

**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.

:

Case No. 2020-0031

:

:

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

:

:

:

:

---

**MERIT BRIEF OF AMICUS THE GUERNSEY COUNTY COMMUNITY  
DEVELOPMENT CORPORATION IN SUPPORT OF APPELLANTS**

---

Andrew P. Lycans (0077230) (COUNSEL OF RECORD)  
CRITCHFIELD, CRITCHFIELD & JOHNSTON, LTD.  
225 North Market Street, P.O. Box 599  
Wooster, OH 44691  
Phone: 330-264-4444; Fax: 330-263-9278  
Email: [lycans@ccj.com](mailto:lycans@ccj.com)

Manmeet S. Walia (PHV-6221-2020)  
1801 Smith Street, Suite 2000  
Houston, Texas 77002  
Phone: 713-375-9208  
Email: [mani.walia@siltstone.com](mailto:mani.walia@siltstone.com)

COUNSEL FOR APPELLANT SILTSTONE RESOURCES, LLC

Kevin L. Colosimo (0090002)  
Christopher W. Rogers (0091843) (COUNSEL OF RECORD)  
Daniel P. Craig (0088891)  
FROST BROWN TODD LLC  
501 Grant Street, Suite 800  
Pittsburgh, PA 15219  
Phone: 412-513-4300; Fax: 412-513-4299  
Email: kcolosimo@fbtlaw.com; crogers@fbtlaw.com; dcraig@fbtlaw.com

COUNSEL FOR APPELLANT AMERICAN ENERGY – UTICA MINERALS, LLC

Scott M. Zurakowski (0069040) (COUNSEL OF RECORD)  
William G. Williams (0013107)  
Matthew W. Onest (0087907)  
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., LPA  
4775 Munson Street N.W.  
P. O. Box 36963  
Canton, OH 44735-6963  
Phone: 330-497-0700; Fax: 330-497-4020  
Email: szurakowski@kwgd.com; bwilliams@kwgd.com; monest@kwgd.com

COUNSEL FOR APPELLANT EAGLE CREEK FARM PROPERTIES, INC.

Dave Yost (0056290)  
James Patterson (0024538) (COUNSEL OF RECORD)  
Rachel O. Huston (0074934)  
Christie Limbert (0090897)  
Cory Goe (0090500)  
Lidia Mowad (0097973)  
Joshua Nagy (0097099)  
Michelle Pfefferle (0081642)  
OHIO ATTORNEY GENERAL'S OFFICE  
30 East Broad Street, 26<sup>th</sup> Floor  
Columbus, OH 43215  
Phone: 614-728-0768; Fax: 866-909-3632  
Email: James.Patterson@ohioattorneygeneral.gov; Rachel.Huston@ohioattorneygeneral.gov;  
Christie.Limbert@ohioattorneygeneral.gov; Cory.Goe@ohioattorneygeneral.gov;  
Lidia.Mowad@ohioattorneygeneral.gov; Joshua.Nagy@ohioattorneygeneral.gov;  
Michelle.Pfefferle@ohioattorneygeneral.gov

COUNSEL FOR APPELLEE STATE OF OHIO, PUBLIC WORKS COMMISSION

Daniel C. Gibson (0080129)  
Kara H. Herrnstein (0088520)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215  
Phone: (614) 227-2300; Fax: (614) 227-2390

Zachary M. Simpson (0089862)  
GULFPORT ENERGY CORPORATION  
3001 Quail Springs Parkway  
Oklahoma City, OK 73134  
Phone: (405) 242-8807

COUNSEL FOR AMICUS CURIAE  
GULFPORT ENERGY CORPORATION

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES .....	v
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS AND STATEMENT OF CASE .....	1
A.    Facts .....	2
B.    Statement of Case .....	3
ARGUMENT .....	3
Proposition of Law No. 1:.....	3
Courts may not enforce a restrictive covenant in a deed barring the grantee from alienating the property without the 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. ....	3
A.    Alienation restraints are contrary to public policy and the parties to a deed may not enforce such a restriction under the guise of contract law.....	3
B.    Statutes restricting the transfer of private property must expressly provide for such a result and are to be strictly construed. ....	5
Proposition of Law No. 2:.....	7
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. ....	7
Response to Proposition of Law No. 3: .....	8
The CDC takes no position as to Proposition of Law No. 3 other than to reiterate its argument, never addressed by the trial court, that the draconian liquidated damage clause is an improper penalty.....	8
CONCLUSION.....	8
CERTIFICATE OF SERVICE .....	9

