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
Defendant/Appellee	:	
v.	:	
PATRIOT LAND COMPANY, LLC, et al.,	:	
Crossclaim Defendants/Appellants.	:	

MERIT BRIEF OF APPELLANTS SILTSTONE RESOURCES, LLC AND AMERICAN ENERGY – UTICA MINERALS, LLC

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STATEMENT OF FACTS

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

A. The OPWC imposes an alienation restriction on 228.485 acres purchased by the CDC with a Clean Ohio Conservation Fund grant.

On October 14, 2005, the CDC applied for a $430,200 grant from the Clean Ohio Conservation Fund to purchase 228.485 acres in Belmont County (the "Property"). (Supp. 4, Appellants' Supp. 579-580, at ¶¶ 31, 36; Supp. 5, Appellants' Supp. 1303, at ¶ 1.) The entire Property had previously been strip mined all the way through, except for the fringes. (Supp. 16, Appellants' Supp. 2107-2108, at Tr. 50-51.) When the CDC sought funding from the OPWC, reclamation activities under the supervision of the Ohio Department of Natural Resources were still ongoing. (Supp. 16, Appellants' Supp. 2108-2109, at Tr. 51-52.) There are no structures on the Property. (Supp. 13, Appellants' Supp. 1638-1639, at Tr. 111-12.)

The OPWC approved the grant and entered into a project grant agreement with the CDC on April 24, 2006. (Supp. 4, Appellants' Supp. 581, at ¶¶ 40-41; Supp. 5, Appellants' Supp. 1303, at ¶ 1.) Pursuant to R.C. § 164.26(A), the director of the OPWC 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 a Clean Ohio grant. (Supp. 4, Appellants' Supp. 579, at ¶ 29; Supp. 5, Appellants' Supp. 1303, at ¶ 1.) Revised Code § 164.26(A) specifically provides that such 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." (Supp. 4, Appellants' Supp. 579, at ¶ 30; Supp. 5, Appellants' Supp. 1303, at ¶ 1.) Section 9 of the Project Grant Agreement required the CDC to record restrictions on the deed conveying the Property to the CDC. (Supp. 4, Appellants' Supp. 581, at ¶ 42, 36; Supp. 5, Appellants' Supp. 1303, at ¶ 1.)

On February 23, 2007, Capstone Holding Company deeded the Property to the CDC. (Supp. 10, Appellants' Supp. 1410, at ¶ 8, Ex. 1; Supp. 12, Appellants' Supp. 1509, at ¶ 8.) The deed included the following Use Restriction: "This property will not be developed in any manner that conflicts with the use of the Premises as a green space park area that protects the historical significance of this particular parcel. Only current structures will be maintained and no new structures will be built on the Premises." (*Id.*) The deed also included the following Alienation Restriction: "Grantee shall not voluntarily or involuntarily sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of OPWC, which consent may be withheld in its sole and absolute discretion." (*Id.*) Additionally, the deed included the following provision regarding liquidated damages:

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

(*Id.*) Finally, the deed included a provision purporting to allow OPWC to enforce the restrictions at any proceeding in law or in equity. (*Id.*)

B. Siltstone purchases mineral rights associated with the Property, but the producer refuses to pay oil and gas royalties because of the deed restrictions.

On March 25, 2011, the CDC signed an oil and gas lease covering the Property (the "Lease") with Patriot Land Company, LLC. (Supp. 10, Appellants' Supp. 1431, at ¶ 13, Ex. 2; Supp. 8, Appellants' Supp. 1343, at ¶ 13.) On June 22, 2012, Patriot Land Company, LLC executed an Assignment of Oil, Gas and Mineral Leases in favor of Gulfport Energy Corporation ("Gulfport"). (Supp. 10, Appellants' Supp. 1432, at ¶ 16; Supp. 8, Appellants' Supp. 1344, at ¶ 16.) On December 31, 2013, the CDC sold 186.9189 net mineral acres associated with the Property to Siltstone for $3,707,162.54.[1] (Supp. 10, Appellants' Supp. 1433, at ¶ 27, Ex. 3; Supp. 12, Appellants' Supp. 1511, at ¶ 27.) The CDC represented and warranted that it had received all state, county, and jurisdictional approvals needed. (*Id.*) The deed was made subject to the existing Lease held by Gulfport. (Supp. 10, Appellants' Supp. 1433, at ¶ 27, Ex. 3; Supp. 12, Appellants' Supp. 1511, at ¶ 27.)

On September 17, 2014, the CDC sold 29.595 net mineral acres associated with the Property to Triple Crown Energy, LLC, and this interest was eventually assigned to American Energy – Utica Minerals, LLC ("AEUM"). (Supp. 15, Appellants' Supp. 1992-1993, at ¶¶ 10-13; Supp. 18, Appellants' Supp. 2285, at ¶¶10-13.) Various interests in the Lease where also assigned to James Coffelt; Whispering Pines, LLC; Axebridge Energy, LLC; Eagle Creek Farm Properties, Inc. ("Eagle Creek"); and Windsor Ohio, LLC. (Supp. 4, Appellants' Supp. 711-749, at Exhibits

[1] Pursuant to the Purchase Sale Agreement, Siltstone agreed to purchase a 6/7ths interest in 228.4850 net mineral acres at a price of $19,833 per acre. (Supp. 10, Appellants' Supp. 1433, at ¶ 27, Ex. 3; Supp. 12, Appellants' Supp. 1511, at ¶ 27.) During title examination, Siltstone determined that 10.413 mineral acres covered by the agreement had been reserved by a prior owner (Supp. 10, Appellants' Supp. 1433, at ¶ 26), reducing the net mineral acres to be purchased by Siltstone to 186.9189. (Supp. 10, Appellants' Supp. 1433, at ¶ 27; Supp. 12, Appellants' Supp. 1511, at ¶ 27.)

J-N.) Gulfport also offered the Lease as part of the collateral for a $1.5 billion loan from The Bank of Nova Scotia. (Supp. 4, Appellants' Supp. 1060-1116, at Exhibit S.)

Despite the CDC's representation that it had received all approvals needed from the state, the CDC had not requested the OPWC's consent to sell mineral rights associated with the Property to Siltstone. (Supp. 4, Appellants' Supp. 586, at ¶ 78; Supp. 5, Appellants' Supp. 1304, at ¶ 3.) Instead, the CDC took the position that the OPWC's consent was not required because none of the CDC's actions with regard to leasing the Property and selling the mineral interests conflicted with the use of the premises as a green space park area. (Supp. 5, Appellants' Supp. 1304, at ¶ 3.) In fact, the CDC had used Clean Ohio grant funds to purchase other properties which had existing oil and gas wells on them and were subject to oil and gas leases at the time of purchase; the OPWC was fully aware that it had previously funded the purchase of properties subject to oil and gas leases. (Supp. 10, Appellants' Supp. 1434, at ¶ 34; Supp. 12, Appellants' Supp. 1511, at ¶ 34.)

In October of 2015, Gulfport stopped paying Siltstone under the Lease. (Supp. 10, Appellants' Supp. 1435, at ¶ 41; Supp. 8, Appellants' Supp. 1347, at ¶ 41). Gulfport indicated that the OPWC had learned the CDC transferred mineral rights associated with the Property to Siltstone without the OPWC's consent and that the OPWC intended to file suit contesting the validity of the deed to Siltstone. (Supp. 10, Appellants' Supp. 1435-1436, at ¶ 42; Supp. 8, Appellants' Supp. 1347, at ¶ 42.) Gulfport invoked a Lease provision allowing it to withhold royalty payments until the "adverse claim" (which it believed the OPWC would assert in the near future) had been "fully resolved." (*Id.*) After 18 months passed without Gulfport paying any royalties and without the OPWC filing a lawsuit challenging Siltstone's title to the minerals, Siltstone filed an arbitration proceeding seeking to force Gulfport to release the funds. (Supp. 10, Appellants' Supp. 1436, at ¶¶ 43, 45; Supp. 8, Appellants' Supp. 1347-1348, at ¶¶ 43, 45.) The arbitrator ultimately

determined that an apparent title dispute existed, and that, if no one else was willing to bring an action to resolve the title dispute, Siltstone could bring an action to remove the cloud on its title to the minerals conveyed by the CDC. (Supp. 10, Appellants' Supp. 1436, at ¶ 46; Supp. 11, Appellants' Supp. 1348, at ¶ 46.)

C. Siltstone files suit and the trial court holds that the deed restrictions were not violated and, in the event they were violated, the OPWC would be limited to a liquidated damages award against the CDC.

On March 29, 2017, Siltstone filed suit against the OPWC, the CDC, and Gulfport, seeking, inter alia, a declaration either that the Lease and sale of minerals to Siltstone did not violate the deed restrictions or (in the alternative) that the alienation restriction was void, that the relief available to the OPWC was limited to its liquidated damages, and that (pursuant to the Lease) Siltstone was entitled to the royalties generated by the minerals it had purchased. (Supp. 1.) The OPWC sought and obtained permission to add AEUM and all those who had an interest in the Lease. (Supp. 2; Supp. 3.) The OPWC requested a declaration that all the parties had breached the deed restrictions and that every transfer made by the CDC was void and also sought "injunctive or other equitable relief" ordering all those holding any kind of interest in the Property to assign their interests back to the CDC based upon the deed restrictions. (Supp. 4, Appellants' Supp. 597, 599-601, at ¶¶ 139, 149, 151-161.) In addition to the requested equitable relief, the OPWC also sought money damages against the CDC and others[2] based upon the liquidated damages provision in the deed. (Supp. 4, Appellants' Supp. 600-603, at ¶¶ 161-177.)

[2] The heading for Count 3 of the Amended Counterclaim and Crossclaims indicates that the OPWC is seeking money damages against the CDC, Gulfport, Patriot, Windsor Ohio, LLC, and AEUM. (Supp. 4, Appellants' Supp. 601.) In a subsequent paragraph, the OPWC included Siltstone in the list of parties it was allegedly entitled to money damages against. (Supp. 4, Appellants' Supp. 603, at ¶ 177.) It is unclear how the OPWC determined which parties it believed it was entitled to money damages from and why the Amended Counterclaim and Crossclaim inconsistently lists who the OPWC was seeking such damages against.

