claim that it could not enforce the policies behind R.C. 164.26 without being able to seek injunctive relief. *See Siltstone Resources*, 2019-Ohio-4916, ¶¶ 64-65. As discussed above, the OPWC has the ability to seek significant amounts of monetary damages from those parties who actually violate the enforceable restrictions within the Deed. The threat of significant monetary damages most certainly can be a deterrent for violations of enforceable use and alienation restrictions. In addition, this Court has rejected a claim that an administrative agency is permitted to exceed the authority created by statute under the guise that the extra-statutory action was necessary to enforce the policy at issue. In *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, the local health board argued for a broad interpretation of the powers granted to it by the applicable statute, i.e. it advocated that it be given the benefit of the doubt on the issue of whether the General Assembly had actually conferred the power at issue. 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 42 (2002). The Court rejected the local health board's argument that matters of public health were of such importance that the Court could broadly construe the authority granted under the relevant statute, even when the statute did

not actually grant said authority. *Id*. at ¶¶ 46-47. The Court was constrained by the statute's actual text even though the local board of health was "better situated than the General Assembly to protect the public health. That is one reason why R.C. 3709.21 does not burden local boards with restrictive guidelines or standards. Local boards need the flexibility to meet unforeseen public-health concerns and to promptly address any problems arising from previous orders and regulations." *Id*. at ¶ 46. "However, local boards cannot act in any area of public health without prior legislative approval." *Id.*

Moreover, the Court explicitly rejected the local health board's claim that it has broad authority through the granting of authority to make all orders and regulations necessary to carry out its public health functions. *Id*. at ¶ 47 ("Therefore, based on the foregoing reasons, we find that the language of R.C. 3709.21 that '[t]he board of health of a general health district may make such orders and regulations as are necessary * * * for the public health" does not vest local boards of health with unlimited authority to adopt regulations addressing all public-health concerns.'"). Based on *D.A.B.E., Inc.*, it is clear that the OPWC cannot seek to expand the remedies available to it under R.C. 164.26.

In *D.A.B.E., Inc.*, the local health board could not justify its actions through a claim that it was empowered to deal in all matters relating to public health. Here, the OPWC cannot take any and all actions it, within its sole discretion, deems necessary to serve the policy of promoting public green space. The OPWC and the judiciary are specifically restrained by what the statute says, specifically that monetary damages are the sole remedy available to the OPWC. The statute (R.C. 164.26) restricts the OPWC's remedy to monetary relief and *ipso facto* precludes injunctive relief.

Other appellate courts have refused to accept that an explicit grant of authority to

penalize conduct with certain remedies nevertheless permits an administrative agency to craft other relief. *See Penix v. Ohio Real Estate Appraiser Board,* 5th Dist. Fairfield No. 09-CA-14, 2009-Ohio-6439, ¶ 54-57 (The court of appeals held that imposing a monetary fine was not incidental to the statutorily authorized actions, that a monetary fine was not similar to the authorized penalties, and that the legislature did not clearly grant the agency authority to levy fines.). *See also Cowans v. Ohio State Racing Comm.,* 2014-Ohio-1811, 11 N.E.3d 1215, ¶ 61 (10th Dist.). The statute at issue expressly directs the OPWC to seek monetary relief, not injunctive relief, in the event that the referenced policies are violated. There is no express, clear, or even implied grant of authority in the enabling statute suggesting the General Assembly intended to authorize enforcing the control polices through equitable (including injunctive) relief. As in *Cowans*, the administrative agency (the OPWC) is attempting to allow itself relief not provided for by the enabling statute and such action is unconstitutional and void.

C. **CONCLUSION**

Based on the foregoing, the Court must answer Proposition of Law No. II and Proposition of Law No. III in the affirmative. By answering either proposition in the affirmative, the Court must reverse the Seventh District's decision and opinion and reinstate the trial court's order that the OPWC is not permitted to require or seek equitable relief in this case.

II. **PROPOSITION OF LAW NO. I:** **"**Courts may not enforce a restrictive covenant in a deed barring the grantee from alienating the property without consent of some other party, unless the legislature has clearly allowed for such restraint on alienation in a statute by express terms or unmistakable implication."

A. **PRELIMINARY STATEMENT**

Eagle Creek's request to construe the language of R.C. 164.26 narrowly and strictly against the OPWC is further bolstered by Ohio's strong disfavor of restraints on alienation, like those imposed by the OPWC. As discussed above, the OPWC and the Seventh District did not

have the authority to expand the remedies available to the OPWC under the Clean Ohio Fund. Eagle Creek submits that this conclusion could and should be reached based on R.C. 164.26's plain language. However, even if there is any doubt as to whether R.C. 164.26 supports restraints on alienation of real property acquired under the Clean Ohio Fund, the Court must construe R.C. 164.26 in favor of the Appellants, holding that no restraints in alienation are permitted under the statute.

B. **LAW AND ARGUMENT**

Ohio law disfavors on restraints on alienation of real property. *Anderson v. Cary*, 36 Ohio St. 506, 515 (1881); *Hamilton v. Link-Hellmuth, Inc.*, 104 Ohio App. 1, 146 N.E.2d 615 (2nd Dist.1957); *Wayne Lakes Park, Inc. v. Warner*, 104 Ohio App. 167, 172, 147 N.E.2d 269 (2nd Dist.1957). Generally, such restraints on alienation (which bar the conveyance of the property) are deemed to be void and unenforceable. *"Automatic" Sprinkler Corp. of America v. Kerr*, 1986 WL 7307 (11th Dist. Lake No. 11-017), *citing* Restatement of Law, Property (1944) 2375, Introductory Note; *see Anderson*, 36 Ohio St. 506; *see also Huber Homes, Inc. v. Oberer*, 2nd Dist. Montgomery No. CA4484, 1974 WL 184620 (Dec. 3, 1974).

"Statutes … which impose restrictions upon the … alienation of private property, [must] be strictly construed, and their scope cannot be extended to include limitations not therein clearly prescribed; exemptions from such restrictive provisions are for like reasons liberally construed." *State ex rel. Moore Oil Co. v. Dauben*, 99 Ohio St. 406, 411, 124 N.E. 232, 233 (1919); *see also Henley v. Youngstown Bd. of Zoning Appeals,* 90 Ohio St.3d 142, 151, 735 N.E.2d 142 (2000) (same); *Baur v. United Foundation,* 9th Dist. Summit No. 15341, 1992 WL 98858, at *2 (statutes limiting alienation of private property are in derogation of the common law and must be strictly construed). Thus, this Court has recognized that any statute restraining the alienation of private property "should not be extended to include limitations not clearly described therein."

Symmes Twp. Bd. of Trs. v. Smyth, 87 Ohio St. 3d 549, 554, 721 N.E.2d 1057 (2000).

If confronted with a close call as to whether a restraint on alienation is reasonable, a court must favor free alienability, meaning the grantee is free to convey its property as it deems appropriate. *See Anderson*, 36 Ohio St. at 515. This extends to enactments of the General Assembly. Thus, a statute which apparently restricts the alienation of property must specifically state the restriction and a court may not infer that the statute contains such a restriction. *Hamilton*, 104 Ohio App. at 7–8 ("In the light of that principle any such statutory restriction must be specifically stated and not implied.").

This Court has since interpreted *Anderson* as holding, "where land is devised upon condition that the devisee shall not sell it, such a restraint is void as repugnant to the devise and contrary to public policy." *Ohio Soc. for Crippled Children & Adults, Inc. v. McElroy*, 175 Ohio St. 49, 52, 191 N.E.2d 543 (1963). As such, "'restrictions on the rights of alienation are simply of no effect.'" *Bragdon v. Carter*, 4th Dist. Scioto No. 2017-Ohio-8257, ¶ 11, *quoting Margolis v. Pagano,* 39 Ohio Misc.2d 1, 3, 528 N.E.2d 1331 (Clermont C.P. 1986). Indeed, the "unlimited right of disposition is the essence of an estate in fee simple, and the law of Ohio is fairly well settled that any attempt to restrict the right of the holder to alienate his interest is null and void." *Foureman v. Foureman,* 79 Ohio App. 351, 354, 70 N.E.2d 780 (2nd Dist. 1946); *Durbin v. Durbin*, 106 Ohio App. 155, 159 (3rd Dist. 1957) (same).

As stated by one Ohio court "'[o]ne of the most important qualities of an estate in fee simple is the approximately absolute freedom of alienation enjoyed by the owner.'" *Hamilton*, 104 Ohio App. at 7, *quoting* 1 Tiffany on Real Property (3 Ed.), 47, Section 33. Therefore, the grantor conveying a fee simple cannot therein limit those to whom the grantee may sell the property or give control of the right to convey to another party. *Methodist Episcopal Church v.*

Gamble, 26 Ohio C.C. 295, 1904 WL 633, at *1 (Ohio Cir. Ct. Feb. 1904), aff'd sub nom. *Methodist Episcopal Church of Cincinnati v. Gamble*, 74 Ohio St. 433, 78 N.E. 1132 (1906); *Schwren v. Falls*, 170 N.C. 251, 87 S.E. 49, 50 (1915) (provision requiring daughter to obtain executor's consent to dispose of property was void because daughter was conveyed fee simple title); *see N. Point Patio Offices Venture v. United Ben. Life Ins. Co.*, 672 S.W.2d 35, 37 (Tex. App. 1984) (prohibition on the sale, lease, exchange, assignment, transfer, conveyance or other disposal of all or part of property without consent of third-party is prohibited by the Restatement of Property); *Terry v. Born,* 24 Wash. App. 652, 653, 655, 604 P.2d 504 (1979) (barring buyer from conveying the property without the seller's written consent was unreasonable and unenforceable restraint on alienation); *Estate of Mundy v. Comm'r*, 35 T.C.M. (CCH) 1778 (T.C. 1976), *citing Davis v. Geyer*, 151 Fla. 362, 370, 9 So. 2d 727, 730 (1942) (deed clause prohibiting grantee from conveying without the consent of the grantor is void).

The deed restriction at issue states that the Real Estate's owner may not "sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of OPWC, which consent may be withheld in its sole or absolute discretion." This is the type of restriction on alienation that this Court has repeatedly held void as repugnant to the grant of a fee simple ownership interest. According to the OPWC, the "deed restrictions … broadly prevent the CDC from relinquishing ownership or control over the property in any way, shape or form." (Appellants' Supp., Vol. 8, at p. 2319.). The OPWC has acknowledged that it thinks grant recipients are required "to hold on to those properties in perpetuity," thereby rendering the consent clause within the restriction without any real meaning or effect. (*Id*.). However, because the Deed conveyed "fee simple" title to the Real Estate (*Id*. at 2334), the OPWC could not enforce the restriction on alienation.

The Deed's alienation restriction purports to require the fee owner of the Real Estate to obtain the OPWC's consent prior to conveying any interest in the Real Estate. This is both repugnant to the grant of a fee simple estate and renders the Real Estate inalienable, especially because the OPWC's statement that the restriction requires the original grantee to own the Real Estate in perpetuity. The Deed's alienation restriction is, therefore, illegal and void, even though it purports to subject the fee holder's right to alienate the Real Estate to the consent of a third-party.

Article VIII, Section 2o of the Ohio Constitution permits the State to sell bonds for purposes of environmental conservation and revitalization projects and to make grants to local governmental entities (or others acting at their direction or authorization) to finance such projects. The Ohio Constitution specifically provides that grant funds may be used to acquire land for remediation ***and*** to remediate privately owned lands so they can be put to economic use. Article VIII, Section 2o(A)(2). Thus, the OPWC's contention that grant recipients must hold all properties acquired under the Clean Ohio Fund in perpetuity is inconsistent with the language of the Ohio Constitution. Likewise, the OPWC's objection to any private landowner using property in any way is directly at odds with numerous provisions in Article VIII, Section 2o.

In addition, the provisions relating to the acquisition of land or interests therein for conservation purposes does not support the OPWC's position. The conservation provision addresses what the land's use rather than who should own the land. Article VIII, Section 2o(A)(2). In this case, the Deed's use restriction preserves the Real Estate as a public green space. From the Constitutional perspective, it does not matter who owns the Real Estate, just so long as it is not used in a matter inconsistent with a public green space.

Indeed, there is no provision of Article VIII, Section 2o which limits the right of the fee

owner of property to alienate that property—even if it was purchased or revitalized under the Clean Ohio Fund. In fact, the provisions relating to the remediation of privately owned lands for purposes of economic development directly refute any such contention. Section 164.26(A) of the Revised Code provides that the OPWC director "shall establish policies related to the need for long-term ownership, or long term control through a lease or the purchase of an easement, of real property that is the subject of an application for a grant" under the Clean Ohio Fund. The OPWC claims this is a decision by the General Assembly that all lands purchased under the Clean Ohio Fund should never be alienable. However, this is inconsistent with the very next sentence in R.C. 164.26(A), which provides: "The policies shall provide for liquidated damages and grant repayments ***for entities that fail to comply with the long-term ownership or control requirements*** established under this division." (Emphasis added).

By telling the director to "establish policies related to the need", the General Assembly was not seeking to make the lands unalienable. Instead, the language achieves an entirely different end—it foresees that long-term ownership or control might be needed in some situations, but not in others, and instructs the director adopt policies distinguishing between the two. In fact, this is the only reading of the statute consistent with the Ohio Constitution, which clearly contemplates that certain lands acquired under the Clean Ohio Fund will later be alienated.

The very fact the General Assembly anticipated that long-term ownership requirements might not be complied with indicates that the lands remain alienable under the statute. The Court cannot interpret R.C. 164.26(A) as clearly eliminating the right of grantees (who take title to the lands in fee simple) to alienate the lands and it should reject any argument to the contrary.

In the end, the Court should continue Ohio's tradition of barring restraints on alienation.

The OPWC clearly acted outside its statutory authority when it imposed an absolute restraint on alienation on the Real Estate. And telling the director he can "do all … acts … necessary" does not clearly state that the director has the right to set aside general property law in this state or render property inalienable. The OPWC's interpretation of these provision is unwarranted and should be rejected.

C. **CONCLUSION**

Based on the foregoing, the Court must answer Proposition of Law No. I in the affirmative. By answering this proposition in the affirmative, the Court must reverse the Seventh District's decision and opinion and reinstate the trial court's order that the OPWC attempt to impose an absolute restraint on the alienation of the Real Estate was void, *ab initio*.

CONCLUSION

Based on the foregoing, the Court should reverse the Seventh District's judgment and opinion as to the enforceability of injunctive relief under the Clean Ohio Fund.

