

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

REPLY BRIEF OF EAGLE CREEK FARM PROPERTIES, INC.

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PRELIMINARY STATEMENT

The entirety of Ohio Public Works Commission (“OPWC”) arguments is based upon the faulty premise that OPWC was party to an unrestricted “arms-length commercial transaction” with the Guernsey County Development Corporation (“Guernsey Corp.”). [See OPWC Br., p. 19]. To that end, OPWC believes it has unlimited choice in the food, meaning remedies, it may negotiate under the Clean Ohio Fund. It believes it can eat ice cream and also broccoli. [*Id.*, 30]. However, the General Assembly placed OPWC on a strict diet of liquidated damages and grant repayment. Thus, the OPWC is not choosing from multiple available items on a menu of assorted goodies but is strictly limited to the General Assembly’s strict dietary restrictions. Because the OPWC gorged itself on items outside its prescribed diet, the Court must immediately get the OPWC back on track by reversing the Seventh District’s judgment and opinion as to the enforceability of injunctive relief under the Clean Ohio Fund.

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. **Because there is a dispute about whether the General Assembly granted the OPWC the power to seek or impose injunctive remedies, the Court should construe that doubt strictly against the OPWC.**

At the outset, the Court could (and should) reverse the Seventh District’s decision and prevent the OPWC from using injunctive relief because there is clearly a dispute as to whether the General Assembly conferred this power on the OPWC. Any “doubt” about whether the

OPWC has the broad powers to (1) demand full restraints on alienation and (2) demand grantees' acquiescence to both legal and equitable relief must be resolved against the OPWC. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917). As a result, the Court should construe the OPWC's power in the most limited manner—OPWC is limited to the remedies the General Assembly enumerated.

B. The OPWC's power to "[d]o all other acts, enter into contracts, and execute all instruments necessary and appropriate" cannot enlarge the limited power of enforcement through only liquidated damages or grant repayment.

OPWC cannot utilize the language of "[d]o all other acts, enter into contracts, and execute all instruments necessary and appropriate" contained in R.C. 164.05(A)(9) to overcome the specific remedy language within R.C. 164.26. That particular statute does not give the OPWC unlimited power to create remedies for a grantee's violation of the Clean Ohio Fund's rules and regulations. It merely provides that the OPWC may enter into contracts or other instruments necessary to carry out the program and does not provide unlimited power to negotiate contract or instrument terms. It certainly did not give OPWC the power to require grantees accept both legal and equitable remedies for breach of the restraints on alienation.

Moreover, the OPWC's argument about the general provisions of R.C. 164.27 and R.C. 164.05 is precluded by R.C. 1.51. That provision of the Revised Code requires applying a specific statutory provision over a general provision if there is irreconcilable conflict between the two. Here, OPWC's arguments highlight the irreconcilable conflict: R.C. 164.26 (the specific statute addressing remedies for breach) limits enforcement remedies to liquidated damages and grant repayment and R.C. 164.27 and .05 (the general statutes) allegedly provide broad powers to create additional enforcement remedies. This conflict cannot be reconciled because one can only reconcile if the limitations within R.C. 164.26 are ignored. Breaches would be remedied solely through liquidated damages and grant repayment under R.C. 164.26. That same conduct would

be remedied through the expansive “legal and equitable” relief under R.C. 164.27 and .05. This disparate treatment is an irreconcilable conflict and as a result, R.C. 164.26’s remedial limitations must prevail. *State v. Sufronko*, 105 Ohio App.3d 504, 506, 664 N.E.2d 596, 597 (4th Dist.1995) (recognizing that an irreconcilable conflict exists when the same conduct is subject to different penalties or remedies under different statutes).

C. Nothing within the Revised Code conveys the OPWC the “traditional mode for enforcing” deed restrictions; instead, the General Assembly enumerated two modes for enforcement—liquidated damages and grant repayment.

OPWC cannot resort to the traditional common law methods for enforcing deed restrictions or other restrictive covenants because the OPWC is a creature of limited power and cannot seek to expand its power through an argument about implicit authority. [*See Eagle Creek’s Merit Br.*, § I(B)(2)]. Private parties, or even administrative agencies with broader remedial power, are permitted to negotiate deed restrictions or other restrictive covenants and maintain the traditional methods for enforcing those restrictions or covenants. However, the General Assembly explicitly told the OPWC that it was limited to two remedies. Therefore, the OPWC cannot (1) negotiate the inclusion of additional remedies within the parties’ contracts nor (2) use traditional common law remedies which, themselves, exceed the OPWC’s enforcement authority.

D. If liquidated damages and injunctive relief are separate, complementary remedies, as contended by OPWC, then the General Assembly was aware of that fact, yet chose to restrict the OPWC to liquidated damages and grant repayment.