Siltstone moved to dismiss the OPWC's Amended Counterclaim pursuant to Civil Rule 12(B)(6), arguing that the Alienation Restriction was an impermissible restraint on alienation and that R.C. § 164.26(A) does not allow for equitable relief or monetary relief beyond the liquidated damages the CDC agreed to pay. (Supp. 6.) The trial court granted this motion in part, holding that damages are the sole and exclusive remedy available to the OPWC for any alleged breach of the deed restrictions. (Appx. 5, Appellants' Appx. 43.) At the OPWC's request, the trial court subsequently issued Conclusions of Law, explaining that R.C. § 164.26(A) does not create an exception to the bar against restraints on alienation and that R.C. § 164.26(A) expressly provides for liquidated damages to be paid by the grantee in the event that long-term ownership or control provisions imposed on properties purchased with Clean Ohio grant funds are violated, such that the OPWC lacks discretion to seek equitable enforcement of such provisions, either in addition to (or in lieu of) the liquidated damages mandated by statute. (Appx. 4, Appellants' Appx. 37-42.)

The trial court then ordered the parties to brief the issue of the applicability of the restrictive covenants found in the deed. (Supp. 14.) All parties filed briefs in response to the order, variously labeled motions for partial summary judgment or judgment on the pleadings. The trial court first found that the Use Restriction had not been violated, because the Use Restriction applies solely to the surface and the OPWC had not contended that anyone had made use of the surface for anything other than a green space park. (Appx. 3, Appellants' Appx. 34, Conclusion of Law ¶ 8.) The trial court then found that applying the Alienation Restriction to the subsurface estate would constitute an "illegal unreasonable restraint on alienability." (Appx. 3, Appellants' Appx. 34-35, Conclusion of Law ¶ 9.)

D. The court of appeals holds that alienation restrictions may be enforced so long as they are clear and that the OPWC could seek equitable relief despite the plain language of R.C. § 164.26(A).

The OPWC appealed the decisions finding that the Use Restriction had not been violated, that the Alienation Restriction was unenforceable as to the subsurface estate, and that R.C. § 164.26(A) limited the OPWC to grant repayment and liquidated damages in the event that the long-term ownership or control policies it adopted were violated. The panel was unanimous in holding that, since "green space" is not underground, the Use Restriction had not been violated by the mere signing of the Lease and sale of minerals, it being undisputed that this had not led to any use or disruption of the surface estate. (Appx. 2, Appellants' Appx. 19-22, 29, at ¶¶ 38-46, 75.)

Two of the three judges on the panel found that the trial court improperly held the Alienation Restriction to be unenforceable because the Lease and sale of minerals "were all in clear violation of the Restrictions on transfer of the Property." (Appx. 2, Appellants' Appx. 23, at ¶ 50.) In reaching this conclusion, the panel held that the enforcement of an alienation restriction is purely a matter of contract interpretation. (Appx. 2, Appellants' Appx. 24, at ¶ 54.) Despite the fact that the trial court had quoted prior case law indicating that alienation restrictions are disfavored, the panel asserted that trial court "offer[ed] no law or explanation" for its conclusion that the Alienation Restriction was an "illegal unreasonable restraint on alienability." (*Id.*) The panel, therefore, reversed the decision that the Alienation Restriction was unenforceable.

The same two judges held that, because the deed purported to grant the OPWC the right to enforce the restrictions in both law and equity, the parties to the deed clearly intended to allow the OPWC to seek equitable relief in the event the control provisions in the deed were violated and this clear "restriction" in the deed must be enforced. (Appx. 2, Appellants' Appx. 27, at ¶¶ 68-

69.) The panel acknowledged that R.C. § 164.26(A) expressly instructs the director of the OPWC to establish policies requiring grant repayment and liquidated damages in the event that the long-term ownership requirements set forth in the statute are violated. (Appx. 2, Appellants' Appx. 26-27, at ¶ 66.) Nevertheless, the panel held that this only requires "some of [the] policies" adopted by the director to provide for grant repayment and liquidated damages, but the statute does not expressly indicate it is an exclusive list of remedies, so the director was free to adopt policies allowing for equitable relief in addition to the monetary relief required by the statute. (*Id.*) The panel, therefore, reversed the decision that R.C. § 164.26 limited the OPWC to monetary relief, such that it could pursue equitable relief upon remand.

Siltstone, AEUM, and Eagle Creek filed their notice of appeal to the Supreme Court of Ohio on January 7, 2020. (Appx. 1.) On March 25, 2020, the Supreme Court of Ohio granted jurisdiction to hear the case and allowed the appeal.

ARGUMENT

Proposition of Law No. 1:

Courts may not enforce a restrictive covenant in a deed barring the grantee from alienating the property without the consent of some other party, unless the legislature has clearly allowed for such restraint on alienation in a statute by express terms or unmistakable implication.

A. Alienation restraints are inimical to public policy and the parties to a deed may not enforce a consent to alienate provision under the guise of contract law.

This Court has long recognized that "it is of the very essence of an estate in fee simple absolute, that the owner … may alien it … at any and all times; and any attempt to evade or eliminate this element from a fee simple estate … by deed … must be declared void and of no force." *Anderson v. Cary*, 36 Ohio St. 506, 515 (1881). While "the owner of an absolute estate in fee simple may by deed … transfer the whole upon conditions, the breach of which will terminate

the estate granted," the owner may not "fasten upon the estate devised a limitation repugnant to the estate." *Id.* Thus, the owner of a property cannot "take from a fee simple estate its inherent alienable quality, and still transfer it as a fee simple." *Id.* at 517. Therefore, "the devise of an absolute fee, with a clause restraining alienation … is void as against public policy" because, in this state, every absolute owner of real property has the power to control and dispose of such property, which is a matter of both sound principle and sound policy. *Id.* at 517.

This Court has since interpreted *Anderson* as holding that, "where land is devised upon condition that the devisee shall not sell it, such a restraint is void as repugnant to the devise and contrary to public policy." *Ohio Soc. for Crippled Children & Adults, Inc. v. McElroy*, 175 Ohio St. 49, 52, 191 N.E.2d 543, 546 (1963). "'Restrictions on the rights of alienation are simply of no effect.'" *Bragdon v. Carter*, 4th Dist. Scioto No. 2017-Ohio-8257, ¶ 11 quoting *Margolis v. Pagano,* 39 Ohio Misc.2d 1, 3, 528 N.E.2d 1331 (Clermont C.P. 1986). As the lower courts recognized decades ago, "[a]n unlimited right of disposition is the essence of an estate in fee simple, and the law of Ohio is fairly well settled that any attempt to restrict the right of the holder to alienate his interest is null and void." *Foureman v. Foureman,* 79 Ohio App. 351, 354, 70 N.E.2d 780 (2nd Dist. 1946); *Durbin v. Durbin*, 106 Ohio App. 155, 159, 153 N.E.2d 706 (3rd Dist. 1957) (same); *see also In re Smeller*, 9th Dist. Wayne No. 07CA0003, 2007-Ohio-2563, ¶ 19 (creation of inalienable land contravenes public policy).

Of course, "[i]n some nebulous sense … all agreements involving real property … 'restrain' alienability." *First Fed. Sav. & Loan Assn. of Toledo v. Perry's Landing, Inc.*, 11 Ohio App.3d 135, 142, 463 N.E.2d 636 (6th Dist. 1983). Thus, even though unlimited or absolute restraints on alienation are void ab initio, provisions which indirectly or incidentally restrain alienation may be allowed. *Id.* Even these provisions, however, are generally disfavored under the

law and will be strictly construed such as to favor free alienability and the right to convey, as, where there is antagonism between the freedom of alienation and the freedom of contract, the weight of authority favors freedom of alienation. *Id.* at 141-142; *see also Fairbanks v. Power Oil Co. of Ohio,* 81 Ohio App. 116, 122, 77 N.E.2d 499 (3rd Dist. 1945) ("from the earliest of times" courts have "with the utmost jealously" construed restrictions that would affect alienation against the restriction to limit it to its express terms). Many of the lower courts have attempted to resolve this tension between the freedom of alienation and the freedom of contract by holding that a restraint on alienation that does not (on its face) impose an unlimited or absolute restraint is permissible, so long as the restraint is determined to be reasonable. *See Worthinglen Condo. Unit Owners' Assn. v. Brown*, 57 Ohio App.3d 73, 75, 566 N.E.2d 1275, 1277 (1989).

"'One of the most important qualities of an estate in fee simple is the approximately absolute freedom of alienation enjoyed by the owner.'" *Hamilton v. Link-Hellmuth, Inc.*, 104 Ohio App. 1, 7, 146 N.E.2d 615 (2nd Dist. 1957) quoting 1 *Tiffany on Real Property* (3 Ed.), 47, Section 33. A grantor conveying a fee simple cannot limit those to whom the grantee may sell the property, such restraint being illegal and void. *Methodist Episcopal Church v. Gamble*, 26 Ohio C.C. 295, 297 (Ohio Cir. Ct. Feb. 1904), aff'd sub nom. *Methodist Episcopal Church of Cincinnati v. Gamble*, 74 Ohio St. 433, 78 N.E. 1132 (1906). Likewise, any attempt by a grantor to subject the grantee's ability to re-convey the property to the control of another has been considered repugnant to the estate granted and void since the statute quia emptores was adopted in 1290. *Schwren v. Falls*, 170 N.C. 251, 87 S.E. 49, 50 (1915) (holding that since property was devised to daughter in fee, provision requiring daughter to obtain executor's consent to dispose of property was void); *see also N. Point Patio Offices Venture v. United Ben. Life Ins. Co.*, 672 S.W.2d 35, 37 (Tex. App. 1984) (provision prohibiting the sale, lease, exchange, assignment, transfer, conveyance or other

disposal of all or part of property without written consent is the type of restraint on alienation prohibited by the Restatement of Property); *Terry v. Born,* 24 Wash. App. 652, 653, 655, 604 P.2d 504 (1979) (provision barring buyer from conveying the property without the seller's written consent an unreasonable and unenforceable restraint on alienation); *Estate of Mundy v. Comm'r*, 35 T.C.M. 1778 (T.C. 1976) citing *Davis v. Geyer*, 151 Fla. 362, 370, 9 So.2d 727 (1942) (deed clause prohibiting grantee from conveying without the consent of the grantor is void).

Here, the deed restriction stating that CDC may not "sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of OPWC, which consent may be withheld in its sole or absolute discretion" is a quintessential restriction on alienation, the likes of which this Court has repeatedly held void as repugnant to the grant of a fee simple ownership interest. The OPWC's briefing in this case makes the unlimited and absolute nature of the restraint clear. According to the OPWC, the "deed restrictions … broadly prevent the CDC from relinquishing ownership or control over the property in any way, shape or form." (Supp. 20, Appellants' Supp. 2319, at 7.) Further, despite the language in the deed suggesting that the OPWC might consent to a transfer, the OPWC has acknowledged that it thinks grant recipients are required "to hold on to those properties in perpetuity." (Supp. 20, Appellants' Supp. 2319, 2344, at 7, 32.) Simultaneously, however, the OPWC itself has emphasized the deed to the CDC conveyed a "fee simple transfer of the entire property." (Supp. 20, Appellants' Supp. 2333, at 21.) Given the nature of the estate conveyed to the CDC, the OPWC could not use deed restrictions to bar the CDC from alienating the Property.