Respectfully submitted,

s/ Scott M. Zurakowski
Scott M. Zurakowski (0069040) (COUNSEL OF RECORD)
Matthew W. Onest (0087907)
William G. Williams (0013107)
Krugliak, Wilkins, Griffiths & Dougherty Co., LPA
4775 Munson Street N.W.
P.O. Box 36963
Canton, OH 44735-6963
Phone No.: 330-487-0700/ Fax No. : 330-497-4020
Email: szurakowski@kwgd.com;
monest@kwgd.com; bwilliams@kwgd.com

COUNSEL FOR APPELLANT EAGLE CREEK FARM PROPERTIES, INC.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent via email this 8th day of June, 2020, to:

James Patterson
Rachel O. Huston
Christie Limbert
Leigh Bayer
Jennifer S.M. Croskey
Ohio Attorney General's Office
30 East Broad Street, 26th Floor
Columbus, OH 43215
Phone No.: 614-728-0768
Fax No.: 866-909-3632
Email:
rachel.huston@ohioattorneygeneral.gov;
christie.limbert@ohioattorneygeneral.gov;
james.patterson@ohioattorneygeneral.gov;
leigh.bayer@ohioattorneygeneral.gov;
jennifer.croskey@ohioattorneygeneral.gov

COUNSEL FOR APPELLEE STATE OF OHIO, PUBLIC WORKS COMMISSION

Andrew P. Lycans (COUNSEL OF RECORD)
Critchfield, Critchfield & Johnston, Ltd.
225 North Market Street, P.O. Box 599
Wooster, OH 44691
Phone No: 330-264-4444
Fax No.: 330-263-9278
Email: lycans@ccj.com

Manmeet S. Walia
Siltstone Services, LLC
1801 Smith Street, Suite 2000
Houston, Texas 77002
Phone No: 713-375-9208
Email: mani.walia@siltstone.com

COUNSEL FOR APPELLANT SILTSTONE RESOURCES, LLC

William B. Benson
Maribeth Meluch
Isaac, Wiles, Burkholder & Teetor, LLC
Two Miranova Place, Suite 700
Columbus, OH 43215
Phone No.: 614-221-2121
Fax No.: 614-365-9516
Email: wbenson@isaacwiles.com;
mmeluch@isaacwiles.com

COUNSEL FOR APPELLANT GUERNSEY COUNTY COMMUNITY DEVELOPMENT CORPORATION

William J. Taylor
Scott D. Eickelberger
Ryan H. Linn
David J. Tarbert
Kincaid, Taylor & Geyer
50 North Fourth Street, P. O. Box 1030
Zanesville, OH 43701
Phone No : 740-454-2591
Fax No. : 740-454-6975
Email: wjt@kincaidlaw.com;
scotte@kincaidlaw.com;
rlinn@kincaidlaw.com;
dtarbert@kincaidlaw.com

COUNSEL FOR APPELLANT BANK OF NOVA SCOTIA

Richard V. Zurz, Jr.
Slater & Zurz, LLP
One Cascade Plaza
Akron, OH 44308
Phone No: 330-762-0700
Fax No.: 330-762-3923
Email: rzurz@slaterzurz.com
COUNSEL FOR APPELLANTS PATRIOT LAND CO. AND JAMES COFFELT

Kevin L. Colosimo
Christopher W. Rogers (COUNSEL OF RECORD)
Daniel P. Craig (0088891)
Frost Brown Todd LLC
501 Grant Street, Suite 800
Pittsburgh, PA 15219
Phone No.: 412-513-4300
Fax No.: 412-513-4299
Email: kcolosimo@fbtlaw.com; crogers@fbtlaw.com; dcraig@fbtlaw.com

COUNSEL FOR APPELLANT AMERICAN ENERGY – UTICA MINERALS, LLC

Erik A. Schramm
Kyle W. Bickford
HANLON, ESTADT, MCCORMICK & SCHRAMM CO., LPA
46457 National Road West
St. Clairsville, OH 43950
Phone No.: 740-695-1444
Fax No.: 740-695-1563
Email: easchramm@ohiovalleylaw.com; kbickford@ohiovalleylaw.com

COUNSEL FOR APPELLANT AXEBRIDGE ENERGY, LLC

David K. Schaffner
Schaffner Law Offices Co., LPA
132 Fair Avenue N.W.
New Philadelphia, OH 44663
Phone No.: 330-364-9070
Fax No.: 330-364-9073
Email: schaffner@schaffnerlaw.com

COUNSEL FOR APPELLANT WHISPERING PINES, LLC

John Kevin West
Steptoe & Johnson PLLC
41 South High Street, Suite 2200
Columbus, OH 43215
Phone No: 614-221-5100
Fax No.: 614-221-0952
Email: kevin.west@steptoe-johnson.com

COUNSEL FOR APPELLANT WINDSOR OHIO, LLC

Matthew W. Warnock
Christine Rideout Schirra
Aaron M. Bruggeman
Daniel C. Gibson
Kara Herrnstein
Bricker & Eckler, LLP
100 South Third Street
Columbus, OH 43215
Phone No: 614-227-2300
Fax No.: 614-227-2390
Email: mwarnock@bricker.com; abruggeman@bricker.com; kherrnstein@bricker.com; cschirra@bricker.com; dgibson@bricker.com

Zachary M. Simpson
Gulfport Energy Corporation
3001 Quail Springs Parkway
Oklahoma City, Oklahoma 73134
Phone No.: 405-242-8807
Email: zsimpson@gulfportenergy.com

COUNSEL FOR APPELLANT GULFPORT ENERGY CORPORATION

s/ Scott M. Zurakowski
Scott M. Zurakowski (0069040)
Krugliak, Wilkins, Griffiths & Dougherty Co., LPA

COUNSEL FOR APPELLANT, EAGLE CREEK FARM PROPERTIES, INC.

Appendix to Merit Brief
of
Eagle Creek Farm Properties, Inc.

Appendix 1:
November 25, 2019 Opinion and Judgment Entry from the Seventh District Court of Appeals

FILED
COURT OF APPEALS
NO 18 BE 42
Cynthia L Fregiato
CLERK OF COURTS, BELMONT COUNTY

NOV 25 2019

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

SILTSTONE RESOURCES, LLC,

Plaintiff-Appellee,

v.

STATE OF OHIO PUBLIC WORKS
COMMISSION, et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0042

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 17 CV 128

BEFORE:
Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Andrew P. Lycans, Critchfield, Critchfield, & Johnson, LTD., 225 North Market Street, P.O. Box 599, Wooster Ohio 44691 and *Atty. Manmeet S. Walla*, Siltstone Resources, LLC, 1801 Smith Street, Suite 2000, Houston Texas 77002 for Plaintiff-Appellee and

Atty. Michael DeWine, Ohio Attorney General, *Atty. Jennifer Croskey, Atty. James Patterson, Atty. Rachel Huston, Atty. Christie Limbert, Atty. Leigh Bayer*, Assistant Attorneys General, Executive Agencies Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215 for Defendants-Appellants and

Atty. William B. Benson, Atty. Maribeth Meluch, Isaac, Wiles Burkholder & Teetor, LLC, Two Miranova Place, Suite 700, Columbus, Ohio 43215 for Appellee-Defendant, The Guernsey County Community Development Corporation and

Atty. Aaron M. Bruggeman, Atty. Christine Rideout Schirra, Atty. Daniel C. Gibson, Atty. Matthew W. Warnock , Atty. Kara Herrnstein, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215 and *Atty. Zachary M. Simpson*, Gulfport Energy Corporation, 14313 North May Avenue, Suite 100, Oklahoma City, Oklahoma 73134 for Cross-Claim Appellee-Defendant, Gulfport Energy Corporation and

Atty .Richard V. Zurz, Jr. Slater & Zurz, LLP, One Cascade Plaza, Akron, Ohio 44308, for Cross-Claim Defendants-Appellees, Patriot Land Co. and

James Coffelt and *Atty. John Kevin West*, Steptoe & Johnson PLLC, 41 South High Street, Suite 2200, Columbus, Ohio 43215 and *Atty. Kara Herrnstein*, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215 for Cross-Claim Defendant-Appellee, Windsor Ohio, LLC and

Atty. David K. Schaffner, Schaffner Law Offices, Co., L.P.A, 132 Fair Avenue, N.W., New Philadelphia, Ohio 44663 and *Atty. Kara Herrnstein*, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215 for Cross-Claim Defendant-Appellee, Whispering Pines, LLC and

Atty. Erik A. Schramm, Atty. Kyle W. Bickford, Hanlon, Estadt, McCormick & Schramm Co., LPA, and *Atty. Kara Herrnstein,* Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215 for Cross-Claim Defendant-Appellee, Axebridge Energy, LLC and

Atty. Scott M Zurakowski, Atty. William G. Williams, Atty. Matthew W. Onest, Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., 4775 Munson Street N.W., P O Box 36963, Canton, Ohio 44735 and *Atty. Kara Herrnstein,* Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215 for Cross-Claim Defendant-Appellee, Eagle Creek Farm Properties, Inc. and

Atty. William J. Taylor, Atty. Scott D. Eickelberger, Atty. Ryan H. Linn, Atty. David J. Tarbert, Kinkaid, Taylor & Geyer, 50 North Fourth Street, P.O. Box 1030, Zanesville, Ohio 43702, *Atty. Kara Herrnstein,* Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215 for Cross-Claim Defendant-Appellee, The Bank of Nova Scotia and

Atty. Kevin L. Colosimo, Atty. Christopher A. Rogers, Atty. Daniel P. Craig, Frost Brown Todd LLC, 501 Grant Street, Suite 800, Pittsburgh, Pennsylvania 15219 for Cross-Claim Defendant-Appellee, American Energy-Utica Minerals, LLC.

Dated:
November 25, 2019

DONOFRIO, J.

{¶1} Defendant-Appellant Ohio Public Works Commission (OPWC) appeals from Belmont County Common Pleas Court judgments granting Plaintiff-Appellee's Siltstone Resources, LLC; Defendant-Appellee's Guernsey County Community Development Corporation; Cross-Claim Defendants-Appellees' Gulfport Energy, Corporation; Axebridge Energy, LLC; Eagle Creek Farm Properties, Inc.; Windsor Ohio, LLC; The Bank of Nova Scotia; Whispering Pine, LLC; American Energy-Utica Minerals, LLC; Patriot Land Company, LLC; and James Coffelt (collectively referred to as Appellees) motions to dismiss, granting Appellees' motions for partial summary judgment and denying Appellant OPWC's motion for partial summary judgment. The motions for partial summary judgment concerned whether certain deed restrictions applied to the subsurface of the property at issue. The trial court found the restrictions did not apply to the subsurface.

{¶2} This case concerns the Clean Ohio Conservation Program and approximately 228.45 acres of property in Belmont County, Ohio.

{¶3} In 2000, Ohio voters approved a constitutional amendment to create a tax-exempt bond fund to be used for environmental conservation and revitalization purposes. Ohio Constitution, Article VIII, Section 2o(A). The amendment permitted the General Assembly to enact laws in accordance with the amendment. Ohio Constitution, Article VIII, Section 2o(B). As a result of the amendment, the Clean Ohio Fund Green Space Conservation Program was created and Appellant OPWC was tasked with administering the program.

{¶4} In 2005, Defendant-Appellee Guernsey County Community Development Corporation (Guernsey) applied for a $430,200 grant from the Clean Ohio Conservation Fund for the Leatherwood Creek Riparian Project. The money was to be used to purchase the 228.45 acre tract of land in Belmont County that parallels Leatherwood

Creek. Appellee Guernsey was going to restore the area to its natural state. It appears this 228.45 acre tract abuts land in Guernsey County paralleling the Leatherwood Creek. The abutting tract appears to be owned by Appellee Guernsey and is part of the Leatherwood Creek Riparian Project. The 228.45 acres includes a railway bed to be turned into a hike and bike trail.

{¶5} The 228.45 tract of land was previously strip mined and was being reclaimed by Capstone Holding Company.

{¶6} Appellant OPWC approved the grant and a project agreement was entered into between Appellant OPWC and Appellee Guernsey in 2006. As part of the agreement, deed restrictions were required to be recorded with the deed.

{¶7} In 2007, Appellee Guernsey purchased the 228.45 acres from Capstone. The deed contained the following restrictions:

> 1. Use and Development Restrictions. Declarant hereby agrees, for itself and its successors and assigns as owners of the Property, which Property shall be subject to the following: This property will not be developed in any manner that conflicts with the use of the Premises as a green space park area that protects the historical significance of this particular parcel. Only current structures will be maintained and no new structures will be built on the premises.
>
> 2. Perpetual Restrictions. The restrictions set forth in this deed shall be perpetual and shall run with the land for the benefit of, and shall be enforceable by, Ohio Public Works Commission (OPWC). This deed and the covenants and restrictions set forth herein shall not be amended, released, extinguished or otherwise modified without the prior written consent of OPWC, which consent may be withheld in its sole and absolute discretion.
>
> 3. Enforcement. If Grantee, or its successors or assigns as owner of the Property, should fail to observe the covenants and restrictions set forth herein, the Grantee or it is successors or assigns, as the case may be, shall pay to OPWC upon demand, as liquidated damages, an amount equal to the rate of (a) two hundred percent (200%) of the amount of the Grant

received by Grantee, together with interest accruing at the rate of six percent (6%) per annum from the date of Grantee's receipt of the Grant, or (b) two hundred percent (200%) of the fair market value of the Property as of the date or demand by OPWC. Grantee acknowledges that such sum is not intended as, and shall not be deemed, a penalty, but is intended to compensate for damages suffered in the event a breach or violation of the covenants and restrictions set forth herein, the determination of which is not readily ascertainable.

OPWC shall have the right to enforce by any proceedings at law or in equity, all restrictions, conditions, and covenants set forth herein. Failures by OPWC to proceed with such enforcement shall in no event be deemed a waiver of the right to enforce at a later date the original violation or subsequent violation.

4. Restrictions on transfer of the Property. Grantee acknowledges that the Grant is specific to Grantee and that OPWC's approval of Grantee's application for the Grant was made in reliance on Grantee's continued ownership and control of the Property. Accordingly, Grantee shall not voluntarily or involuntarily sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of OPWC, which consent may be withheld in its sole and absolute discretion.

(2007 Deed from Capstone Holding Company to Appellee Guernsey).

{¶8} Although the deed does not contain any oil and gas mineral reservation language, it is undisputed that about 10 acres of the land conveyed had a prior mineral interest, known as the Devine reservation. The remainder of the minerals were conveyed to Appellee Guernsey with the surface. Consequently, Appellee Guernsey owned the mineral rights to approximately 218 acres.

{¶9} In 2011, without written permission from Appellant OPWC, Appellee Guernsey entered into a lease with Appellee Patriot Energy for all the oil and gas underlying the property. This lease contains language prohibiting storage and disposal. But it does permit the drilling of one water well with lessor's consent and removal of timber after appraisal. Also, the language of the lease does not appear to prohibit disturbing the

surface. The lease specifically states the construction or installation of access road and pipeline rights of way would be done in a way to minimize any related soil erosion, but does not require Appellee Guernsey's permission prior to surface disturbing activity. (¶17 Patriot Lease). As part of the lease, Appellee Guernsey acquired a 14% royalty interest on any oil and gas extracted from the Property.

{¶10} In 2012, Appellee Patriot assigned the lease to Appellee Gulfport.

{¶11} In 2013, without written permission from Appellant OPWC, Appellee Guernsey sold 6/7 of its mineral interest to Appellee Siltstone Resources, Inc., which amounted to 186.9189 mineral acres. (12/17/13 Purchase Agreement).

{¶12} In 2014, Appellee Guernsey, without written permission from Appellant OPWC, sold 29.595 mineral acres to Triple Crown Energy LLC and that interest was eventually assigned to Appellee American Energy-Utica Minerals, LLC.

{¶13} The parties agree that various interests in the lease and mineral estate were transferred between and among various Appellees.

{¶14} It is undisputed that to date the surface of the property has not been disturbed. No wells have been drilled on the surface, no access roads have been built on the surface, and no removal of trees has occurred. The land is potentially being drilled through use of lateral wells or preparation for drilling has begun.

{¶15} In 2017, Appellee Siltstone filed suit against Appellant OPWC, Appellee Guernsey, and Appellee Gulfport. The complaint was amended twice. The remaining Appellees were eventually added as necessary parties and OPWC filed a counterclaim against Appellee Siltstone and cross-claims against the other appellees. This included Appellee Gulfport, Appellee Guernsey, and Appellant OPWC filing cross-claims against each other.

{¶16} Appellee Siltstone sought a declaration that Appellee Guernsey did not violate the deed restrictions when it signed the oil and gas lease. Appellee Siltstone also sought to quiet title to the minerals it had purchased from Appellee Guernsey. Appellee Siltstone additionally argued Appellant OPWC could only recover monetary damages if it was determined any Appellee was liable.

{¶17} OPWC's counterclaim and cross-claims sought declaratory and injunctive relief. It asked for an injunction restraining all parties from violating the deed restrictions

and asked that the interest be assigned back to Appellee Guernsey. Appellant OPWC also asked for liquidated damages as set forth in the deed.

{¶18} Appellees filed motions to dismiss asserting Appellant OPWC could not pursue nonmonetary relief to enforce the deed restrictions. The trial court granted Appellees' motions to dismiss in part. (10/13/17 J.E.; 12/18/17 J.E.). It indicated it would not make a ruling on whether or not the restrictive covenants were void ab initio. (10/13/17 J.E.; 12/18/17 J.E.). Instead, the trial court determined injunctive relief was not available to Appellant OPWC. It determined there was no language in the statute, R.C. 164.26(A), entitling Appellant OPWC to obtain equitable relief. The only relief set forth in that statute was grant repayment and liquidated damages, i.e., monetary relief. (10/13/17 J.E.; 12/18/17 J.E.).

{¶19} Following that ruling, all parties filed motions for partial summary judgment regarding whether the Use and Development Restriction and the Restrictions on transfer of the Property applied to the subsurface. On July 20, 2018, following a hearing, the trial court granted Appellees' motions for partial summary judgment. The court determined the Use and Development Restriction was unambiguous and did not apply to the subsurface because green space is not underground. (7/20/18 J.E.). The court further determined that the Restrictions on transfer of the Property constituted an illegal, unreasonable restraint on alienability. (7/20/18 J.E.).

