IN THE SUPREME COURT OF OHIO

SILTSTONE RESOURCES, LLC,	:	
	:	
Plaintiff/Appellant,	:	**Case No. 2020-0031**
	:	
v.	:	
	:	
STATE OF OHIO, PUBLIC WORKS COMMISSION,	:	**On Appeal from the Belmont County Court of Appeals, Seventh Appellate District, Case No. 18 BE 0042**
	:	
Defendant/Appellee	:	
	:	
v.	:	
	:	
PATRIOT LAND COMPANY, LLC, et al.,	:	
	:	
Crossclaim Defendants/Appellants.	:	

REPLY BRIEF OF AMICI CURIAE GULFPORT ENERGY CORPORATION, AXEBRIDGE ENERGY, LLC AND WHISPERING PINES, LLC IN SUPPORT OF APPELLANTS

Daniel C. Gibson (0080129)
Kara H. Herrnstein (0088520)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
dgibson@bricker.com
kherrnstein@bricker.com

Zachary M. Simpson (0089862)
Gulfport Energy Corporation
3001 Quail Springs Parkway
Oklahoma City, OK 73134
Phone: (405) 242-8807
zsimpson@gulfportenergy.com

Counsel for Amicus Curiae
Gulfport Energy Corporation

Andrew P. Lycans (0077230)
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 (PHV-6221-2020)
1801 Smith Street, Suite 2000
Houston, Texas 77002
Phone No: 713-375-9208
Email: mani.walia@siltstone.com

Counsel for Appellant Siltstone Resources

Erik A. Schramm, Sr. (0071690)
Kyle W. Bickford (0086520)
HANLON, ESTADT, MCCORMICK
& SCHRAMM CO., LPA
46457 National Road West
St. Clairsville, OH 43950
Telephone: 740/695-1444
Telefax: 740/695-1563
E-mail: hems@ohiovalleylaw.com

Counsel for Amicus Curiae Axebridge Energy, LLC

Craig G. Pelini (0019221)
Paul B. Ricard (0088207)
Pelini, Campbell & Williams, LLC
8040 Cleveland Ave., NW, Suite 400
North Canton, OH 44720
Telephone: (330) 305-6400
Facsimile: (330) 305-0042
E-mail: cgp@pelini-law.com
pbricard@pelini-law.com
Counsel for Amicus Curiae
Whispering Pines, LLC

Kevin L. Colosimo (0090002)
Christopher W. Rogers (0091843)
Daniel P. Craig (0088891)
FROST BROWN TODD LLC
501 Grant Street, Suite 800
Pittsburgh, PA 15219
Phone No.: 412-513-4300
kcolosimo@fbtlaw.com;
crogers@fbtlaw.com; dcraig@fbtlaw.com

Counsel For Appellant American Energy – Utica Minerals, LLC

Scott M. Zurakowski (0069040)
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 No.: 330-497-0700
szurakowski@kwgd.com;
bwilliams@kwgd.com; monest@kwgd.com

Counsel For Appellant Eagle Creek Farm Properties, Inc.

Dave Yost (0056290)
Benjamin M. Flowers (0095284)
(COUNSEL OF RECORD)
Samuel C. Peterson (0081432)
James Patterson (0024538)
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, 26thFloor
Columbus, OH 43215
Phone No.: 614-728-0768;
Fax No.: 866-909-3632 Email:
bflowers@ohioattorneygeneral.gov;
Samuel.Peterson@ohioattorneygeneral.gov;
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

The Commission asks this Court to engage in a wholesale redrafting project.

First, the Commission attempts to rewrite the Clean Ohio enabling statutes. It begins by inverting the means and ends of the Clean Ohio program. But "long-term ownership, or long-term control" of grant-funded properties is not, itself, the *public policy* of Clean Ohio. It is merely a mechanism for accomplishing the program's broader conservation, natural resource and economic development objectives. *See*, R.C. 164.26(A). The Commission then misconstrues the statute's statement of means, first as a legislative mandate for a deed restriction that "unambiguously forbids transferring any interests in the [Property]" in derogation of Ohio's pro-development oil and gas policy; then, alternatively, as a wholesale delegation of the legislative power to administratively abrogate public policy according to its discretion. Neither reading is supported by the plain text of the statute, let alone by constitutional principles.

Second, the Commission attempts to rewrite the Deed's enforcement language, as well as Amici's arguments about what it says. The Commission starts with mischaracterizing Amici's argument with respect to liquidated damages. Although injunction is not "necessarily mutually exclusive" with liquidated damages, it is here. The key is the nature of the injunction and the injury it serves to redress. A prohibitory injunction to prevent future conduct may still lie, even where liquidated damages suffice to remedy a past breach. But mandatory injunction to remedy a past breach—which is what the Commission demands when it seeks to unwind the allegedly offending transactions—cannot lie, when the legally adequate remedy of liquidated damages for those alleged breaches has already been stipulated in the parties' contract.

Then the Commission garbles Amici's argument concerning rescission, by declaring that "enforcement of a liquidated-damages clause does not constitute a rescission." CB at 33. Amici

never argued that it does. Rather, *grant repayment—i.e.*, the statutorily mandated return of the entire consideration given in exchange for the deed restriction that the Commission purports to be enforcing—unmistakably is a rescission, irrespective of the liquidated damages issue. That is the "equity" the General Assembly authorized the Commission—indeed, *required* it—to pursue. And the Commission does not dispute that, once an agreement has been rescinded, it cannot be enforced *via* prospective injunction. Whether or not the Commission finds the General Assembly's choice "surprising," (CB at 4), that is the choice it has made. And that should be the end of the matter.

ARGUMENT

Reply in Support of Proposition of Law No. 1:

The Commission acknowledges that Ohio has a longstanding public policy of encouraging oil and gas development. CB at 25. The Commission also concedes that the Alienation Restriction's comprehensive prohibition on all transfers is in conflict with this public policy. *Id*. The only question, then, is under what authority did the Commission enter into contractual terms with the CDC that plainly violate Ohio's public policy favoring oil and gas production? No such authority can be found in R.C. 164.26(A), which merely delegates to the Commission the administrative power to establish policies concerning ownership or control necessary for conservation. The Commission continues to confuse the purposes of Clean Ohio with the means of the program's administration. In doing so, it asks this Court to license its *ad hoc*, administrative abrogation of Ohio public policy in a manner that the General Assembly did not—and could not—authorize.

A. The Commission acknowledges that the Alienation Restriction and Ohio's oil and gas public policy are in conflict

The Commission responds to Amici's public policy argument with a straw man, arguing that Ohio's longstanding pro-development oil and gas policy does not "trump all other policies—

including conservation…." CB at 25. But Amici only argued that Ohio's oil and gas policy trumps the Alienation Restriction itself, which was never authorized by the Clean Ohio statutes to begin with and is not necessary in order to serve any other, overriding public policy interest, including conservation.

1. The existence of Ohio's public policy of encouraging oil and gas development is not in dispute. As the Commission acknowledges, "[i]t is true enough that Ohio has adopted any number of policies designed to support the extraction of oil and gas." *Id*. But it is even more than that. Ohio's public policy favoring oil and gas development has been stated "express[ly] and explicit[ly]," just as the Commission demands, both by this Court and by the General Assembly, with respect to private and public property. *Newbury Twp. Bd. of Twp. Trustees v. Lomak Petroleum*, 62 Ohio St. 3d 387, 389, 583 N.E.2d 302, 304 (1992) ("[i]t is the public policy of the state…"); R.C. 1509.71(A) ("[i]t is the policy of the state…").

Nonetheless, the Commission attempts to distinguish from the current dispute Amici's specific legislative and judicial examples of how Ohio's "express and explicit" public policy encouraging oil and gas development has been recognized and enforced. For example, the Commission observes that this Court has enforced Ohio public policy in disputes between parties to an oil and gas lease and in a dispute over regulatory authority under a since-repealed statute, neither of which is at issue here. CB at 25. But so what? Those cases still stand for the proposition that Ohio's policy is to encourage oil and gas development and that neither local authorities nor private parties are permitted to impede that development in the absence of a clearly expressed and overriding public policy interest. *See, e.g., Newbury* at 389 (noting that the statute at issue allowed for local health and safety restrictions).

Similarly, the Commission observes that the legislative acknowledgment of Ohio's oil and gas public policy with regard to state owned and controlled property is found in the Revised Code sections establishing the Oil and Gas Leasing Commission, which does not control here. CB at 25-26. But again, so what? The General Assembly's broad statement of Ohio's public policy explains the underlying rationale for creating the Leasing Commission as one means of effectuating it—the Leasing Commission's jurisdiction does not define the limits of Ohio's oil and gas public policy. As this Court has observed, "[t]he public welfare is safeguarded, not only by Constitutions, statutes, and judicial decisions, but by *sound and substantial public policies underlying all of them*.'" *Cincinnati City Sch. Dist. Bd. of Ed. v. Connors*, 132 Ohio St.3d 468, 473, 974 N.E.2d 78, 83, 2012-Ohio-2447, ¶16 (quoting *J.F. v. D.B.*, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740, ¶ 5, quoting *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney*, 95 Ohio St. 64, 115 N.E. 505 (1916), syllabus) (emphasis added).

2. The Commission also concedes that the Alienation Restriction is in direct conflict with Ohio public policy favoring oil and gas development. It could not be otherwise. The central premise of the Commission's theory of breach is that transfers of oil and gas interests in the Property for purposes of facilitating development and production of deep minerals beneath the Property violate the Alienation Restriction. Tr. 42, pp. 22-24. Further, while the argument that oil and gas development does not "trump" all other public policies is a straw man, the Commission's refutation of the straw man is an implicit acknowledgement that an absolute bar on all transfers of interests in the Property and Ohio's oil and gas public policy are irreconcilably in conflict, such that one must prevail over the other. As a result, the only question is whether Clean Ohio abrogated Ohio's energy development public policy with respect to grant-funded lands in a

manner that authorized the Commission to "unambiguously forbid[ ] transferring any interests in the [Property]." CB at 27. Despite the Commission's insistence otherwise, it did not.

B. The Commission is wrong that the Clean Ohio statutes justify the Alienation Restriction's bar to oil and gas development.

According to the Commission, R.C. 164.26(A) established a "more specific" and overriding public policy of "long-term ownership" with respect to grant-funded properties that mandated—or at least authorized—the Alienation Restriction. CB at 26. A plain reading of the statute says otherwise.

1. The statutory recognition of the "need for long term ownership, or long term control" (R.C. 164.26(A)) of grant funded properties is not even close to an "express and explicit statement[ ] of public policy," (CB at 17), let alone a legislative abrogation of Ohio's pre-existing and longstanding policy favoring oil and gas development.

First, the statute is not a statement of public policy at all. It is a statement about the means of accomplishing the public policy objectives of Clean Ohio by delegating to the Commission authority to adopt policies effectuating those means. Unlike the legislative and judicial statements of Ohio's pro-development oil and gas public policy ("it is the [public] policy of the state"), R.C. 164.26(A) does not declare that "it is the public policy of the state to preclude the transfer of any and all interests in Clean Ohio grant-funded properties." The statute merely acknowledges that for the grant program to achieve its conservation purposes, there may be a need for ownership or control requirements to be imposed. But those mechanisms are not themselves the policy of the law. "Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Muschany v. U.S.*, 324 U.S. 49, 66, 65 S.Ct. 442, 451, 89 L.Ed. 744 (1945).

Second, the Commission misconstrues the statutory language. The law does not say that the director is required to restrain the alienability of grant-funded properties. It says that the director is empowered to adopt policies "*related to the need* for long-term ownership, or long-term control…." R.C. 164.26(A) (emphasis added). Thus, to the extent that the Commission has been empowered to impose any long-term ownership or control restrictions on the Property, it is only where doing so is necessary to serve the conservation policy objectives of Clean Ohio. If conservation and the simultaneous development of oil and gas resources are not in conflict, then the Commission clearly has no power to inhibit the latter in the name of the former. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 567-568, 697 N.E.2d 198, 202 (1998) ("administrative agencies cannot dictate public policy" but "may make only 'subordinate' rules" that "plac[e] into effect a policy declared by the General Assembly in the statutes to be administered by the agency"). Further, any doubts regarding the scope of the Commission's power must be resolved against it. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 259, 773 N.E.2d 536, 545-546, 2002-Ohio-4172, ¶40 (2002). As Amici explain below, the Commission has established neither the existence of a conflict between two public policies, nor a need for the Alienation Restriction in aid of conservation.

Third, and perhaps most critically, the Commission simply was not—and could not have been—delegated the unlimited discretion to make that determination, *i.e.*, to "decide when a transfer restriction should be required as a condition of a Conservation Fund grant," despite the Commission's assertion that it is the *least* it has been empowered to do. CB at 23. Instead, any discretion the Commission was granted remains entirely constrained, not only by the public policy articulated by the General Assembly in the Clean Ohio statutes themselves, but also by the unabrogated public policies of the State writ large, including Ohio's oil and gas policy. *See,*

Williams v. Spitzer Autoworld Canton, L.L.C., 122 Ohio St.3d 546, 913 N.E.2d 410, 2009-Ohio-3554 (2009); *McFee v. Nursing Care Mgt. of Am. Inc.*, 126 Ohio St.3d 183, 190, 931 N.E.2d 1069, 1076, 2010-Ohio-2744, ¶31 (where the legislature declares apparently competing public policies, agency authority must be construed to accommodate both, if possible). In *Williams*, this Court invalidated a rule promulgated by the attorney general defining various acts and practices that violate the Consumer Sales Practices Act ("CSPA"), because the regulation conflicted with Ohio's public policy regarding the parol evidence rule. Although the attorney general expressly had been given authority to define violations of the act, this Court held that the particular regulation was invalid, because the legislature had never "delegated authority to the attorney general to abrogate the parol evidence rule." *Id*. at ¶18.

Similarly, here, the Commission has been empowered to adopt policies concerning long-term ownership or control of grant-funded properties. But that authority extends only to the promulgation of policies necessary to effectuate Clean Ohio's purposes, and even then, only to the extent such authority does not subvert existing Ohio public policy. Although the General Assembly *could* have abrogated Ohio's oil and gas public policy in the context of Clean Ohio, it "will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly supports such intention.'" *Williams* at ¶17 (quoting *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, at ¶ 29, quoting *State ex rel. Hunt v. Fronizer*, 77 Ohio St. 7, 16, 82 N.E. 518 (1907)). Here, as in *Williams*, because "[n]o plain and express language in the [statute] manifests the General Assembly's intent" to limit or abrogate Ohio's public policy favoring oil and gas development, R.C. 164.26(A) does not empower the Commission to do so on its own. Otherwise, to license the Commission in this

manner "would be tantamount to an unconstitutional delegation of legislative authority…." *Chambers* at 568.