**TABLE OF AUTHORITIES**

**Page**

**Cases**

*Anderson v. Cary*, 36 Ohio St. 506 (1881) ..... 3

*Automatic Sprinkler v. Kerr*, 11th Dist. Lake Case No. 11-017, 1986 WL 7307 ..... 4

*Baur v. United Foundation*, 9th Dist. Summit No. 15341, 1992 WL 98858..... 5

*Bragdon v. Carter*, 4th Dist. Scioto No. 17CA3791 2017-Ohio-8257 ..... 4

*City of Pepper Pike v. Landskroner*, 53 Ohio App. 2d 63, 76, 371 N.E.2d 579, 587 (8th  
Dist. 1977)..... 5

*Danopulas v. Am. Trading II, LLC*, 1st Dist. Hamilton No. C-150565 2016-Ohio-5014 ..... 5

*Fodor v. First Natl. Supermarkets, Inc.*, 63 Ohio St.3d 489, 492, 589 N.E.2d 17 (1992)..... 8

*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)..... 7

*Gay Union Corp. v. Wallace*, 112 F.2d 192, 201 (D.C. Cir. 1940) ..... 6

*Hamilton*, 104 Ohio App. 1, 7, 146 N.E.2d 615 (1957)..... 5

*Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 151, 735 N.E.2d 142  
(2000)..... 5

*In re Smeller*, 2007-Ohio-2563 (9th Dist.)..... 4

*Margolis v. Pagano*, 39 Ohio Misc.2d 1, 3, 528 N.E.2d 1331 (Clermont C.P. 1986)..... 4

*Ohio Soc. for Crippled Children & Adults, Inc. v. McElroy*, 175 Ohio St. 49, 52, 191  
N.E.2d 543, 546 (1963)..... 4

*Robinson v. Swing*, 70 Ohio App. 83, 36 N.E.2d 880 (1st Dist. 1939)..... 5

*State ex rel. Moore Oil Co. v. Dauben*, 99 Ohio St. 406, 411, 124 N.E. 232, 233 (1919) ..... 5

*Symmes Twp. Bd. of Trs. v. Smyth*, 87 Ohio St.3d 549, 554 2000-Ohio-470 ..... 5

**Statutes**

R.C. § 164.05(A)(9) ..... 6  
R.C. § 1.49 ..... 7  
R.C. §§ 164.26(B)..... 6  
R.C. Chapter 1923..... 8  
Revised Code § 164.26(A)..... 6, 7

## **PRELIMINARY STATEMENT**

While the Guernsey County Development Corporation (“CDC”), did not file a notice of appeal at this point due to motion practice in the Court of Appeals, the CDC was a party to the underlying appeal and has an interest as it could be subject to liquidated damages if the deed restriction containing a liquidated damage provision is ultimately held applicable.

The CDC was founded as in 1996 by the Byesville Board of Trade with the purpose of promoting economic development the Village and in 2002 transitioned to Guernsey County CDC to better assist local communities around the county with economic recreational development. The CDC applies for and administers grants that provide a variety of services and opportunities to the residents of Guernsey County, including trails, little league baseball fields and area parks. The CDC is a non-profit corporation that is also very active in assisting veterans in Guernsey County.

## **STATEMENT OF FACTS AND STATEMENT OF CASE**

This case arises from the efforts of Siltstone Resources, LLC (“Siltstone”) to obtain oil and gas royalties generated from mineral rights it purchased from the Guernsey County Community Development Corporation (“CDC”), and the subsequent assertion of the Ohio Public Works Commission (“OPWC”) that the deed conveying the property to the CDC contained an enforceable restraint on alienation which prohibited the CDC from conveying any interest in the property without the OPWC’s consent.