{¶20} Appellant OPWC timely appealed the trial court's October/December 2017 dismissal order indicating it could not pursue equitable relief and the trial court's July 2018 order granting partial summary judgment to Appellees holding there was no violation of the deed restrictions and denying Appellant OPWC's motion for partial summary judgment. It now raises two assignments of error.

{¶21} Appellant OPWC's first assignment of error states:

> THE TRIAL COURT ERRED IN DENYING THE COMMISSION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN GRANTING APPELLEES' VARIOUS MOTIONS FOR PARTIAL SUMMARY JUDGMENT BECAUSE THE DEED RESTRICTIONS ARE ENFORCEABLE AND SHOULD HAVE BEEN ENFORCED AGAINST THE APPELLEES.

{¶22} Appellant OPWC raises two issues in this assignment of error. First, it argues the trial court erred in granting summary judgment to Appellees on the basis that the Use and Development Restriction did not apply to the subsurface since green space cannot be underground. Second, it argues the trial court erred in holding that the Alienation Restriction had no impact on the green space of the property.

{¶23} An appellate court reviews a summary judgment ruling de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether its judgment granting Appellees' motions for partial summary judgment and denying Appellant OPWC's motion for partial summary judgment was proper.

{¶24} A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher*, 9th Dist. Summit No. 27799, 2015-Ohio-4167, ¶ 8; Civ.R. 56(C). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

{¶25} As stated above, the trial court determined the Use and Development Restriction only applied to the surface "because green space is not underground." (7/20/18 J.E.). It also stated "the subsurface (whether by lease, deed, mortgage, or otherwise) has no impact on the green space on the Premises." (7/20/18 J.E.). Therefore, the court concluded the "Alienation Restriction is an illegal unreasonable restraint on alienability as it has been attempted to be utilized in this case to apply to the subsurface estate." (7/20/18 J.E.).

{¶26} Appellant OPWC argues that decision is incorrect. It contends the language of the restriction is clear and unambiguous; the deed restrictions apply to subsurface and surface. It asserts the Ohio Constitution and R.C. 164.26 grant it the authority to establish policies to ensure the grant recipients maintain long term ownership and control of the property purchased with Clean Ohio funds. It argues environmental conservation is not limited to the surface of the land; it includes the protection of above ground and below

ground water. Alternatively, it argues even if green space only included the surface, the surface is still affected by subsurface mining, and the leasing and selling of the minerals.

{¶27} Although there are many Appellees and many Appellee briefs filed, the arguments asserted by the individual Appellees are very similar. They assert the Use and Development Restriction only restricts three uses. First, it restricts any new structures being built on the premises. Second, it restricts use that will impact the historical significance of the premises. Third, it restricts use of the property that conflicts with the premises being used as a green space park area. They contend it is undisputed that there have been no new structures built on the property and there is no evidence of "historical significance" of the property. They argue the only issue is whether subsurface lateral mining thousands of feet below the surface conflicts with the premises being used as a green space park area. They contend it does not; a green space park occurs on the surface, not the subsurface. Thus, according to Appellees the deed restriction is clear and unambiguous; it applies only to the surface and the lease/sale of the subsurface has not affected the surface in any manner. They assert the use of the word "on" when referencing new structures means the restriction only applies to the surface. They argue if the restriction was intended to restrict the subsurface that language would have been included in the restriction. Appellees contend we cannot look to R.C. 164.22 and the Ohio Constitution to determine what the deed restrictions were intended to restrict.

{¶28} Alternatively, Appellees also argue that if the deed restriction is ambiguous it should be interpreted against the party seeking to enforce the restriction and against the alienation of the property. Appellees contend the deed defines "Premises" based upon the legal description. However, it does not define "Property." Thus, since the word "Property" as used in the restriction can be defined in multiple ways, the deed restriction must be interpreted in the least restrictive manner. Appellees also assert if the Use and Development Restriction is interpreted to apply to the subsurface, then it is an unlawful restraint on alienation.

{¶29} "A 'restrictive covenant' is a 'private agreement, [usually] in a deed or lease, that restricts the use or occupancy of real property, [especially] by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put'." *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 28 (2002), citing

Black's Law Dictionary 371 (7th Ed.Rev.1999). Contract construction rules apply to the interpretation of the deed restrictions. In the case of contracts, deeds, or other written instruments, the construction of the writing is a matter of law, which is reviewed de novo. *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 697 N.E.2d 208 (1998). Under a de novo review, an appellate court may interpret the language of the contract substituting its interpretation for that of the trial court. *Witte v. Protek Ltd.*, 5th Dist. Stark No. 2009CA00230, 2010-Ohio-1193, ¶ 6, citing *Children's Medical Center v. Ward*, 87 Ohio App.3d 504, 622 N.E.2d 692 (2d Dist.1993).

{¶30} Written instruments "are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. "When construing a deed, a court must examine the language contained within the deed, the question being not what the parties meant to say, but the meaning of what they did say, as courts cannot put words into an instrument which the parties themselves failed to do." *Johnson v. Consol. Coal Co.*, 7th Dist. Belmont No. 13 BE 3, 2015-Ohio-2246, ¶ 15 quoting, *McCoy v. AFTI Properties, Inc.*, 10th Dist. Franklin No. 07AP-713, 2008-Ohio-2304, ¶ 8. If the terms of the written instrument are clear and unambiguous, courts must give the words their plain and ordinary meaning and may not create a new contract by finding the parties intended something not set out in the contract. *Alexander v. Buckeye Pipe Line*, 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978).

{¶31} But when the plain language of a written instrument is ambiguous, then a court can look to parol evidence to resolve the ambiguity and ascertain the parties' intent. *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 521, 639 N.E.2d 771 (1994); *City of Steubenville v. Jefferson Cty.*, 7th Dist. Jefferson No. 07JE51, 2008-Ohio-5053, ¶ 22. Terms in a contract are ambiguous if their meanings cannot be determined from reading the entire contract, or if they are reasonably susceptible to multiple interpretations. *First Natl. Bank of Pennsylvania v. Nader*, 2017-Ohio-1482, 89 N.E.3d 274, ¶ 25 (9th Dist.).

{¶32} With that standard in mind, we examine the language used in the Use and Development Restriction:

> 1. Use and Development Restrictions. Declarant hereby agrees, for itself and its successors and assigns as owners of the Property, which

> Property shall be subject to the following: This property will not be developed in any manner that conflicts with the use of the Premises as a green space park area that protects the historical significance of this particular parcel. Only current structures will be maintained and no new structures will be built on the premises.

(2007 Deed from Capstone Holding Company to Appellee Guernsey).

{¶33} It is undisputed that no new structures have been built on the premises. Also, no one has suggested this property has historical significance. The issue here is whether the lateral mining is a development of the "property" in a "manner that conflicts with the use of the premises as a green space park area." Specifically, does the statement, "This property will not be developed in any manner that conflicts with the use of the Premises as a green space park area" prevent lateral mining?

{¶34} The deed defines the word "Premises." The definition is the legal description (metes and bounds) of the land sold. The deed does not indicate the oil and gas rights were severed from the surface. Therefore, the word "premises" includes everything that was conveyed, including mineral rights.

{¶35} The deed defines the word "Premises" on the first page of the deed as Exhibit A, which is a legal description of the property conveyed. The deed uses the word "premises" to describe what was conveyed. For instance, the first sentence states, "for valuable consideration received grants with limited warranty covenant to The Guernsey County Community Development Corporation * * * the following described premises." The limited warranty paragraph begins by stating, "Under and Subject to any and all exceptions, reservations, restrictions, easements, rights of way, highways, estates, covenants and conditions apparent on the premises or shown by instruments of record * * *." It then states, "By accepting this deed Grantee also acknowledge that it has inspected the premises and is acquired the same as a result of such inspections in its present condition and circumstance."

{¶36} It is not until the restrictions that the use of the word "property" is used in the deed. The deed does not define "property."

{¶37} The use of the words "premises" and "property" in the context they are used in this deed does not indicate that the words have two separate meanings. They are

referring to all the rights conveyed by deed subject to the Use and Development Restrictions that place restrictions on surface use only. When the words "property" and "premises" are used in conjunction with "green space park area" they can only apply to the surface.

{¶38} We agree with the trial court that "green space" is not underground, rather it is surface. "Green space park area" is not defined in the deed. Likewise, it is also not defined in the statutes enacted as part of the Ohio Clean Conservation Fund.

{¶39} R.C. 164.22 titled the "Natural Resources Assistance Councils; Power and Duties" provides for the natural resource assistance council to review grants for projects that propose the acquisition of land and easements in parks, forests, wetlands, natural areas for the protection of endangered plant or animal population, other natural areas, and connecting corridors for natural areas. R.C. 164.22(A). Projects proposed pursuant to division (A) must emphasize:

> (4) The preservation of existing high quality wetlands or other scarce natural resources within the geographical jurisdiction of the council;
>
> (5) The enhancement of educational opportunities and provision of physical links to schools and after-school centers;
>
> (6) The preservation or restoration of water quality, natural stream channels, functioning floodplains, wetlands, streamside forests, and other natural features that contribute to the quality of life in this state and to the state's natural heritage. Projects shall not include hydromodification projects such as dams, dredging, sedimentation, and bank clearing and shall not accelerate untreated water runoff or encourage invasive nonnative species.

R.C.164.22(A)(4)-(6).

{¶40} The natural resource council also reviews grants for projects that propose to:

> (B) Protect and enhance riparian corridors or watersheds, including the protection and enhancement of streams, rivers, lakes, and other waters

> of the state. Such projects may include, without limitation, the reforestation of land or the planting of vegetation for filtration purposes; the fee simple acquisition of lands for the purpose of providing access to riparian corridors or watersheds or for other purposes necessary for the protection and enhancement of riparian corridors or watersheds; and the acquisition of easements for the purpose of protecting and enhancing riparian corridors or watersheds. Projects proposed pursuant to division (B) of this section shall emphasize the following:
>
> (1) The increase of habitat protection;
>
> (2) Inclusion as part of a stream corridor-wide or watershed-wide plan;
>
> (3) The provision of multiple recreational, economic, and aesthetic preservation benefits;
>
> (4) The preservation or restoration of floodplain and streamside forest functions;
>
> (5) The preservation of headwater streams;
>
> (6) The restoration and preservation of aquatic biological communities.
>
> Projects shall not initiate or perpetuate hydromodification projects such as dams, ditch development, or channelization.

R.C.164.22(B).

{¶41} These statutes refer to surface areas. Therefore, they support our conclusion that "green space park area" is a reference to the surface.

{¶42} Since there is no statutory or deed definition for "green space park area," rules of construction indicate we use the common definition. A park is an area of land set aside for public use. https://www.thefreedictionary.com/park. Green space is "a natural area in or around a development, intended to provide buffer, noise control, recreational use, and/or wildlife refuge, all in order to enhance the quality of life in and around the development." https://financial-dictionary.thefreedictionary.com/ green+space. Green space is often intentionally provided in the urban setting; it is nature space in the city. However, green space may occur in the rural setting also. Commonly, in the rural settings

it is preserving areas of nature from development or reclaiming areas of nature that were used for industry. In northeast Ohio, unused railways are converted to trails and land stripped from mining is reclaimed. Both occurred on the property in this case.

{¶43} Therefore, the phrase "green space park area" means the portion of the property that one would use in the normal park setting, meaning the area on which one actually walks, runs, bikes, and hikes, which is the surface, not the subsurface. The trial court's limitation of green space to the surface of the property was correct.

{¶44} Appellant OPWC argues that allowing lateral mining still permits Appellees reasonable access to the surface and therefore allowing mining of any sort defeats the purpose of a "green space park area." Admittedly, at common law the mineral holder was still entitled to reasonable access to the surface to reach his or her property. Eastern Mineral Law Foundation, The Issues: The Rights and Interests at Play, 23 E. Min. Found. § 9.04, 2003 WL 22234516 ("Despite the availability of modern directional drilling, the development and production of oil and gas in Eastern states most often requires reasonable access to and the use and occupancy of some portion of the surface."). See also *Skivolocki*, 38 Ohio St.2d at 249, fn. 1 ("'* * * unless the language of the conveyance by which the minerals are acquired repels such construction, the mineral estate carries with it the right to use as much of the surface as may be reasonably necessary to reach and remove the minerals.' See, also, 37 Ohio Jurisprudence 2d 18, Mines and Minerals, Section 14. This implied right of the mineral owner is best explained as a practical attempt to insure that both he, and the surface owner, can enjoy their respective estates."). If the mineral holder was not permitted reasonable access, then the minerals would essentially be landlocked without means of extraction. Typically when mineral rights are leased, the lease usually permits reasonable access to the surface by the terms of the lease. For instance, often the lease permits drilling of water wells, building access roads, installing fencing, and removing trees and brush. These acts affect the surface.

{¶45} The lease with Appellee Patriot includes provisions such as these. Admittedly, it does not permit the placement of a wellhead on the property. But it does permit removal of timber and the drilling of a water well. These things affect the surface. However, the restrictions set forth in the deed that run with the land clearly do not permit any disturbance of the surface. Therefore, Appellees or their heirs or assigns are not

permitted to disturb the surface in any manner that conflicts with the use of the property as a "green space park area." Given the restrictions, neither the lease nor the common law allows for access to the surface of the property at issue in this case.

{¶46} For those reasons, the language of the restriction is clear and unambiguous; the Use and Development Restrictions only apply to the surface. The trial court's decision was correct on this point.

{¶47} Next, we must move to examine Appellant OPWC's second argument regarding the Restrictions on transfer of the Property. As to this issue, the trial court found that applying the Restrictions on transfer of the Property to the subsurface is an unreasonable restraint on the alienation of the property. These restrictions provide:

> 4. Restrictions on transfer of the Property. Grantee acknowledges that the Grant is specific to Grantee and that OPWC's approval of Grantee's application for the Grant was made in reliance on Grantee's continued ownership and control of the Property. Accordingly, Grantee shall not voluntarily or involuntarily sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of OPWC, which consent may be withheld in its sole and absolute discretion.

(Deed from Capstone Holding Company to Appellee Guernsey).

{¶48} In addressing the Restrictions on transfer of the Property, which it termed the "Alienation Restriction," the trial court found that the alienability of the subsurface has no impact on the green space of the property. Therefore, the trial court concluded that the Restrictions on transfer of the Property were an "illegal unreasonable restraint on alienability as it has been attempted to be utilized in this case to apply to the subsurface estate." (July 20, 2018 Judgment Entry).

{¶49} Appellant OPWC argues these restrictions are clear and unambiguous and required Appellee Guernsey to maintain ownership and control over the property. It points out that these restrictions do not differentiate between a lease of the surface and a lease of the mineral rights. It notes that the deed conveyed the entire property, including the subsurface estate. And the deed specifically stated: "This conveyance is SUBJECT

to the following restrictions." One of the restrictions is the Restrictions on transfer of the Property.

{¶50} The trial court erred in finding that the Restrictions on transfer of the Property apply only to the surface. There is no question that Appellee Guernsey entered into an oil and gas lease with Appellee Patriot Energy in 2011 without consent from Appellant OPWC. Likewise, there is no question that in 2013 Appellee Guernsey sold 6/7 of its mineral interest to Appellee Siltstone without Appellant OPWC's consent. Finally, there is no question that in 2014 Appellee Guernsey sold 29.595 mineral acres to Triple Crown Energy, LLC without Appellant OPWC's consent and that interest was eventually assigned to Appellee American Energy-Utica Minerals, LLC. These transactions were all in clear violation of the Restrictions on transfer of the Property because not once did Appellee Guernsey seek Appellant OPWC's consent.

{¶51} The reference to "property" in the Restrictions on transfer of the Property refers to both the surface and the subsurface. In the Restrictions on transfer of the Property there is no reference to "green space park area" to modify "property." It is because of the green space park area language in the Use and Development Restrictions that those restrictions only apply to the surface and not to the subsurface. As stated above, the use of the words "premises" and "property" as used in this deed do not have two separate meanings. The deed defines "premises" by setting out the metes and bounds of the land sold. The word "premises" includes everything that was conveyed, including mineral rights. Following this logic, "property" as used in the Restrictions on transfer of the Property includes the subsurface minerals.