Fourth, Clean Ohio's silence specifically with respect to oil and gas development on grant-funded properties is at least an implicit recognition by the General Assembly that Ohio's public policy on that subject was never understood to be in conflict with Clean Ohio to begin with—at least not uniformly so in a manner that would justify construing the Alienation Restriction as a matter of legislative mandate. *See, e.g.*, *Redman v. Ohio Dept. of Indus. Relations*, 75 Ohio St.3d 399, 662 N.E.2d 352 (1996) (rejecting a non-delegation challenge to a statutory grant of authority to the Ohio Division of Mines precisely because the legislature had specified what criteria should guide agency discretion when Ohio's public policy favoring coal development conflicted with Ohio's public policy encouraging oil and gas development). In other words, the General Assembly clearly did not conclude that oil and gas development and environmental conservation are incompatible. Here, the Commission has arrogated to itself unfettered discretionary authority that is predicated upon a false dichotomy that the General Assembly has never endorsed—*i.e.*, between the conservation objectives of Clean Ohio on the one hand, and on Ohio public policy in favor of responsible oil and gas development on the other. That fallacy is not a foundation upon which the Alienation Restriction may properly rest.

In the final analysis, it is only the Commission's unauthorized and *post hoc* adoption of draconian restrictions on all transfers of any interest in the Property whatsoever—not two competing public policies of the State—that yields the present conflict. In this circumstance, the legislatively codified, judicially recognized, and unabrogated public policy always prevails.

2. Even if Clean Ohio had abrogated Ohio policy favoring oil and gas development, the Alienation Restriction is not the authorized means. The Commission insists that "surely the People

would not have agreed to spend public funds on conserving lands if they had believed the State would be barred from protecting that expenditure *by placing restrictions on the funded land's transfer*" (CB at 18) (emphasis added)—but that is exactly what the People of Ohio did.

First, The Clean Ohio constitutional amendment itself was ratified by the People without any statement of purpose or delegation of authority suggesting that transfer restrictions in derogation of Ohio's oil and gas public policy were a permitted or mandated aspect of the program. *See*, Ohio Const. Art. VIII, Sec. 02o(F) (expressly declaring that the powers and authority granted "do not impair any…law previously enacted by the General Assembly"); Ohio Const. Art. VIII, Sec. 02q(A)(1) (authorizing conservation and preservation by means of "acquiring land or interests therein"). Moreover, as Amici observed, Clean Ohio's purposes also include enhancing the availability of natural resources and creating jobs. *Id*. Thus, it is far more plausible to suggest that, "surely the People would have would not have agreed to spend public funds on conserving lands if they had believed the State" would prohibit the safe and responsible development of oil and gas resources thousands of feet beneath grant-funded lands, despite such development having no adverse impact on conservation whatsoever.

Second, the Clean Ohio enabling statutes directly refute the Commission's position. Specifically, the plain language of the statute authorizes the Commission to address the "need for long-term ownership, or long-term control by the purchase of an easement or lease." R.C. 164.26(A). Not only does the statute not authorize (let alone mandate) absolute restraints on alienation, but it actually prescribes specific interests in land—easements and leases—that the General Assembly acknowledges would adequately serve the "long-term control" requirements necessary to achieve Clean Ohio's purposes. The distinction is not a mere formality. Both a lease and easement are property interests with respect to use and occupancy that do not implicate rights

to control alienation. "A lease is a contract by which an owner or rightful possessor of real property conveys the right to use and occupy the property," (65 Ohio Jur. 3d Landlord and Tenant, section 1) which does not preclude transfer of title, while "[t]he basic definition of an easement is that it is the grant of a use on the land of another." *Alban v. R.K. Co.*, 15 Ohio St.2d 229, 231, 239 N.E.2d 22, 24 (1968). The legislature expressly endorsed Clean Ohio funding for the acquisition of property interests that would give neither the grantee nor the Commission any control over transactions in the underlying fee. At a minimum, this demonstrates the General Assembly's own determination that, contrary to the Commission's assertions, an absolute restriction on transfers was not necessary to accomplish the authorized purposes.

Third, the Commission's analogy to a charitable trust is not persuasive. CB at 20 (citing *Ohio Society for Crippled Children & Adults, Inc. v. McElroy*, 175 Ohio St. 49 (1963)). To begin with, there is nothing in the Clean Ohio statutory language to suggest an intent of the legislature to endorse alienation restraints on grant-funded properties under the charitable trust exception. In addition, the rationale for the exception plainly does not apply here. *McElroy* makes clear that the reason for the exception is (1) to encourage the creation of charitable trusts—a purpose with which Clean Ohio is not concerned—and (2) because a court of equity can order a sale when necessary to serve the trust's purposes—an authority that does not adhere in the present circumstances.[1] *McElroy* at 52-53; *Brown v. First Presbyterian Church of Mt. Gilead*, 5th Dist. Morrow No. CA-

[1] The Commission's peculiar and unsupported suggestion that the Alienation Restriction can be modified by legislation, because it was entered into "pursuant to statute," is a misguided attempt to minimize the absolute nature of the restriction by falsely analogizing the legislature's ability to change the law with a court's equitable power to advance the purposes of a trust. CB at 20-21. While a restraint created *by* statute (*i.e.*, the statute itself imposes the restraint), can be changed by statute, a contractual restraint created *pursuant* to statute cannot be retroactively undone by mere statutory repeal.

586, 1981 WL 6458 (Oct. 23, 1981) (even a gift of property "for charitable purposes does not automatically create a charitable trust").

Even more, the principal concern of the charitable trust exception is the *use* of the property in accordance with the purposes of the trust. *Id.* at 52-54 (repeatedly emphasizing that the obligation to hold the property is in order to honor the trust's mandate regarding its use and operation); *Brown* at *3 (invalidating a no-sale clause in a charitable gift that did not ensure certainty of use). Where, as here, a land use restriction runs with the land, the rationale (and need) for also restricting alienation completely falls away. This is particularly true in the present case, since fulfillment of a charitable purpose typically is a unique feature of the ongoing administrative responsibilities of the trust *via* its use of trust funds (like running a school, church or a home for crippled children, *etc.*). *Id.* at 53 ("a trust may be established which contemplates the payment of the income of a certain fund to some charitable purpose forever" (quoting *Henshaw v. Flenniken* (1945), 183 Tenn. 232, 238, 191 S.W.2d 541, 544, 198 A.L.R. 1010)). Here, the grant money was given to aid in the one-time purchase of property for the purpose of preserving it—not for the operation of some continuing charitable or public enterprise funded indefinitely by a "donor's bounty [that] will be a perennial spring for generations." *Id.*

3. Finally, even if restraints on alienation were statutorily authorized in theory, there still is nothing in the record to demonstrate that *this* Alienation Restriction serves the conservation policy objectives of Clean Ohio in fact. As the Commission acknowledges, the general rule regarding restraints on alienation is that they must at least be reasonable. CB at 18. Specifically, such restraints must be reasonably tethered to the legitimate purposes that they ostensibly serve. Similarly, and as previously observed, "administrative agency rules are an administrative means for the accomplishment of a legislative end." *Caroll v. Dept. Admin. Servs.*, 10 Ohio App.3d 108,

110, 460 N.E.2d 704, 706 (10 Dist. 1983). If a rule "bears no reasonable relationship to the legislative purpose stated in the statute, the rule declares policy rather than dealing with administrative detail," and thereby exceeds the authority delegated to the agency. *Id.*

The Commission offers neither an argument nor a citation to record evidence showing how the Alienation Restriction advances the purposes of Clean Ohio. Instead, it baldly asserts that "by giving the [Commission] the power to veto any transfers, the Restriction empowers the Commission to ensure that the citizens of Ohio are getting the conservation they paid for." CB at 3. But how? Without the Use Restriction, the Alienation Restriction would accomplish nothing in terms of environmental conservation. The inability to transfer the Property does not preclude the owner from exploiting it gratuitously. And as the dissent below observed in this case, *with* the Use Restriction, which runs with the land and prevents uses of the Property that are inconsistent with the green-space, conservation purposes of Clean Ohio, the Alienation Restriction serves no independent purpose of its own. *See Siltstone* App. Opinion, (R. 32 at ¶¶ 75-77) (Robb, J., dissenting). A superfluous restraint—especially one that offends public policy—can never be reasonable.

* * * * *

The Alienation Restriction is not a means of fulfilling Clean Ohio's purposes; it is a means of aggrandizing the Commission's power beyond its constitutional limits in violation of Ohio public policy. Its "necessity" is not at all a function of legislative mandate, but of the Commission's own invention. It should be invalidated.

Reply in Support of Propositions of Law Nos. 2 and 3:

The Commission's arguments in support of its request for injunctive relief do not even address, much less refute, Amici's position. *First*, the Commission asserts that future-looking, prohibitory injunctions are not necessarily incompatible with liquidated damages for a past breach.

But mandatory injunctions, which the Commission seeks here, unquestionably are. *Second*, the Commission asserts that liquidated damages do not effectuate rescission. But the return of consideration paid *via* grant repayment, which is the relief in "equity" that the Commission is statutorily obligated to pursue in the event of a breach, indisputably does.

A. The Commission's request for mandatory injunction is incompatible with liquidated damages, even if a prohibitory injunction is not

In arguing for the complimentary nature of injunctive and liquidated damages remedies, the Commission fails to distinguish between mandatory injunction, which it has requested in this case, and prohibitory injunction, which it has not. As this Court has made clear, prohibitory injunctions prevent future injury by enforcing inaction, while mandatory injunctions remedy past injury by compelling action. *State ex rel. Gadell-Newton v. Husted*, 153 Ohio St.3d 225, 227, 103 N.E.3d 809, 2018-Ohio-1854, ¶10. The Commission has sought only the latter with respect to its enforcement of the Alienation Restriction. However, because damages—liquidated or otherwise—compensate past injury resulting from a completed act of breach, the availability of such relief precludes mandatory injunction, even if prohibitory injunction might otherwise still be possible. The distinction makes all the difference.

The Commission triumphantly cites to Amici's authority in *Mesarvey, Russell & Co. v. Boyer*, 10th Dist. Franklin No. 91AP-974, 1992 WL 185656, *5 (Jul. 30, 1992) for the proposition that "[e]quitable relief and damages are not necessarily mutually exclusive remedies," (CB at 32-33), even though *Mesarvey Russell* itself makes the critical distinction that the Commission's argument elides. The Tenth District immediately qualifies the foregoing statement by declaring, "[b]ut where damages will adequately compensate an injured party for a harm suffered, equitable relief is not appropriate." *Id*. And it goes on to explain that, because the parties stipulated in their contract that liquidated damages were adequate compensation for a breach of the non-solicitation

agreement, injunction was not available. *Id*. The court left open the possibility of prospective, prohibitory injunction only "as for MRC clients *not yet* solicited by or *not yet* served by defendant Boyer…." *Id*. (emphases added).

The Commission does not dispute that the Deed expressly renders liquidated damages legally adequate compensation for the already consummated, allegedly breaching transactions. CB at 29. Moreover, the record is clear that, with respect to the Commission's claim that various transfers of interests in the Property constitute a breach—*i.e.*, the only claims of breach sustained by the Seventh District and before this Court now[2]—it has sought only a *mandatory* injunction. To wit: The Commission "requests judgment…as follows: I. Injunctive or other equitable relief that: * * * c. Orders all individuals holding any kind of interest on the property to assign their interests back to the CDC; d. Orders the merger of surface and mineral rights on the Subject Property." Tr. 42, p. 32. That is, the Commission has asked for injunctive relief that compels action to cure a series of alleged breaches, despite having contractually agreed to a sum certain as legally adequate compensation for the same alleged breaches. Injunctive relief is not available to the Commission.

One additional observation is in order. The unavailability of mandatory injunction with respect to the transfers at issue only further reinforces the gratuitous nature of the Alienation Restriction. Having failed to allege, much less prove, that surface use violations ever occurred in contravention of Clean Ohio's "green space," conservation objectives, including by parties to the

[2] The Commission arguably sought prohibitory injunction for alleged, ongoing activity on the surface of the Property in breach of the Use Restriction. *See*, Tr. 42, p. 31. But no surface activity was ever alleged, much less proved, and so the Commission's claims for breach of the Use Restriction were dismissed, which was sustained below and is not before this Court on appeal. Nonetheless, such prohibitory injunctive relief would be precluded by statutorily mandated rescission in any event. *See* section B, *infra*.

allegedly offending transfers, the Commission is left only with the trivial pursuit of title transaction purity that has absolutely nothing to do with the "conservation and preservation of natural areas, open spaces, and farm lands" or the "public use, and enjoyment of natural areas and open spaces in Ohio…." Ohio Const. Art. VIII, Sec. 02o(A)(1).

B. Grant repayment constitutes rescission, which precludes prospective enforcement, irrespective of liquidated damages

The Commission responds to Amici's rescission argument with another straw man. While "the enforcement of a liquidated-damages clause does not constitute a rescission," the return of consideration paid in order to form a contract does. CB at 33. *See*, Brief of Amici Curiae at 11-13 (the return of consideration, including a grant award, constitutes rescission of an agreement and collecting authorities). The Commission does not dispute that the remedy of *grant repayment* is, indeed, rescissionary in nature. In fact, it has expressly acknowledged as much in related litigation, arguing that "rescission of the grant amount" is the only readily ascertainable component of the liquidated damages clause in an identical Clean Ohio deed enforcement provision. Brief of Commission, *Siltstone Services LLC v. The Guernsey County Community Development Corp.*, 5th Dist. Guernsey No. 19-CA-47, p. 33 (filed Jan. 27, 2020) (attached hereto as Exhibit A). *See*, *City of Rocky River v. State Emp. Rel. Bd.*, 39 Ohio St.3d 196, 206, 530 N.E.2d 1, 10 (1988) (referring to and considering what "the state admitted in its brief" in a different appeal to inform the Court's legal analysis of a related issue, despite the brief not being part of the record in the instant appeal).