In the interest of brevity, the CDC adopts and incorporates the facts and statement of the case of Appellant Siltstone and the arguments and ITS authorities in Propositions of Law No. 1 and 2. The arguments and authorities in Gulfport’s Amicus Brief as to Propositions of Law No. 1 and 2 only are also adopted and incorporated in the interest of brevity. It takes no position on

Proposition of Law No. 3 as it has always maintained that the liquidated damages clause in this case is an improper penalty.

**A. Facts**

On October 14, 2005, the CDC applied for a \$430,200 grant from the Clean Ohio Conservation Fund to purchase 228.485 acres in Belmont County (the “Property”). The entire Property had previously been strip mined all the way through, except for the fringes. When the CDC sought funding from the OPWC, reclamation activities under the supervision of the Ohio Department of Natural Resources were still ongoing. There are no structures on the Property.

The purpose of CDC’s application to the OPWC for grant monies from the Clean Ohio Conservation Fund, was to advance the Leatherwood Creek Riparian Project, a four-phase program to preserve the riparian corridor of Leatherwood Creek, starting in Belmont County and continuing as it flowed into Wills Creek in Cambridge, Ohio. The plan included repair of the corridor due to the build-up of silt from the coal mining, increase of the flood plain and re-establishment of the natural flora and fauna by the planting of 40,000 trees. The end goal was creation of a public park system with 24/7 access. *Id.* In its application to the OPWC for the Clean Ohio Conservation Fund, the CDC indicated its purpose to acquire this land was generally for wetland preservation or restoration, creation of natural areas protecting endangered species and to reforest land to improve water quality.

The CDC did not request the OPWC’s consent to sell mineral rights associated with the Property to Siltstone. The OPWC’s consent was not required because none of the CDC’s actions with regard to leasing the Property and selling the mineral interests interfered with the use of the premises as a green space park area. In fact, the CDC had used Clean Ohio grant funds to purchase other properties which had existing oil and gas wells on them and were subject to oil and gas leases

at the time of purchase; the OPWC was fully aware that it had previously funded the purchase of properties subject to oil and gas leases.

**B. Statement of Case**

Siltstone, AEUM, and Eagle Creek filed their notice of appeal to the Supreme Court of Ohio on January 7, 2020. On March 25, 2020, the Supreme Court of Ohio granted jurisdiction to hear the case and allowed the appeal. No cross-appeal was filed by the OPWC regarding the Court of Appeals holding that the use restriction did not prohibit subsurface drilling.

**ARGUMENT**

**Proposition of Law No. 1:**

**Courts may not enforce a restrictive covenant in a deed barring the grantee from alienating the property without the 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. Alienation restraints are contrary to public policy and the parties to a deed may not enforce such a restriction under the guise of contract law.**

This Court has long recognized that “it is of the very essence of an estate in fee simple absolute, that the owner ... may alien it ... at any and all times; and any attempt to evade or eliminate this element from a fee simple estate ... by deed ... must be declared void and of no force.” *Anderson v. Cary*, 36 Ohio St. 506 (1881). While “the owner of an absolute estate in fee simple may by deed ... transfer the whole upon conditions, the breach of which will terminate the estate granted,” the owner may not “fasten upon the estate devised a limitation repugnant to the estate.” *Id.* Thus, the owner of a property cannot “take from a fee simple estate its inherent alienable quality, and still transfer it as a fee simple.” *Id.* at 517. Therefore, “the devise of an absolute fee, with a clause restraining alienation ... is void as against public policy” because, in

this state, every absolute owner of real property has the power to control and dispose of such property, which is a matter of both sound principle and sound policy. *Id.* at 517.

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, 546 (1963). “Restrictions on the rights of alienation are simply of no effect.” *Bragdon v. Carter*, 4th Dist. Scioto No. 17CA3791 2017-Ohio-8257, ¶ 11 quoting *Margolis v. Pagano*, 39 Ohio Misc.2d 1, 3, 528 N.E.2d 1331 (Clermont C.P. 1986). *See also, In re Smeller*, 2007-Ohio-2563 (9th Dist.), ¶ 19 (creation of unalienable land contravenes public policy).