{¶52} It is also important to point out that the deed uses the phrase "This conveyance is SUBJECT to the following restrictions" just before listing the restrictions. The "conveyance" does not refer solely to the surface land but to all land conveyed, including the subsurface mineral rights. Thus, the use of this language further supports reading the Restrictions on transfer of the Property to apply to the subsurface.

{¶53} Moreover, while the trial court calls the restriction an "illegal unreasonable restraint on alienability," it offers no law or explanation for this conclusion. The issue surrounding the Restrictions on the transfer of the Property is a matter of contract interpretation. The language of the Restriction is clear and unambiguous. Appellee

Guernsey was not to sell, assign, transfer, lease, exchange, or convey the property without Appellant OPWC's consent. Appellee Guernsey violated this restriction when it leased and sold the property.

{¶54} In sum, there is no genuine issue of material fact that Appellee Guernsey violated the Restrictions on transfer of the Property and that these restrictions apply to the subsurface. Therefore, the trial court erred in granting partial summary judgment in favor of Appellees and in denying Appellant OPWC's motion for partial summary judgment. Because Appellee Guernsey violated the Restrictions on transfer of the Property, the trial court should have granted summary judgment in favor of Appellant OPWC.

{¶55} Accordingly, Appellant OPWC's first assignment of error has merit in part and it is sustained in part.

{¶56} Appellant OPWC's second assignment of error states:

> THE TRIAL COURT ERRED IN DISMISSING COUNT 1 AND COUNT 2 OF THE COMMISSION'S COUNTERCLAIM AND CROSS-CLAIM, BECAUSE THE COMMISSION CAN ENFORCE THE DEED RESTRICTIONS IN EQUITY.

{¶57} Appellant OPWC's second assignment of error concerns the trial court's November 6, 2017 judgment entry and December 18, 2017 conclusions of law, which determined that injunctive relief was not available to Appellant OPWC. The trial court dismissed Appellant OPWC's claims seeking injunctive or non-monetary relief for the alleged breach of the deed restrictions. These claims sought to prevent Appellees from lateral mining, null the lease, and have the subsurface interest that was sold by Appellee Guernsey returned to Appellee Guernsey.

{¶58} Appellant OPWC argues the deed restrictions allow for the right to enforce the restrictions at law or in equity. Thus, it contends it could pursue equitable remedies. Furthermore, it contends that although R.C. 164.26(A) only lists liquidated damages, it does not indicate monetary damages are the sole remedy.

{¶59} The Enforcement Restriction of the deed states:

> 3. Enforcement. If Grantee, or its successors or assigns as owner of the Property, should fail to observe the covenants and restrictions set forth herein, the Grantee or it is successors or assigns, as the case may be, shall pay to OPWC upon demand, as liquidated damages, an amount equal to the rate of (a) two hundred percent (200%) of the amount of the Grant received by Grantee, together with interest accruing at the rate of six percent (6%) per annum from the date of Grantee's receipt of the Grant, or (b) two hundred percent (200%) of the fair market value of the Property as of the date or demand by OPWC. Grantee acknowledges that such sum is not intended as, and shall not be deemed, a penalty, but is intended to compensate for damages suffered in the event a breach or violation of the covenants and restrictions set forth herein, the determination of which is not readily ascertainable.
>
> OPWC shall have the right to enforce by any proceedings at law or in equity, all restrictions, conditions, and covenants set forth herein. Failures by OPWC to proceed with such enforcement shall in no event be deemed a waiver of the right to enforce at a later date the original violation or subsequent violation.

(2007 Deed from Capstone Holding Company to Appellee Guernsey).

{¶60} This restriction provides for liquidated damages. It also permits proceedings in equity. Therefore, the restriction allows for both monetary and equitable relief.

{¶61} The trial court, however, found that R.C. 164.26(A) prohibited equitable relief. R.C. 164.26(A) provides:

> The director of the Ohio public works commission shall establish policies related to the need for long-term ownership, or long-term control through a lease or the purchase of an easement, of real property that is the subject of an application for a grant under sections 164.20 to 164.27 of the Revised Code and establish requirements for documentation to be submitted by grant applicants that is necessary for the proper administration of this division. The policies shall provide for

> proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements established under this division.

{¶62} The trial court noted that this section anticipates that grant recipients may alienate property purchased with grant funds and imposes monetary consequences for these actions. It found that because this section does not specifically identify equitable relief, it cannot be a remedy. The trial court determined that granting injunctive relief in this case would be in direct violation of R.C. 164.26(A). It reasoned that if the Legislature had intended equitable relief to be available in cases such as this one, it would have included equitable relief in the statute.

{¶63} Appellant OPWC argues that a breach of a restrictive covenant can generally be prevented by a court of equity. It asserts that when deed restrictions are clear and unambiguous, courts must enforce them. In this case, Appellant OPWC points out, the Enforcement Restriction clearly states that it has the right to enforce all restrictions by any proceedings at law or in equity. And it notes that Appellee Guernsey knew that it was agreeing to the restrictions of long-term ownership of the property.

{¶64} Moreover, Appellant OPWC argues that enforcement of the restrictions by injunctive relief is necessary to promote public policy. It contends that its equitable claims against the appellees in this case are necessary to protect the Clean Ohio Fund and Program. If it is not able to enforce the long-term ownership of the property via equitable means, Appellant OPWC argues then nothing prevents a grant recipient from acting as a straw man to acquire property and to then sell it to be used as a landfill, for strip mining, for dumping, or any other purpose. It contends that without equitable relief as a remedy, it would never be able to prevent any of these uses.

{¶65} Appellant OPWC's arguments are convincing.

{¶66} First, nothing in R.C. 164.26(A) prevents equitable relief. That section instructs the director of the OPWC to establish policies related to the need for long-term ownership or control of property that is subject to clean Ohio conservation fund grants. It also states the policies are to provide for proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements. Reading the plain wording of the statute leads to the conclusions that (1) the OPWC

director must establish policies relating to the need for long-term ownership or control of the property that is the subject of the grant and (2) some of those policies are to provide for liquidated damages and grant repayment for failure to comply with the long-term requirement.

{¶67} Nothing in the statute prevents equitable relief as a remedy for failure to comply with the long-term ownership requirement. The statute does not include an exclusive list of remedies. The remedies the statute mentions are in regard to instructing the director of the OPWC to establish policies to provide for liquidated damages and grant repayment.

{¶68} Second, the Enforcement Restriction clearly and unambiguously provides that Appellant OPWC has the right to enforce the deed restrictions in equity. Nothing in the language of the Enforcement Restriction can be construed to mean anything else.

{¶69} As noted by the Fifth District:

> The Supreme Court of Ohio has consistently held that "[w]here the language contained in a deed restriction is indefinite, doubtful and capable of contradictory interpretation, that construction must be adopted which least restricts the free use of the land." *Houk v. Ross* (1973), 34 Ohio St.2d 77, 296 N.E.2d 266, paragraph two of the syllabus, overruled on other grounds by *Marshall v. Aaron* (1984), 15 Ohio St.3d 48, 15 OBR 145, 472 N.E.2d 335. "*Where the language in the restriction is clear, the court must enforce the restriction.* Otherwise, the court would be rewriting the restriction. * * * The key issue is to determine the intent of the parties as reflected by the language used in the restriction." *Dean v. Nugent Canal Yacht Club, Inc.* (1990), 66 Ohio App.3d 471, 475, 585 N.E.2d 554, 556-557.

(Emphasis added); *Morgan Woods Homeowners' Assn. v. Wills*, 5th Dist. Licking No. 11 CA 57, 2012-Ohio-233, ¶ 42.

{¶70} The parties' intent when they agreed to the restrictions here is clear. Appellee Guernsey was not to "sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of OPWC[.]" If

Appellee Guernsey violated the above restriction, then Appellant OPWC could enforce that restriction "by any proceedings at law or in equity[.]"

{¶71} Because the equitable relief is not prohibited by statute and because the restrictions are clear and unambiguous, the trial court erred in dismissing Appellant OPWC's claims for equitable relief.

{¶72} Accordingly, Appellant OPWC's second assignment of error has merit and is sustained.

{¶73} For the reasons stated above, the trial court's judgment denying Appellant OPWC's motion for partial summary judgment and granting partial summary judgment to Appellees is hereby reversed. Appellant OPWC's motion for partial summary judgment is sustained. The trial court's judgment dismissing Appellant OPWC's claims for equitable relief is also reversed. This matter is remanded to the trial court to determine the proper equitable relief and/or the amount of liquidated damages appellant OPWC is entitled to based on Appellee Guernsey's breach of the Restrictions on transfer of the Property.

Waite, P. J., concurs.
Robb, J., dissents with dissenting opinion.

Robb, J., dissenting.

{¶74} I respectfully dissent from the decision reached by my colleagues; I would affirm the trial court's decision.

{¶75} I agree that the Use and Development Restrictions only apply to the surface and the trial court was correct in that determination. However, I disagree with my colleagues analysis regarding the Alienation Restriction. I would hold the trial court was correct in its determination that applying the Alienation Restriction to the subsurface is an unreasonable restraint on the alienation of the property.

{¶76} The Alienation Restriction specifically refers to Appellant OPWC. It is undisputed that Appellee Guernsey applied for a grant from the Clean Ohio Conservation Fund for the purposes of utilizing the space as a green space park area; its application for the fund clearly sets forth what improvements it was making for the property and its use. Therefore, although this restriction does not use the term "green space park area," the reference to Appellant OPWC indicates the purpose of the restriction is to maintain it for the purposes that the grant was awarded to Appellee Guernsey. As discussed above, green space refers only to surface. While it was permissible to restrain the use of the surface and require consent for transfers of the surface, it is unreasonable to require approval for transfers of the subsurface and permit Appellant OPWC to refuse, for any reason, the transfer of the subsurface. This is especially the case in this instance where the Use and Development Restriction runs with the land. This holding is the least restrictive interpretation of the covenant and reinforces the public policy for the development of oil and gas production. *Newbury Twp. Bd. of Twp. Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992) ("It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio.").

{¶77} Accordingly, I would find that the first assignment of error lacks merit in its entirety; the Use and Development Restrictions only apply to surface and the Alienation

Restriction does not prohibit the lease or sale of the mineral interests. Since I find there is no breach of the restrictions, the second assignment of error, in my opinion, is moot and I would not address it.

{¶78} For the above stated reasons, I would affirm the trial court's decision.

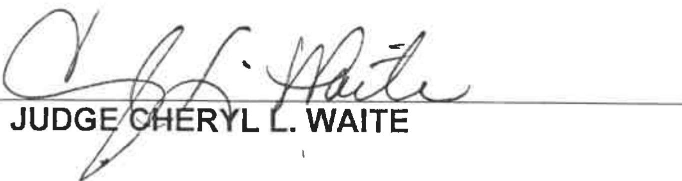
APPROVED:

CAROL ANN ROBB, JUDGE

For the reasons stated in the Opinion rendered herein, Appellant OPWC's first assignment of error is sustained in part and overruled in part. Appellant OPWC's second assignment of error is sustained. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, denying Appellant OPWC's motion for partial summary judgment and granting partial summary judgment to Appellees is hereby reversed. Appellant OPWC's motion for partial summary judgment is sustained. The trial court's judgment dismissing Appellant OPWC's claims for equitable relief is also reversed. This matter is remanded to the trial court to determine the proper equitable relief and/or the amount of liquidated damages appellant OPWC is entitled to based on Appellee Guernsey's breach of the Restrictions on transfer of the Property. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

JUDGE GENE DONOFRIO



JUDGE CHERYL L. WAITE

Dissents with Dissenting Opinion
JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

Appendix 2:
Relevant Judgments, Orders, and Opinions from Belmont County Court of Common Pleas

CLERK SERVED COPIES ON
ALL THE PARTIES OR
THEIR ATTORNEYS

COMMON PLEAS COURT
BELMONT CO OH.
2018 JUL 20 AM 10: 59
DAVID S. TROUTEN JR.
CLERK OF COURT

IN THE COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

SILTSTONE RESOURCES, LLC,	)	Case No. 17 CV 128
	)	
Plaintiff,	)	Judge Frank A. Fregiato
	)	
v.	)	
	)	**FINAL JUDGMENT ENTRY**
STATE OF OHIO, PUBLIC WORKS COMMISSION, et al.,	)	
	)	
Defendants.	)	

Before the Court are seven motions for partial summary judgment which concern two deed restrictions in a February 23, 2007 deed from Capstone Holding Company to the Guernsey County Community Development Corporation. For reasons set forth below, and in the motions for partial summary judgment, the Court hereby DENIES the Ohio Public Works Commission's ("OPWC") motion for partial summary judgment. The Court GRANTS the motions for partial summary judgment filed by Siltstone Resources, LLC ("Siltstone"); The Guernsey County Community Development Corporation ("CDC"); Gulfport Energy Corporation ("Gulfport"); American-Energy- Utica Minerals, LLC ("AEUM"); James Coffelt and Patriot Land Company, LLC ("Patriot"); Axebridge Energy, LLC; and The Bank of Nova Scotia. While each of these parties filed a motion for partial summary judgment, all pending claims in this case are resolved as part of this Final Judgment Entry.

I. FINDINGS OF FACTS.

The Court finds that there are no genuine issues of material fact remaining for trial, and that the following facts are undisputed:

1. On February 23, 2007, Capstone Holding Company conveyed approximately 228.485 acres of real property (the "Premises") in Kirkwood Township, Belmont County to the CDC.

12970148v1

A-028

2. The deed included the following Use Restriction:

   This property will not be developed in any manner that conflicts with the use of the Premises as a green space park area that protects the historical significance of this particular parcel. Only current structures will be maintained and no new structures will be built on the Premises.

3. The deed also included the following Alienation Restriction:

   Grantee shall not voluntarily or involuntarily sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of OPWC, which consent may be withheld in its sole and absolute discretion.

4. On March 25, 2011, the CDC executed an oil and gas lease with Patriot Land Company, LLC ("the Lease"), covering four tracts, including the Premises.

5. On June 22, 2012, Patriot assigned the Lease to Gulfport.

6. On December 31, 2013, the CDC sold 6/7ths of its right, title and interest in and to the mineral rights associated with the Premises to Siltstone, resulting in a transfer of 186.9189 net mineral acres. This transfer was memorialized in a deed recorded in Official Records Volume 444, Page 432 and as Instrument Number 201400000052 in the Belmont County Recorder's Office (the "Siltstone Mineral Deed").

7. Various interests in the Lease and the mineral acreage were subsequently transferred to the other parties in this litigation (the "Other Mineral Transfers").

II. SUMMARY JUDGMENT STANDARD

Civil Rule 56 governs summary judgment motions. Civil Rule 56(C) provides that, before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing such evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St. 3d 447, 448 (1996). If the moving party makes such a showing, the non-moving party then must produce evidence on any issue for which the party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St. 3d 108,

Syl. ¶3 (1991).

III. CONCLUSIONS OF LAW.

1. "'The construction of written contracts and instruments, including deeds, is a matter of law.'" *DeRosa v. Parker*, 2011-Ohio-6024, ¶8 (7th Dist.) (quoting *Long Beach Ass'n, Inc. v. Jones* (1998), 82 Ohio St.3d 574, 576, 697 N.E.2d 208).

2. A fundamental rule of deed interpretation is that "a deed's language is conclusively presumed to express the parties' intention absent 'uncertainty' in the language employed." *Cartwright v. Allen*, 2012-Ohio-3631, ¶21 (12th Dist.). "If the language of a deed restriction is unambiguous, the court must enforce the restriction as written." *Corna v. Szabo*, 2006-Ohio-2764, ¶38 (6th Dist.).

3. Under Ohio law, "it is a well-settled rule that in construing deeds and instruments containing restrictions and prohibitions as to the use of property conveyed all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee." *Hunt v. Held*, 90 Ohio St. 280, 282–83, 107 N.E. 765 (1914).

4. "Deed restrictions are generally disfavored and will be strictly construed against limitations upon use, and all doubts should be resolved against a possible construction thereof which would increase the restriction upon the use of such real estate." *Cincinnati City Sch. Dist. Bd. of Ed. v. Conners*, 132 Ohio St. 3d 468, 474 (2012) (quotation omitted).

5. Even if any provision of the deed restrictions was "ambiguous and unclear, parol evidence or extrinsic evidence is not required to resolve the ambiguity. Rather, the ambiguity is automatically read in favor of the party who argues for free use of his land." *Frederick v. Cocca Dev., Ltd.*, 2006-Ohio-7273, ¶46 (7thc Dist.).