The Seventh District failed to appreciate the fundamental difference between use restrictions and alienation restrictions when it stated courts must enforce deed restrictions which are clear. "Ohio law generally adheres to the Restatement distinction between restraints on

alienation and mere restrictions on the use of land." *Automatic Sprinkler v. Kerr*, 11th Dist. Lake Case No. 11-017, 1986 WL 7307, at *2 (June 30, 1986). A restraint on alienation acts to bar further conveyance, while a restriction on use limits how a property can be used. *Id*. The Seventh District quoted from a case dealing with a use restriction barring certain types of fences for the proposition that clear deed restrictions must be enforced by the courts. *See* Appx. 2, Appellants' Appx. 27, at ¶ 69 quoting *Morgan Woods Homeowners' Assn. v. Wills,* 5th Dist. Licking No. 11 CA 57, 2012-Ohio-233, ¶ 42. Cases setting forth the law relating to the enforcement of use restrictions are simply irrelevant to cases dealing with the enforcement of alienation restrictions. A deed restriction which clearly requires the grantee of a fee simple estate to obtain a third-party's permission to further convey the property does not become enforceable merely because of its clarity. To the contrary, the clarity of such language emphasizes the restriction's illegality and ineffectiveness because it is repugnant to the fundamental rights included with the grant of a fee simple estate.

The Seventh District also chastised the trial court for "finding that the Restrictions on transfer of the Property apply only to the surface" because the Alienation Restriction does not reference "green space park area" as does the Use Restriction. *See* Appx. 2, Appellants' Appx. 23, at ¶¶ 50-51. However, it is clear that the trial court was attempting to construe the Alienation Restriction in a way that would render it a "reasonable" restraint on the alienation of the Property. *Cf. Littlejohn v. Parrish,* 2005-Ohio-4850, 163 Ohio App.3d 456, 839 N.E.2d 49, ¶ 15, 31 (1st Dist.) (noting "a nonpayable mortgage is surely a restraint on alienation" but holding that instrument could be deemed reasonable if the borrower was allowed to pay the present day value of future interest payments). The trial court held that the Alienation Restriction was tied to the Use Restriction and meant to protect against transfers of the Property that would likely lead to violation of the Use Restriction. Thus, it concluded that, while the OPWC did not have a reasonable

justification for requiring the CDC to maintain ownership of the Property "in perpetuity," it did have a reasonable justification for preventing a transfer of the surface rights. Although the trial court failed to acknowledge that an alienation restriction repugnant to the grant of a fee interest is wholly impermissible, it did at least acknowledge precedent allowing only *reasonable* restraints on alienation.

Here, the Alienation Restriction purports to require the fee owner of the Property to obtain the OPWC's consent prior to conveying any interest in the Property. This is both repugnant to the grant of a fee and renders the Property inalienable, especially in light of the OPWC's statement that the intent of the clause is to force the fee owner to maintain ownership in perpetuity. Thus, far from supporting the OPWC and the Seventh District's position that it should be enforced, the clarity of the Alienation Restriction's language overtly demonstrates its illegality. It is illegal and void under this Court's precedent and the Court should reverse the Seventh District's decision subjecting a fee holder's right to alienate property to the consent of a third-party.

B. In order to restrict the transfer of private property, a statute must expressly provide for such a result and is to be strictly construed.

The OPWC has largely relied upon the express language of the deed restrictions in arguing that the CDC could not alienate any interest in the Property, despite being the fee owner of the Property, but the OPWC has also contended that the General Assembly decided to restrain the alienation of properties purchased with Clean Ohio funds grants. (Supp. 20, Appellants' Supp. 2328-2329, at 16-17.) The OPWC has variously cited the Ohio Constitution, R.C. § 164.26(A), R.C. § 164.26(B), and R.C. § 164.05(A)(9) for the proposition that either the people (through the Constitution) or the General Assembly have specifically indicated that properties purchased with Clean Ohio fund grants cannot be alienated as a matter of law. (Supp. 20, Appellants' Supp. 2326-2327, at 14-15.) Yet, neither the Constitution nor the cited statutes expressly provide that Clean

Ohio fund grantees are prohibited by law from further transferring the properties.

"Statutes … which impose restrictions upon the … alienation of private property, [must] be strictly construed, and their scope cannot be extended to include limitations not therein clearly prescribed; exemptions from such restrictive provisions are for like reasons liberally construed." *State ex rel. Moore Oil Co. v. Dauben*, 99 Ohio St. 406, 411, 124 N.E. 232, 233 (1919); *see also Henley v. Youngstown Bd. of Zoning Appeals,* 90 Ohio St.3d 142, 151, 735 N.E.2d 142 (2000) (same); *Baur v. United Foundation,* 9th Dist. Summit No. 15341, 1992 WL 98858, at *2 (May 6, 1992) (statutes limiting alienation of private property are in derogation of the common law and must be strictly construed). This Court has recognized that any statute restraining the alienation of private property "should not be extended to include limitations not clearly described therein." *Symmes Twp. Bd. of Trs. v. Smyth*, 87 Ohio St.3d 549, 554, 721 N.E.2d 1057 (2000). This is true, even where the proposed extension appears to be "within the reason and spirit of the statute." *City of Pepper Pike v. Landskroner*, 53 Ohio App.2d 63, 76, 371 N.E.2d 579 (8th Dist. 1977).

If there is any serious doubt as to the meaning of a statute bearing on alienation, it is the duty of the court to apply any reasonable construction consistent with the owner's free right of alienation. *Hamilton,* 104 Ohio App. at 7, 146 N.E.2d 615. "In the light of [this] principle any … statutory restriction [affecting the alienability of property] must be specifically stated and not implied." *Id.* Further, if the language of the act in question casts doubt on the correctness of the construction that would restrict the property owner's rights, this indicates that the statute does not specifically and explicitly allow the restriction. *See Gay Union Corp. v. Wallace*, 112 F.2d 192, 201 (D.C.Cir. 1940) (Groner, C.J., dissenting in part) citing *Dauben*.

Article VIII, Section 2o of the Ohio Constitution allows the State to sell bonds in order to undertake environmental conservation and revitalization projects and to make grants to local governmental entities (or others acting at their direction or authorization) to finance such projects. The Constitution specifically provides that grant funds may be used both to acquire land for remediation and to remediate privately owned lands so they can be put to economic use. Article VIII, Section 2o(A)(2). Indeed, the purposes of the section include improving the economic-well being of the people, making urban areas more desirable or suitable for development, and enhancing employment opportunities. Thus, the OPWC's contention that grant recipients must continue to hold all properties purchased with Clean Ohio grant funds in perpetuity is simply not consistent with the language of the Constitution. Likewise, the OPWC's strenuous objection to any private party using property that was purchased or remediated with a Clean Ohio fund grant is directly at odds with numerous provisions in Article VIII, Section 2o.

Even focusing solely on the provisions relating to the acquisition of land or interests therein for conservation purposes does not support the OPWC's position. The conservation provision addresses what the land will be used for rather than who should own the land. Article VIII, Section 2o(A)(2). In this case, it is the Use Restriction that conserves the Property as a green space park available to the public for use and enjoyment of natural areas and open spaces. From the Constitutional perspective, it does not matter whether the Property is owned by the non-profit CDC or the Walt Disney Company, just so long as it is not used in a matter inconsistent with a green space park area.

At no point in this case has anyone contended that the Use Restriction is void or otherwise unenforceable. Rather, the dispute with regard to the Use Restriction has focused on the OPWC's efforts to convince the courts that Section 2o bars any economic use of the Property and bans any

development of a property purchased with a Clean Ohio program grant. Since both of those are stated *purposes* of this section of the Constitution, neither the Constitution nor the Use Restriction can be interpreted as barring private use or economic development, so long as those ends are accomplished in a manner consistent with the use of the Property as a green space park area. There is certainly no provision of Section 2o which purports to impose limitations on the right of the fee owner of property to alienate that property—even if it was purchased or revitalized with a Clean Ohio program grant. In fact, the provisions relating to the remediation of privately owned lands to promote economic development directly refute any such contention.

Revised Code § 164.26(A) provides that the OPWC director "shall establish policies related to the need for long-term ownership, or long term control through a lease or the purchase of an easement, of real property that is the subject of an application for a grant" under the Clean Ohio Conservation Fund. The OPWC contends that this constitutes a decision by the General Assembly that properties purchased with Clean Ohio Fund grant money should be rendered inalienable. That contention, however, is inconsistent with the very next sentence in R.C. § 164.26(A), which provides: "The policies shall provide for liquidated damages and grant repayments *for entities that fail to comply with the long-term ownership or control requirements* established under this division." (Emphasis added).

As an initial matter, the statute itself does not actually require that all properties purchased with Clean Ohio Funds should be subject to long-term ownership or control requirements—only that policies should be established to determine *when* long-term ownership or control is needed. This language clearly anticipates situations in which long-term ownership or control is needed and situations where it is not. Had the Generally Assembly believed that all grant recipients needed to maintain long-term ownership or control, it presumably would have imposed this requirement

itself, rather than use language that clearly contemplates flexibility. In fact, this interpretation is the only reading of the statute consistent with the Ohio Constitution, which anticipates that certain properties revitalized with Clean Ohio grant funds will later be alienated.

Further, if the statute makes such properties inalienable as the OPWC contends, then the statute's language setting forth the remedy for when grant recipients fail to comply is rendered superfluous. Stated another way, how can grant recipients fail to comply with the long term-ownership or control requirements if the property cannot be transferred? The very fact that General Assembly anticipated non-compliance with the long-term ownership requirements indicates that the properties in question remain alienable under the statute. Thus, the legislature clearly chose not to bar alienation in derogation of the common law, but instead chose to impose certain consequences on local governmental entities (and those acting under their direction or control) for failure to comply with long-term ownership requirements connected with the grants under Chapter 164.

Even if the Court does not accept that the General Assembly expressly anticipated that properties purchased with Clean Ohio program grants might be alienated, the OPWC's position is, at best, premised upon R.C. 164.26(A) *implying* authority to wholly bar the alienation of property purchased with Clean Ohio funds. Yet statutes must use clear and specific in language when indicating the legislature's intent to restrict the alienability of private property in derogation of the common law. Revised Code § 164.26(A) contains no such language. This Court cannot interpret R.C. § 164.26(A) as clearly eliminating the right of grant recipients (who take title to their properties in fee simple) to alienate the properties they own and it should reject any argument to the contrary.