The Seventh District failed to appreciate the fundamental difference between use restrictions and alienation restrictions when it stated courts must enforce deed restrictions which are clear. “Ohio law generally adheres to the Restatement distinction between restraints on alienation and mere restrictions on the use of land.” *Automatic Sprinkler v. Kerr*, 11th Dist. Lake Case No. 11-017, 1986 WL 7307, at \*2 (June 30, 1986). A restraint on alienation acts to bar further conveyance, while a restriction on use limits how a property can be used. *Id.* Interestingly, the OPWC has not appealed the Court of Appeals affirmance of the trial court holding that surface drilling does not violate the use restriction in the Deed. (Court of Appeals Decision, ¶¶ 43, 46) Absent a cross appeal that finding arguable becomes the law of the case. Cases setting forth the law relating to the enforcement of use restrictions are simply irrelevant to cases dealing with the enforcement of alienation restrictions. A deed restriction which clearly requires the grantee of a fee simple estate to obtain a third-party’s permission to further convey the property does not

become enforceable merely because of its clarity. The public policy against such restrictions remain the same irrespective of their clarity.

**B. Statutes restricting the transfer of private property must expressly provide for such a result and are to be strictly construed.**

“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 2000-Ohio-470. This is true, even where the proposed extension appears to be “within the reason and spirit of the statute.” *City of Pepper Pike v. Landskroner*, 53 Ohio App. 2d 63, 76, 371 N.E.2d 579, 587 (8th Dist. 1977).

This rule of construction is in accord with the general rule that statutes in derogation of the common law are to be strictly construed. *Danopulas v. Am. Trading II, LLC*, 1st Dist. Hamilton No. C-150565 2016-Ohio-5014 at ¶ 15; *Robinson v. Swing*, 70 Ohio App. 83, 36 N.E.2d 880 (1st Dist. 1939); *Henley* at p. 151.

If there is any serious doubt as to the meaning of a statute bearing on alienation, it is the duty of the court to adopt any reasonable construction consistent with the owner’s free right of alienation. *Hamilton*, 104 Ohio App. 1, 7, 146 N.E.2d 615 (1957). “In the light of [this] principle any ... statutory restriction [affecting the alienability of property] must be specifically stated and

not implied.” *Id.* Further, if the language of the act in question casts doubt on the correctness of the construction that would restrict the property owner’s rights, this demonstrates that the statute does not specifically and explicitly allow the restriction. *See Gay Union Corp. v. Wallace*, 112 F.2d 192, 201 (D.C. Cir. 1940) (Groner, C.J., dissenting in part).

Revised Code § 164.26(A) 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 Conservation Fund. The OPWC contends that this constitutes a decision by the General Assembly that properties purchased with Clean Ohio Fund grant money should be rendered unalienable. The contention, however, 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).

The statute itself does not even clearly provide that all properties purchased with Clean Ohio Funds should be subject to long-term ownership or control requirements—only that policies should be established to determine when long-term ownership or control is needed. Further, if the statute renders such properties unalienable, how can grant recipients fail to comply with the long term-ownership or control requirements? The very fact that General Assembly anticipated that the long-term ownership requirements might not be complied with indicates that the properties in question remain alienable under the statute.

The OPWC’s contention that the General Assembly specifically curtailed the alienability of certain private properties in R.C. §§ 164.26(B) and 164.05(A)(9) is even more tenuous. Both of these statutes constitute a general grant of authority to the OPWC to administer the Clean Ohio

Fund. The contention that this grants the director carte blanche to adopt policies in derogation of the common law and to adopt alienation restrictions that were disallowed in English speaking countries 730 years ago is incredible.

R.C. § 1.49 provides that Public Policy can be considered in interpreting a statute. In the interest of brevity, the discussion of oil and gas policy in Gulfport's Amicus Brief is adopted and incorporated herein. (Gulfport Amicus Brief at pp 2-8).