6. "As a general matter, of course, the law disfavors restraints on alienation, unless reasonable, and in close cases that construction will be adopted which most favors free alienability and the right to convey." *First Fed. Sav. & Loan Ass'n of Toledo v. Perry's Landing, Inc.*, 11 Ohio App. 3d 135, 142 (1983). Unreasonable abridgements of the right of alienation, voluntary or involuntary, will not be sustained by the courts. *Anderson v. Cary*, 36 Ohio St. 506, 510 (1881).

7. This Court concludes as a matter of law that the Use Restriction is unambiguous.

8. For the reasons set forth in the Motions, and because green space is not underground, this Court concludes that the Use Restriction applies solely to the surface of the Premises and not to the subsurface estate. OPWC has not contended that the opposing parties have made any use of the surface of the Premises, and, therefore, summary judgment is appropriate as to the Use Restriction.

9. For the reasons set forth in the Motions, this Court further concludes that the

alienability of the subsurface (whether by lease, deed, mortgage, or otherwise) has no impact on the green space on the Premises. There is no conflict between the use of the subsurface and green space on the surface of the Premises. Therefore, this Court concludes that the Alienation Restriction is an illegal unreasonable restraint on alienability as it has been attempted to be utilized in this case to apply to the subsurface estate.

Based on the foregoing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

A. The Motion for Partial Summary Judgment filed by Ohio Public Works Commission is hereby DENIED. The Motions for Partial Summary Judgment filed by Siltstone Resources, LLC; the Guernsey County Community Development Corporation; Gulfport Energy Corporation; American-Energy- Utica Minerals, LLC; James Coffelt and Patriot Land Company, LLC; Axebridge Energy, LLC; and the Bank of Nova Scotia are hereby GRANTED for the reasons stated therein and in this Judgment Entry. The Court hereby finds that both the Use Restriction and the Alienation Restriction apply only to the surface of the Premises and do not apply to the subsurface mineral rights;

B. Accordingly, this Judgment Entry holds that the mortgaging, leasing, sale or other transfer of subsurface interests involving the Premises (including but not limited to the Gulfport Lease, Siltstone Mineral Deed and Other Mineral Transfers) do not violate the Deed Restrictions. This entry, therefore, resolves all claims between the parties seeking a declaration to that effect and confirms that Siltstone, CDC, Gulfport, AEUM, James Coffelt, Patriot, Axebridge Energy, LLC, Whispering Pines, LLC, Eagle Creek Farm Properties, Inc., Windsor Ohio, LLC, and The Bank of Nova Scotia as the owners of their respective interests in the Premises;

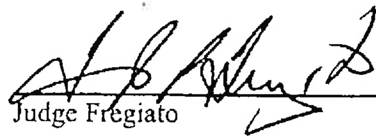
    i. Siltstone is the sole and exclusive owner of the mineral acres underlying the Premises as set forth in the Siltstone Mineral Deed;

    ii. AEUM is the sole and exclusive owner of the mineral acres underlying the Premises as set forth in the deed from American Energy—Utica, LLC to AEUM recorded in Official Record Volume 528, Page 939 as Instrument Number 201500000185 in the Belmont County Recorder's Office.

C. This Judgment Entry resolves all remaining counts in Siltstone's Second Amended Complaint, AEUM's crossclaim, and both Gulfport and CDC's amended crossclaims. As to OPWC's amended counterclaim, amended cross-claims, and cross-claims, Counts I-II were previously dismissed and this judgment entry resolves Count III against OPWC and in favor of all other parties; and

D. This judgment entry, having resolved all remaining issues before the Court, constitutes a final appealable order. The status conference set for August 6, 2018, at 11:45 a.m. is, therefore, cancelled.

Dated: 7/20, 2018.



Judge Fregiato

ENDED

12970148v1

COMMON PLEAS COURT
BELMONT CO OH.
2017 NOV -6 AM 9:23
DAVID S. TROUTEN JR.
CLERK OF COURT

IN THE COMMON PLEAS COURT OF BELMONT COUNTY, OHIO

SILTSTONE RESOURCES, LLC,	:	
Plaintiff,	:	Case No. 17-CV-0128
v.	:	Judge Frank A. Fregiato
STATE OF OHIO, PUBLIC WORKS COMMISSION, ET AL.,	:	
Defendants.	:	

ORDER AND JUDGMENT ENTRY

This matter is before the Court upon the motions, the memoranda in support and in opposition, the related submissions of the parties, and the arguments presented to the Court at the October 13, 2017 hearing.

IT IS HEREBY ORDERED AND ADJUDGED that

1. The Motion to Dismiss Defendant State of Ohio, Public Works Commission's Amended Counterclaim filed by Plaintiff Siltstone Resources LLC ("Siltstone") is hereby GRANTED in part, for the reasons set forth in the Motion, the accompanying memoranda, and set forth in the parties' arguments at the October 13, 2017 hearing. The Court hereby finds that damages are the sole and exclusive remedy available to the Ohio Public Work's Commission ("OPWC") for any alleged breach of the deed restrictions and that OPWC's claims seeking injunctive or other non-monetary relief are hereby dismissed;
2. The remainder of Siltstone's Motion to Dismiss is hereby HELD IN ABEYANCE; and

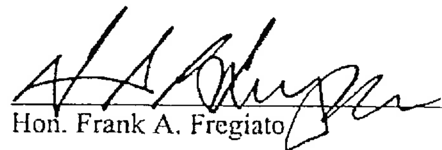
12137783v1

3. The Motion to Dismiss Defendant OPWC's Cross-Claims filed by Defendant Gulfport Energy Corporation ("Gulfport") and all other parties' motions joining Gulfport's Motion or incorporating it by reference are hereby HELD IN ABEYANCE.

IT IS FURTHER ORDERED AND ADJUDGED that a telephone scheduling conference with counsel for all parties shall take place on November 27, 2017 @ 9:45 a.m. Counsel for Gulfport shall be responsible for setting up and circulating a conference call-in number to all counsel of record and to the Court in advance of the scheduled conference.

IT IS SO ORDERED.

Date: 11/6/17



Hon. Frank A. Fregiato

12137783v1

IN THE COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

COMMON PLEAS COURT
BELMONT CO. OH
2017 DEC 18 AM 10 17
DAVID S. TROUTEN JR.
CLERK OF COURT

SILTSTONE RESOURCES, LLC, Plaintiff, v. STATE OF OHIO, PUBLIC WORKS COMMISSION, et al., Defendants, v. PATRIOT LAND COMPANY, LLC, et al., New Party Defendants to Crossclaim.	)	Case No. 17 CV 128 Judge Frank A. Fregiato **CONCLUSIONS OF LAW**

In a Docket and Journal Entry dated October 13, 2017, the Court found that Injunctive Relief shall not lie on behalf of the State of Ohio, Public Works Commission ("OPWC") on its counterclaim and crossclaims in this case. In an Order and Judgment Entry dated November 6, 2017, the Court granted Plaintiff Siltstone Resources, LLC's Motion to Dismiss OPWC's Amended Counterclaim in part, dismissing OPWC's claims seeking injunctive or other non-monetary relief based upon any alleged breach of the deed restrictions at issue in this case. OPWC filed a motion for conclusions of law asking the Court to set forth the legal basis for these findings. The Court orally granted that motion during a telephonic conference conducted on November 27, 2017, and now makes the following conclusions of law as to why R.C. § 164.26(A) bars OPWC from seeking injunctive or other non-monetary relief in this case.

I. R.C. § 164.26(A) DOES NOT CREATE AN EXCEPTION TO THE BAR AGAINST RESTRAINTS ON ALIENATION EITHER EXPRESSLY OR BY CLEAR IMPLICATION.

"The American courts hold that a condition of limitation in a conveyance or devise in fee to the effect that a grantee or devisee is not to alienate except with the consent of some other person is void." *See Durbin v. Durbin*, 106 Ohio App. 155, 159 (3rd Dist. 1957) (quotation omitted). "An unlimited right of disposition is the essence of an estate in fee simple, and the law of Ohio is fairly well settled that any attempt to restrict the right of the holder to alienate his interest is null and void." *Id.* (quotation omitted). While the legislature may create exceptions allowing for the "restraint on the use, management, or alienation of private property" any such statute "should not be extended to include limitations not clearly described therein." *Symmes Twp. Bd. of Trs. v. Smyth*, 87 Ohio St. 3d 549, 554 (2000).

Revised Code § 164.26(A) provides:

> The director of the Ohio public works commission shall establish policies related to the need for long-term ownership, or long-term control through a lease or the purchase of an easement, of real property that is the subject of an application for a grant under sections 164.20 to 164.27 of the Revised Code and establish requirements for documentation to be submitted by grant applicants that is necessary for the proper administration of this division. The policies **shall provide for proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements established under this division.**

R.C. § 164.26(A) (emphasis added).

The statute anticipates that grant recipients may alienate property purchased with grant funds and imposes specified monetary consequences for grant recipients who chose to surrender ownership or control of property purchased with grant funds. Directing OPWC to adopt policies providing for long-term ownership or control that expressly provide for money damages in the event of noncompliance does not constitute either an express or unmistakably implied intent to set aside public policy barring restraints on alienation. There is simply no statutory language which would authorize enforcing the long-term ownership or control

policies through equitable means, such as enjoining transfers made in contradiction of alienation restraint.

In fact, when the legislature wanted to authorize equitable enforcement of contractual obligations relating to the Clean Ohio Program (or combinations of legal and equitable relief) it did so explicitly. *See* R.C. § 164.09(F)(6) (stating that any contract under which bonds were issued relating to the Clean Ohio program could be enforced "by mandamus, suit in equity, action at law, or any combination of the foregoing"). The General Assembly's decision to allow for both equitable and legal relief in R.C. § 164.09(F)(6) while allowing for only specific legal remedies in R.C. § 164.26(A) must be given effect. *See State v. Maxwell,* 95 Ohio St. 3d 254, 258 (2002) (holding statute's requirement for knowledge in one part and not in the other indicated the General Assembly's intent to impose strict liability with regard to the subsection that didn't include a knowledge requirement); *see also State ex rel. Hall v. Police Relief & Pension Fund*, 149 Ohio St. 367, 377 (1948) (applying rule of statutory construction *inclusio unius est exclusio alterius*).

II. OPWC DOES NOT HAVE DISCRETION TO ENFORCE THE CONTROL REQUIREMENTS THROUGH EQUITABLE MEANS GIVEN THE STATUTORY LANGUAGE.

It is undisputed that the word 'shall' is mandatory." *San Allen v. Buehrer*, 2014-Ohio-2071, ¶81 (8th Dist.). "The General Assembly is presumed to mean what it said." *Id.* Where a statute is clear on its face, it must be implemented as written. *Id.* Had the General Assembly intended to authorize OPWC to use equitable relief to enforce the ownership policies, it would not have mandated that OPWC's policies provide for grant repayment and liquidated damages without making mentioning equitable relief. *Id.* There is no language in the statute authorizing OPWC to enforce policies relating to long-term ownership or control through equitable means

such as injunctive relief, and granting such relief would be "in direct and clear violation" of the statute. *Id.* at ¶¶79-80, 82 (explicit statutory direction to state agency to take one approach precludes agency from adopting an alternative approach not provided for by statute).

"[I]t is the court's duty to give effect to the words used [in a statute] and to refrain from inserting words not used." *Whitaker v. M.T. Auto., Inc.*, 111 Ohio St. 3d 177, 181 (2006) (quotation omitted). In particular, a Court may not add to the remedies available under a statute simply because doing so might advance the purpose of the legislative scheme. *Wilson v. Burt*, Case Nos. 13096, 12389, 1994 Ohio App. LEXIS 6003, at *9 (2nd Dist. Dec. 7, 1994). The decision to limit the remedies available under a statute is reserved to the legislature, and the statute as passed by the General Assembly governs the relief available under the statute in question. *Sutton v. Tomco Machining, Inc.*, 129 Ohio St. 3d 153, 163 (2011). Where a claim is inextricably intertwined with a statutory framework created by a statute, a party is limited to the remedies and procedures provided in that statute. *See Franklin Cty. Law Enforcement Ass'n v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St. 3d 167, 171 (1991).

Further, an administrator of a state agency may not adopt a position, no matter how reasonable it might appear in light of legislative intent, if that position contradicts express legislative language. *Knutty v. Wallace*, 84 Ohio App. 3d 623, 627 (10th Dist. 1992). In particular, an administrator may not formulate new policy rather than administering the legislative policy as written. *Id.* "In the absence of clear legislative authorization, declarations of policy are denied administrative agencies and are reserved to the General Assembly." *Id.* (quotation omitted). Thus, "an administrative agency may not legislate by enacting rules which are in excess of legislative policy, or which conflict with the enabling statute." *P. H.*

English, Inc. v. Koster, 61 Ohio St. 2d 17, 19 (1980).

Revised Code § 164.26(A) anticipates that the policies requiring long-term ownership or control might be violated and sets forth a remedy inconsistent with injunctive relief and continued ownership of the property by the grant recipient. Specifically, the General Assembly specified that, in the event a Clean Ohio grant recipient fails to comply with the long-term ownership or control policies adopted by OPWC, the grant recipient should repay the grant and pay liquidated damages to OPWC. If the legislature's intent was for OPWC to be able to force grant recipients to retain ownership in perpetuity through injunctive relief, it would not have expressly required the director to address violations of the policies adopted under R.C. § 164.26(A) through grant repayment and liquidated damages.

OPWC cannot expand its options under the statute by including the option for equitable relief in a deed restriction it drafted. *See In re E. ProMedica Prof'l Bldg.*, Case Nos. 91AP-869 & 91AP-892, 1992 Ohio App. LEXIS 3627, at *9 (10th Dist. June 30, 1992) ("Administrative agencies are creatures of statute and, as such, may not expand upon the scope of their authority."); *see also Wee Care Child Ctr., Inc. v. Ohio Dep't of Job & Family Servs. (In re Clark)*, 127 Ohio St. 3d 1235, 1235 (2009) (holding local rule that purported to expand the authority of the chief justice beyond that contemplated by statute was invalid). The statute does not grant OPWC authority to seek equitable relief by including such a provision in the deed, and the deed language allowing for equitable relief cannot overcome the statutory provision which requires grant repayment and liquidated damages in the event of a violation of policies providing for long-term ownership or control.

DeRosa v. Parker, 2011-Ohio-6024 (7th Dist.), which held that deed restrictions are generally enforceable in equity, is inapplicable, as the question before the Court is not

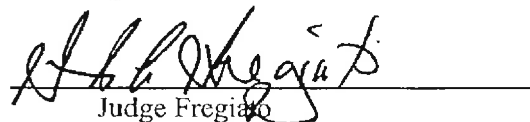
whether deed restrictions in general can be enforced through equitable relief but, rather, whether OPWC can use equitable means to enforce R.C. § 164.26(A) despite statutory language to the contrary. OPWC cannot avoid the statutory provision limiting it to monetary relief for violations of the policies regarding long term ownership and control by incorporating the policies into deed restrictions in contradiction of the statute, then seeking to enforce such deed restrictions in equity based upon cases such as *DeRosa*.

The general grant of authority under R.C. § 164.05(A)(9) allowing the director of OPWC to do all acts necessary or appropriate to carry out the chapter does not authorize the director to seek equitable relief for violations of policies requiring long-term ownership or control, where the statutory provision requiring the director to adopt such policies also mandates that the policies shall provide for monetary relief without any mention of equitable relief. The director may not determine that equitable relief is "necessary" to carry out the long-term ownership or control provisions in R.C. § 164.26(A), where the legislature has determined that such control requirements shall be enforced through monetary relief. Likewise, R.C. § 164.23, which provides that the director shall develop an application form for the Clean Ohio program, does not authorize the director to include provisions in the application forcing grant recipients to agree to equitable relief in contradiction of express statutory requirements.

III. CONCLUSION

Revised Code § 164.26(A) bars OPWC from seeking injunctive or other non-monetary relief in this case.

Dated: ___________, 2017.



Judge Fregiato

Appendix 3:
R.C. 164.26

R.C. § 164.26

164.26 Policies

Effective: September 15, 2014
Currentness

(A) The director of the Ohio public works commission shall establish policies related to the need for long-term ownership, or long-term control through a lease or the purchase of an easement, of real property that is the subject of an application for a grant under sections 164.20 to 164.27 of the Revised Code and establish requirements for documentation to be submitted by grant applicants that is necessary for the proper administration of this division. The policies shall provide for proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements established under this division.