And because it is beyond dispute that rescission is an equitable remedy, the Deed's reference to "equity" is properly understood as an endorsement of that relief, not injunction. *See*, Brief of Amici Curiae at 14. Moreover, the Commission does not quarrel with the principle that rescission precludes injunction, since a rescinded contract cannot be enforced prospectively. Instead, the Commission asserts that if Amici are correct, then it is entitled to make "a choice of

relief." CB at 33. But, as with the Commission's other arguments, this assertion is contrary to the plain, statutory text. R.C. 164.26(A) mandates that the Commission's policies "shall provide for proper liquidated damages and grant repayment" against grant recipients that breach the program's ownership or control requirements. Once again, the Commission perceives only the expansion of its own discretion in the statutory text, despite the General Assembly's clear and unqualified instructions.

Finally, the Commission's argument that the Alienation Restriction survives if it cannot be enforced by injunction has the analysis completely backward. CB at 33-34. The question of relief for a breach presupposes a valid and enforceable contractual provision. The validity of the Alienation Restriction does not depend upon *how* it may be enforced, but instead upon whether it comports with public policy in the first instance. Only if it does will the question of relief even arise. To conclude otherwise would be to hold that a wife may validly enter into a contract with a hitman to murder her husband in violation of public policy, so long as the hitman can "buy [his] way out of" (CB at 34) the obligation with liquidated damages, rather than be enjoined to follow through with the crime. Surely that is not the Commission's view of Ohio law.

CONCLUSION

Amici respectfully request that the Court reverse the judgment of the Seventh District.

Respectfully submitted,

/s Daniel C. Gibson
Daniel C. Gibson (0080129)
Kara H. Herrnstein (0088520)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
dgibson@bricker.com
kherrnstein@bricker.com

Zachary M. Simpson (0089862)
Gulfport Energy Corporation
3001 Quail Springs Parkway
Oklahoma City, OK 73134
Phone: (405) 242-8807
zsimpson@gulfportenergy.com

Counsel for Amicus Curiae
Gulfport Energy Corporation

/s Erik A. Schramm, Sr.
Erik A. Schramm, Sr. (0071690)
Kyle W. Bickford (0086520)
HANLON, ESTADT, MCCORMICK
& SCHRAMM CO., LPA
46457 National Road West
St. Clairsville, OH 43950
Telephone: 740/695-1444
Telefax: 740/695-1563
E-mail: hems@ohiovalleylaw.com

Counsel for Amicus Curiae
Axebridge Energy, LLC

/s Craig Pelini
Craig G. Pelini (0019221)
Paul B. Ricard (0088207)
Pelini, Campbell & Williams, LLC
8040 Cleveland Ave., NW, Suite 400
North Canton, OH 44720
Telephone: (330) 305-6400
Facsimile: (330) 305-0042
E-mail: cgp@pelini-law.com
pbricard@pelini-law.com

Counsel for Amicus Curiae
Whispering Pines, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail on August 10, 2020, upon the following:

Andrew P. Lycans (0077230)
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 (PHV-6221-2020)
1801 Smith Street, Suite 2000
Houston, Texas 77002
Phone No: 713-375-9208
Email: mani.walia@siltstone.com

Counsel for Appellant Siltstone Resources

Erik A. Schramm (0071690)
Kyle W. Bickford (0086520)
HANLON, ESTADT, MCCORMICK & SCHRAMM CO., LPA
46457 National Road West
St. Clairsville, OH 43950
Telephone: 740/695-1444
Telefax: 740/695-1563
E-mail: hems@ohiovalleylaw.com

Counsel for Amicus Curiae Axebridge Energy, LLC

Craig G. Pelini (0019221)
Paul B. Ricard (0088207)
Pelini, Campbell & Williams, LLC
8040 Cleveland Ave., NW, Suite 400
North Canton, OH 44720
Telephone: (330) 305-6400
Facsimile: (330) 305-0042
E-mail: cgp@pelini-law.com
pbricard@pelini-law.com
Counsel for Amicus Curiae Whispering Pines, LLC

Kevin L. Colosimo (0090002)
Christopher W. Rogers (0091843)
Daniel P. Craig (0088891)
FROST BROWN TODD LLC
501 Grant Street, Suite 800
Pittsburgh, PA 15219
Phone No.: 412-513-4300
kcolosimo@fbtlaw.com; crogers@fbtlaw.com; dcraig@fbtlaw.com

Counsel For Appellant American Energy – Utica Minerals, LLC

Scott M. Zurakowski (0069040)
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 No.: 330-497-0700
szurakowski@kwgd.com; bwilliams@kwgd.com; monest@kwgd.com

Counsel For Appellant Eagle Creek Farm Properties, Inc.

Dave Yost (0056290)
Benjamin M. Flowers (0095284)
(COUNSEL OF RECORD)
Samuel C. Peterson (0081432)
James Patterson (0024538)
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, 26thFloor
Columbus, OH 43215
Phone No.: 614-728-0768;
Fax No.: 866-909-3632 Email:
bflowers@ohioattorneygeneral.gov;
Samuel.Peterson@ohioattorneygeneral.gov;
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

/s Daniel C. Gibson
Daniel C. Gibson (0080129)

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
GUERNSEY COUNTY, OHIO

SILTSTONE SERVICES LLC Plaintiff-Appellee, v. THE GUERNSEY COUNTY COMMUNITY DEVELOPMENT CORPORATION, ET AL., Defendants-Appellees and OHIO PUBLIC WORKS COMMISSION Defendant-Appellant.	:	CASE NO. 19-CA-47 On Appeal from the Guernsey County Court of Common Pleas Case No. 17 CV 000611

BRIEF OF DEFENDANT-APPELLANT OHIO PUBLIC WORKS COMMISSION

DAVE YOST (0056290)
Attorney General of Ohio

Lidia Mowad (0097973)
James Patterson (0024538)
Rachel Huston (0074934)
Christie Limbert (0090897)
Cory Goe (0090500)
Michelle Pfefferle (0081642)
Joshua Nagy (0097099)

Assistant Attorneys General
Executive Agencies Section
30 E. Broad St. 26th Floor
Columbus, OH 43215-3428
Telephone: (614) 466-2980
Fax: (614) 506-0283

Andrew P. Lycans
Critchfield, Critchfield & Johnson, Ltd.
225 N. Market St., P.O. Box 599
Wooster, OH 44691
Counsel for Plaintiff-Appellee Siltstone Services, LLC

Manmeet Walia
1801 Smith Street, Suite 2000
Houston, TX 77002
mani.walia@siltstone.com
Counsel for Plaintiff-Appellee Siltstone Services, LLC

William Benson
Maribeth Meluch
Isaac, Wiles, Burkholder & Teeter, LLC

Exhibit A

james.patterson@ohioattorneygeneral.gov
rachel.huston@ohioattorneygeneral.gov
christie.limbert@ohioattorneygeneral.gov
cory.goe@ohioattorneygeneral.gov
lidia.mowad@ohioattorneygeneral.gov
michelle.pfefferle@ohioattorneygeneral.gov
joshua.nagy@ohioattorneygeneral.gov
Counsel for Defendant-Appellant
Ohio Public Works Commission

2 Miranova Place, Suite 700
Columbus, OH 43215
wbenson@isaacwiles.com
mmeluch@isaacwiles.com
Counsel for Defendant-Appellee Guernsey County Community Development Corporation

Erik A. Schramm
Kyle Bickford
Hanlon, Estadt, McCormick & Schramm LPA
46457 National Road West
St. Clairsville, OH 43950
hems@ohiovalleylaw.com
kbickford@ohiovalleylaw.com
Counsel for Defendant-Appellee Guernsey County Community Development Corporation

Matthew W. Warnock
Aaron M. Bruggeman
Daniel C. Gibson
Christine Rideout Schirra
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
mwarnock@bricker.com
dgibson@bricker.com
abruggeman@bricker.com
cschirra@bricker.com
Counsel for Defendant-Appellee Gulfport Energy Corporation

Zachary Simpson
Gulfport Energy Corporation
3001 Quail Springs Parkway
Oklahoma City, OK 73134
zsimpson@gulfportenergy.com
Counsel for Defendant-Appellee Gulfport

Craig G. Pelini
William M. Shackleford
Pelini, Campbell & Williams, LLC
8040 Cleveland Ave. NW, Suite 400
North Canton, OH 44720

cgp@pelini-law.com
wms@pelini-law.com
Counsel for Defendant-Appellees Synergy Land Company LLC and Whispering Pines Land Company LLC

Richard V. Zurz, Jr.
Slater & Zurz, LLP
1 Cascade Plaza #2210
Akron, OH 44308
rzurz@slaterzurz.com
Counsel for Defendant-Appellee Patriot Land Company, LLC

Jim R. Skelton
Guernsey County Prosecutor's Office
627 Wheeling Avenue, Suite 300
Cambridge, OH 43725
jim@coshoctonlaw.com
Counsel for Defendant-Appellee Guernsey County Commissioners

Timothy B. McGranor
Elizabeth S. Alexander
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
Columbus, OH 43215
tbmcgranor@vorys.com
esalexander@vorys.com
Counsel for Defendant-Appellee Devon Energy Production, LP

Craig Pelini
William Shackelford
Pelini, Campbell, & Williams, LLC
Bretton Commons, Suite 400
8040 Cleveland Ave. NW
North Canton, OH 44720
cgp@pelinilaw.com
wms@pelinilaw.com
Counsel for Defendant-Appellee Synergy Land Company and Whispering Pines Land Company, LLC

Exhibit A

TABLE OF CONTENTS

Exhibit A

Exhibit A

TABLE OF AUTHORITIES

Page(s)

Cases

Exhibit A

Exhibit A

Statutes

Other Authorities

Exhibit A

STATEMENT OF ASSIGNMENTS OF ERROR

I. Appellant Commission's First Assignment of Error (Final Judgment Entry dated October 25, 2019): The Trial Court erred in denying the Commission's motion for partial summary judgment and in granting Appellees' various motions because the Court should have applied the plain language of the Deed Restrictions to find that Appellees breached the Deed Restrictions.

II. Appellant Commission's Second Assignment of Error (Final Judgment Entry dated October 25, 2019): The Trial Court erred in denying the Commission's motion for partial summary judgment and in granting Appellees' various motions for summary judgment because the Deed Restrictions are valid and are enforceable through declaratory judgment and injunctive relief.

III. Appellant Commission's Third Assignment of Error (Final Judgment Entry dated October 25, 2019): The Trial Court erred in denying the Commission's motion for partial summary judgment and in granting Appellees' various motions for summary judgment because the Commission is entitled to money damages.

SUMMARY JUDGMENT APPEAL STATEMENT

In its October 25, 2019 Final Entry, the Guernsey County Court of Common Pleas ruled on several summary judgment motions:

- Ohio Public Works Commission's Motion for Partial Summary Judgment;
- Guernsey County Community Development Commission's Motion for Summary Judgment;
- Guernsey County Community Development Commission's Motion for Summary Judgment as to Devon Energy Production Company, L.P.'s Cross-claim;
- Siltstone Services, LLC's Motion for Summary Judgment;
- Devon Energy Production Company, L.P.'s Motion for Summary Judgment as to Ohio Public Work Commission's Cross-claims;
- Devon's Motion for Partial Summary Judgment as to Cross-claims against Guernsey County Community Development Commission; and
- Patriot Land Company, LLC's Motion for Summary Judgment.

The court also ruled on several motions for judgment on the pleadings:

- Gulfport Energy Corporation's Motion for Judgment on the Pleadings;
- Synergy Land Company, LLC's Motion for Judgment on the Pleadings; and
- Whispering Pine Land Company, LLC's Motion for Judgment on the Pleadings.

The lower court erred in ruling on several summary judgment motions. First, it erred in its ruling with regard to the summary judgment motions because it erred as a matter of law on the undisputed facts. The Court also erred, however, in misstating the procedural history—by stating that "OPWC has withdrawn their declaratory judgment and injunctive relief claims against Devon"—when the Ohio Public Works Commission had not withdrawn its declaratory judgment relief claim against Devon Energy Production Company. As such, while this appeal concerns an error of judgment as a matter of law, the lower court simultaneously created an error of fact, as well.

STATEMENT OF ISSUES PRESENTED

1. ISSUE NO. 1 (ASSIGNMENTS OF ERROR I, II, and III)

   When deed restrictions in a deed for real property purchased with Clean Ohio funds clearly and unambiguously prohibit the transfer of any interest in the property, including the subsurface mineral estate, a trial court must enforce those restrictions.

2. ISSUE NO. 2 (ASSIGNMENTS OF ERROR I, II, and III)

   When the General Assembly explicitly granted the Ohio Public Works Commission the authority to require long-term ownership and protection of environmental conservation properties, the Ohio Public Works Commission may seek equitable relief to enforce those policies.

INTRODUCTION

Read the deed. The Ohio Public Works Commission's argument is simple: when a Clean Ohio grantee agrees to restrict the transfer and use of property that it purchases with grant funds, the Commission must be able to enforce the agreed-upon restrictions. The Defendant-Appellees disagree—only because they each profited off of the illegal sale and use of the deed-restricted property. But the deed is clear and its plain language should have been enforced.

Here, the State of Ohio awarded Defendant-Appellee Guernsey County Community Development Corporation ("CDC") a significant grant of tax-exempt bond money to purchase property in exchange for recording deed restrictions on that property. CDC applied for and received that bond money under its pledge that it would preserve land and natural resources in Guernsey County for its citizens and wildlife to enjoy. But CDC wasted no time preserving the property or its natural resources, because it was too busy selling off the property to oil and gas companies for development—all while deceiving the State of Ohio and its citizens.

CDC sold off the property and its resources *multiple times* and misappropriated the tax-exempt bond money so that the property could be exploited for CDC's and those companies' private financial gain. Despite clear deed language, the lower court held that Defendant-Appellees' breaches of the deed restrictions were permissible. The lower court's decision prohibits the State of Ohio from carrying out its *constitutional* and statutory mandate—to conserve natural areas and resources, preserve the welfare of Ohio citizens and wildlife, and protect the tax-exempt funds enabling the Clean Ohio Program—and allows entities, like CDC, to commit blatant fraud.

STATEMENT OF THE CASE

CDC obtained grant funds from the State of Ohio in order to purchase property for environmental conservation purposes. As consideration for that grant, CDC promised to maintain

long-term ownership and control of that property for green space purposes. CDC broke that promise. CDC granted seven different third parties permission to use the property for any purpose, including private, commercial purposes, in defiance of the contractual obligation it owed to the Ohio Public Works Commission (the "Commission"), and at the expense of the taxpayers of the State of Ohio. The Commission has the right to enforce the Deed Restrictions and hold CDC accountable for breaching its agreements, and the Commission intervened in this lawsuit to hold the CDC accountable for its actions and to protect the Property from future improper transfers.