The OPWC's contention that the General Assembly specifically curtailed the alienability of certain private properties via R.C. §§ 164.26(B) and 164.05(A)(9) is even more tenuous. Both of these statutes constitute a general grant of authority to the OPWC to administer the Clean Ohio Fund, with R.C. § 164.26(B) stating the OPWC "shall exercise any authority and use any procedures granted or established under [provisions of the act] that are necessary for that purpose, and R.C. § 164.05(A)(9) stating that the director shall "[d]o all acts, enter into contracts, and execute all instruments necessary or appropriate to carry out this chapter." The contention that this grants the director carte blanche to adopt property alienation restrictions that have been disallowed in English speaking countries for 730 years is incredible. Under this interpretation, the director could literally do anything he deeded "necessary or appropriate" to ensure grantees recognized the "need for long-term ownership." Thus, providing that the director can "do all … acts … necessary" does not clearly constitute a grant of authority to the director to set aside general property law in this state or render property inalienable. The OPWC's interpretation of these provisions is unwarranted and a dangerous expansion of director's authority without any basis in the law. It should be rejected by the Court.

Proposition of Law No. 2:

The legislature's express provision for grant repayment and liquidated damages in R.C. § 164.26(A) in the event that a grant recipient fails to comply with long-term ownership requirements does not allow for additional equitable relief fashioned by the courts.

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

under the common law, the OPWC's request for equitable relief in the form of an injunction forcing all interests in the Property to be assigned back to the CDC is fundamentally inconsistent with the remedy provided for by the General Assembly in R.C. § 164.26(A).

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

"'If the General Assembly has provided a remedy for the enforcement of a specific new right, a court may not on its own initiative apply another remedy it deems appropriate.'" *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 169, 572 N.E.2d 87 (1991) quoting *Fletcher v. Coney Island, Inc.*, 165 Ohio St. 150, 155, 134 N.E.2d 371 (1956); *see also State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, 855 N.E.2d 1188, ¶ 37 quoting *Fletcher* at 154 ("'Where the General Assembly by statute creates a new right and at the same time prescribes remedies or penalties for its violation, the courts may not intervene and create an additional remedy.'") Any contention that the remedies provided by the statute "are inadequate and that resort may be had to equity for the full and complete realization of … rights" must be rejected. *Fletcher* at 154. Where the General Assembly establishes the right asserted and definitively fixes the method whereby the violator of that right might be punished, any contention that the remedies provided for by statute are inadequate must be directed to the legislature. *Id.* Thus, where the statute provides for monetary relief but not injunctive relief, the courts may not arbitrarily invoke such a remedy not provided for by the

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

Only where the General Assembly is codifying a common law right must the courts determine whether the codification is meant to supplement or supplant common law rights and remedies. *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, ¶ 32. If the statute created the right, awarding relief beyond what the statute provides for "amount[s] to unauthorized intervention [to] create an additional remedy not provided for by law." *Elsass v. St. Marys City School Dist. Bd. of Edn.*, 3rd Dist. Auglaize No. 2-10-30, 2011-Ohio-1870, ¶ 67. A court may not add to the remedies available under a statute simply because doing so might advance the purpose of the legislative scheme. *Wilson v. Burt*, 2nd Dist. Montgomery Case Nos. 13096, 12389, 1994 WL 723506, at *3 (2nd Dist. Dec. 7, 1994).

In this case, the General Assembly created the Clean Ohio Conservation Fund, charged the director of the OPWC with establishing policies related to the need for long-term ownership or control of real property that is the subject of a grant, and stated that "[t]he policies shall provide for proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements established under this division." R.C. § 164.26(A). The OPWC's right to adopt policies regarding the need for long-term ownership or control derives solely from the statute itself and, as such, the OPWC is limited to the relief provided for by statute. The court of appeals finding below that the relief specifically provided for by statute was not meant to be exhaustive, and that the OPWC can, therefore, seek injunctive relief ordering the return of any interest in the Property to the CDC, is problematic for at least three reasons.

First, "[a]n injunction is an extraordinary remedy in equity where there is no adequate remedy available at law." *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 15 quoting *Garono v. State,* 37 Ohio St.3d 171, 173, 524 N.E.2d 496 (1988). "[W]here damages will adequately compensate an injured party for a harm suffered, equitable relief is not appropriate." *Mesarvey, Russell & Co. v. Boyer*, 10th Dist. Franklin No. 91AP-974, 1992 Ohio App. LEXIS 3947, at *12 (July 30, 1992). Where the General Assembly has explicitly identified monetary damages as an adequate remedy at law for any injury suffered, "[i]t is difficult to conceive how damages can be irreparable" such that equitable relief could be awarded in addition to damages. *Id*. at *12-13. Revised Code 164.26(A) specifically provides for monetary damages in the event that a grant recipient fails to maintain long-term ownership or control of the property purchased with grant funds. Thus, the statute itself creates a remedy at law in the event a grant recipient fails to comply with the OPWC's policies—this precludes the OPWC from seeking injunctive relief in addition to monetary relief. *Fodor,* 63 Ohio St.3d at 492, 589 N.E.2d 17.

Second, R.C. § 164.26(A) states that the OPWC's policies "*shall* provide for proper liquidated damages and grant repayment for entities that fail to comply with long-term ownership and control requirements established under this division." (Emphasis added.) R.C. § 164.26(A). "It is undisputed that the word 'shall' is mandatory." *San Allen, Inc. v. Buehrer,* 2014-Ohio-2071, 11 N.E.3d 739, ¶ 81 (8th Dist.). "The General Assembly is presumed to mean what it said." *Id.* Where a statute is clear on its face, it must be implemented as written. *Id.*

The OPWC has at times suggested that it be allowed to seek both injunctive relief (requiring all interests in the Property be returned to the CDC and that the CDC be required to maintain ownership in perpetuity) and grant repayment, while at other times suggesting that it be allowed to seek injunctive relief as an alternative to grant repayment. *See* Supp. 20, Appellants'

Supp. 2349, at 37 (stating that the legislature required policies to provide for monetary damages but commission must also be permitted equitable relief); Supp. 11, Appellants' Supp. 1494, at 3 (describing request for money damages as an "alternative remedy" to injunctive relief). The OPWC has made it clear throughout these proceedings that, if forced to choose between the statutorily required damages and injunctive relief that it would *always* elect injunctive relief, which it views as critical to the purposes of the Clean Ohio fund.

As to the suggestion that the OPWC is free to seek both grant repayment and injunctive relief, by definition, the statute provides damages adequate to compensate for the harm suffered. Specifically, the statute provides for grant repayment and *liquidated damages.* "Liquidated damages are defined as an 'amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches.'" *Anna Holdings, LLC v. McClanahan*, 2019-Ohio-4697, __ N.E.3d __, ¶ 16 (2nd Dist.) quoting *Black's Law Dictionary* (7 Ed. 1999) 395. "The sole purpose of such a liquidated damages clause is to compensate the nonbreaching party for losses suffered as the result of a breach." *Tremco Inc. v. Kent*, 8th Dist. Cuyahoga No. 70920, 1997 WL 284744, at *8 (May 29, 1997).

The OPWC's argument that the CDC should have to repay the $430,200 grant, then pay at least $860,400 on top of that (and possibly in excess of $7,414,325.08)[3] as liquidated damages—*in addition to* an injunction assigning all interests back to the CDC and requiring the CDC to maintain ownership of the Property in perpetuity is truly astounding. Equitable relief is not available where monetary damages will adequately compensate the injured party. The OPWC

[3] On its face, the liquidated damages provision requires a payment of either 200% of the $430,200 grant (plus interest at the rate of 6% from the date of the grant) or 200% of the fair market value—whichever is greater. Considering that Siltstone paid $3,707,162.54 for just 6/7ths of the mineral rights to the Property, 200% of the fair market value of the Property would seem to be the greater number.

issued a $430,200 grant to the CDC to purchase Property for conservation purposes. If the CDC is forced to repay that grant, and the OPWC gets back its administrative expenses associated with repurposing the grant funds, the OPWC has been made whole. The notion that, after the grant recipient is forced to pay approximately $8 million for failing to comply with the terms of a $430,200 grant, injunctive relief would also be necessary to protect the OPWC is absurd.

Perhaps realizing this, the OPWC has previously indicated that injunctive relief is more important to the OPWC than monetary relief. *See* Supp. 20, Appellant's Supp. 2347-2348, at 35-36 (stating that injunctive relief is "necessary" and that sole recourse of monetary damages is inadequate). However, the OPWC cannot forego the relief expressly provided for by statute in favor of the equitable relief it prefers. The Eighth District Court of Appeals rejected a similar argument made by the Bureau of Workers Compensation ("BWC") in *San Allen.* In *San Allen,* the relevant statute provided that the administrator of the BWC "shall consider an employer group as a single employing entity for the purposes of retrospective rating." *San Allen,* 2014-Ohio-2071, 11 N.E.3d 739, ¶ 79. Despite the statutory language, the BWC adopted a prospective rating plan. *Id.* Like the OPWC, the BWC argued that the explicit statutory direction to take one approach did not preclude it from adopting another approach. *Id.* at ¶ 80. However, the Eighth District rightly rejected this argument, noting that "there is no language" in the statute which would authorize the BWC's actions, and agreed with the trial court that the agency's actions were "in direct and clear violation" of the statute. *Id.* at ¶¶ 79, 82.

From the very beginning of this case, the OPWC has argued that the monetary relief provided by statute is inadequate to protect the OPWC's interest. This is an argument that should be addressed to the legislature. Instead, the OPWC convinced the court of appeals to expand its panoply of remedies, even if that meant allowing it to forego the statutorily provided for remedy

in favor of the OPWC's preferred remedy—a remedy not mentioned in the statute.

The bargain struck by the legislature is clear. Revised Code § 164.26(A) anticipates that the policies addressing the need for long-term ownership or control might be violated and yet sets forth a remedy entirely inconsistent with injunctive relief and continued ownership of the property by the grant recipient by requiring grant repayment and payment of liquidated damages. Once the grant funds are repaid, the OPWC must deposit such grant repayments into the Clean Ohio Conservation Fund with the grant repayment being "used for the same purpose as the grant was originally approved for." R.C. § 164.261. The legislative approach adopted in R.C. § 164.26(A) anticipates that the OPWC and the grant recipient will be returned to the status quo ante. The grant recipient may transfer ownership or control of a property—so long as it is willing to make the OPWC whole by giving up the benefits of the grant and compensating the OPWC a predetermined amount of damages. In turn, the OPWC can implement the Clean Ohio program by making a grant to another recipient. While the OPWC has complained that it will not be able to hold others "accountable" in this scenario, because only the CDC is responsible for the grant repayment and liquidated damages, the statute simply does not provide for holding anyone else accountable after the grant recipient makes the OPWC whole.