The director also shall adopt policies delineating what constitutes administrative costs for purposes of division (F) of section 164.27 of the Revised Code.

(B) The Ohio public works commission shall administer sections 164.20 to 164.27 of the Revised Code and shall exercise any authority and use any procedures granted or established under sections 164.02 and 164.05 of the Revised Code that are necessary for that purpose.

CREDIT(S)

(2014 H 483, eff. 9-15-14; 2001 H 3, eff. 7-26-01)

Notes of Decisions (1)

R.C. § 164.26, OH ST § 164.26
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 4:
Ohio Constitution, Article VIII, Section 2o

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article VIII. Public Debt and Public Works (Refs & Annos)

OH Const. Art. VIII, § 2*o*

O Const VIII Sec. 2*o* Environmental and related conservation, preservation, and revitalization purposes

Currentness

(A) It is determined and confirmed that the environmental and related conservation, preservation, and revitalization purposes referred to in divisions (A)(1) and (2) of this section, and provisions for them, are proper public purposes of the state and local governmental entities and are necessary and appropriate means to improve the quality of life and the general and economic-well being of the people of this state; to better ensure the public health, safety, and welfare; to protect water and other natural resources; to provide for the conservation and preservation of natural and open areas and farmlands, including by making urban areas more desirable or suitable for development and revitalization; to control, prevent, minimize, clean up, or remediate certain contamination of or pollution from lands in the state and water contamination or pollution; to provide for safe and productive urban land use or reuse; to enhance the availability, public use, and enjoyment of natural areas and resources; and to create and preserve jobs and enhance employment opportunities. Those purposes are:

(1) Conservation purposes, meaning conservation and preservation of natural areas, open spaces, and farmlands and other lands devoted to agriculture, including by acquiring land or interests therein; provision of state and local park and recreation facilities, and other actions that permit and enhance the availability, public use, and enjoyment of natural areas and open spaces in Ohio; and land, forest, water, and other natural resource management projects;

(2) Revitalization purposes, meaning providing for and enabling the environmentally safe and productive development and use or reuse of publicly and privately owned lands, including those within urban areas, by the remediation or clean up, or planning and assessment for remediation or clean up, of contamination, or addressing, by clearance, land acquisition or assembly, infrastructure, or otherwise, that or other property conditions or circumstances that may be deleterious to the public health and safety and the environment and water and other natural resources, or that preclude or inhibit environmentally sound or economic use or reuse of the property.

(B) The General Assembly may provide by law, subject to the limitations of and in accordance with this section, for the issuance of bonds and other obligations of the state for the purpose of paying costs of projects implementing those purposes.

(1) Not more than two hundred million dollars principal amount of obligations issued under this section for conservation purposes may be outstanding in accordance with their terms at any one time. Not more than fifty million dollars principal amount of those obligations, plus the principal amount of those obligations that in any prior fiscal year could have been but were not issued within the fifty-million-dollar fiscal year limit, may be issued in any fiscal year. Those obligations shall be general obligations of the state and the full faith and credit, revenue, and taxing power of the state shall be pledged to the payment of debt service on them as it becomes due, all as provided in this section.

(2) Not more than two hundred million dollars principal amount of obligations issued under this section for revitalization purposes may be outstanding in accordance with their terms at any one time. Not more than fifty million dollars principal

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

amount of those obligations, plus the principal amount of those obligations that in any prior fiscal year could have been but were not issued within the fifty-million-dollar fiscal year limit, may be issued in any fiscal year. Those obligations shall not be general obligations of the state and the full faith and credit, revenue, and taxing power of the state shall not be pledged to the payment of debt service on them. Those obligations shall be secured by a pledge of all or such portion of designated revenues and receipts of the state as the General Assembly authorizes, including receipts from designated taxes or excises, other state revenues from sources other than state taxes or excises, such as from state enterprise activities, and payments for or related to those revitalization purposes made by or on behalf of local governmental entities, responsible parties, or others. The General Assembly shall provide by law for prohibitions or restrictions on the granting or lending of proceeds of obligations issued under division (B)(2) of this section to parties to pay costs of cleanup or remediation of contamination for which they are determined to be responsible.

(C) For purposes of the full and timely payment of debt service on state obligations authorized by this section, appropriate provision shall be made or authorized by law for bond retirement funds, for the sufficiency and appropriation of state excises, taxes, and revenues pledged to the debt service on the respective obligations, for which purpose, notwithstanding Section 22 of Article II of the Ohio Constitution, no further act of appropriation shall be necessary, and for covenants to continue the levy, collection, and application of sufficient state excises, taxes, and revenues to the extent needed for those purposes. Moneys referred to in Section 5a of Article XII of the Ohio Constitution may not be pledged or used for the payment of debt service on those obligations.

As used in this section, “debt service” means principal and interest and other accreted amounts payable on the obligations referred to.

(D)(1) Divisions (B) and (C) of this section shall be implemented in the manner and to the extent provided by the General Assembly by law, including provision for procedures for incurring, refunding, retiring, and evidencing state obligations issued pursuant to this section. Each state obligation issued pursuant to this section shall mature no later than the thirty-first day of December of the twenty-fifth calendar year after its issuance, except that obligations issued to refund or retire other obligations shall mature not later than the thirty-first day of December of the twenty-fifth calendar year after the year in which the original obligation to pay was issued or entered into.

(2) In the case of the issuance of state obligations under this section as bond anticipation notes, provision shall be made by law or in the bond or note proceedings for the establishment, and the maintenance during the period the notes are outstanding, of special funds into which there shall be paid, from the sources authorized for payment of the particular bonds anticipated, the amount that would have been sufficient to pay the principal that would have been payable on those bonds during that period if bonds maturing serially in each year over the maximum period of maturity referred to in division (D)(1) of this section had been issued without the prior issuance of the notes. Those special funds and investment income on them shall be used solely for the payment of principal of those notes or of the bonds anticipated.

(E) In addition to projects undertaken by the state, the state may participate or assist, by grants, loans, loan guarantees, or contributions, in the financing of projects for purposes referred to in this section that are undertaken by local governmental entities or by others, including, but not limited to, not-for-profit organizations, at the direction or authorization of local governmental entities. Obligations of the state issued under this section and the provisions for payment of debt service on them, including any payments by local governmental entities, are not subject to Sections 6 and 11 of Article XII of the Ohio Constitution. Those obligations, and obligations of local governmental entities issued for the public purposes referred to in this section, and provisions for payment of debt service on them, and the purposes and uses to which the proceeds of those state or local obligations, or moneys from other sources, are to be or may be applied, are not subject to Sections 4 and 6 of Article VIII of the Ohio Constitution.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(F) The powers and authority granted or confirmed by and under this section, and the determinations and confirmations in this section, are independent of, in addition to, and not in derogation of or a limitation on, powers, authority, determinations, or confirmations under laws, charters, ordinances, or resolutions, or by or under other provisions of the Ohio Constitution including, without limitation, Section 36 of Article II, Sections 2i, 2***l***, 2m, and 13 of Article VIII, and Articles X and XVIII, and do not impair any previously adopted provision of the Ohio Constitution or any law previously enacted by the General Assembly.

(G) Obligations issued under this section, their transfer, and the interest, interest equivalent, and other income or accreted amounts on them, including any profit made on their sale, exchange, or other disposition, shall at all times be free from taxation within the state.

CREDIT(S)

(2000 HJR 15, adopted eff. 11-7-00)

Const. Art. VIII, § 2***o***, OH CONST Art. VIII, § 2o
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 5:
R.C. 921.25

Baldwin's Ohio Revised Code Annotated
Title IX. Agriculture--Animals--Fences
Chapter 921. Pesticides (Refs & Annos)
Offenses and Remedies

R.C. § 921.25

921.25 Civil penalties; injunctive relief

Currentness

(A)(1) Whenever the director of agriculture has cause to believe that any person has violated, or is violating, this chapter or any rule or order adopted or issued under it, the director may conduct a hearing in accordance with Chapter 119. of the Revised Code to determine whether a violation has occurred. Except as otherwise provided in division (A)(3) of this section, the director shall assess a civil penalty against any person who violates this chapter or any rule or order adopted or issued under it in accordance with the schedule of civil penalties established in rules adopted under division (B) of section 921.16 of the Revised Code. Each day a violation continues constitutes a separate and distinct violation.

(2) In addition to assessing a civil penalty under division (A)(1) of this section, the director may deny, modify, suspend, revoke, or refuse to renew a license, permit, or registration issued under this chapter.

(3) The civil penalty authorized under division (A)(1) of this section may be assessed against the employer of a person who violates this chapter or any rule adopted or order issued under it rather than against the person.

Divisions (A)(1), (2), and (3) of this section do not affect, and shall not be construed as affecting, any other civil or criminal liability of the employee or the employer that may arise in consequence of the employer's or the employee's violation of this chapter or any other law.

(4) If the person or employer does not pay a civil penalty within a reasonable time after its assessment, the attorney general, upon the request of the director, shall bring a civil action to recover the amount of the penalty.

(B)(1) In lieu of conducting a hearing under division (A) of this section, the director may refer the violation to the attorney general who, except as otherwise provided in division (B)(2) of this section, may bring a civil action against any person who violates this chapter or any rule or order adopted or issued under it. If the court determines that a violation has occurred, the court shall order the person to pay a civil penalty for each violation, not to exceed five thousand dollars for a first violation and not to exceed ten thousand dollars for each subsequent violation. Each day a violation continues constitutes a separate and distinct violation.

(2) The civil action authorized under division (B)(1) of this section may be brought against the employer of a person who violates this chapter or any rule adopted or order issued under it rather than against the person.

Divisions (B)(1) and (2) of this section do not affect, and shall not be construed as affecting, any other civil or criminal liability of the employee or the employer that may arise in consequence of the employer's or employee's violation of this chapter or any other law.

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(C) In addition to the remedies provided and irrespective of whether or not there exists an adequate remedy at law, the director may apply to the court of common pleas for a temporary or permanent injunction or other appropriate relief against continued violation of this chapter.

(D) The remedies available to the director and to the attorney general under this chapter are cumulative and concurrent, and the exercise of one remedy by either the director or the attorney general, or by both, does not preclude or require the exercise of any other remedy by the director, the attorney general, or a prosecutor as defined in section 2935.01 of the Revised Code, except that no person shall pay both a civil penalty under division (A) of this section and a civil penalty under division (B) of this section for the same violation.

(E) If a person violates this chapter or rules adopted under it, both of the following apply:

(1) The person is liable for the violation.

(2) The employer of the person is liable for and may be convicted of the violation if the person was acting on behalf of the employer and was acting within the scope of the person's employment.

CREDIT(S)

(2002 S 217, § 3, eff. 7-1-04)

Notes of Decisions (2)

R.C. § 921.25, OH ST § 921.25
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 6:
R.C. 1345.07

Baldwin's Ohio Revised Code Annotated
Title XIII. Commercial Transactions (Refs & Annos)
Chapter 1345. Consumer Sales Practices (Refs & Annos)
Unfair, Deceptive, or Unconscionable Acts or Practices

R.C. § 1345.07

1345.07 Action for declaratory judgment or injunction by attorney general; appointment of master or receiver; limitation of action; termination of enforcement proceedings; civil penalty

Effective: April 6, 2017
Currentness

(A) If the attorney general, by the attorney general's own inquiries or as a result of complaints, has reasonable cause to believe that a supplier has engaged or is engaging in an act or practice that violates this chapter, and that the action would be in the public interest, the attorney general may bring any of the following:

(1) An action to obtain a declaratory judgment that the act or practice violates section 1345.02, 1345.03, or 1345.031 of the Revised Code;

(2)(a) An action, with notice as required by Civil Rule 65, to obtain a temporary restraining order, preliminary injunction, or permanent injunction to restrain the act or practice. If the attorney general shows by a preponderance of the evidence that the supplier has violated or is violating section 1345.02, 1345.03, or 1345.031 of the Revised Code, the court may issue a temporary restraining order, preliminary injunction, or permanent injunction to restrain and prevent the act or practice.

(b)(i) Except as provided in division (A)(2)(b)(ii) of this section, on motion of the attorney general, or on its own motion, the court may impose a civil penalty of not more than five thousand dollars for each day of violation of a temporary restraining order, preliminary injunction, or permanent injunction issued under this section, if the supplier received notice of the action. The civil penalties shall be paid as provided in division (G) of this section.

(ii) If the court issues under this section a temporary restraining order, preliminary injunction, or permanent injunction to restrain and prevent an act or practice that is a violation of section 1345.02 and division (A) of section 1349.81 of the Revised Code, on motion of the attorney general, or on its own motion, the court may impose a civil penalty of not less than five thousand dollars and not more than fifteen thousand dollars for each day of violation of the temporary restraining order, preliminary injunction, or permanent injunction, if the supplier received notice of the action. The civil penalties shall be paid as provided in division (G) of this section.

(c) Upon the commencement of an action under division (A)(2) of this section against a supplier who operates under a license, permit, certificate, commission, or other authorization issued by the supreme court or by a board, commission, department, division, or other agency of this state, the attorney general shall immediately notify the supreme court or agency that such an action has been commenced against the supplier.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(3) A class action under Civil Rule 23, as amended, on behalf of consumers who have engaged in consumer transactions in this state for damage caused by:

(a) An act or practice enumerated in division (B), (D), or (G) of section 1345.02 of the Revised Code;

(b) Violation of a rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based;

(c) An act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code.

(B) On motion of the attorney general and without bond, in the attorney general's action under this section, the court may make appropriate orders, including appointment of a referee or a receiver, for sequestration of assets, to reimburse consumers found to have been damaged, to carry out a transaction in accordance with a consumer's reasonable expectations, to strike or limit the application of unconscionable clauses of contracts so as to avoid an unconscionable result, or to grant other appropriate relief. The court may assess the expenses of a referee or receiver against the supplier.

(C) Any moneys or property recovered by the attorney general in an action under this section that cannot with due diligence within five years be restored by a referee to consumers shall be unclaimed funds reportable under Chapter 169. of the Revised Code.

(D) In addition to the other remedies provided in this section, if the violation is an act or practice that was declared to be unfair, deceptive, or unconscionable by rule adopted pursuant to division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based occurred or an act or practice that was determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the court's determination was made available for public inspection pursuant to division (A)(3) of section 1345.05 of the Revised Code, the attorney general may request and the court may impose a civil penalty of not more than twenty-five thousand dollars against the supplier. The civil penalties shall be paid as provided in division (G) of this section.

(E) No action may be brought by the attorney general under this section to recover for a transaction more than two years after the occurrence of a violation.

(F) If a court determines that provision has been made for reimbursement or other appropriate corrective action, insofar as practicable, with respect to all consumers damaged by a violation, or in any other appropriate case, the attorney general, with court approval, may terminate enforcement proceedings brought by the attorney general upon acceptance of an assurance from the supplier of voluntary compliance with Chapter 1345. of the Revised Code, with respect to the alleged violation. The assurance shall be filed with the court and entered as a consent judgment. Except as provided in division (A) of section 1345.10 of the Revised Code, a consent judgment is not evidence of prior violation of such chapter. Disregard of the terms of a consent judgment entered upon an assurance shall be treated as a violation of an injunction issued under this section.

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(G) Civil penalties ordered pursuant to divisions (A) and (D) of this section shall be paid as follows: one-fourth of the amount to the treasurer of the county in which the action is brought and three-fourths to the consumer protection enforcement fund created by section 1345.51 of the Revised Code.

(H) The remedies available to the attorney general under this section are cumulative and concurrent, and the exercise of one remedy by the attorney general does not preclude or require the exercise of any other remedy. The attorney general is not required to use any procedure set forth in section 1345.06 of the Revised Code prior to the exercise of any remedy set forth in this section.

CREDIT(S)

(2016 S 227, eff. 4-6-17; 2011 S 84, eff. 9-30-11; 2006 S 185, eff. 1-1-07; 1986 H 382, eff. 3-19-87; 1983 H 291; 1978 H 681; 1972 H 103)

Notes of Decisions (22)

R.C. § 1345.07, OH ST § 1345.07
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 7:
R.C. 1349.34

Baldwin's Ohio Revised Code Annotated
Title XIII. Commercial Transactions (Refs & Annos)
Chapter 1349. Consumer Protection (Refs & Annos)
Consumer Credit Mortgage Loans

R.C. § 1349.34

1349.34 Powers and duties of superintendent; fines

Currentness

(A) As often as the superintendent of financial institutions considers it necessary, the superintendent may examine a person's records regarding covered loans. The superintendent may recover from the person any costs incurred in connection with and reasonably related to the examination.