This case concerns one specific parcel of real estate in Guernsey County (the "Property"). CDC purchased the Property with the proceeds of a Clean Ohio grant from the Commission. In consideration for the grant funds, CDC voluntarily entered into a Grant Agreement with the Commission, where it agreed to record deed restrictions on the Property. Ex. B. The Deed Restrictions prohibit uses of the Property that conflict with "green space park area" and prohibited CDC from alienating the Property in any way without the Commission's written consent (Deed Restrictions). Ex. C. As part of the deal, CDC agreed that the Commission would have the right to enforce the Deed Restrictions in law and in equity. Ex. C. However, within just a few years, CDC breached those commitments by selling off control over the Property and giving numerous third parties the right to use the property for various commercial purposes.

The procedural history of this case is not straightforward because litigation began before the Commission knew about CDC's violations on this Property. In 2013, the private, for-profit company Siltstone Services, LLC ("Siltstone") entered into a right-of-way agreement with CDC, allowing Siltstone to use a road on the Property of its own commercial purposes. Complaint, ¶ 6. The Commission did not know about this agreement and did not authorize CDC to enter into it.

In November of 2017, Siltstone sued CDC to enforce the right-of-way ("Complaint"), but CDC correctly asserted that "the purported right of way agreement cannot be enforced due to pre-existing deed restrictions." CDC Ans. To Siltstone Am. Compl., Affirm. Def. 5. The Commission quickly intervened because the right-of-way agreement clearly breached the deed restrictions. Motion to Intervene, May 25, 2018. The Commission filed a counterclaim and cross-claim seeking declaratory and injunctive relief, as well as money damages, in July 2018.

But, unknown and unauthorized by the Commission, the CDC had further alienated the Property by leasing oil and gas rights, leasing water rights, transferring two acres of the Property to another entity, and allowing for the assignment of mineral royalty interests. All of the transfers violate the Deed Restrictions so the Commission sought leave to join the additional parties—Patriot Land Company, LLC ("Patriot"), Gulfport Energy Corporation ("Gulfport"), Synergy Land Company, LLC ("Synergy") Whispering Pines Land Company, LLC ("Whispering Pines"), Devon Energy Productions Company, LP ("Devon"), and the Guernsey County Commissioners ("County Commissioners"). Motion to Join Additional Parties, May 25, 2018.

The Court granted leave in September 2018, and the Commission filed cross-claims against the additional parties in October 2018. The Commission sought declaratory and injunctive relief to cancel CDC's improper transfers and to prevent use of the Property in ways that conflict with the Deed Restrictions, and also sought money damages per the terms of the Deed. Crossclaim. CDC filed a crossclaim against the Commission in August 2018, and Siltstone filed an amended complaint on August 30, 2018. Devon brought a cross-claim against CDC in November of 2018.

In September of 2019, each party filed either a Motion for Summary Judgment or a Motion for Judgment on the Pleadings, with the exception of the County Commissioners, who did not file any dispositive motion. See Summary Judgment Appeal Statement.

The Trial Court issued its ruling in October 2019, as follows:

- To resolve the dispute between Siltstone and CDC, the Court found that the right-of-way agreement was void as an ultra vires action, and thus ruled:
    - In favor of CDC on its Motion for Summary Judgment against Siltstone;
    - Against Siltstone on its Motion for Summary Judgment against CDC.
- To resolve the dispute between the Commission and all other parties, the Court found that the Commission could not enforce the Deed Restrictions as to any party, and thus ruled:
    - In favor of Gulfport, Synergy, and Whispering Pines as to their Motions for Judgment on the Pleadings against the Commission;
    - In favor of CDC, Patriot, and Devon as to their Motions for Summary Judgment against the Commission;
    - Against the Commission as to its Motion for Partial Summary Judgment against all parties.
- To resolve the dispute between CDC and Devon, the Court ruled:
    - In favor of CDC on its Motion for Summary Judgment against Devon;
    - Against Devon on its Motion for Partial Summary Judgment against CDC.

The Commission filed this appeal on November 21, 2019, designated Case No. 19 CA 000047. Devon filed a cross-appeal on November 25, 2019, designated under the same case number. Siltstone also filed an appeal on November 25, 2019, designated Case No. 19 CA 000049.

STATEMENT OF FACTS

On November 7, 2000, Ohio's voters overwhelmingly voted to amend the Constitution and raise their taxes in order to conserve and preserve Ohio land and its natural resources. This Constitutional amendment authorized the issuance of tax-exempt bonds to governmental, non-

Exhibit A

profit entities to carry out conservation projects ("Clean Ohio Fund"). Ohio Constitution, Article VIII, Section 02o(A)(1). The General Assembly then created a statutory framework to implement the Clean Ohio Fund. See R.C. 151.09, 151.01(A)(9), and 164.27. Under R.C. 164.26(A), the Director of the Commission must "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." The Commission requires deed restrictions to be placed on Clean Ohio Fund properties in furtherance of its long-term ownership and control policies authorized by R.C. 164.26(A). Under R.C. 164.26(A), in addition to policies requiring long-term ownership, the Commission's 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."

A. CDC received Clean Ohio grant funds to purchase property.

It is undisputed that on or about October 18, 2006, CDC applied for a grant of $894,500 from the Clean Ohio Fund for its "Leatherwood Creek Riparian Project." Ex. A; Crossclaim, ¶ 35, CDC Ans., August 21, 2018, ¶ 27. CDC represented that it would purchase land along Leatherwood Creek "to allow the riparian corridor to be protected from *encroachment by development* and allow the natural beauty of [the] valley to be *accessed by the public.*" Ex. A; Crossclaim, ¶ 38; CDC Ans., ¶ 30. CDC also represented that "the primary emphasis of this project is the preservation and restoration of water quality, natural stream channels, functioning floodplains, wetlands, streamside forests, and other natural features that contribute to the quality of life in Guernsey and Belmont County." Ex. A; Crossclaim, ¶ 40, CDC Ans., ¶ 32.

The Commission approved the grant, but before disbursing grant funds, required CDC to enter into a Grant Agreement requiring CDC to record the Deed Restrictions. Ex. B. CDC agreed

that, as consideration for receiving this bond-funded grant from the Commission, it would record deed restrictions on the Property, and that the Commission "shall have full enforcement authority with respect to the Deed Restrictions." Ex. B, p. 11, Sec. 9.

CDC recorded the deed with the Deed Restrictions requiring CDC's long-term ownership and control of the Property. Ex. C. No party disputes the text of these restrictions or that the Deed was properly recorded. The Deed Restrictions contain the following provisions:

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

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, [the Commission]. 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 [the Commission]*, which consent may be withheld in its sole and absolute discretion.

3. Enforcement. If [CDC], or its successors or assigns as owner of the Property, should fail to observe the covenants and restrictions set forth herein, the [CDC] or its successors or assigns, as the case may be, shall pay to [the Commission] upon demand, as liquidated damages, an amount equal to the greater 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 [the Commission]. [CDC] 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.

   [The Commission] shall have the right to enforce by any proceedings at law or in equity, all restrictions, conditions and covenants set forth herein. Failure by [the Commission] 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 a subsequent violation.

4. Restriction on transfer of the Property. [CDC] acknowledges that the Grant is specific to [CDC] and that [the Commission's] approval of [CDC's] application for the Grant was made in *reliance on [CDC's] continued ownership and control of the Property.* According, *[CDC] shall not voluntarily or*

> *involuntarily sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior consent of [the Commission]*, which consent may be withheld in its sole and absolute discretion.

Ex. C. (emphasis added). CDC received significant funding in exchange for the Commission's right to enforce these Deed Restrictions. Despite its pledge, CDC sold the land for private development, receiving additional significant consideration from private companies, all while misappropriating Clean Ohio funds and exploiting the Property it swore to protect.

B. CDC sold off numerous interests in the Property to third parties.

It is undisputed that CDC transferred various interests in the Property to third parties, primarily for private commercial use. CDC has not denied that these transfers happened, as they are easily confirmed by public records and, in the case of the right-of-way, by the signed agreement. This series of transfers and encumbrances led to a total of *seven* entities purportedly holding an interest in or encumbrance on the Property—a Property that CDC pledged it *would not transfer* and would not use in any way that conflicts with *green space park area* use. CDC breached the Deed Restrictions and its promise of long-term ownership of the

First, on March 25, 2011, just three years after obtaining the Property and without the Commission's knowledge or permission, CDC entered into an oil and gas lease with Patriot in clear violation of the Deed Restrictions. CDC's transfer of a leasehold interest in the Property's mineral rights allowed for the commercial development of the Property through oil and gas extraction. Ex. E; Ex. Q-1 at RFA 1–2.

Patriot later assigned the oil and gas lease to Gulfport, but retained an oil and gas royalty interest. Ex. F; Ex. Q-3 at RFA 11–12. Patriot then assigned part of its royalty interest on the Property to two other companies, Synergy and Whispering Pines. Exs. O and P; Ex. Q-3 at RFA 19–20, 24–25. Patriot, Gulfport, Synergy, and Whispering Pines did not seek or receive permission from the Commission before transferring these interests in the deed-restricted Property.

Ex. Q-4 at RFA 12, 13, 14; Q-6 at RFA 11, 12; Q-7 at RFA 11, 12. Gulfport later assigned its interest to Windsor Ohio LLC and Rhino Exploration LLC, but those two entities assigned their interests back to Gulfport within a year. Exs. K, L, M.

Second, and only a year later, in 2012, CDC entered into a water and surface use agreement with Devon, again, without the Commission's or knowledge or permission. Exs. G, H, I. CDC and Devon later amended this agreement to expand Devon's rights ("Water and Surface Use Agreement"). The Water and Surface Use Agreement permits Devon to use the surface of the Property; *draw unlimited quantities of water* from the Property; *cut trees and other vegetation* on the Property; and build *surface and subsurface pipelines, equipment, and facilities* on the Property. Ex. H, ¶ 1(a)-(c), ¶ 3. The Water and Surface Use Agreement allows Devon to "pump non-potable replenishment water into the Pond(s)." Ex. I, ¶ (i). Thus, the Water and Surface Use Agreement gives the right not only to extract water, but also to *dump contaminated water* from its nearby fracking operations back onto the Property. Devon and CDC acknowledged the possibility of contaminated water when they agreed that CDC was "not to use, and not to allow third parties to use, the Ponds as a source of drinking water for humans or as a source for fish to be consumed by humans." Ex. I, ¶ (ii). Further, the Water and Surface Use Agreement explicitly constrains CDC's own use of the Property, stating that CDC "shall be permitted to use the Water Sources for agricultural and livestock uses, so long as [CDC's] uses do not unreasonably interfere with the rights granted to Devon under this Agreement." Ex. H at ¶ 3.

Devon *exercised* its rights under the Water and Surface Use Agreement in 2013. After installing water pipelines and a portable water pump, Devon withdrew 71,332 barrels of water from ponds on the Property and a nearby creek. Ex. Q-5, Int. 12. Devon initially paid CDC $500, and then $14,226.40 for the amount of water that it withdrew from the Property. Ex. Q-5, Int. 3.

Third, CDC's assignment of interests in the Property continued in October 2012, when CDC recorded a deed transferring two acres of surface rights to the Property to the County Commissioners ("Acreage Transfer"). Ex. J. Neither CDC nor the County Commissioners sought or obtained the Commission's permission for this conveyance.

Fourth, a year later, on April 24, 2013, CDC further violated the Deed Restrictions when it executed a Right-of-Way Agreement with Siltstone, purporting to allow Siltstone to use a private road on the Property to access Siltstone's nearby property, without the Commission's knowledge or permission. Ex. D. The Right-of-Way Agreement was not recorded. Ex. Q-2, RFA 11.

CDC's transfers gave permission to multiple third parties to use Property in ways that conflict with the Property's "use as a green space park area." CDC sold an oil and gas leasehold to Patriot and sold water use rights to Devon. Ex. E; Exs. H-I. The *extraction of natural resources* for commercial purposes is wholly inconsistent with the use as a green space park area—especially when both leases allow Appellees to freely manipulate the surface to facilitate their extractions. Ex. Q-8; Ex. I. CDC also *erected a fence to actively prevent access*. Siltstone Motion, p. 4.

With the exception of the County Commissioners, all of the third parties are for-profit, non-governmental entities, that are ineligible for Clean Ohio Grant funds. *See* R.C. 164.23(A). These for-profit, non-governmental entities acquired interests in the Property despite the fact that the funding for the original purchase of the Property came from tax-exempt bonds and conditioned the funding on the status of the grantee. R.C. 151.01(K); R.C. 5709.76; Ohio Constitution, Article VIII, Section 02o(G). Their private, commercial uses of the Property jeopardize the tax-exempt status of the bonds which fund the Clean Ohio Conservation Fund.

Shortly after the Commission asserted its claims, on October 16, 2018, Gulfport surrendered all of its rights in the Property back to CDC. Patriot's Motion for Summary Judgment,

Dickey Aff., ¶ 13. Additionally, Devon's water lease expired on August 10, 2013. Devon's Motion for Summary Judgment, Ex. B.

STANDARD OF REVIEW

Deed restrictions are contracts and the "[o]rdinary rules of contract construction are used to construe [them]." *Heather Lake Ass'n v. Billiter*, 2017-Ohio-8387, 99 N.E.3d 1018, ¶ 27 (5th Dist.), citing *LuMac Dev. Corp. v. Buck Point Ltd. Partnership*, 61 Ohio App.3d 558, 566, 573 N.E.2d 681 (6th Dist.1988). The construction of deed restrictions is a matter of law. *Heather Lake Ass'n*, 99 N.E.3d at ¶ 22. Questions of law are determined *de novo* on appeal. *Id.* "'If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined.'" *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995), quoting *Inland Refuse Transfer Co. v. Browning-Ferris Industries, Inc.*, 15 Ohio St. 3d 321, 322, 474 N.E.2d 271 (1984).

Pursuant to App.R. 12(B), a reviewing court has the power to render the judgment that the court of common pleas should have rendered. App.R. 12(B); *see also Superior Metal Prods., Inc. v. Admr., Ohio Bur. of Emp. Servs.*, 41 Ohio St.2d 143, 145, 324 N.E.2d 179 (1975).

LAW AND ARGUMENT

I. ASSIGNMENT OF ERROR NO. 1: The Trial Court erred in denying the Commission's motion for partial summary judgment and in granting Appellees' various motions because the Court should have applied the plain language of the Deed Restrictions to find that Appellees breached the Deed Restrictions.