If OPWC is correct in saying liquidated damages and injunctive relief complement one another and do not exclude one another, then the General Assembly knew this and by intentionally limited to the OPWC through specific enumeration. If these specific remedies were to not preclude use of other non-monetary relief, then the General Assembly would have stated

as much. Yet, it chose not to do that with the Clean Ohio Fund, even when it had done so with other statutes. [See Eagle Creek’s Merit Br., pp. 15-16 (detailing statutes where the General Assembly used language showing its intent to not limit an executive or administrative agency’s remedial powers)].

The General Assembly’s ability to provide broader remedial powers and the fact it has done so with other statutes precludes OPWC from arguing about whether enforcing deed restrictions under the Clean Ohio Fund is a matter of common law or a creature of statute. The OPWC is a creature of statute and its powers are derived solely from statute. Thus, it must act within its statutory powers and cannot seek refuge under common law. Further, even if common law were potentially available to the OPWC, the General Assembly precluded such a power grab by (1) limiting remedies and (2) not referencing the OPWC’s right to seek common law remedies.

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. **The OPWC is not free to create whatever restraints on alienation that it deems appropriate because the General Assembly limited its power to seek or impose liquidated damages or grant repayment.**

Each of OPWC’s arguments about the viability and enforceability of restraints on alienation assumes the OPWC is free to impose such restrictions. While the OPWC could, in theory, be permitted to impose restraints on alienation to promote long-term ownership of property obtained under the Clean Ohio Fund, OPWC is not free to couple those restraints with the ability to seek injunctive relief. The General Assembly explicitly limited the available remedies to liquidated damages and grant repayment.

The public-policy exception discussed at page 17 of OPWC’s brief indeed applies to this case. As acknowledged by OPWC, if a restraint violates a statute, in any respect, then the restraint “may be declared void as against public policy[.]” [OPWC’s Br, p. 17]. As detailed above and within Appellants’ merit briefs, the OPWC’s coupling of the restraints at issue with equitable relief violates R.C. 164.26. As a result, the restraint must be invalidated because it contains an enforcement mechanism which Ohio law does not authorize.

Also, the OPWC cannot use the three portions of the Restatement it cites within its brief to expand its power because (1) only the General Assembly is permitted to dictate the OPWC’s authority and (2) Eagle Creek could not locate a single Ohio court that cited any of the three Restatement provisions. Thus, these Restatement provisions do not apply to the issues before this Court.

Finally, the OPWC did not enter the transaction with Guernsey Corp. as some arms-length seller. The General Assembly is the only body which can expand the remedial framework for violations of negotiated restraints. The General Assembly has not yet done so and as a result, the OPWC’s restraints coupled with the equitable relief enforcement mechanism must be deemed invalid.

- B. ***Ohio Society for Crippled Children* is distinguishable because (1) it did not involve an administrative agency with limited legal authority, (2) it involved a private transaction creating a charitable trust and (3) the testator in that case was free to place within his will whatever restrictions he desired, including those creating a private trust.**

OPWC spends a great deal of time explaining why it believes *Ohio Soc. for Crippled Children & Adults, Inc. v. McElroy*, 175 Ohio St. 49, 191 N.E.2d 543 (1963) gives it the authority to exceed its enumerated powers. However, upon examination, that case does not condone OPWC’s overreach:

First, *Ohio Society for Crippled Children* did not involve an administrative agency or the issue of an administrative agency's limited powers. Instead, it involved the question of whether a private citizen-testator is permitted to create a private trust through his will. *Ohio Soc. for Crippled Children & Adults, Inc*, 175 Ohio St. at 50. The Court's determination that the testator "express an intention" that his property be held by the charitable corporation and that the corporation was subject to a duty to use the property for a specific purpose and not sell or lease the property does not determine whether the OPWC may exceed its authority.

Second, the testator created a trustee and the charitable corporation was the trustee. *Id.* at 51-52. The Court permitted restrictions on the charitable corporation as trustee. *Id.* Here, the Guernsey Corp. did not acquire the real property at issue as trustee for the benefit of beneficiary or the public. Instead, it acquired the property under the guise of keeping the surface estate in its natural state—which it accomplished, and which is not threatened by the beneficial oil and gas exploration at issue.

Finally, the testator had full authority and discretion to set up his estate plan, including creating a charitable trust designed to benefit "crippled children." Here, the OPWC is not free to create any remedy it deems appropriate because the General Assembly limited the OPWC's remedies to liquidated damages and grant repayment.

CONCLUSION

The OPWC's actions in this case were unauthorized because the General Assembly limited the OPWC's authority to impose or seek liquidated damages or grant repayment. The OPWC's action in negotiating the purchase agreement and deed at issue cannot be condoned because to do so would expand the agency's authority without the General Assembly's consent. The Court should decline to condone such expansion of an agency's authority by reversing the

Seventh District's judgment and opinion as to the enforceability of injunctive relief under the Clean Ohio Fund.

Respectfully submitted,

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