(B) The superintendent may investigate alleged failures to comply with sections 1349.25 to 1349.36 of the Revised Code, or any rule adopted thereunder, or complaints concerning any such failure to comply. In conducting any investigation under this section, the superintendent may compel, by subpoena, witnesses to testify in relation to any matter over which the superintendent has jurisdiction and may require the production of any book, record, or other document pertaining to that matter. If a person fails to file any statement or report, obey any subpoena, give testimony, produce any book, record, or other document as required by a subpoena, or permit photocopying of any book, record, or other document subpoenaed, the court of common pleas of any county in this state, upon application made to it by the superintendent, shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify therein.

(C) Whenever it appears to the superintendent that a person has engaged in, is engaging in, or is about to engage in, any activity constituting a failure to comply with section 1349.26 or 1349.27 of the Revised Code, the superintendent may make application to the court of common pleas of any county in this state for an order enjoining any such activity. Upon a showing by the superintendent that a person has engaged in, is engaging in, or is about to engage in, any activity constituting a failure to comply with section 1349.26 or 1349.27 of the Revised Code, the court shall grant an injunction, restraining order, or other appropriate relief.

(D) Whenever it appears to the superintendent that a person has engaged in, is engaging in, or is about to engage in, any activity that may constitute a failure to comply with section 1349.26 or 1349.27 of the Revised Code, the superintendent, after notice and a hearing conducted in accordance with Chapter 119. of the Revised Code, may issue a cease and desist order. Such an order shall be enforceable in any court of common pleas in this state.

(E) If a person that fails to comply with section 1349.26 or 1349.27 of the Revised Code is licensed, registered, or charted by, or otherwise operates under the authority of, the superintendent, the superintendent may, in accordance with Chapter 119. of the Revised Code, suspend, revoke, or deny the renewal of such license, registration, charter, or other authority.

(F) If a person fails to comply with section 1349.26 or 1349.27 of the Revised Code, the superintendent may, in accordance with Chapter 119. of the Revised Code, impose a fine of not more than two thousand five hundred dollars per compliance failure. If the person fails to comply two or more times, the superintendent may, in accordance with Chapter 119. of the Revised Code,

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

impose a fine of not more than five thousand dollars per compliance failure. If the person injured by the failure to comply is sixty-five years of age or older, the superintendent may double the amount of the fine.

An order to pay a fine pursuant to this division shall be enforceable in any court of common pleas in this state. All fines collected under this division shall be paid to the superintendent and shall be deposited by the superintendent into the state treasury to the credit of the consumer finance fund created under section 1321.21 of the Revised Code.

In determining the amount of a fine to be imposed under this division, the superintendent shall consider all of the following:

(1) The seriousness of the conduct;

(2) The person's good faith efforts to prevent the conduct;

(3) The person's history regarding violations and compliance with the superintendent's orders;

(4) The person's financial resources;

(5) Any other matter the superintendent considers appropriate in enforcing sections 1349.26 and 1349.27 of the Revised Code.

The superintendent shall not impose a fine under this division if the superintendent has imposed or will impose a fine under another provision of the Revised Code for the same conduct.

(G)(1) The superintendent may take any of the actions set forth in this section with respect to any person other than a federally chartered financial institution or its operating subsidiaries. Whenever it appears to the superintendent that a federally chartered financial institution or its operating subsidiary has engaged in, is engaging in, or is about to engage in, any activity that may constitute a failure to comply with section 1349.26 or 1349.27 of the Revised Code, the superintendent may present any evidence of such activity to the institution's appropriate federal regulatory authority, along with any recommendations regarding the imposition of specific sanctions.

(2) Any action taken by the superintendent under this section shall be commenced within three years after the alleged compliance failure.

(H) The remedies available to the superintendent under this section are cumulative and concurrent, and the exercise of one remedy by the superintendent does not preclude or require the exercise of any other remedy.

(I) The remedies available to the superintendent under this section or to the appropriate federal regulatory authority, the right of rescission described in section 1349.29 of the Revised Code, and the criminal penalty provided in section 1349.31 of the Revised Code shall constitute the sole and exclusive remedies for any failure to comply with section 1349.26 or 1349.27 of the Revised Code.

CREDIT(S)

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(2002 H 386, eff. 5-24-02)

R.C. § 1349.34, OH ST § 1349.34
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 8:
R.C. 1707.23

R.C. § 1707.23

1707.23 Enforcement powers; remedies cumulative and concurrent

Effective: July 1, 2009
Currentness

Whenever it appears to the division of securities, from its files, upon complaint, or otherwise, that any person has engaged in, is engaged in, or is about to engage in any practice declared to be illegal or prohibited by this chapter or rules adopted under this chapter by the division, or defined as fraudulent in this chapter or rules adopted under this chapter by the division, or any other deceptive scheme or practice in connection with the sale of securities, or acting as a dealer, a salesperson, an investment adviser, investment adviser representative, bureau of workers' compensation chief investment officer, or state retirement system investment officer or when the division believes it to be in the best interests of the public and necessary for the protection of investors, the division may do any of the following:

(A) Require any person to file with it, on such forms as it prescribes, an original or additional statement or report in writing, under oath or otherwise, as to any facts or circumstances concerning the issuance, sale, or offer for sale of securities within this state by the person, as to the person's acts or practices as a dealer, a salesperson, an investment adviser, investment adviser representative, bureau of workers' compensation chief investment officer, or state retirement system investment officer within this state, and as to other information as it deems material or relevant thereto;

(B) Examine any investment adviser, investment adviser representative, state retirement system investment officer, bureau of workers' compensation chief investment officer, or any seller, dealer, salesperson, or issuer of any securities, and any of their agents, employees, partners, officers, directors, members, or shareholders, wherever located, under oath; and examine and produce records, books, documents, accounts, and papers as the division deems material or relevant to the inquiry;

(C) Require the attendance of witnesses, and the production of books, records, and papers, as are required either by the division or by any party to a hearing before the division, and for that purpose issue a subpoena for any witness, or a subpoena duces tecum to compel the production of any books, records, or papers. The subpoena shall be served by personal service or by certified mail, return receipt requested. If the subpoena is returned because of inability to deliver, or if no return is received within thirty days of the date of mailing, the subpoena may be served by ordinary mail. If no return of ordinary mail is received within thirty days after the date of mailing, service shall be deemed to have been made. If the subpoena is returned because of inability to deliver, the division may designate a person or persons to effect either personal or residence service upon the witness. The person designated to effect personal or residence service under this division may be the sheriff of the county in which the witness resides or may be found or any other duly designated person. The fees and mileage of the person serving the subpoena shall be the same as those allowed by the courts of common pleas in criminal cases, and shall be paid from the funds of the division. Fees and mileage for the witness shall be determined under section 119.094 of the Revised Code, and shall be paid from the funds of the division upon request of the witness following the hearing.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(D) Initiate criminal proceedings under section 1707.042 or 1707.44 of the Revised Code or rules adopted under those sections by the division by laying before the prosecuting attorney of the proper county any evidence of criminality which comes to its knowledge; and in the event of the neglect or refusal of the prosecuting attorney to prosecute such violations, or at the request of the prosecuting attorney, the division shall submit the evidence to the attorney general, who may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before such grand juries.

(E) Require any dealers immediately to furnish to the division copies of prospectuses, circulars, or advertisements respecting securities that they publish or generally distribute, or require any investment advisers immediately to furnish to the division copies of brochures, advertisements, publications, analyses, reports, or other writings that they publish or distribute;

(F) Require any dealers to mail to the division, prior to sale, notices of intention to sell, in respect to all securities which are not exempt under section 1707.02 of the Revised Code, or which are sold in transactions not exempt under section 1707.03 or 1707.04 of the Revised Code;

(G) Issue and cause to be served by certified mail upon all persons affected an order requiring the person or persons to cease and desist from the acts or practices appearing to the division to constitute violations of this chapter or rules adopted under this chapter by the division. The order shall state specifically the section or sections of this chapter or the rule or rules adopted under this chapter by the division that appear to the division to have been violated and the facts constituting the violation. If after the issuance of the order it appears to the division that any person or persons affected by the order have engaged in any act or practice from which the person or persons shall have been required, by the order, to cease and desist, the director of commerce may apply to the court of common pleas of any county for, and upon proof of the validity of the order of the division, the delivery of the order to the person or persons affected, and of the illegality and the continuation of the acts or practices that are the subject of the order, the court may grant an injunction implementing the order of the division.

(H) Issue and initiate contempt proceedings in this state regarding subpoenas and subpoenas duces tecum at the request of the securities administrator of another state, if it appears to the division that the activities for which the information is sought would violate this chapter if the activities had occurred in this state.

(I) The remedies provided by this section are cumulative and concurrent with any other remedy provided in this chapter, and the exercise of one remedy does not preclude or require the exercise of any other remedy.

CREDIT(S)

(2008 H 525, eff. 7-1-09; 2005 H 66, eff. 9-29-05; 2004 S 133, eff. 9-15-04; 2003 H 7, eff. 9-16-03; 2001 S 32, § 3, eff. 10-8-01; 2001 S 32, § 1, eff. 10-8-01; 2000 H 551, eff. 10-5-01; 1998 H 695, eff. 3-18-99; 1984 S 310, eff. 4-11-85; 1982 H 822; 1978 S 139; 125 v 903; 1953 H 1; GC 8624-28)

Notes of Decisions (13)

R.C. § 1707.23, OH ST § 1707.23
Current through File 30 of the 133rd General Assembly (2019-2020).

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 9:
R.C. 1707.261

Baldwin's Ohio Revised Code Annotated
Title XVII. Corporations--Partnerships (Refs & Annos)
Chapter 1707. Securities (Refs & Annos)
Powers of Division of Securities

R.C. § 1707.261

1707.261 Restitution or rescission

Currentness

(A) If a court of common pleas grants an injunction pursuant to section 1707.26 of the Revised Code, after consultation with the attorney general the director of commerce may request that court to order the defendant or defendants that are subject to the injunction to make restitution or rescission to any purchaser or holder of securities damaged by the defendant's or defendants' violation of any provision of sections 1707.01 to 1707.45 of the Revised Code.

(B) If the court of common pleas is satisfied with the sufficiency of the director's request for restitution or rescission under division (A) of this section and with the sufficiency of the proof of a substantial violation of any provision of sections 1707.01 to 1707.45 of the Revised Code, or of the use of any act, practice, or transaction declared to be illegal or prohibited or defined as fraudulent by those sections or rules adopted under those sections by the division of securities, to the material prejudice of a purchaser or holder of securities, the court may order the defendant or defendants subject to the injunction to make restitution or rescission to any purchaser or holder of securities damaged by the defendant's or defendants' violation of sections 1707.01 to 1707.45 of the Revised Code.

(C) A court order granting restitution or rescission based upon a request made pursuant to division (A) of this section shall meet the requirements of division (B) of this section and may not be based solely upon a final order issued by the division of securities pursuant to Chapter 119. of the Revised Code or upon an action to enforce a final order issued by the division pursuant to that chapter. Notwithstanding the foregoing provision, a request for restitution or rescission pursuant to division (A) of this section may concern the same acts, practices, or transactions that were, or may later be, the subject of a division of securities action for a violation of any provision of sections 1707.01 to 1707.45 of the Revised Code. If a request for restitution or rescission pursuant to division (A) of this section concerns the same acts, practices, or transactions that were the subject of a final order issued by the division of securities pursuant to Chapter 119. of the Revised Code, the court shall review the request in accordance with division (B) of this section, and the standard of review in section 119.12 of the Revised Code shall not apply to the request.

(D) No purchaser or holder of securities who is entitled to restitution or rescission under this section shall recover, pursuant to this section or any other proceeding, a total amount in excess of the person's purchase price for the securities sold in violation of sections 1707.01 to 1707.45 of the Revised Code.

(E)(1) If a court of common pleas grants an injunction pursuant to section 1707.26 of the Revised Code against any state retirement system investment officer, after consultation with the attorney general, the director of commerce may request that court to order the state retirement system investment officer or officers that are subject to the injunction to make restitution to the state retirement system damaged by the state retirement system investment officer's or officers' violation of any provision of sections 1707.01 to 1707.45 of the Revised Code.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(2) If the court of common pleas is satisfied with the sufficiency of the director's request for restitution under division (E)(1) of this section and with the sufficiency of the proof of a substantial violation of any provision of sections 1707.01 to 1707.45 of the Revised Code, or of the use of any act, practice, or transaction declared to be illegal or prohibited or defined as fraudulent by those sections or rules adopted under those sections by the division of securities, to the material prejudice of a state retirement system, the court may order the state retirement system investment officer or officers subject to the injunction to make restitution to the state retirement system damaged by the state retirement system investment officer's or officers' violation of sections 1707.01 to 1707.45 of the Revised Code. A request for restitution pursuant to division (E)(1) of this section may concern the same acts, practices, or transactions that were, or may later be, the subject of a division of securities action for a violation of any provision of section 1707.01 to 1707.45 of the Revised Code.

(F)(1) If a court of common pleas grants an injunction pursuant to section 1707.26 of the Revised Code against a bureau of workers' compensation chief investment officer, after consultation with the attorney general, the director of commerce may request that court to order the bureau of workers' compensation chief investment officer who is subject to the injunction to make restitution to the bureau of workers' compensation damaged by the bureau of workers' compensation chief investment officer's violation of any provision of sections 1707.01 to 1707.45 of the Revised Code.

(2) If the court of common pleas is satisfied with the sufficiency of the director's request for restitution under division (F)(1) of this section and with the sufficiency of the proof of a substantial violation of any provision of sections 1707.01 to 1707.45 of the Revised Code, or of the use of any act, practice, or transaction declared to be illegal or prohibited or defined as fraudulent by those sections or rules adopted under those sections by the division of securities, to the material prejudice of the bureau of workers' compensation, the court may order the bureau of workers' compensation chief investment officer subject to the injunction to make restitution to the bureau of workers' compensation damaged by the bureau of workers' compensation chief investment officer's violation of sections 1707.01 to 1707.45 of the Revised Code. A request for restitution pursuant to division (F)(1) of this section may concern the same acts, practices, or transactions that were, or may later be, the subject of a division of securities action for a violation of any provision of section 1707.01 to 1707.45 of the Revised Code.

CREDIT(S)

(2005 H 66, eff. 9-29-05; 2004 S 133, eff. 9-15-04; 2003 H 7, eff. 9-16-03)

R.C. § 1707.261, OH ST § 1707.261
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 10:
R.C. 3709.21

Baldwin's Ohio Revised Code Annotated
Title XXXVII. Health--Safety--Morals
Chapter 3709. Health Districts (Refs & Annos)
Orders and Regulations

R.C. § 3709.21

3709.21 Orders and regulations of board of general health district

Effective: September 29, 2011
Currentness

The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances. Such board may require that no human, animal, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch, or watercourse without a permit therefor having been secured from the board under such terms as the board requires. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded, and certified as are ordinances of municipal corporations and the record thereof shall be given in all courts the same effect as is given such ordinances, but the advertisements of such orders and regulations shall be by publication in a newspaper of general circulation within the district. Publication shall be made once a week for two consecutive weeks or as provided in section 7.16 of the Revised Code, and such orders and regulations shall take effect and be in force ten days from the date of the first publication. In cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, the board may declare such orders and regulations to be emergency measures, and such orders and regulations shall become effective immediately without such advertising, recording, and certifying.

CREDIT(S)

(2011 H 153, eff. 9-29-11; 1953 H 1, eff. 10-1-53; GC 1261-42)

Notes of Decisions (93)

R.C. § 3709.21, OH ST § 3709.21
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 11: R.C. 3901.221

Baldwin's Ohio Revised Code Annotated
Title XXXIX. Insurance (Refs & Annos)
Chapter 3901. Superintendent of Insurance (Refs & Annos)
Unfair and Deceptive Acts (Refs & Annos)

R.C. § 3901.221

3901.221 Cease and desist order; notice

Currentness

If a violation of section 3901.20 of the Revised Code has caused, is causing, or is about to cause substantial and material harm, the superintendent of insurance may issue an order that the person cease and desist from any activity violating such section. Notice of the order shall be mailed by certified mail, return receipt requested, or served in any manner provided in section 3901.04 of the Revised Code, immediately after its issuance by the superintendent to the person subject to the order and to all persons known to be involved in the violation. The superintendent may thereafter publicize or otherwise make known to all interested persons that the order has been issued.