Third, court of appeals' conclusion that equitable relief is available in addition to the express monetary relief provided for by statute is belied by another provision of the act in question. When the legislature authorized the issuance and sale of bonds to fund the Clean Ohio program, it explicitly provided that any contract under which bonds were issued could be enforced "by mandamus, suit in equity, action at law, or any combination of the foregoing." R.C. § 164.09(F)(6). The General Assembly's decision to allow for both equitable and legal relief in one part of the act, while allowing for only specific legal remedies in another part, cannot be ignored. *See State v.*

Maxwell, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, ¶ 30 (holding statute's requirement for knowledge in one part and not in the other indicated the General Assembly's intent to impose strict liability with regard to the subsection that didn't include a knowledge requirement). Further, the rule of statutory construction inclusio unius est exclusio alterius also counsels against reading R.C. § 164.26(A) to allow for equitable relief; the inclusion of a specific remedy for violation of the policies the statute requires the director to adopt shows a legislative intent to exclude all other relief. *See State ex rel. Hall v. Police Relief & Pension Fund*, 149 Ohio St. 367, 377, 78 N.E.2d 719 (1948); *see also Akron v. Ohio Dept. of Ins.,* 2014-Ohio-96, 9 N.E.3d 371, ¶ 39 (10th Dist.) (statutes relating to the same subject matter are to be read in pari materia based upon the assumption that the General Assembly legislates with full knowledge of all statutory provisions concerning the subject matter in question). The General Assembly explicitly allowed for equitable relief in R.C. § 164.09(F)(6) but not R.C. § 164.26(A)—the Court cannot add language to R.C. § 164.26(A) to allow for relief the legislature clearly decided not to include.

When the legislature wanted to authorize equitable enforcement of contractual obligations relating to the Clean Ohio program (or combinations of legal and equitable relief) it did so explicitly. If the legislature's intent was for the OPWC to be able to force grant recipients to retain ownership in perpetuity through injunctive relief, the statute would have expressed this. And if the intent was to allow the OPWC to choose between injunctive relief forcing the grant recipient to maintain ownership in perpetuity and monetary relief (including an exceedingly generous liquidated damages provision) it certainly would not have stated that policies adopted by the OPWC shall provide for grant repayment and liquidated damages without making any mention of injunctive relief. The decision of the court of appeals allowing the OPWC to seek equitable relief in the face of a statute which expressly provides only for monetary relief must be reversed.

Proposition of Law No. 3:

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

The court of appeals held that, because the enforcement restriction crafted by the OPWC clearly and unambiguously allows for equitable relief, the trial court erred in dismissing OPWC's claim for equitable relief. (Appx. 2, Appellants' Appx. 27-28, at ¶¶ 68-71.) There is no question that the deed restrictions purport to grant the OPWC authority to seek the equitable enforcement of the Alienation Restriction. However, the OPWC cannot expand its options under the statute by including a provision for equitable relief in a deed restriction which is inconsistent with the statute allowing the OPWC to adopt policies in the first place.

"It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 38. "The General Assembly sets public policy, and administrative agencies, when granted rulemaking power, 'develop and administer' those policies." *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 25 quoting *D.A.B.E.* at ¶ 41. An administrative action that exceeds the statutory authority granted by the General Assembly usurps the legislative function and violates the separation of powers established by the Ohio Constitution. *Id.* at ¶ 24. Policies that exceed the authority of the agency will be held unconstitutional. *Id.* This includes administrative activities beyond formal rulemaking and polices. *See Watson Gravel, Inc. v. Div. of Mines & Reclamation,* 133 Ohio App.3d 132, 139-140, 726 N.E.2d 1105 (12th Dist. 1999) (stop work order constituted a rule or procedure that was inconsistent with enabling statute).

"Authority that is conferred by the General Assembly cannot be extended by the administrative agency." *D.A.B.E.* at ¶38; *see also Ohio Fresh Eggs, L.L.C. v. Boggs,* 183 Ohio App.3d 511, 2009-Ohio-3551, 917 N.E.2d 833, ¶ 26 (10th Dist.) (an administrative body possesses no inherent authority and has only those powers conferred upon it by statute); *Matter of E. ProMedica Prof'l Bldg.,* 10th Dist. Franklin No. 91AP-869, 1992 WL 158430, at *4 (June 30, 1992) ("Administrative agencies are creatures of statute and, as such, may not expand upon the scope of their authority.") When an agency contends that it has implied powers under a statute, such implied powers are limited to what is "'reasonably necessary to make the express power effective.'" *D.A.B.E.* at ¶ 39 quoting *State ex rel. A. Bentley & Sons Co. v. Pierce,* 96 Ohio St. 44, 47, 117 N.E. 6 (1917). "'In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it." *Id.* at ¶ 40 quoting *Bentley* at 47.

An administrator may not formulate new policy rather than administering the legislative policy as written. *Knutty v. Wallace*, 84 Ohio App.3d 623, 627, 617 N.E.2d 783 (10th Dist. 1992). "'In the absence of clear legislative authorization, declarations of policy … are denied administrative agencies and are reserved to the General Assembly.'" *Id.* quoting *Carroll v. Dept. of Adm. Serv.,* 10 Ohio App.3d 108, 460 N.E.2d 704 (10th Dist. 1983). If the administrative action requires a balancing of social, political, and economic concerns, that is an indication that the administrative body is engaging in prohibited policy making rather than acting under the express delegation of the legislative body. *Id.* at ¶ 41.

"[A]n administrative agency may not legislate by enacting rules which are in excess of legislative policy, or which conflict with the enabling statute." *P. H. English, Inc. v. Koster*, 61

Ohio St.2d 17, 19, 399 N.E.2d 72 (1980). Thus, an administrator of a state agency may not adopt a position, no matter how reasonable it might appear in light of legislative intent, if that position contradicts express legislative language. *Knutty,* 84 Ohio App.3d at 627, 617 N.E.2d 783. Further, a director may not take action to "add to his delegated power, no matter how laudable or sensible the ends sought to be accomplished." *Id*. An agency "cannot—through an errant course of practice—grant itself power withheld by the General Assembly." *In re Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶45.

In applying this line of cases, this Court has held that statutory authority granted to a local board of health to make such orders and regulations as necessary to "prevent disease" did not grant a local health board the authority to institute a smoking ban, as the statute did not grant the board of health "unfettered authority to promulgate any health regulation deemed necessary"—and expressly rejected the argument that such a ruling would "eviscerate" the administrative agencies' ability to carry out its obligations under the statute. *D.A.B.E.,* 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 250, at ¶ 41. Similarly, after the SmokeFree Act was adopted, the Tenth District rejected the Ohio Department of Health's argument that a rule it adopted "protected the spirit and purpose" of the act, even though it conflicted with the express terms of the act. *Ohio Licensed Beverage Assn. v. Ohio Dept. of Health,* 10th Dist. Franklin No.07AP-490, 2007-Ohio-7147, ¶¶ 40-41 (rule "reached legislative functions involving the balancing of social and economic concerns").

In this case, the OPWC director adopted a policy requiring deeds transferring properties purchased with Clean Ohio funds to include language allowing the OPWC to obtain equitable relief to enforce the Alienation Restriction. Revised Code 164.26(A) is the enabling statute directing the OPWC to adopt policies concerning the need for long-term ownership or control of

properties purchased with Clean Ohio grant funds. Given the express statutory language in R.C. § 164.26(A), the OPWC should presumably have set policies establishing *when* long-term ownership or control is needed, as the statutory language implies this will not be necessary in all cases. Such policies should also presumably address the definition of "long-term"—which the OPWC has unreasonable argued means "in perpetuity" in this case. (Supp. 20, Appellants' Supp. 2344, at 32.). Beyond doubt, however, such polices must provide "for proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements established under this division." R.C. § 164.26(A).

The OPWC argued below that "[t]he law does not limit the Commission to monetary damages because that remedy alone could not assure long-term ownership, and therefore could never achieve or protect the statute's purpose." *See* Supp. 20, Appellants' Supp. 2351, at 39. This statement is striking because it overtly demonstrates the OPWC's belief that equitable relief will always be needed to achieve the statute's purpose—despite the General Assembly's providing for a remedy that makes no mention of equitable relief.

Any argument that the enabling statute implicitly allows for equitable relief is baseless because it conflicts with the express provision allowing for monetary relief in the form of liquidated damages. Grant repayment and liquidated damages would return the OPWC to the position it was in before the grant was made, i.e., the OPWC would have funds for the purposes of environmental conservation equal to what it had before making the (repaid) grant, including any incidental costs incurred in making the grant (repaid in the form of liquidated damages). Employing equitable relief to force all parties to assign any interest in the Property back to the CDC, while also forcing the CDC to repay the grant along with millions of dollars in liquidated damages, would clearly be excessive. The OPWC's response to the statutory requirement to seek

grant repayment and liquidated damages was to unilaterally grant itself the authority to include deed language allowing it to elect equitable relief as a means of enforcement, notwithstanding the clear conflict between that remedy and the express monetary relief provided for by statute. OPWC's response is clearly an attempt to formulate new policy rather than administering the policy embodied in the statute.

Determining what approach the State should take with regard to grant recipients who fail to comply with long-term ownership or control policies involves the balancing of social, political, and economic concerns. It should be remembered that Clean Ohio grants are only made to local governmental organizations or those acting under their direction or authorization. With the grant repayment and liquidated damages provided for by the General Assembly, a local government would be able to react to changing circumstances and return grant funds in exchange for the lifting of restrictions placed on the property. It is not surprising that the legislature would make such a provision to accommodate its governmental partners while still ensuring that the Clean Ohio Conservation Fund was not negatively affected financially. It is surprising that the OPWC would claim that it has implicit authority to ignore the explicit bargain struck by the general assembly.

Other courts of appeal have rejected the contention that an explicit grant of authority to penalize conduct in a certain manner nevertheless allows an administrative body freedom to craft additional relief. Revised Code § 4763.11(F) previously authorized the Ohio Real Estate Appraiser Board to take "appropriate" disciplinary action against an appraiser, including (but not limited to) reprimands, suspensions, or revocations of a license. *See Penix v. Ohio Real Estate Appraiser Bd.,* 5th Dist. Fairfield No. 09-CA-14, 2009-Ohio-6439, ¶ 56. In *Penix,* the Fifth District Court was asked to decide whether the Board exceeded its authority under the enabling statute by imposing a monetary fine in addition to a license suspension. *Id.* at ¶ 1. The court of appeals held that

imposing a monetary fine was not incidental to the statutorily authorized actions, that a monetary fine was not similar to the authorized penalties, and that the legislature did not clearly grant the agency authority to levy fines. *Id.* at ¶¶ 54-57.