CDC breached the Deed Restrictions the moment it transferred property interests to Appellees— when it leased oil and gas rights to Patriot; when it CDC leased water rights to Devon; when it CDC conveyed two acres of the Property to the County Commissioners; and when it executed a right-of-way agreement. These transfers breached the Transfer Restriction and

permitted others to violate the Use Restriction. The Trial Court erred when it failed to recognize clear breaches.

A. CDC breached the Deed Restrictions by selling an Oil and Gas Lease to Patriot.

The Oil and Gas Lease from CDC to Patriot violates the Deed Restrictions, and the Trial Court should have granted declaratory and injunctive relief to the Commission. Patriot is a private, for-profit company, and by leasing the mineral rights to the Property, had *only one purpose*: to extract natural resources from the Property.

1. The Oil and Gas Lease violates the Use Restriction.

The Use Restriction states: "This property *will not be developed in any manner that conflicts with the current use as a green space park area* that protects the historical significance of this particular parcel. Only the current structures will be maintained and *no new structures will be built.*" Ex. C (emphasis added). The Trial Court, with no analysis, concluded that "green space is not underground" and underground drilling activity would not conflict with use of the property as green space. Entry, p. 6, ¶ 11. This is an error because it oversimplifies the issue and ignores long-standing Ohio law. The Trial Court should have found that the Oil and Gas Lease violates the Use Restriction because CDC gave up ownership and control of the surface, even if drilling were to occur underground.

The Use Restriction prohibits development "that conflicts with the Property's current use as a green space park area." Ex. C. The extraction of natural resources from land for commercial purposes is *wholly inconsistent* with the use of the Property as a green space park area. However, with its cursory conclusion, the Trial Court overlooks the fact that the Oil and Gas Lease encumbers more than just the subsurface estate. When CDC gave up control of the minerals on the Property, it lost control over both the "underground" and the surface.

First, under long-standing Ohio law, mineral rights and surface rights are intrinsically linked. *Quarto Mining Co v. Litman*, 42 Ohio St.2d 73, 80, 326 N.E.2d 676 (1975). The use of the surface is a necessary incident to the use and enjoyment of an underlying mineral estate. *Quarto*, 42 Ohio St.2d at 80. Thus, the lease of the right to extract oil and gas always includes the right to access, use, and alter the *surface* of the Property. Loss of control of mineral rights is therefore a loss of control of surface rights. As a result, when Patriot obtained the lease, it also gained the right to use the surface as reasonably necessary to access oil and gas—and CDC lost part of its control over the surface, as well.

Second, the specific lease at issue in this case *includes* permission to engage in surface activities. While Appellees argued that their drilling activities only occurs several miles below the ground, the Oil and Gas Lease itself is not limited to drilling a few miles underground. Ex. Q-8. Under the terms of the Lease, the lessee may engage in "core drilling, and the drilling, operating for, and producing of" all of the oil and gas on the Property. Ex. Q-8. In fact, CDC affirmatively *chose not to limit* Patriot's various surface uses. Ex. Q-8, ¶ 2(b) (allowing Patriot to lay pipelines (p. 1), remove timber (p. 8), dig pits (p. 9), and "construct gates on all access roads" (p. 8)). The lease even dedicates three whole pages to provisions for possible "impacts and effects" on the surface of the property and the water on the property—providing contingency plans for any of Patriot's surface uses.

Recently, the Seventh District ruled that these terms in a similar oil and gas lease allow for surface uses of a property that conflict with use as a green space park area. *Siltstone Resources, LLC v. State Pub. Works Comm.*, 7th Dist. Belmont No. 18 BE 0042, 2019-Ohio-4916, ¶¶ 44–46 (holding that Siltstone's oil and gas leases to Patriot that allowed "removal of timber," "drilling of water well" "building access roads," and "installing fencing" were all acts that affect the surface

and would breach a green space use restriction prohibiting uses that conflict use as a with green space park area).

Under Ohio law and the Oil and Gas Lease, CDC sold Patriot the right to use the surface of the Property as reasonably necessary to access the subsurface oil and gas. And, under recent law, the surface use of a Clean Ohio property for oil and gas drilling purposes is inconsistent with use of the property as green space. The Trial Court erred when it oversimplified the Oil and Gas Lease issue. It is not sufficient to say "green space is not underground" because CDC also gave away the *above-ground* rights. The Trial Court should have ruled in favor of the Commission on summary judgment by finding that the Oil and Gas Lease violated the Use Restriction.

2. The Oil and Gas Lease violates the Transfer Restriction.

The Transfer Restriction states: "[CDC] shall not voluntarily or involuntarily sell, assign, transfer, *lease*, exchange, convey or otherwise encumber the Property *without the prior consent of [the Commission]*, which consent may be withheld in its sole and absolute discretion." Ex. C. But the Trial Court erroneously concluded that the Oil and Gas Lease did not violate the restriction on transfer of interests in the Property.

Interestingly, the Trial Court seemed to agree that the Transfer Restriction prevented transfers of interests in the Property in general. The Trial Court found the Transfer Restriction void, however, because it requires perpetual ownership. Entry, p. 7, ¶ 14. Inconsistently and with no analysis, it concluded that "the use of the subsurface is neither a violation of the Transfer Restriction nor the Use Restriction." Entry, p, 6, ¶ 11. Instead, the Trial Court should have found

the lease of oil and gas rights on the Property violated the Transfer Restriction. The Transfer Restriction requires perpetual ownership and CDC gave away ownership.

First, the Trial Court should not have separated the concept of subsurface versus surface rights when it ruled on the Transfer Restriction. The Deed provides that "*This conveyance* is subject to the following restrictions." Ex. C. The Deed also provides that "[t]his conveyance" pertains to "the following real property" and refers to an Attached Exhibit A. Ex. C. Attached Exhibit A is the Deed Description for the Property which provides a thorough, two-page description of the real property. Ex. C. Critically, the Deed Description does not disclose *any* subsurface severances or reservations. Ex. C. Additionally, the Deed Restrictions consistently use "Property" to refer to the "real property" described in the Attached Exhibit A. Ex. C. Without justification, the Trial Court distinguished between subsurface property transfers and surface property transfers, even though the Deed makes no such distinction. Any transfer of any interest in the "Property"—surface or subsurface— violates the Deed's Transfer Restriction.

The Seventh District Court of Appeals ruled on this same issue in a similar case. *Siltstone Resources, LLC v. State Pub. Works Comm.*, 7th Dist. Belmont No. 18 BE 0042, 2019-Ohio-4916. The *Siltstone Resources* case also involved CDC and its improper transfers of interests in real property purchased with Clean Ohio funds. In *Siltstone*, CDC contracted with the Commission to record the *exact same* Transfer Restriction that is at issue in this case. *Id.*, ¶ 7.

In *Siltstone Resources,* CDC purported to lease oil and gas rights to Patriot. *Id.*, ¶ 9. The Seventh District ruled that the 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." *Id.*, ¶ 50. The Seventh District held:

> 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.

Id., ¶ 53. The Seventh District agreed with the Commission—the Transfer Restriction prohibited CDC from transferring *any* interests in the Property, and when CDC leased and sold the property, it violated the restriction. *Id.* The Trial Court here should have similarly found that the plain language of the Deed Restriction prevented transfers of *any* interest in the Property.

Second, the Trial Court found that, because the Commission submitted no proof of surface use regarding oil and gas development, the Oil and Gas Lease did not violate the Transfer Restriction. This was an error. The Transfer Restriction was breached no matter how the Property was used. The Transfer Restriction is supposed to prevent transfers and the Use Restriction is supposed to prevent uses. Once the Oil and Gas Lease was executed, the leasehold interest was transferred, regardless of whether Patriot or Gulfport later acted on their newfound property interests. The Commission did not need to prove any improper use of the Property to show that the Property never should have been *transferred* in the first place.

Third, the Trial Court also implies that, because the Oil and Gas Lease has since been released, it does not violate the Transfer Restriction. This is incorrect. It does not matter that the Oil and Gas Lease has expired since the Commission filed its crossclaims. *See infra* III(B)(2). Under the plain language of the Transfer Restriction, that lease *never should have occurred* in the first place. The breach already happened, regardless of whether the parties have relinquished the rights that they unlawfully obtained. If a person steals merchandise from a store, it does not matter that the person later feels remorseful and returns the merchandise to the store—the theft still happened. The Oil and Gas Lease breached the Transfer Restriction at the moment it was assigned, and later "forfeiting" that right does not undo the violation.

Based on the undisputed facts, reasonable minds could only conclude that CDC's lease of oil and gas rights to Patriot was a breach of the both the Deed Restrictions. The Trial Court should have granted the Commission's Motion for Partial Summary Judgment on this issue.

B. CDC breached the Deed Restrictions by selling the Water and Surface Use Agreements to Devon.

The Trial Court should have found that the Water and Surface Use Agreements violated the Deed Restrictions and should have granted the Commission declaratory relief against CDC and Devon. As an initial matter, the Trial Court incorrectly stated that the Commission withdrew its claim for declaratory relief against Devon. Entry, p. 4, ¶ 8. The Commission withdrew its claim for monetary relief against Devon, but *not its claim for declaratory judgment.* Commission's Reply in Support, p. 6. The Commission was entitled to a declaration that the Water and Surface Use Agreements breached both the Use Restriction and the Transfer Restriction.

1. The Water and Surface Use Agreements violates the Use Restriction.

The Trial Court did not find that the Water and Surface Use Agreements violated the Use Restrictions. Rather, the Trial Court simply stated that the Commission could not "establish a claim for damages" for use of the Property under the Water and Surface Use Agreement. Entry, p. 6, ¶ 9. The Trial Court also stated that the Commission's claim for declaratory relief would be moot because the Water Lease expired. Entry, p.5, ¶ 8. The Trial Court erred.

First, Devon's agreement allowed it to withdraw water from ponds and the creek on the Property, and gave express permission to dump *non-potable* water *back into* the ponds. Exs. H-I. It is also undisputed that Devon *exercised* this right by withdrawing 71,332 barrels of water from the ponds on the Property and the creek abutting the Property for its own private use to operate an oil and gas well. Ex. Q-5, Int. 3. This activity involved entering onto the Property to install water lines and a pump, and then withdrawing the water itself—water that CDC had explicitly agreed to

protect. Ex. Q-5, Int. 12. This is not "green space park area" use; this is conflicting, private exploitation of a natural resource on green space property for development of an oil and gas well.

This active surface use of the Property violates the Use Restrictions contained in the deed. In *Siltstone Resources*, the Seventh District found "green space park area" to mean "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." *Siltstone Resources, LLC*, 2019-Ohio-4916, ¶ 43. The installation of water lines and a pump across park area property and subsequent withdrawal of natural resources from the Property disrupts the use of the Property as a park and environmentally-protected natural area. Ex. A; Crossclaim, ¶ 40, CDC Ans., ¶ 32 (providing CDC's representation that the emphasis of the project is the preservation and restoration of water quality, natural stream channels, functioning floodplains, wetlands, streamside forests, and other natural features). Yet the Trial Court found that the Commission was not entitled to relief because it could not prove "damage" to the Property. Entry, p.3, ¶ 8; p. 6, ¶ 9.

The Trial Court conflated "use" of the Property with "damage" to the Property. The Commission asked for a declaration that the Water and Surface Use Agreements and the withdrawal of water from the Property violated the *Use* Restriction. Then it asked for money damages because of the improper use. The Commission did not need to prove damage in order to prove there was a use of the Property that violated the Deed Restrictions. If anything, the question of damage to the Property would go to the Commission's remedies, not to the question of breach.

This Court has held that a court should award injunctive relief to prevent the violation of a restrictive covenant, *even if* the breach will occasion no damage and *even if* there is an adequate remedy at law. *Goutras v. Dillon-McDonald*, 5th Dist. Stark Case No. CA-8349, 1991 Ohio App. Lexis 4889, at *10 (Sep. 30, 1991), citing *Brown v. Huber*, 80 Ohio St. 183, 88 N.E. 322 (1909)

("It is not necessary that he should show that any damage has been done."). Proof of actual damages is not required as a basis for granting injunctive relief regarding deed restrictions. *Goutras*, 1991 Ohio App. Lexis 4889, at *10. On the contrary, the mere existence of a breach is ordinarily sufficient grounds for an injunction. *Brown v. Huber*, 80 Ohio St. 183, 207, 88 N.E. 322 (1909); *Hitz v. Flower*, 104 Ohio St. 47, 47, 135 N.E. 450 (1922); *Goutras v. Dillon-McDonald*, 5th Dist. Stark Case No. CA-8349, 1991 Ohio App. Lexis 4889, at *1 (Sep. 30, 1991). As such, the Trial Court's failure to enforce the Deed Restrictions absent proof of damage is patently contrary to Ohio law and this Court's precedent. The Trial Court should have declared the action a breach of the Use Restriction, and should have decided separately if damages were warranted. Motion, p. 3 (asking for a damages hearing).

2. The Water and Surface Use Agreements violate the Transfer Restriction.

The Trial Court did not find whether the Water Lease, the Acreage Transfer, or the Right-of-Way Agreement violated the Transfer Restriction. The Trial Court only addresses the Transfer Restriction as it applies to the Oil and Gas Lease. The Trial Court should have found that the Water Lease breached the Transfer Restriction.

As explained above, the issues regarding the Transfer Restriction are simple. The Trial Court must have agreed that the Transfer Restriction required CDC to maintain complete ownership of the Property, because it concluded that the Transfer Restriction requires perpetual ownership. The Transfer Restriction flatly prohibits "leasing" and "conveying" interests in the Property. But CDC did exactly that—it leased the right to withdraw water from the Property, and the Water and Surface Use Agreements breached the Transfer Restriction the moment it was executed. Even if the Water and Surface Use Agreements have since expired, it never should have been executed in the first place.

The Trial Court incorrectly conflated a breach of the deed restriction with a request for enforcement of that restriction. The Transfer Restriction was still breached, even if the Trial Court thought the restriction could not be enforced. The Trial Court should have issued a declaration finding that the Water and Surface Use Agreements breached the Transfer Restrictions.

C. CDC breached the Deed Restrictions by selling the Acreage Transfer to the Commissioners.

In yet another unauthorized breach, CDC transferred two acres of the Property directly to the County Commissioners. This was a wholesale transfer of property, and the deed to the County Commissioners did not include any deed restriction language. Yet, the Trial Court found that the County Commissioners did not violate the Deed Restrictions. Entry, p.7, ¶ 13. Inconsistently though, the Trial Court stated that the restriction runs with the land, and thus the County Commissioners are bound by it. *Id.* Thus, the Trial Court agreed that the Deed Restrictions run with the land and are valid at least to the County Commissioners, a subsequent owner of the two acres, while simultaneously finding no breach. This logic cannot be squared.