The notice shall specify the particular act, omission, practice, or transaction that is subject to the cease and desist order and shall set a date, not more than fifteen days after the date of the cease-and-desist order, for a hearing on the continuation or revocation of the order. The person shall comply with the order immediately upon receipt of notice of the order. The superintendent may, upon the application of a party and for good cause shown, continue the hearing. Chapter 119. of the Revised Code applies to such hearings to the extent that that chapter does not conflict with the procedures set forth in this section. The superintendent shall, within fifteen days after objections are submitted to the hearing officer's report and recommendation, issue a final order either confirming or revoking the cease-and-desist order. The final order may be appealed as provided under section 119.12 of the Revised Code. The remedy under this section is cumulative and concurrent with the remedies available under section 3901.22 of the Revised Code and may be enforced by the attorney general at the request of the superintendent as provided in division (E) of that section.

CREDIT(S)

(1987 H 1, eff. 1-5-88)

R.C. § 3901.221, OH ST § 3901.221
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 12:
R.C. 3961.08

R.C. § 3961.08

3961.08 Violations; remedies

Currentness

(A) No person shall fail to comply with sections 3961.01 to 3961.09 of the Revised Code. If the superintendent of insurance determines that any person has violated sections 3961.01 to 3961.07 of the Revised Code, the superintendent may take one or more of the following actions:

(1) Assess a civil penalty in an amount not to exceed twenty-five thousand dollars per violation if the person knew or should have known of the violation;

(2) Assess administrative costs to cover the expenses incurred in the administrative action, including, but not limited to, expenses incurred in the investigation and hearing process. Costs collected under this division shall be paid into the state treasury to the credit of the department of insurance operating fund created in section 3901.021 of the Revised Code.

(3) Order corrective actions in lieu of or in addition to the other penalties described in this section, including, but not limited to, suspending civil penalties if a discount medical plan organization complies with the terms of the corrective action order;

(4) Order restitution to members.

(B) Before imposing a penalty under division (A) of this section, the superintendent shall give a discount medical plan organization notice and opportunity for hearing as described in Chapter 119. of the Revised Code to the extent that Chapter 119. of the Revised Code does not conflict with any of the following service requirements:

(1)(a) A notice of opportunity for hearing, a hearing officer's findings and recommendations, or any order issued by the superintendent under division (A) of this section shall be served by certified mail, return receipt requested, to the last known address of a discount medical plan organization. For purposes of division (B) of this section, an organization's last known address is the address listed on the organization's disclosures required under section 3961.04 of the Revised Code.

(b) If the certified mail envelope described in division (B)(1)(a) of this section is returned to the superintendent with an endorsement showing that service was refused or that the envelope was unclaimed, the notices, findings and recommendations, and orders described in division (B)(1)(a) of this section and all subsequent notices required under Chapter 119. of the Revised Code may be served by ordinary mail to the discount medical plan organization's last known address. The time period to request an administrative hearing described in Chapter 119. of the Revised Code shall begin to run from the date the ordinary mailing was sent. A certificate of mailing shall evidence any mailings sent by ordinary mail pursuant to this division and shall complete

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

service to the organization unless the ordinary mail envelope is returned to the superintendent with an endorsement showing failure of delivery.

(c) If service by ordinary mail as described in division (B)(1)(b) of this section fails, the superintendent may publish a summary of the substantive provisions of the notice, findings and recommendations, or orders described in division (B)(1)(a) of this section once a week for three consecutive weeks in a newspaper of general circulation in the county of the discount medical plan organization's last known address. The notice shall be considered served on the date of the third publication.

(d) Any notice required to be served under Chapter 119. of the Revised Code also shall be served upon the party's attorney by ordinary mail if the party's attorney has entered an appearance in the matter.

(e) In lieu of certified or ordinary mail or publication notice as described in divisions (B)(1)(a), (b), and (c) of this section, the superintendent may perfect service on a party by personal delivery of the notice by the superintendent's designee.

(f) Notices regarding the scheduling of hearings and all other notices not described in division (B)(1)(a) of this section shall be sent by ordinary mail to the party and the party's attorney.

(2) A subpoena or subpoena duces tecum from the superintendent or the superintendent's designee or attorney to a witness for appearance at a hearing, for the production of documents or other evidence, or for taking testimony for use at a hearing shall be served by certified mail, return receipt requested. The subpoenas described in this division shall be enforced in the manner described in section 119.09 of the Revised Code. Nothing in this division shall be construed to limit the superintendent's other statutory powers to issue subpoenas.

(C)(1) If a violation of sections 3961.01 to 3961.07 of the Revised Code has caused, is causing, or is about to cause substantial and material harm, the superintendent may issue a cease-and-desist order requiring a person to cease and desist from engaging in a violation.

(2) The superintendent shall, immediately after issuing an order pursuant to division (C)(1) of this section, serve notice of the order by certified mail, return receipt requested, or by any other manner described in division (B) of this section to the person subject to the order and all other persons involved in the violation. The notice shall specify the particular act, omission, practice, or transaction that is the subject of the order and set a date, not more than fifteen days after the date the order was issued, for a hearing on the continuation or revocation of the order. The person subject to the order shall comply with the order immediately upon receiving the order. After an order is issued pursuant to division (C)(1) of this section, the superintendent may publicize and notify all interested parties that a cease-and-desist order was issued.

(3) Upon application by the person subject to the order and for good cause, the superintendent may continue the hearing date described in division (C)(2) of this section. Chapter 119. of the Revised Code applies to the hearing on the order to the extent that the chapter does not conflict with the procedures described in this section. The superintendent shall, within fifteen days after objections are submitted concerning the hearing officer's report and recommendations, issue a final order either confirming or revoking the cease-and-desist order described in division (C)(1) of this section. The final order may be appealed as described in section 119.12 of the Revised Code.

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(4) The remedy described in division (C) of this section is cumulative and concurrent with other remedies available under this section.

(D) If the superintendent has reasonable cause to believe that an order issued pursuant to this section has been violated in whole or in part, the superintendent may request the attorney general to commence any appropriate action against the violator. In an action described in this division, a court may impose any of the following penalties:

(1) A civil penalty of not more than twenty-five thousand dollars per violation;

(2) Injunctive relief;

(3) Restitution;

(4) Any other appropriate relief.

(E) The superintendent shall deposit any penalties assessed under division (A)(1) or (D) of this section into the state treasury to the credit of the department of insurance operating fund created in section 3901.021 of the Revised Code.

CREDIT(S)

(2006 S 5, eff. 3-23-07)

R.C. § 3961.08, OH ST § 3961.08
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 13:
R.C. 4165.03

R.C. § 4165.03

4165.03 Injunction; damages

Currentness

(A)(1) A person who is likely to be damaged by a person who commits a deceptive trade practice that is listed in division (A) of section 4165.02 of the Revised Code may commence a civil action for injunctive relief against the other person, and the court of common pleas involved in that action may grant injunctive relief based on the principles of equity and on the terms that the court considers reasonable. Proof of monetary damage or loss of profits is not required in a civil action commenced under division (A)(1) of this section.

(2) A person who is injured by a person who commits a deceptive trade practice that is listed in division (A) of section 4165.02 of the Revised Code may commence a civil action to recover actual damages from the person who commits the deceptive trade practice.

(B) The court may award in accordance with this division reasonable attorney's fees to the prevailing party in either type of civil action authorized by division (A) of this section. An award of attorney's fees may be assessed against a plaintiff if the court finds that the plaintiff knew the action to be groundless. An award of attorney's fees may be assessed against a defendant if the court finds that the defendant has willfully engaged in a trade practice listed in division (A) of section 4165.02 of the Revised Code knowing it to be deceptive.

(C) The civil relief provided in this section is in addition to civil or criminal remedies otherwise available against the same conduct under the common law or other sections of the Revised Code.

CREDIT(S)

(1998 S 173, eff. 3-30-99; 1984 H 426, eff. 4-4-85; 1969 H 39)

Notes of Decisions (46)

R.C. § 4165.03, OH ST § 4165.03
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 14:
R.C. 4549.48

Baldwin's Ohio Revised Code Annotated
Title XLV. Motor Vehicles--Aeronautics--Watercraft
Chapter 4549. Motor Vehicle Crimes (Refs & Annos)
Odometer Rollback and Disclosure Act

R.C. § 4549.48

4549.48 Action for injunction; civil penalties

Currentness

(A) Whenever it appears that a person has violated, is violating, or is about to violate any provision of sections 4549.41 to 4549.46 of the Revised Code, the attorney general may bring an action in the court of common pleas to enjoin the violation. Upon a showing of a violation of sections 4549.41 to 4549.46 of the Revised Code, a temporary restraining order, preliminary injunction, or permanent injunction shall be granted without bond. The court may impose a penalty of not more than five thousand dollars for each day of violation of a temporary restraining order, preliminary injunction, or permanent injunction issued under this section. The court may issue an order requiring the reimbursement of a consumer for any loss that results from a violation of sections 4549.41 to 4549.46 of the Revised Code, for the recovery of any amounts for which a violator is liable pursuant to division (A) of section 4549.49 of the Revised Code, for the appointment of a referee or receiver, for the sequestration of assets, for the rescission of transfers of motor vehicles, or granting any other appropriate relief. The court may award the attorney general all costs together with all expenses of his investigation and reasonable attorneys' fees incurred in the prosecution of the action, which shall be deposited in the consumer protection enforcement fund created by section 1345.51 of the Revised Code.

(B) In addition to the remedies otherwise provided by this section, the attorney general may request and the court shall impose a civil penalty of not less than one thousand nor more than two thousand dollars for each violation. A violation of any provision of sections 4549.41 to 4549.46 of the Revised Code shall, for purposes of this section, constitute a separate violation with respect to each motor vehicle or unlawful device involved, except that the maximum civil penalty shall not exceed one hundred thousand dollars for any related series of violations by a person. Civil penalties ordered pursuant to this division shall be paid as follows: one-fourth of the amount to the treasurer of the county in which the action is brought; three-fourths to the consumer protection enforcement fund created by section 1345.51 of the Revised Code.

(C) The remedies prescribed by this section are cumulative and concurrent with any other remedy, and the existence or exercise of one remedy does not prevent the exercise of any other remedy.

CREDIT(S)

(1986 H 382, eff. 3-19-87; 1977 S 78)

Notes of Decisions (6)

R.C. § 4549.48, OH ST § 4549.48
Current through File 30 of the 133rd General Assembly (2019-2020).

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 15:
R.C. 4719.16

Baldwin's Ohio Revised Code Annotated
Title XLVII. Occupations--Professions (Refs & Annos)
Chapter 4719. Telephone Solicitors

R.C. § 4719.16

4719.16 Cumulative and concurrent powers, remedies, and penalties; burden of proof for exemptions

Currentness

(A) The powers, remedies, and penalties provided by sections 4719.11 to 4719.15 of the Revised Code are in addition to any other power, remedy, or penalty provided by law.

(B) The remedies and powers available to the attorney general under division (B) of section 4719.03 and sections 4719.11 to 4719.13 of the Revised Code are cumulative and concurrent, and the exercise of one remedy or power by the attorney general does not preclude or require the exercise of any other remedy or power. the attorney general is not required to use any procedure set forth in division (B) of section 4719.03 or section 4719.11 of the Revised Code prior to the exercise of a remedy or power set forth in section 4719.12 or 4719.13 of the Revised Code.

(C) In a civil proceeding or action in which a violation of a provision of sections 4719.01 to 4719.18 of the Revised Code is alleged, if the person who is alleged to have violated that provision claims that the person or the person's actions comes within an exemption in division (B) of section 4719.01 or division (H) of section 4719.07 of the Revised Code, the person has the burden of proving that the exemption applies to the person or the person's actions.

CREDIT(S)

(1996 S 214, eff. 12-5-96)

R.C. § 4719.16, OH ST § 4719.16
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

Appendix 16:
R.C. 4722.07

Baldwin's Ohio Revised Code Annotated
Title XLVII. Occupations--Professions (Refs & Annos)
Chapter 4722. Home Construction Service Law

R.C. § 4722.07

4722.07 Remedies available to attorney general

Effective: August 31, 2012
Currentness

(A) If the attorney general, by the attorney general's own inquiries or as a result of complaints, has reasonable cause to believe that a supplier has engaged or is engaging in an act or practice that violates this chapter, and that the action would be in the public interest, the attorney general may bring any of the following:

(1) An action to obtain a declaratory judgment that the act or practice violates this chapter;

(2)(a) An action, with notice as required by Civil Rule 65, to obtain a temporary restraining order, preliminary injunction, or permanent injunction to restrain the act or practice. If the attorney general shows by a preponderance of the evidence that the supplier has violated or is violating this chapter, the court may issue a temporary restraining order, preliminary injunction, or permanent injunction to restrain and prevent the act or practice.

(b) On motion of the attorney general, or on its own motion, the court may impose a civil penalty of not more than five thousand dollars for each day of violation of a temporary restraining order, preliminary injunction, or permanent injunction issued under this section, if the supplier received notice of the action. The civil penalties shall be paid as provided in division (G) of this section.

(c) Upon the commencement of an action under division (A)(2) of this section against a supplier who operates under a license, permit, certificate, commission, or other authorization issued by the supreme court or by a board, commission, department, division, or other agency of this state, the attorney general shall immediately notify the supreme court or agency that such an action has been commenced against the supplier.

(3) A class action under Civil Rule 23, as amended, on behalf of owners who have engaged in home construction service contracts in this state for damage caused by an act or practice described in this chapter.

(B) On motion of the attorney general and without bond, in the attorney general's action under this section, the court may make appropriate orders, including appointment of a referee or a receiver, for sequestration of assets, to reimburse owners found to have been damaged, to carry out a home construction service contract in accordance with an owner's reasonable expectations, to strike or limit the application of unconscionable clauses of contracts so as to avoid an unconscionable result, or to grant other appropriate relief. The court may assess the expenses of a referee or receiver against the supplier.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(C) Any moneys or property recovered by the attorney general in an action under this section that cannot with due diligence within five years be restored by a referee to owners shall be unclaimed funds reportable under Chapter 169. of the Revised Code.

(D) In addition to the other remedies provided in this section, the attorney general may request and the court may impose a civil penalty of not more than twenty-five thousand dollars against the supplier for each violation of an act or practice described in this chapter. The civil penalties shall be paid as provided in division (G) of this section.

(E) No action may be brought by the attorney general under this section to recover for a home construction service contract more than two years after the occurrence of a violation.

(F) If a court determines that provision has been made for reimbursement or other appropriate corrective action, insofar as practicable, with respect to all consumers damaged by a violation, or in any other appropriate case, the attorney general, with court approval, may terminate enforcement proceedings brought by the attorney general upon acceptance of an assurance from the supplier of voluntary compliance with this chapter, with respect to the alleged violation. The assurance shall be filed with the court and entered as a consent judgment. A consent judgment is not evidence of prior violation of such chapter. Disregard of the terms of a consent judgment entered upon an assurance shall be treated as a violation of an injunction issued under this section.

(G) Civil penalties ordered pursuant to divisions (A) or (D) of this section shall be paid as follows: one-fourth of the amount to the treasurer of the county in which the action is brought and three-fourths to the consumer protection enforcement fund created by section 1345.51 of the Revised Code.

(H) The remedies available to the attorney general under this section are cumulative and concurrent, and the exercise of one remedy by the attorney general does not preclude or require the exercise of any other remedy.

(I) In carrying out the attorney general's official duties, the attorney general shall not disclose publicly the identity of any supplier who is or was the subject of an investigation under this chapter or any facts developed during such an investigation unless those matters have become a matter of public record in enforcement proceedings, or the supplier who is the subject of the investigation gives written consent to public disclosure of those matters.

(J) The attorney general shall cooperate with state and local officials, officials of other states, and officials of the federal government in the administration of statutes comparable to this chapter.

CREDIT(S)

(2012 H 383, eff. 8-31-12)

R.C. § 4722.07, OH ST § 4722.07
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document © 2020 Thomson Reuters. No claim to original U.S. Government Works.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.