In *Cowans,* the Tenth District Court of Appeals was asked to consider whether R.C. § 3769.01 allows the Racing Commission to assess the costs of a hearing as penalty. *Cowans v. Ohio State Racing Comm.,* 2014-Ohio-1811, 11 N.E.3d 1215, ¶ 61 (10th Dist.). The court of appeals noted that the statute enumerates particularized sanctions, and, unlike other similar statutes, the costs of the hearing was not among the enumerated penalties. *Id.* at ¶¶ 61, 65. Thus, the court held that "the Commission's rule granting costs to the Commission under the guise of a penalty is an unreasonable usurpation of the legislative function." *Id.* at ¶ 61.

In this case, the statute expressly directs the OPWC to seek monetary relief in the event that the referenced policies are violated, but the OPWC contends that the statute also allows it to seek equitable relief. Equitable relief in the form on an injunction is not incidental to an award of monetary relief, an injunction is not similar to the authorized relief of a monetary penalty, and the legislature did not clearly grant the agency authority to seek an injunction. Thus, as was the case in *Penix* and *Cowans*, the administrative agency in this case is attempting to pursue a remedy not provided for by the enabling statute. Here, there is no express, clear, or even implied grant of authority in the enabling statute that suggests the General Assembly intended to authorize enforcing the control polices through equitable (including injunctive) relief and this argument must be rejected.

Ultimately, the question is not whether the deed language provides for equitable enforcement. It does. The question is whether the OPWC's inclusion of that language and attempted pursuit of an equitable remedy constitutes an improper expansion of power withheld by

the General Assembly. The General Assembly directed the OPWC to adopt policies amounting to rescission of the grant in the event that the policies adopted regarding the need for long-term ownership or control were violated. As an administrative agency, the OPWC's practice of asking grant recipients to include deed language allowing the OPWC to also seek equitable relief does not, *and cannot*, change that fact.

The Court should hold that the OPWC's actions unconstitutionally usurp the authority of the General Assembly, as those actions constitute policy making rather than carrying out the policy set forth in the enabling statute. This Court must disabuse the OPWC of the notion that it has plenary power to adopt "whatever policies it needs to cause grant recipients *to maintain ownership or control*." *See* Supp. 20, Appellants' Supp, 2327, at 15. The OPWC is an administrative agency whose power is limited to that set forth in R.C. 164.26(A), which specifically states the remedy the OPWC's policies should provide for—and that remedy is not equitable relief. The court of appeals' judgment allowing the OPWC to expand its statutorily authorized power by entering into a contract with a third party must be reversed.

CONCLUSION

England statutorily barred deed provisions requiring the grantee to obtain permission to further alienate property in 1290, and the common law has barred such alienation restrictions in this country since its founding. While the legislature is able to set aside existing public policy as embodied in the common law, the courts of this state have long held that the legislature must be explicit when doing so. The legislature's adoption of R.C. 164.26(A) does not explicitly set aside the public policy barring alienation restrictions in the form of consents to transfer with regard to properties purchased with a grant from the Clean Ohio Conservation Fund. To the contrary, it explicitly recognizes that policies adopted regarding the need to maintain long-term ownership or

control might not be complied with and provides for monetary damages in the form of grant repayment and liquidated damages in the event of noncompliance.

The fact that the legislature explicitly provided for grant repayment and liquidated damages in the event of noncompliance also demonstrates that the General Assembly did not intend for equitable relief in the form of an injunction to be available. An injunction constitutes extraordinary relief and is inconsistent with the legislature's conclusion that grant repayment and liquidated damages would be sufficient to address the State's losses. The OPWC's arguments that it should be allowed both the monetary damages provided for by statute and injunctive relief would result in an unauthorized windfall, and allowing the OPWC to seek equitable relief in lieu of what the statute provides is untenable. The OPWC's argument that the statute implicitly allows for equitable relief to achieve the ends of the statute is also at odds with other provisions of the same chapter, in which the legislature explicitly allowed the OPWC to seek both monetary damages and equitable relief, something it did not due in R.C. 164.26(A).

The fact that the OPWC inserted a provision in the relevant deed purporting to expand the relief available to it for violations of the long-term ownership or control provisions in the deed should have no bearing on the outcome of this case. Such equitable relief is inconsistent with the enabling statute providing only for monetary relief. The decision as to what type of relief to allow against local governmental entities and those acting under their direction and authorization in the event of a noncompliance is clearly a public policy decision reserved for the legislature. The OPWC cannot avoid that fact by unilaterally granting to itself authority (through deed restrictions) that the legislature did not provide for in the statute.

The court of appeals' judgment should be reversed and the trial court's judgment should be reinstated, except for the provision requiring the CDC to obtain the OPWC's consent to convey

the surface interest. The surface can only be used as a green space park area based upon the Use Restriction, regardless of who owns the surface. There is no need to require the CDC to maintain ownership of the surface under the circumstances, especially if it would require setting aside centuries of precedent.

Respectfully submitted,
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The undersigned certifies that a true and accurate copy of the foregoing *Merit Brief of Appellants Siltstone Resources, LLC and American Energy – Utica Minerals, LLC* was served upon the following by electronic mail this 8th day of June, 2020:

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IN THE SUPREME COURT OF OHIO

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

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Notice of Appeal of Appellants Siltstone Resources, LLC; American Energy – Utica Minerals, LLC; and Eagle Creek Farm Properties, Inc.

Appellants Siltstone Resources, LLC; American Energy – Utica Minerals, LLC; and Eagle Creek Farm Properties, Inc. hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Belmont County Court of Appeals, Seventh Appellate District, entered in Court of Appeals Case No. 18 BE 0042 on November 25, 2019.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing *Notice of Appeal* was served upon the following by electronic mail this 7th day of January, 2019:

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Court of Appeals of Ohio

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February 24, 2020

Cynthia L. Fregiato, Clerk of Courts
101 West Main Street
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St. Clairsville, Ohio 43950-1154

Re: Siltstone Resources, LLC. v. State of Ohio Public Works Commission et al.
Belmont County Case No. 18 BE 0042

To The Clerk of Courts:

By direction of the Court you are hereby authorized to enter on the docket (not journal) of the Court of Appeals the decision of this Court in the above-captioned case as evidenced by the following entry:

> "February 26, 2020: Judgment of the Court of Common Pleas, Belmont County, Ohio, Motion for Reconsideration is denied. See Opinion and JE."

You are hereby authorized to file and spread upon the journal of this Court the enclosed journal entry in the above-captioned case.

Sincerely,

Patricia Loncar
Judicial Secretary

Encl.

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

SILTSTONE RESOURCES, LLC,

Plaintiff-Appellee,

v.

STATE OF OHIO PUBLIC WORKS COMMISSION ET AL.,

Defendants-Appellants

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0042

Motion for Reconsideration

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

JUDGMENT:
Denied.

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Dated:
February 26, 2020

PER CURIAM.

{¶1} Defendant-appellee, Gulfport Energy, has filed a motion for reconsideration asking this court to reconsider our decision and judgment entry in which we reversed and remanded the judgment of the Belmont County Common Pleas Court. See *Siltstone Resources, LLC v. Ohio Pub. Works Commission*, 7th Dist. Belmont No. 18 BE 0042, 2019-Ohio-4916, 137 N.E.3d 144. Defendant-appellee, Guernsey County Community Development Corporation, has likewise filed a motion for reconsideration of that decision along with a motion for leave to file the motion for reconsideration.

{¶2} App.R. 26, which provides for the filing of an application for reconsideration in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered and changed. *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1981). The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not at all or was not fully considered by us when it should have been. *Id.* An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). Rather, App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law. *Id.*

{¶3} A motion for reconsideration must be filed within ten days of the judgment. App.R. 26(A)(1)(a). Our judgment in this case was filed on November 25, 2019. Therefore, any motions for reconsideration had to be filed by December 5, 2019. Both Gulfport and Guernsey County filed their motions on December 6, 2019. Thus, both motions were untimely.

{¶4} App.R. 14(B) provides:

> For good cause shown, the court, upon motion, may enlarge or reduce the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of the prescribed time. The court may not enlarge or reduce the time for filing a notice of appeal or a motion to certify pursuant to App. R. 25. *Enlargement of time to file an application for reconsideration* or for en banc consideration pursuant to App. R. 26(A) *shall not be granted except on a showing of extraordinary circumstances.*

(Emphasis added).

{¶5} Thus, per the Appellate Rules, an appellate court may permit an act to be done after the expiration of the prescribed time when good cause is shown. But this standard does not apply to motions for reconsideration. An appellate court only has the authority to grant leave to file a delayed motion for reconsideration if there is a showing of extraordinary circumstances. In this case, neither Gulfport nor Guernsey County have indicated any extraordinary circumstances. Gulfport does not provide any reason for its late filing. And the only reason Guernsey County provided is that it did not receive a copy of the decision until December 2, 2019, which does not constitute an extraordinary circumstance.

{¶6} For the reasons stated, the applications for reconsideration are denied.

JUDGE GENE DONOFRIO

JUDGE CHERYL L. WAITE

JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

IN THE COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

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

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

I. FINDINGS OF FACTS.

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

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

2. The deed included the following Use Restriction:

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

3. The deed also included the following Alienation Restriction:

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

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

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

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

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

II. SUMMARY JUDGMENT STANDARD

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

Syl. ¶3 (1991).

III. CONCLUSIONS OF LAW.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: 7/20, 2018.

Judge Fregiato

ENDED

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IN THE COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

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

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

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

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

Revised Code § 164.26(A) provides:

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

R.C. § 164.26(A) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

Dated: _____, 2017

Judge Fregiato

IN THE COMMON PLEAS COURT OF BELMONT COUNTY, OHIO

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

ORDER AND JUDGMENT ENTRY

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

IT IS HEREBY ORDERED AND ADJUDGED that

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

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

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

IT IS SO ORDERED.

Date: 11/6/17

Hon. Frank A. Fregiato

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

OH Const. Art. VIII, § 2***o***

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

Currentness

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

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

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

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

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

payment of debt service on them as it becomes due, all as provided in this section.