1. The Acreage Transfer violates the Transfer Restriction.

First, the Trial Court should have found that the Acreage Transfer to the County Commissioners violated the Transfer Restriction. The Transfer Restriction forbids CDC from giving up long-term ownership and control of the Property by conveying the Property, and CDC did so anyway. The conveyance caused CDC to lose ownership—wholesale—of two acres of the Property. The transfer itself violated the Transfer Restriction no matter what happened next.

2. The Acreage Transfer violates the Perpetual Restriction.

Second, the Deed Restrictions included another restriction, the "Perpetual Restriction," which provided that the Deed Restrictions would not be amended, released, extinguished or otherwise modified without the prior written consent of the Commission. Ex. C. But the Commissioners recorded an Acreage Transfer which purported to *vacate* the Deed Restrictions for

itself and any down-the-line transferees. The Trial Court was silent on this very plain breach. The Trial Court should have found the Acreage Transfer violated the "Perpetual Restriction" because CDC and the Commissioners did not include the Deed Restrictions when it recorded the transfer.

Based on undisputed facts, reasonable minds could only conclude that CDC conveyed an interest in the Property to the County Commissioners, which, as a matter of law, violated the Deed Restrictions. The Trial Court should have granted partial summary judgment to the Commission.

D. CDC breached the Deed Restrictions by selling the Right-of-Way Agreement to Siltstone.

In 2013, CDC's Executive Director, Dan Speedy, signed a letter agreeing to provide a right-of-way to Siltstone across the Property to access its adjoining property for oil and gas exploration and development (the "Right-of-Way Agreement"). Entry, p. 3, ¶ 5. The Trial Court ruled that Speedy acted outside of his authority as Executive Director, and his execution of the Right-of-Way Agreement was ultra vires making the Right-of-Way Agreement void. *Id.*, p. 3, ¶ 6.

The Commission argued in its Motion for Partial Summary Judgment that Speedy had apparent authority to bind CDC to the Right-of-Way Agreement, but that the Trial Court should find the Right-of-Way Agreement void because it violated the Deed Restrictions. Motion, p. 16-18. The Commission is satisfied with the Trial Court's ruling here because the Commission's goal is to ensure that CDC maintains complete ownership and control over the Property. But, Siltstone appealed this ruling to this Court. In the event this Court rules in favor of Siltstone and finds the Right-of-Way Agreement valid, this Court should still find the Right-of-Way Agreement to be void because it breaches both the Use Restriction and the Transfer Restriction.

1. <u>The Right-of-Way Agreement violates the Use Restriction.</u>

First, the Right-of-Way Agreement violates the Use Restriction because the third-party use as a private road conflicts with the use of the Property as green space park area. Siltstone is a

private company, accessing a road on a piece of land that is supposed to be used as a green space park area. Ex. C. Siltstone's private use for Siltstone's own private surface travel is not a "green space" use, nor does it further the use of the Property as a park area or its environmental conservation. Instead, the right-of-way caused CDC to lose control over who is allowed to use the road and for what purpose. Moreover, CDC *installed a fence* to prevent Siltstone's access, which *also actively prevents pedestrian or citizen access*. Siltstone Motion, p. 4.

2. The Right-of-Way Agreement violates the Transfer Restriction.

Second, the Right-of-Way Agreement violates the Transfer Restriction because it encumbers the Property. CDC gave up part of its long-term ownership and control over the Property by encumbering the property with an easement. This lawsuit's very existence demonstrates that the right-of-way encumbers the Property; when CDC attempted to exert ownership and control over the Property by telling Siltstone it could no longer use the right-of-way, Siltstone sued for its access. *See* Siltstone Compl. ¶¶ 4-11.

Based on the above evidence, reasonable minds could only conclude that if the Right-of-Way Agreement was authorized by CDC, then it violated the Deed Restrictions. Should the Court find the Right-of-Way Agreement was authorized by CDC, the Commission should still be entitled to summary judgment in its favor on this issue.

II. ASSIGNMENT OF ERROR NO. 2: The Trial Court erred in denying the Commission's motion for partial summary judgment and in granting Appellees' various motions for summary judgment because the Deed Restrictions are valid and are enforceable through declaratory judgment and injunctive relief.

The Trial Court was required to enforce clear and unambiguous deed restrictions. It failed to do so here. In this case, the parties do not dispute the text of the Deed Restrictions. Nor do the parties dispute that CDC applied for and was granted significant tax-exempt bond money in exchange for recording the Deed Restrictions. The Trial Court *did not find that the Restrictions*

were ambiguous in any way. But, without legal or factual explanation, the Trial Court issued a ruling that re-wrote the plain language of the restrictions. In this way, the Trial Court erred and should have granted partial summary judgment to the Commission.

A. The Trial Court failed to enforce clear and unambiguous Deed Restrictions.

1. The Deed Restrictions are clear and unambiguous.

Courts must give clear and unambiguous deed restrictions their common and ordinary meaning. The Trial Court's misapplication of this basic principle defines this appeal. *None* of the parties claimed that the deed restriction language was unclear or ambiguous.[1] Notably, neither did the Court make any such finding. Yet, the Trial Court took clear language, rewrote it, and issued a decision based on its revised language. To do so contradicted precedent, relied on facts not supported by the record, and departed from the parties' bargained-for Deed Restrictions.

The ordinary rules of construction applicable to the interpretation of contracts are to be applied when interpreting deed restrictions. *Heather Lake Assn. v. Billiter*, 2017-Ohio-8387, 99 N.E.3d 1018, ¶ 27 (5th Dist.), citing *LuMac Dev. Corp. v. Buck Point Ltd. Partnership*, 61 Ohio App.3d 558, 565-566, 573 N.E.2d 681 (6th Dist.1988). The construction of written contracts and instruments, including deeds, is a matter of law. *Heather Lake*, 99 N.E.3d at ¶ 22, citing *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 1998-Ohio-186, 697 N.E.2d 208.

The deed restriction language will be given its common and ordinary meaning in the context of the time that the restriction was created. *Arnoff v. Chase*, 101 Ohio St. 331, 335, 128 N.E. 319 (1920). The key issue is to determine the intent of the parties as reflected by the language used in the restriction. *Lipchak v. Chevington Woods Civic Ass'n*, 5th Dist. Fairfield No. 14-CA-40, 2015-Ohio-263. If the language is indefinite, doubtful, or capable of contradictory

[1] Excepting Siltstone's secondary argument that "Property" could be ambiguous because it could include personal property or nonliving objects in a museum's possession. Siltstone Motion for Summary Judgment, pp. 20–21.

interpretation, a court must adopt that construction which least restricts the free use of the property. *Houk v. Ross*, 34 Ohio St.2d 77, 296 N.E.2d 266 (1973). However, if the language in a restrictive covenant is clear and not doubtful in meaning, the court *must enforce the restriction; otherwise, the court would be re-writing the restriction. D & L Ferguson LLC v. Thompson*, 5th Dist. Stark No. 2017 CA 00194, 2018-Ohio-2473, ¶ 38.

The Trial Court **never** found that the Deed Restrictions were "indefinite, doubtful, or capable of contradictory interpretation." *Nationwide*, 73 Ohio St.3d at 108. As such, the court should have enforced the Deed Restrictions. But the Trial Court did not enforce the restriction; it did exactly what Ohio law prohibits—it re-wrote the Deed Restrictions.

2. The Trial Court re-wrote the Use Restriction.

Despite the clear language of the Use Restriction and its application to the entire conveyance, the Trial Court re-wrote this Deed Restriction to apply to only the surface and to permit new structures that conflicted with the use as a green space park area. As discussed above, the revisions conflict with the plain language of the Deed Restrictions (*see supra* III(A)(2)), but the revisions also conflict with Ohio law.

First, the Property was transferred with no severance or reservation of the mineral estate, so the Deed Restrictions legally apply to the surface and subsurface. Ohio law is clear that, unless mineral rights are severed from the surface rights, the fee owner of the property owns and controls both the surface and subsurface rights, with the concomitant power to restrict subsurface rights by agreement. *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 201 (1927); *Chesapeake Exploration, L.L.C., v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 21. The Deed did not disclose any severance or reservation; thus, CDC deed restricted the Property's surface and subsurface. The Trial Court re-defined what "Property" means under the Deed and Ohio law.

Second, the Trial Court did not acknowledge that the conveyance of mineral rights always includes the right to use the surface of the property. *See supra* III(A)(1). Even though the Trial Court upheld the Use Restriction as to surface use, the Trial Court inconsistently allowed for surface uses that were tied to uses of the underlying mineral estate.

The Trial Court also inconsistently applied its revision of the Use Restriction to uses *not incident* to use of the oil and gas extraction. This Court cannot square the finding that CDC erected a locked gate preventing access to the Property (Entry, p. 3, ¶ 5), yet no breach of the surface Use Restriction occurred. This surface use plainly conflicts with green space park area, even as re-written by the Trial Court, because it denies access to the Property.

Even if a Court is called to interpret deed restrictions, it is required to heed to the plain language meaning and parties' intentions. Ex. C., ¶ 2 (agreeing that "the restrictions set forth herein shall not be amended, released, extinguished or otherwise modified without the prior written consent of [the Commission]"). It failed to do so here and the *only* explanation, since the Court did not provide one, is that the Court improperly turned to the wrong public policy.

3. The Deed Restrictions advance public policy.

The Trial Court ignored express public policy in the Deed Restrictions, Ohio Constitution, and Revised Code—applying general property law instead to facilitate unmistakable breaches. A well-established prerequisite for enforcing a covenant that runs with the land is that the restrictions imposed cannot be against public policy. *Dixon v. Van Sweringen Co.*, 121 Ohio St. 56, 7 Ohio Law Abs. 351, 166 N.E. 887 (1929), syllabus. As a result, the public policy doctrine calls for the court to "examine whether the subject deed restriction accomplishes a result that the legislature has sought to prevent." *Fairfield Twp. Bd. of Trustees v. Testa*, 153 Ohio St.3d 255, 2018-Ohio-2381, 104 N.E.3d 749, ¶ 20.

The Trial Court erred in finding that the Deed Restrictions were against public policy because the Trial Court failed to defer to the Ohio Constitution, relevant statutes, and parties' intentions, instead of a general proposition of common law. While the *general* common law in Ohio disfavors restraints on property (Entry, p.4, ¶¶ 2-3), a *specific* public policy called for the long-term ownership and control, and restricted use of Clean Ohio properties. The General Assembly is the policy-making body in this State—not the courts. *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 212. Revised Code 164.26 is unambiguous; the Commission is directed to establish policies to cause grant recipients to *maintain long-term ownership or control* of property for green space purposes purchased with Clean Ohio funds. *Cincinnati City School Dist. Bd. of Edn. v. Conners*, 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78, ¶ 21 (using public policy expressed by General Assembly in statute to allow use of property for public purposes); *Fairfield Twp. Bd. of Trustees v. Testa*, 153 Ohio St.3d 255, 2018-Ohio-2381, 104 N.E.3d 749, ¶ 20 (using public policy expressed by General Assembly in statute to allow use of property for public purposes). Where a statute is unambiguous, "courts should look no further in their efforts to interpret the intent of the General Assembly." *State v. Smorgala*, 50 Ohio St.3d 222, 223, 553 N.E.2d 672 (1990). The Deed Restrictions were identically clear. *This* public policy should have been imputed.

Instead, the Trial Court parsed language and held that the Deed Restrictions required "perpetual ownership rather than ownership or long-term control as stated in R.C. 164.26(A)." Entry, p.7, ¶ 14. This distinction is trivial, especially when the transfers here occurred between three and six years after CDC restricted the Property. Moreover, the Trial Court misstated the Transfer Restriction. More accurately stated, the Deed Restriction states: "Grantee shall not voluntarily or involuntarily sell, assign, transfer, lease, exchange, convey or otherwise encumber

the Property *without the prior written consent of OPWC.*" These types of transfer restrictions have been upheld by this Court. *Apple Valley Sales, Inc. v. Apple Valley, Inc.*, 5th Dist. Knox Case No. 88-CA-005, 1988 Ohio App. Lexis 3195, at *6–7 (Aug. 2, 1988) (holding invalid an assignment of property development interest when the restriction provided that no assignment could occur without the prior written consent of the seller).

B. The Commission is entitled to declaratory and injunctive relief.

The Trial Court's decision eliminates any accountability over a grant recipient's *actual use* of a Clean Ohio property for environmental conservation purposes. The Trial Court found that R.C. 164.26(A) contained "no provision for injunctive nor declarative relief." Entry, p. 5, ¶ 8. This is incorrect because, while the statute requiring policies for long-term ownership contains a provision for monetary damages, nowhere does it state that this as an exclusive remedy for the Commission. *See Siltstone Resources, LLC*, 2019-Ohio-4916, ¶ 67 ("The statute [R.C. 164.26(A)] does not include an exclusive list of remedies. The remedies the statute mentions are in regard to instructing the director of the [Commission] to establish policies to provide for liquidated damages and grant repayment."). If money damages were the exclusive remedy, then the phrase "long-term ownership or control" would have no meaning. Under the Trial Court's ruling, a grant recipient can just buy its way out of long-term stewardship of environmental conservation property.

1. Declaratory and injunctive relief were authorized, requested, and required.

The Commission *must* be able to enforce the Deed Restrictions "at law or in equity" because the Trial Court's decision permitted CDC to act as a straw man and sell off public land for its own profit. The Seventh District recently agreed: "If [the Commission] is not able to enforce the long-term ownership of the property via equitable means, Appellant [the Commission] 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. * * * Appellant

[the Commission]'s arguments are convincing." *Siltstone Resources, LLC*, 2019-Ohio-4916, ¶¶ 64–65. The Trial Court's holding contradicts well-settled precedent set by this Court and is also illogical. The Clean Ohio Program is rendered useless where the Commission has no ability to stop breaches that negatively impact conservation of green space.

Notably, the Trial Court omitted the controlling enforcement provision of the Deed Restrictions. It is undisputed that the Deed Restrictions provide: "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, [the Commission]." Ex. C. It is also undisputed that "*[the Commission] shall have the right to enforce by any proceedings at law or in equity, all restrictions, conditions and covenants set forth herein.*" Ex. C. The Trial Court's failure to even mention this unambiguous provision dooms its analysis. The parties bargained for the Deed Restrictions to be enforceable at law or in equity. The Trial Court must give heed to the plain language and parties' expressed intentions.