**Proposition of Law No. 2:**

**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.**

As set forth in Proposition of Law No. 1, the OPWC could not contractually require grant recipients who took fee title to real property to obtain the OPWC's consent prior to further alienating the property. The common law does not allow for such alienation restraints and neither the Constitution nor the Ohio Revised Code expressly and unequivocally set aside this centuries old tenant of the common law.

Revised Code § 164.26(A) specifically states what should occur in the event entities "fail to comply with the long-term ownership or control requirements established under [the statute]." Namely, the policies adopted by the director "shall provide for proper liquidated damages and grant repayment." R.C. § 164.26(A). Despite this, the court of appeals held that the OPWC could also seek equitable relief.

"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). Thus, where the statute provides for monetary relief but not injunctive relief, the courts may not arbitrarily invoke such a remedy not provided for by the

statute. *Id.* at 154-155. Further, if a statute provides for relief in the form of monetary damages, “the existence of a remedy at law ... exclude[s] the option of injunctive relief.” *Fodor v. First Natl. Supermarkets, Inc.*, 63 Ohio St.3d 489, 492, 589 N.E.2d 17 (1992) (holding R.C. Chapter 1923 providing for forcible entry and detainer precluded an action for repossession by injunction).

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. If the legislature’s intent was for the OPWC to be able to force grant recipients to retain ownership in perpetuity through injunctive relief, the statute would have clearly expressed this.

**Response to Proposition of Law No. 3:**

**The CDC takes no position as to Proposition of Law No. 3 other than to reiterate its argument, never addressed by the trial court, that the draconian liquidated damage clause is an improper penalty.**

**CONCLUSION**

The Court of Appeals judgment should be reversed and the trial court’s judgment should be reinstated.

Respectfully submitted,

*/s/ Dale D. Cook*

Maribeth Meluch (0055903)

Dale D. Cook (0020707)

ISAAC WILES BURKHOLDER & TEETOR, LLC

Two Miranova Place, Suite 700

Columbus, Ohio 43215

Tel. (614) 221-2121

Fax (614) 365-9516

email: [mmeluch@isaacwiles.com](mailto:mmeluch@isaacwiles.com)

[dcook@isaacwiles.com](mailto:dcook@isaacwiles.com)

*Attorneys for Defendant-Appellant*

*The Guernsey County Community*

*Development Corporation*

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and accurate copy of the foregoing *Merit Brief of Amicus The Guernsey County Community Development Corporation in Support of Appellants* was served upon the following by electronic mail this 8<sup>th</sup> day of June, 2020:

James Patterson  
Rachel O. Huston  
Christie Limbert  
Assistant Attorney General  
rachel.huston@ohioattorneygeneral.gov; christie.limbert@ohioattorneygeneral.gov;  
james.patterson@ohioattorneygeneral.gov;  
*Attorneys for State of Ohio, Public Works Commission*

Scott M. Zurakowski  
William G. Williams  
Matthew W. Onest  
szurakowski@kwgd.com  
bwilliams@kwgd.com  
monest@kwgd.com  
*Attorneys for Eagle Creek Farm Properties, Inc.*

Kevin L. Colosimo  
Christopher W. Rogers  
Daniel P. Craig  
FROST BROWN TODD LLC  
kcolosimo@fbtlaw.com; crogers@fbtlaw.com; dpcraig@fbtlaw.com  
*Attorneys for American Energy – Utica Minerals, LLC*

Andrew P. Lycans (0077230)  
CRITCHFIELD, CRITCHFIELD & JOHNSTON, LTD.  
225 North Market Street, P.O. Box 599  
Wooster, OH 44691  
lycans@ccj.com  
*Attorney for Appellant Siltstone Resources, LLC*

Daniel C. Gibson (0080129)  
Kara H. Herrnstein (0088520)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215  
dgibson@bricker.com  
kherrnstein@bricker.com  
*Attorney for Amicus Curiae  
Gulfport Energy Corporation*

/s/ Dale D. Cook

Dale D. Cook (0020707)  
*Attorneys for Defendant-Appellant  
The Guernsey County Community  
Development Corporation*

4822-7318-3934.3