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

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

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

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

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

(E) In addition to projects undertaken by the state, the state may participate or assist, by grants, loans, loan guarantees, or contributions, in the financing of projects for purposes referred to in this section that are undertaken by local governmental

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

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

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

CREDIT(S)

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

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

End of Document

Baldwin's Ohio Revised Code Annotated
Title I. State Government
Chapter 164. Aid to Local Government Improvements (Refs & Annos)

R.C. § 164.05

164.05 Director of public works commission; powers and duties

Effective: June 29, 2018

Currentness

(A) The director of the Ohio public works commission shall do all of the following:

(1) Approve requests for financial assistance from district public works integrating committees and enter into agreements with one or more local subdivisions to provide loans, grants, and local debt support and credit enhancements for a capital improvement project if the director determines that:

(a) The project is an eligible project pursuant to this chapter;

(b) The financial assistance for the project has been properly approved and requested by the district committee of the district which includes the recipient of the loan or grant;

(c) The amount of the financial assistance, when added to all other financial assistance provided during the fiscal year for projects within the district, does not exceed that district's allocation of money from the state capital improvements fund for that fiscal year;

(d) The district committee has provided such documentation and other evidence as the director may require that the district committee has satisfied the requirements of section 164.06 or 164.14 of the Revised Code;

(e) The portion of a district's annual allocation which the director approves in the form of loans and local debt support and credit enhancements for eligible projects is consistent with divisions (E) and (F) of this section.

(2) Authorize payments to local subdivisions or their contractors for costs incurred for capital improvement projects which have been approved pursuant to this chapter. All requests for payments shall be submitted to the director on forms and in accordance with procedures specified in rules adopted by the director pursuant to division (A)(4) of this section.

(3) Retain the services of or employ financial consultants, engineers, accountants, attorneys, and such other employees as the director determines are necessary to carry out the director's duties under this chapter and fix the compensation for their services. From among these employees, the director shall appoint a deputy with the necessary qualifications to act as the director when the director is absent or temporarily unable to carry out the duties of office.

(4) Adopt rules establishing the procedures for making applications, reviewing, approving, and rejecting projects for which assistance is authorized under this chapter, and any other rules needed to implement the provisions of this chapter. Such rules shall be adopted under Chapter 119. of the Revised Code.

(5) Provide information and other assistance to local subdivisions and district public works integrating committees in developing their requests for financial assistance for capital improvements under this chapter and encourage cooperation and coordination of requests and the development of multisubdivision and multidistrict projects in order to maximize the benefits that may be derived by districts from each year's allocation;

(6) Require local subdivisions, to the extent practicable, to use Ohio products, materials, services, and labor in connection with any capital improvement project financed in whole or in part under this chapter;

(7) Notify the director of budget and management of all approved projects, and supply all information necessary to track approved projects through the state accounting system;

(8) Appoint the administrator of the Ohio small government capital improvements commission;

(9) Do all other acts, enter into contracts, and execute all instruments necessary or appropriate to carry out this chapter;

(10) Develop a standardized methodology for evaluating local subdivision capital improvement needs that permits a district public works integrating committee to consider, when addressing a subdivision's project application, the subdivision's existing capital improvements, the condition of those improvements, and the subdivision's projected capital improvement needs in that five-year period following the application date.

(11) Establish a program to provide local subdivisions with technical assistance in preparing project applications. The program shall be designed to assist local subdivisions that lack the financial or technical resources to prepare project applications on their own.

(B) When the director of the Ohio public works commission decides to conditionally approve or disapprove projects, the director's decisions and the reasons for which they are made shall be made in writing. These written decisions shall be conclusive for the purposes of the validity and enforceability of such determinations.

(C) Fees, charges, rates of interest, times of payment of interest and principal, and other terms, conditions, and provisions of and security for financial assistance provided pursuant to the provisions of this chapter shall be such as the director determines to be appropriate. If any payments required by a loan agreement entered into pursuant to this chapter are not paid, the funds which would otherwise be apportioned to the local subdivision from the county undivided local government fund, pursuant to sections 5747.51 to 5747.53 of the Revised Code, may, at the direction of the director of the Ohio public works commission, be reduced by the amount payable. The county treasurer shall, at the direction of the director, pay the amount of such reductions to the state capital improvements revolving loan fund. The director may renegotiate a loan repayment schedule with a local subdivision whose payments from the county undivided local government fund could be reduced pursuant to this division, but such a renegotiation may occur only one time with respect to any particular loan agreement.

(D) Grants approved for the repair and replacement of existing infrastructure pursuant to this chapter shall not exceed ninety per cent of the estimated total cost of the capital improvement project. Grants approved for new or expanded infrastructure shall not exceed fifty per cent of the estimated cost of the new or expansion elements of the capital improvement project. A local subdivision share of the estimated cost of a capital improvement may consist of any of the following:

(1) The reasonable value, as determined by the director or the administrator, of labor, materials, and equipment that will be contributed by the local subdivision in performing the capital improvement project;

(2) Moneys received by the local subdivision in any form from an authority, commission, or agency of the United States for use in performing the capital improvement project;

(3) Loans made to the local subdivision under this chapter;

(4) Engineering costs incurred by the local subdivision in performing engineering activities related to the project.

A local subdivision share of the cost of a capital improvement shall not include any amounts awarded to it from the local transportation improvement program fund created in section 164.14 of the Revised Code.

(E) The following portion of a district public works integrating committee’s annual allocation share pursuant to section 164.08 of the Revised Code may be awarded to subdivisions only in the form of interest-free, low-interest, market rate of interest, or blended-rate loans:

YEAR IN WHICH MONEYS ARE ALLOCATED	PORTION USED FOR LOANS

Year 1	0%
Year 2	0%
Year 3	10%
Year 4	12%
Year 5	15%
Year 6	20%
Year 7, 8, 9, and 10	22%

(F) The following portion of a district public works integrating committee's annual allocation pursuant to section 164.08 of the Revised Code shall be awarded to subdivisions in the form of local debt support and credit enhancements:

YEAR IN WHICH MONEYS ARE ALLOCATED	PORTIONS USED FOR LOCAL DEBT SUPPORT AND CREDIT ENHANCEMENTS
Year 1	0%
Year 2	0%
Year 3	3%
Year 4	5%
Year 5	5%
Year 6	7%

Year 7	7%
Year 8	8%
Year 9	8%
Year 10	8%

(G) For the period commencing on March 29, 1988, and ending on June 30, 1993, for the period commencing July 1, 1993, and ending June 30, 1999, and for each five-year period thereafter, the total amount of financial assistance awarded under sections 164.01 to 164.08 of the Revised Code for capital improvement projects located wholly or partially within a county shall be equal to at least thirty per cent of the amount of what the county would have been allocated from the obligations authorized to be sold under this chapter during each period, if such amounts had been allocable to each county on a per capita basis.

(H) The amount of the annual allocations made pursuant to divisions (B)(1) and (5) of section 164.08 of the Revised Code which can be used for new or expanded infrastructure is limited as follows:

YEAR IN WHICH MONEYS ARE ALLOCATED	PORTION WHICH MAY BE USED FOR NEW OR EXPANSION INFRASTRUCTURE
Year 1	5%
Year 2	5%
Year 3	10%
Year 4	10%
Year 5	10%
Year 6	15%

Year 7	15%
Year 8	20%
Year 9	20%
Year 10 and each year thereafter	20%

(I) The following portion of a district public works integrating committee's annual allocation share pursuant to section 164.08 of the Revised Code shall be awarded to subdivisions in the form of interest-free, low-interest, market rate of interest, or blended-rate loans, or local debt support and credit enhancements:

YEAR IN WHICH MONEYS ARE ALLOCATED	PORTION USED FOR LOANS OR LOCAL DEBT SUPPORT AND CREDIT ENHANCEMENTS
Year 32 and each year thereafter	At least 10%

(J) No project shall be approved under this section unless the project is designed to have a useful life of at least seven years. In addition, the average useful life of all projects for which grants or loans are awarded in each district during a program year shall not be less than twenty years.

CREDIT(S)

(2018 H 529, eff. 6-29-18; 2017 H 26, eff. 6-30-17; 2016 S 310, eff. 8-16-16; 2015 H 53, eff. 7-1-15; 2013 H 51, eff. 7-1-13; 2012 S 314, eff. 9-28-12; 1996 H 748, eff. 9-17-96 (General Effective Date); 1996 S 257, eff. 8-15-96; 1992 H 808, eff. 10-14-92; 1989 H 381; 1988 H 867, H 704)

Notes of Decisions (2)

R.C. § 164.05, OH ST § 164.05
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document

Baldwin's Ohio Revised Code Annotated
Title I. State Government
Chapter 164. Aid to Local Government Improvements (Refs & Annos)

R.C. § 164.09

164.09 Issuance of obligations

Effective: September 29, 2007

Currentness

(A) The issuer is authorized to issue and sell, as provided in this section and in amounts from time to time authorized by the general assembly, general obligations of this state for the purpose of financing or assisting in the financing of the costs of public infrastructure capital improvements for local subdivisions. The full faith and credit, revenues, and taxing power of the state are and shall be pledged to the timely payment of bond service charges on outstanding obligations, all in accordance with Section 2k or 2m of Article VIII, Ohio Constitution and sections 164.09 to 164.12 of the Revised Code, excluding from that pledge fees, excises, or taxes relating to the registration, operation, or use of vehicles on the public highways, or to fuels used for propelling those vehicles, and so long as such obligations are outstanding there shall be levied and collected excises and taxes, excluding those excepted above, in amounts sufficient to pay the bond service charges on such obligations and costs relating to credit facilities.

(B)(1) The total principal amount of obligations issued pursuant to Section 2k of Article VIII, Ohio Constitution shall not exceed one billion two hundred million dollars, and not more than one hundred twenty million dollars in principal amount of obligations may be issued in any calendar year, all determined as provided in sections 164.09 to 164.12 of the Revised Code.

(2) The total principal amount of obligations issued for the purposes of this section pursuant to Section 2m of Article VIII, Ohio Constitution, shall not exceed one billion two hundred million dollars. Not more than one hundred twenty million dollars in principal amount of such obligations, plus the principal amount of such obligations that in any prior fiscal years could have been but were not issued within the one-hundred-twenty-million-dollar fiscal year limit, may be issued in any fiscal year. No obligations shall be issued for the purposes of this section pursuant to Section 2m of Article VIII, Ohio Constitution, until at least one billion one hundred ninety-nine million five hundred thousand dollars aggregate principal amount of obligations have been issued pursuant to Section 2k of Article VIII, Ohio Constitution. The amounts specified under division (B)(2) of this section shall be determined as provided in sections 164.09 to 164.12 of the Revised Code.