In *Siltstone Resources*, the Court found that identical language in a deed allowed the Commission to obtain equitable relief from the Court: "[T]he enforcement restriction clearly and unambiguously provides that Appellant [the Commission] 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." *Siltstone Resources, LLC*, 2019-Ohio-4916, ¶ 68. Notably, the Court in *Siltstone Resources* cited this Court's own precedent in *Morgan Woods* when making this finding. *Id.*, ¶ 69, citing Morgan *Woods Homeowners' Assn. v. Wills*, 5th Dist. Licking No. 11 CA 57, 2012-Ohio-233, ¶ 60. The Court continued, "The parties' intent when they agreed to the restrictions here is clear. Appellee [CDC] was not to 'sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of [the Commission.' If

Appellee [CDC] violated the above restriction, then Appellant [the Commission] could enforce that restriction 'by any proceedings in law or in equity." *Id.*, ¶ 70.

The Deed Restrictions here plainly state that the Commission "shall have the right to enforce by any proceedings at law or in equity, all restrictions, conditions and covenants set forth herein," and thus the Trial Court should have permitted the Commission to seek equitable relief.

In addition, it makes sense that both money damages and equitable relief should be available here. Money damages can remedy past violations of the Deed Restrictions, but equitable relief is the only way to prevent current and ongoing breaches of the Deed Restrictions. The Commission has no remedy at law to prevent these breaches. Without an injunction, nothing prevents Appellees from continuing to divest the Property, or from using it in ways that conflict with its green space purpose. The repayment of grant money can never make the Commission whole, and the plain language of the deed authorizes this necessary injunctive relief.

The Deed Restrictions are enforceable in equity as a matter of common law, as well. In fact, this Court upheld grants of declaratory and injunctive relief when a party has breached a deed restriction. *D & L Ferguson LLC,* 2018-Ohio-2473 at ¶ 70–71 (upholding injunctive relief upon breach of a deed restriction); *Goutras*, 1991 Ohio App. LEXIS 4889, at *1 (Sep. 30, 1991) (upholding a permanent injunction upon breach of a deed restriction); *Morgan Woods*, 2012-Ohio-233, ¶ 60 (upholding injunctive relief as proper upon breach of a deed restriction).

Even if the Trial Court disregarded the Deed Restriction's equity language and this Court's precedent awarding injunctive relief, trial courts have the general authority to grant this relief. *See* R.C. 2721.02(A) ("[C]ourts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. * * * The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree."); *see*

also Garono v. State, 37 Ohio St.3d 171, 173, 524 N.E.2d 496 (1988) ("An injunction * * * may be granted by a court if it is necessary to prevent a future wrong that the law cannot.").

The Trial Court should have found that the Commission could enforce its Deed Restrictions through declaratory and injunctive relief. This Court should reverse the Trial Court's findings; this Court should issue the Commission a declaratory judgment that the Deed Restrictions were breached, and award injunctions undoing the unlawful transfers and preventing future transfers.

2. Expiration of a property interest does not erase the breach.

The Trial Court erroneously found that any injunctive or declaratory relief against the parties would be moot because use agreements had since expired. Entry, p. 5, ¶ 8; *see supra* III(A)(1), III(B)(1), III(B)(2). This holding is wrong because the Commission seeks to hold the grantee, CDC, accountable by injunctive, declaratory, and monetary relief for all breaches. To remedy all of CDC's past and ongoing wrongs, the Commission must unwind each of CDC's transactions—a feat which requires the participation of all of the parties to those transactions.

First, the Commission sought declaratory judgment against all parties because it sought to declare the rights and standing of all parties. Specifically, the Commission sought to declare its rights in enforcing the Deed Restrictions against CDC. The Commission sought injunctive, declaratory, and money damages from all parties. Crossclaim, Counts 1-3. After discovery, the Commission waived its claims for monetary relief against Patriot and Devon because their rights in the Property had since expired. Reply in Support, p. 6. The Commission maintained its request for declaratory relief against all parties. *Id.* To do so was reasonable and appropriate. CDC sold off various interests and rights in the Property, breaching the Deed Restrictions. In order for a court to declare the Commission's right to enforce the Deed Restrictions, the Commission was required to join all of the parties to CDC's actions. Both Patriot and Devon were parties to CDC's actions and thus both had to be joined to this action.

Second, all parties must be joined in order to issue a declaratory judgment. R.C. 2721.12(A); Civ.R. 19(A); *see also Plumbers & Steamfitters Local Union 83 v. Union Local School Dist. Bd. of Edn.*, 86 Ohio St.3d 318, 323, 1999-Ohio-109, 715 N.E.2d 127. Siltstone and Appellees each would be affected by any enforcement action because each had an actual property interest in the Property, breached the Transfer Restriction, and used the Property in a way that conflicts with conservation, breaching the Use Restriction. Thus, each of the parties were necessarily joined by the Commission in order to facilitate the requested relief.

Third, the Deed Restrictions run with the land and are valid and enforceable, both then and now. Where a grant of real property is made, the grantee is bound by restrictions of record referenced in deeds in the grantee's chain of title. *Ohio Turnpike Comm. v. T.T.R. Media LLC*, 9th Dist. Lorain C.A. No. 99CA007470, 2000 Ohio App. Lexis 5454, at *6 (Nov. 22, 2000); *Natl. City Bank v. Welch*, 188 Ohio App.3d 641, 2010-Ohio-2981, 936 N.E.2d 539, ¶ 14 (10th Dist.); *Wells Fargo Bank, N.A. v. Michael*, 2013-Ohio-2545, 993 N.E.2d 786, ¶ 29 (7th Dist.). And, the Deed Restrictions themselves stated that they run with the land. Ex. C ("The restrictions set forth in this Declaration shall be perpetual and shall run with the land for the benefit of, and shall be enforceable by [the Commission]."). No party disputed that CDC's deed to the Property contained these Deed Restrictions, they did not dispute that the deed was recorded, and they conceded notice of the Deed Restrictions. Because the Deed Restrictions run with the land (Entry, p. 7, ¶ 13), they applied to both parties during their breaches, regardless of any later expiration.

Fourth, there is no statute of limitations on deed restriction enforcement and equitable defenses do not bar the Commission's enforcement. Ohio law does not place a statute of limitations on enforcement of deed restrictions—Appellees' and the Trial Court could not point to any such restriction. Neither could Appellees' defend their affirmative defense that the

Commission was equitably barred from asserting its claims due to the doctrine of laches because the doctrine does not apply to government agencies. *Pilot Oil Corp. v. Ohio Dept. of Transp.*, 102 Ohio App. 3d 278, 281, 656 N.E.2d 1379 (1995).

As such, the Trial Court erred because the Commission's claims for declaratory relief from Patriot and Devon were not moot. The Trial Court should have first found that the Appellees' actions breached the Deed Restrictions, and then should have granted the Commission equitable relief to enforce those restrictions.

III. ASSIGNMENT OF ERROR NO. 3: The Trial Court erred in deny the Commission's motion for partial summary judgment and in granting Appelees' various motions for summary judgment because the Commission is entitled to money damages.

A. Liquidated damages are statutorily mandated.

The General Assembly specifically provided for liquidated damages as an enforcement mechanism when it enacted R.C. 164.26, which calls for "proper liquidated damages" *and* grant repayment in the event of entities failing to comply with the requirements of long-term ownership or control. The Commission appropriately included a liquidated damages provision in the Deed Restrictions as authorized and mandated by statute.

B. The liquidated damages provision is not a penalty.

The Trial Court erred in concluding that the Commission's liquidated damages clause was invalid and unenforceable because the clause provides for an amount disproportionate to actual damage. Entry, p. 6, ¶ 9. The Trial Court did not conduct the analysis required by the Ohio Supreme Court in *Samson Sales, Inc.*, 12 Ohio St.3d 27, 29, 465 N.E.2d 392 (1984). Instead, the Trial Court cited *Lakewood Creative Customers v. Sharp* to support its conclusion. Entry, p. 6, ¶ 9, citing 31 Ohio App. 3d 116, 509 N.E.2d 77, Syll. ¶ 2 (8th Dist.1986). This citation is inapposite.

Ohio law recognizes that proper liquidated damages provisions are enforceable. *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 381, 613 N.E.2d 183 (1993). Indeed, it is only

when the stipulated damages have the *sole purpose* of enacting a penalty that public policy may prevent enforcement. *Id.* The Ohio Supreme Court established the applicable test:

> Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof. *Samson Sales, Inc.*, 12 Ohio St.3d, at 29.

"[I]t is necessary to look to the whole instrument, its subject-matter, the ease or difficulty of measuring the breach in damages, and the amount of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach, and also to the intent of the parties ascertained from the instrument itself in the light of the particular facts surrounding the making and execution of the contract." *Jones v. Stevens*, 112 Ohio St. 43, 146 N.E. 894, paragraph one of the syllabus (1925).

First, the Trial Court cited an Eighth District Appellate Court's decision, instead of citing controlling Ohio Supreme Court precedent. Entry, p. 6, ¶ 9. The *Samson Sales* Test is the appropriate means of conducting this analysis and the Trial Court did not conduct it. In fact, the *Samson Sales* Test is even referenced in the *Lakewood Creative* case. 31 Ohio App.3d at 117. Second, the facts of the *Lakewood Creative* case are grossly incomparable to the facts here. In *Lakewood Creative*, the plaintiff sought to enforce a 400% liquidated damages provision in a costume rental contract when the renter returned the $20-costume two months late. 31 Ohio App.3d at 116–17. That provision objectively was a penalty. This set of facts cannot be

extrapolated to the thousands of dollars of tax-exempt bonds that were abused when Appellees conducted oil and gas operations on deed restricted property.

Second, the liquidated damages provision passes the *Samson Sales* Test. The cost of each type of damage the Commission may suffer is unascertainable at the time of contracting. Nevertheless, the deed language accounted for the difficulty of measuring the damages, and also provided for an amount that was proportional to the probable consequences of the grant recipient's breach. The liquidated damage sum accounts for numerous types of damages that the Commission sustains when a grantee breaches the terms of the deeds. When constructing the relevant deeds, the Commission could not ascertain: the unique cost of losing the particular piece of land which was acquired for conservation; the difficult task of having to find a similar piece of land to replace the land lost; how much damage would be done to the land if it was leased or sold to an oil and gas development company; and the entirely unascertainable cost of rectifying the damage done to the land by any drilling, removal, or withdrawal that has occurred due to the breaches. Most importantly, these provisions must account for the damage done to the citizens who relied on the conservation of these properties. As the pleadings reflect, structures have been erected on the Property in order to facilitate withdrawals, resources have been withdrawn from the Property, and structures have been erected to keep citizens out of the Property.

Based on the far-ranging types of damages and the variable breadth of damage that could occur, the liquidated damages provision was as tailored and accurate as possible. In fact, the only cost of damage which was ascertainable was the rescission of the amount of the grant afforded to the grantee. This amount certainly is reflected and accounted for by the liquidated damages provisions here. What the Trial Court ignored, however, is that the breaches have far greater, unascertainable consequences than just rescission of the grant amount.

Considering the above, the liquidated damages provision is also not so manifestly unconscionable, unreasonable, and disproportionate as to justify the conclusion that it does not express the true intention of the parties. A 200% liquidated damages provision is not unconscionable, unreasonable, or disproportionate in light of the exceeding costs of the Appellees' breaches and the damage occurs when land is leased off to big oil and gas companies.

The liquidated damage provision is also consistent with CDC and the Commission's intentions. CDC came to the Commission espousing its intentions in preserving and protecting the Property. The deed language was constructed off of those intentions. The liquidated damages provision, to which CDC agreed, ensures that the State of Ohio's money was used for the purposes that CDC championed. The Commission is entitled to the benefit of the bargain.

Because the liquidated damage provision satisfies the *Samson Sales* Test and was not enacted for the sole purpose of penalizing CDC, the Trial Court should have enforced it.

C. The Commission requested partial summary judgment in order to present evidence relating to liquidated damages.

Additionally, the Trial Court erred in deciding *sua sponte* that the liquidated damage provision was a penalty without taking any evidence on liquidated damages. Whether a liquidated damage provision is reasonable is a question of fact that prevents the issuance of a decision on a summary judgment motion. Motion, pp. 2-3 (asking the Court for a bifurcated evidentiary hearing on damages). As such, it was inappropriate for the Trial Court to render a decision on this issue.

A court shall not render summary judgment in the presence of a genuine issue of material fact. Civ.R. 56(C). The Ohio Supreme Court stated in *Samson Sales*: "Whether a particular sum specified in a contract is intended as a penalty or as liquidated damages depends upon the operative facts and circumstances surrounding each particular case * * *." *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 28–29, 465 N.E.2d 392 (1984). The determination of a liquidated damages

clause constitutes a penalty involves *factual* questions that cannot be resolved as a matter of law. *Huo Chin Yin v. Amino Prods. Co.*, 141 Ohio St. 21, 29, 46 N.E.2d 610 (1943).

Yet, the Court made this exact fact determination—*without any facts*. Entry, p. 6, ¶ 9. The Commission did not put on any facts on this matter because it only asked for partial summary judgment, with the Court resolving the issue of money damages in a later proceeding. Motion, p. 31 (requesting declaratory judgment that "the Commission is entitled to monetary damages * * * in respective amounts to be determined at trial."). This is a question of fact which prevented the Trial Court from granting any motion for summary judgment. Motion, pp. 2-3. The Supreme Court in *Samson Sales* specifically used its opinion to demonstrate that this particular question of fact is inappropriate for summary judgment and the Trial Court erred in deciding it *sua sponte*.

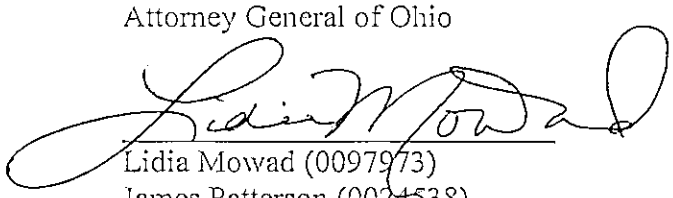
CONCLUSION

The Commission intervened in this suit to protect a Clean Ohio Property, the citizens of Guernsey County and the citizens of Ohio, who voted to put tax-exempt bond money to work for a Clean Ohio. The Deed Restrictions and the Appellees' violations are matters of public record and are not disputable. The Commission was entitled to judgment in its favor as a matter of law. The Trial Court's decision to grant the Appellees' Motions for Judgment on the Pleadings and for Summary Judgment must be reversed, because if allowed to stand, then the Commission will have no ability to enforce the constitutionally-mandated, voter-approved Clean Ohio Program.

The Commission respectfully requests that this Court VACATE the final judgment entry dated October 25, 2019. The Commission requests that this Court REVERSE the Trial Court's findings and find that, as a matter of law, the Commission is entitled to summary judgment, and is entitled to liquidated damages, and injunctive and declaratory relief as pled in the Commission's Cross-Claim.

Respectfully submitted,

DAVE YOST (0056290)
Attorney General of Ohio

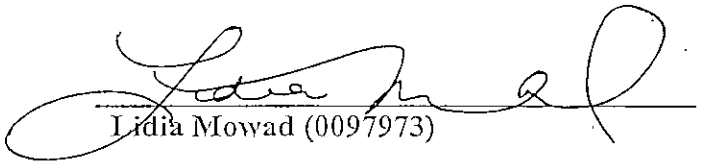


Lidia Mowad (0097973)
James Patterson (0024538)
Rachel Huston (0074934)
Christie Limbert (0090897)
Cory Goe (0090500)
Michelle Pfefferle (0081642)
Joshua Nagy (0097099)
Assistant Attorneys General
Executive Agencies Section
30 E. Broad St. 26th Floor
Columbus, OH 43215-3428
Telephone: (614) 466-2980
Fax: (614) 506-0283
lidia.mowad@ohioattorneygeneral.gov
james.patterson@ohioattorneygeneral.gov
rachel.huston@ohioattorneygeneral.gov
christie.limbert@ohioattorneygeneral.gov
cory.goe@ohioattorneygeneral.gov
michelle.pfefferle@ohioattorneygeneral.gov
joshua.nagy@ohioattorneygeneral.gov
Counsel for Ohio Public Works Commission

Exhibit A

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Defendant-Appellant Ohio Public Works Commission has been served upon the following via electronic mail, pursuant to App. R. 13(C), this 24 day of January, 2020.



Lidia Mowad (0097973)

Exhibit A

IN THE COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

SILTSTONE SERVICES, LLC

Plaintiff

v.

GUERNSEY COUNTY COMMUNITY DEVELOPMENT CORPORATION, et al.

Defendants

Case No. 17 CV 000611

ORDER

This matter comes on before this Court upon Plaintiff Siltstone Services LLC's (Siltstone's) Motion For Summary Judgment, Defendant The Guernsey County Community Development Corporation's (CDC's) Motion For Summary Judgment, Defendant The Guernsey County Community Development Corporation's (CDC's) Motion For Summary Judgment As To Cross-Claim Of Defendant Devon Energy, Defendant Ohio Public Works Commission's (OPWC's) Motion For Partial Summary Judgment, Cross-Claim Defendant and Cross-Claimant Devon Energy Company, L.P.'s (Devon's) Motion for Summary Judgment, Defendant Gulfport Energy Corporation's (Gulfport's) Motion For Judgment On The Pleadings, Patriot Land Company LLC's (Patriot's) Motion For Summary Judgment, Synergy Land Company, LLC and Whispering Pines Land Company, LLC's (Synergy and Whispering Pines') Motion For Judgment On the Pleadings and Cross-Claim Defendant and Cross-Claimant Devon Energy Production Company, L.P.'s (Devon's) Motion for Partial Summary Judgment. After having reviewed the same, this Court makes the following ruling.

FINDINGS OF FACTS

1. The CDC located in Guernsey County is a non-profit corporation organized under the laws of the State of Ohio. In its capacity of assisting with economic and recreational development, the CDC seeks federal, state and local grant monies. The CDC applied for funding, in 2006, from the Clean Ohio Conservation Fund to purchase 334 acres of land in Guernsey County, Ohio and the railroad bed along Leatherwood Creek in order to create a green corridor.

2. After securing approval of the OPWC grant, CDC purchased approximately 60 acres from George and Autumn Thompson. (Thompson)

3. The General Warranty Deed from the Thompson's contained two restrictions to preserve the OPWC's objective of preserving green space.

> Use and Development Restrictions. Declarant 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. (Hereinafter, the "Use Restriction").
>
> Restriction on transfer of the Property. Grantee acknowledges that the Grant is specific to Grantee and 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 prior written consent of OPWC, which consent may be withheld in its sole and absolute discretion. (Hereinafter, the "Alienation Restriction.")

4. The Enforcement provision set forth in the Thompson Deed reads as follows:

> Enforcement. If [the CDC], or its successors or assigns as owner of the Property, should fail to observe the covenants and restriction set forth herein, the [CDC] or its successors or assigns, as the case may be, shall pay to [the Commission] upon demand, as liquidated damages, an amount equal to the greater 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 [the Commission]. [The CDC] 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.

5. In April of 2013, Dan Speedy signed a letter agreeing to provide a right of way to Plaintiff Siltstone across CDC's Property to allow Siltstone to access its own adjoining property for oil and gas exploration and development (ROW Letter Agreement). The purpose of the right of way was to allow Siltstone to run oil and gas rigs and other heavy equipment across the CDC property. The Siltstone property was not land-locked and Siltstone can access the same via its own road frontage. Siltstone has not used the right of way and a locked gate has been erected by CDC.

6. The ROW Letter Agreement signed by Speedy was never presented to the CDC Board of Trustees, nor was it ever discussed nor approved by them in conflict with CDC's By-Laws effective in 2013. No formal right of way agreement was ever recorded with the Guernsey County Recorder. Speedy's actions regarding the ROW Letter Agreement were not within a course of dealing accepted by the Board, but rather were ultra vires.

7. In March, 2011, CDC entered into an oil and gas lease with Patriot Land Company, LLC. In October, 2012, Patriot assigned its rights under the lease to Gulfport and retained an overriding royalty interest. Synergy Land Company LLC and Whispering Pines Land Company LLC subsequently received assigned interests. Any and all activity under said lease was subsurface only.

8. In August 2012, CDC and Devon Energy Production Company L.P. agreed to a Water and Surface Use Agreement and an amendment whereby Devon secured the right to draw water from the ponds on CDC property. OPWC has presented this Court with no proof of damages regarding the same. The First Agreement states the Landowner agrees to:

"INDEMNIFY, RELEASE, ACQUIT, DISCHARGE, AND HOLD HARMLESS DEVON FROM ALL EXISTING AND FUTURE CLAIMS, DEMANDS, AND CAUSES OF ACTION, WHETHER KNOWN OR UNKNOWN, WHETHER BASED ON TORT (INCLUDING STRICT LIABILITY), CONTRACT, OR STATUTORY LAW...THAT RELATE TO OR ARISE FROM (A) DAMAGES TO THE PONDS CAUSED BY THE OPERATIONS, OR (B) PERSONAL INJURY OR DEATH RESULTING FROM THE PONDS OR THE CONTENTS OF THE PONDS BEING USED FOR PURPOSES NOT PERMITTED IN PARAGRAPH 5 OF THIS AGREEMENT."

The Agreements terminated August 10, 2013. OPWC has withdrawn their declaratory judgment and injunctive relief claims against Devon.

9. In September 2012, CDC conveyed two acres of the CDC Property to the Guernsey County Commissioners by way of a General Warranty Deed. These two acres were used to establish a trail head to further the CDC's Property as a green space, or park. There have been no structures erected on the property.

CONCLUSIONS OF LAW

1. It is the acts of the principal, rather than the agent, that determines whether there is apparent authority to bind the principal. Seniah Corp. v. Buckingham, Doolittle and Burroughs, LLP, Fifth Dist. Case No. 2017 CA 00109 at ¶ 57 (March 5, 1978).

2. Restrictive covenants that control the use of property are generally viewed with disfavor. Garvin v. Cull, 11th Dist. No. 2005-L-145, 2006-Ohio-5166, ¶ 19; Baker v. Adams, 3rd Dist. No. 8-05-17, 2006-Ohio-3332, ¶ 30.

3. Agreements "imposing such restrictions must be strictly construed against the imposition of limitations and all doubts must be resolved against a construction which would heighten the restrictive burden upon the property in question." Driscoll v. Austintown

Exhibit A

Associates, 42 Ohio St. 2d 263, 277 (1975); Loblaw, Inc. v. Warren Plaza, Inc., 163 Ohio St. 581 (1955); Hunt v. Held, 90 Ohio St. 280, 282-283 (1914).

4. "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, 697 N.E. 2d 208).

5. Ohio 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.

6. Even if any provision of the deed 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. Cocea Dev., Ltd., 2006-Ohio-7273, ¶ 46 (7th Dist.).

7. As to the Right of Way Letter Agreement signed by Daniel Speedy, this Court concludes that Speedy's actions regarding the creation of the same were ultra vires and therefore not binding upon the Defendant CDC.

8. The remedy afforded to OPWC in R.C. 164.26(A) relates only to damages and makes no provision for injunctive nor declarative relief. If such relief was granted to OPWC, regarding Devon Energy, they would be rendered Moot due to the agreement having long since expired of their own terms.

9. OPWC's claims relating to the Devon Energy Water and Surface Agreements do not establish a claim for damages. The OPWC put forth no evidence that the withdrawal of the de minimus amount of water for a limited period of time conflicts with the use of the CDC property as a green space park area. Additionally, OPWC's claim for damages based upon the Enforcement Provision in the Thompson Deed, is disproportionate to the alleged damages sustained and rather act as a penalty. Liquidated damages clauses are invalid and unenforceable where the damages clause provides for an amount disproportionate to the actual damage. Lakewood Creative Customers v. Sharp, 31 Ohio App. 3d 116, Syll. ¶ 2 (1986).

10. As to Devon's Cross-Claim against CDC, the Water and Surface Agreement provides for indemnification for claims:

> **THAT RELATE TO OR ARISE FROM (A) DAMAGES TO THE PONDS CAUSED BY THE OPERATIONS, OR (B) PERSONAL INJURY OR DEATH RESULTING FROM THE PONDS OR THE CONTENTS OF THE PONDS BEING USED FOR PURPOSES NOT PERMITTED IN PARAGRAPH 5 OF THIS AGREEMENT.**

The Cross-Claims of OPWC against Devon Energy do not involve damages to the ponds or personal injury.

11. Regarding the Patriot Land Company LLC Lease and the subsequent conveyances to Gulfport, Synergy and Whispering Pines, the Use Restriction involved herein reads as follows:

> 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.

The OPWC has submitted no proof that there has been any surface use of the premises regarding oil and gas development. The Patriot Lease has now been released. The Use Restriction applies to the surface of the Premises and not to the subsurface estate. The Use Restriction is designed to protect green space and is not underground. Wherefore, this Court

concludes the use of the subsurface is neither a violation of the Alienation Restriction nor the Use Restriction.

13. CDC's conveyance of two acres to Guernsey County to establish a trail head to further CDC's Property as a green space park area, does not violate the Use Restriction. No structures have been erected and the transfer augments the green space objectives. Guernsey County is bound by the Use Restriction as it runs with the land.

14. Ohio Revised Code 164.26 (A) sets forth in pertinent part:

> 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.

This Court concludes that the Alienability Restriction set forth in the Thompson Deed, is void as a matter of law in that it requires perpetual ownership rather than ownership or long-term control as stated in R.C. 164.26(A).

Wherefore, having found that no dispute of material fact exists and construing the allegations in favor of the nonmoving party, this Court finds that the claimant can prove no set of facts in support of the claim that would entitle them to relief and this Court grants Gulfport Energy Corporation's Motion For Judgment On The Pleadings as to Ohio Public Works Commission's Cross-Claim and grants Synergy Land Company LLC and Whispering Pines Land Company LLC's Motion For Judgment On the Pleadings as to Ohio Public Works Commission's Cross-Claims.

As to the pending Motions and Partial Motions for Summary Judgment, after construing the evidence most strongly in favor of the nonmoving party and having determined that there are

no genuine issues of material fact and that reasonable minds can come to but one conclusion and further that there is no just reason for delay, this Court makes the following ruling.

This Court grants Guernsey County Community Development Corporation's Motion for Summary Judgment as to Siltstone Service LLC's (Siltstone's) Complaint and denies Siltstone's Motion as to CCD. This Court grants CCD's Motion for Summary Judgment as to Ohio Public Works Commission's (OPWC's) Cross-Claim against CCD. Likewise, CCD's Motion for Summary Judgment as to their Cross-Claim against OPWC is hereby granted. Additionally, this Court grants CCD's Motion for Summary and denies Devon Energy Company L.P.'s (Devon's) Motion for Partial Summary Judgment as to Devon's Cross-Claims against CCD.

Patriot Land Company LLC's Motion for Summary Judgment is hereby granted. This Court grants Devon Energy's Motion for Summary Judgment as to OPWC's Cross-Claims.

The Motion for Summary Judgment of Siltstone Service LLC as to its Complaint and OPWC's Counter-Claim are hereby denied in that the right of way agreement herein was ultra vires and this Court further finds OPWC's claim for injunctive and declaratory relief to be Moot.

The Ohio Public Works Commission's Motion for Partial Summary Judgment is hereby denied with the exception that the Siltstone Right of Way Agreement has been found to be ultra vires and thus void.

The Judgment Entry of this Court having resolved all issues between the parties, this is a final appealable order. Each party shall be responsible for their own attorney fees. Costs shall be split between Plaintiff Siltstone Services LLC and Intervening Defendant Ohio Public Works Commission. **IT IS SO ORDERED.**

Judge Linton D. Lewis, Jr.

FINAL APPEALABLE
ORDER

Exhibit A

WITHIN THREE (3) DAYS OF ENTERING THIS JUDGMENT UPON THE JOURNAL, THE CLERK SHALL SERVE NOTICE OF THIS JUDGMENT AND ITS DATE OF ENTRY UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR. SERVICE SHALL BE MADE IN A MANNER PRESCRIBED IN CIVIL RULE 5 (B) AND SHALL BE NOTED IN THE APPEARANCE DOCKET. CIVIL RULE 58.

IN THE COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

SILTSTONE SERVICES, LLC

Case No. 17 CV 000611

Plaintiff

v.

ORDER

GUERNSEY COUNTY COMMUNITY DEVELOPMENT CORPORATION, et al.

Defendants

This matter came on before this Court upon Ohio Public Works Commission's Motion For Status Conference filed on October 1, 2019. The case at bar having been resolved by way of this Court's rulings upon dispositive motions, said Motion herein has been rendered Moot.

IT IS SO ORDERED.

Judge Linton D. Lewis, Jr.

FINAL APPEALABLE ORDER

Exhibit A