(C) Each issue of obligations shall be authorized by order of the issuer. The bond proceedings shall provide for the principal amount or maximum principal amount of obligations of an issue, and shall provide for or authorize the manner or agency for determining the principal maturity or maturities, not exceeding the earlier of thirty years from the date of issuance of the particular obligations or thirty years from the date the debt represented by the particular obligations was originally contracted, the interest rate or rates, the date of and the dates of payment of interest on the obligations, their denominations, and the establishment within or without the state of a place or places of payment of bond service charges. Sections 9.96 and 9.98 to 9.983 of the Revised Code are applicable to the obligations. The purpose of the obligations may be stated in the bond

proceedings as “financing or assisting in the financing of local subdivisions capital improvement projects.”

(D) The proceeds of the obligations, except for any portion to be deposited in special funds, or in escrow funds for the purpose of refunding outstanding obligations, all as may be provided in the bond proceedings, shall be deposited to the state capital improvements fund established by section 164.08 of the Revised Code.

(E) The issuer may appoint paying agents, bond registrars, securities depositories, and transfer agents, and may retain the services of financial advisers and accounting experts, and retain or contract for the services of marketing, remarketing, indexing, and administrative agents, other consultants, and independent contractors, including printing services, as are necessary in the issuer’s judgment to carry out sections 164.01 to 164.12 of the Revised Code. Financing costs are payable, as provided in the bond proceedings, from the proceeds of the obligations, from special funds, or from other moneys available for the purpose.

(F) The bond proceedings, including any trust agreement, may contain additional provisions customary or appropriate to the financing or to the obligations or to particular obligations, including but not limited to:

(1) The redemption of obligations prior to maturity at the option of the state or of the holder or upon the occurrence of certain conditions at such price or prices and under such terms and conditions as are provided in the bond proceedings;

(2) The form of and other terms of the obligations;

(3) The establishment, deposit, investment, and application of special funds, and the safeguarding of moneys on hand or on deposit, without regard to Chapter 131. or 135. of the Revised Code, but subject to any special provisions of this section with respect to particular funds or moneys, and provided that any bank or trust company that acts as a depository of any moneys in special funds may furnish such indemnifying bonds or may pledge such securities as required by the issuer;

(4) Any or every provision of the bond proceedings binding upon the issuer and such state agency or local subdivision, officer, board, commission, authority, agency, department, or other person or body as may from time to time have the authority under law to take such actions as may be necessary to perform all or any part of the duty required by such provision;

(5) The maintenance of each pledge, any trust agreement, or other instrument comprising part of the bond proceedings until the state has fully paid or provided for the payment of the bond service charges on the obligations or met other stated conditions;

(6) In the event of default in any payments required to be made by the bond proceedings, or any other agreement of the issuer made as a part of a contract under which the obligations were issued or secured, the enforcement of such payments or agreements by mandamus, suit in equity, action at law, or any combination of the foregoing;

(7) The rights and remedies of the holders of obligations and of the trustee under any trust agreement, and provisions for protecting and enforcing them, including limitations on rights of individual holders of obligations;

(8) The replacement of any obligations that become mutilated or are destroyed, lost, or stolen;

(9) Provision for the funding, refunding, or advance refunding or other provision for payment of obligations which will then no longer be outstanding for purposes of this section or of the bond proceedings;

(10) Any provision that may be made in bond proceedings or a trust agreement, including provision for amendment of the bond proceedings;

(11) Such other provisions as the issuer determines, including limitations, conditions, or qualifications relating to any of the foregoing;

(12) Any other or additional agreements with the holders of the obligations relating to the obligations or the security for the obligations.

(G) The great seal of the state or a facsimile of that seal may be affixed to or printed on the obligations. The obligations requiring signature by the issuer shall be signed by or bear the facsimile signature of the issuer as provided in the bond proceedings. Any obligations may be signed by the person who, on the date of execution, is the authorized signer although on the date of such obligations such person was not the issuer. In case the person whose signature or a facsimile of whose signature appears on any obligation ceases to be the issuer before delivery of the obligation, such signature or facsimile is nevertheless valid and sufficient for all purposes as if the person had remained the member until such delivery, and in case the seal to be affixed to or printed on obligations has been changed after the seal has been affixed to or a facsimile of the seal has been printed on the obligations, that seal or facsimile seal shall continue to be sufficient as to those obligations and obligations issued in substitution or exchange therefor.

(H) The obligations are negotiable instruments and securities under Chapter 1308. of the Revised Code, subject to the provisions of the bond proceedings as to registration. Obligations may be issued in coupon or in fully registered form, or both, as the issuer determines. Provision may be made for the registration of any obligations with coupons attached as to principal alone or as to both principal and interest, their exchange for obligations so registered, and for the conversion or reconversion into obligations with coupons attached of any obligations registered as to both principal and interest, and for reasonable charges for such registration, exchange, conversion, and reconversion. Pending preparation of definitive obligations, the issuer may issue interim receipts or certificates which shall be exchanged for such definitive obligations.

(I) Obligations may be sold at public sale or at private sale, and at such price at, above, or below par, as determined by the issuer in the bond proceedings.

(J) In the discretion of the issuer, obligations may be secured additionally by a trust agreement between the state and a corporate trustee which may be any trust company or bank having a place of business within the state. Any trust agreement may contain the order authorizing the issuance of the obligations, any provisions that may be contained in the bond proceedings, and other provisions that are customary or appropriate in an agreement of the type.

(K) Except to the extent that their rights are restricted by the bond proceedings, any holder of obligations, or a trustee under the bond proceedings, may by any suitable form of legal proceedings protect and enforce any rights under the laws of this state or granted by the bond proceedings. Such rights include the right to compel the performance of all duties of the issuer and the state. Each duty of the issuer and the issuer's employees, and of each state agency and local public entity and its officers, members, or employees, undertaken pursuant to the bond proceedings, is hereby established as a duty of the issuer, and of each such agency, local subdivision, officer, member, or employee having authority to perform such duty, specifically enjoined by the law and resulting from an office, trust, or station within the meaning of section 2731.01 of the Revised Code. The persons who are at the time the issuer, or the issuer's employees, are not liable in their personal capacities on any obligations or any agreements of or with the issuer relating to obligations or under the bond proceedings.

(L) Obligations are lawful investments for banks, societies for savings, savings and loan associations, deposit guarantee associations, trust companies, trustees, fiduciaries, insurance companies, including domestic for life and domestic not for life, trustees or other officers having charge of sinking and bond retirement or other special funds of political subdivisions and taxing districts of this state, the commissioners of the sinking fund, the administrator of workers' compensation, the state teachers retirement system, the public employees retirement system, the school employees retirement system, and the Ohio police and fire pension fund, notwithstanding any other provisions of the Revised Code or rules adopted pursuant thereto by any state agency with respect to investments by them, and are also acceptable as security for the deposit of public moneys.

(M) Unless otherwise provided in any applicable bond proceedings, moneys to the credit of or in the special funds established by or pursuant to this section may be invested by or on behalf of the issuer only in notes, bonds, or other direct obligations of the United States or of any agency or instrumentality of the United States, in obligations of this state or any political subdivision of this state, in certificates of deposit of any national bank located in this state and any bank, as defined in section 1101.01 of the Revised Code, subject to inspection by the superintendent of financial institutions, in the Ohio subdivision's fund established pursuant to section 135.45 of the Revised Code, in no-front-end-load money market mutual funds consisting exclusively of direct obligations of the United States or of an agency or instrumentality of the United States, and in repurchase agreements, including those issued by any fiduciary, secured by direct obligations of the United States or an agency or instrumentality of the United States, and in collective investment funds established in accordance with section 1111.14 of the Revised Code and consisting exclusively of direct obligations of the United States or of an agency or instrumentality of the United States, notwithstanding division (A)(1)(c) of that section. The income from investments shall be credited to such special funds or otherwise as the issuer determines in the bond proceedings, and the investments may be sold or exchanged at such times as the issuer determines or authorizes.

(N) Unless otherwise provided in any applicable bond proceedings, moneys to the credit of or in a special fund shall be disbursed on the order of the issuer, provided that no such order is required for the payment from the bond service fund or other special fund when due of bond service charges or required payments under credit facilities.

(O) The issuer may covenant in the bond proceedings, and any such covenants shall be controlling notwithstanding any other

provision of law, that the state and the applicable officers and agencies of the state, including the general assembly, so long as any obligations are outstanding in accordance with their terms, shall maintain statutory authority for and cause to be charged and collected taxes, excises, and other receipts of the state so that the receipts to the bond service fund shall be sufficient in amounts to meet bond service charges and for the establishment and maintenance of any reserves and other requirements, including payment of financing costs, provided for in the bond proceedings.

(P) The obligations, and the transfer of, and the interest and other income from, including any profit made on the sale, transfer, or other disposition of, the obligations shall at all times be free from taxation, direct or indirect, within the state.

(Q) Unless a judicial action or proceeding challenging the validity of obligations is commenced by personal service on the treasurer of state prior to the initial delivery of an issue of the obligations, the obligations of that issue and the bond proceedings pertaining to that issue are incontestable and those obligations shall be conclusively considered to be and to have been issued, secured, payable, sold, executed, and delivered, and the bond proceedings relating to them taken, in conformity with law if all of the following apply to the obligations:

(1) They state that they are issued under the provisions of this section and comply on their face with those provisions;

(2) They are issued within the limitations prescribed by this section;

(3) Their purchase price has been paid in full;

(4) They state that all the bond proceedings were held in compliance with law, which statement creates a conclusive presumption that the bond proceedings were held in compliance with all laws, including section 121.22 of the Revised Code, where applicable, and rules.

(R) This section applies only with respect to obligations issued and delivered before September 30, 2000.

CREDIT(S)

(2007 H 119, eff. 9-29-07; 2000 H 640, eff. 9-14-00; 1999 H 222, eff. 11-2-99; 1997 H 215, eff. 6-30-97; 1996 H 538, eff. 1-1-97; 1996 H 748, eff. 9-17-96 (General Effective Date); 1996 S 257, eff. 8-15-96; 1995 H 7, eff. 9-1-95; 1993 H 107, eff. 10-20-93; 1992 S 269, H 808; 1989 H 222; 1988 H 704)

Notes of Decisions (1)

R.C. § 164.09, OH ST § 164.09
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document

Baldwin's Ohio Revised Code Annotated
Title I. State Government
Chapter 164. Aid to Local Government Improvements (Refs & Annos)

R.C. § 164.26

164.26 Policies

Effective: September 15, 2014

Currentness

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

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

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

CREDIT(S)

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

Notes of Decisions (1)

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

End of Document

Baldwin's Ohio Revised Code Annotated
Title I. State Government
Chapter 164. Aid to Local Government Improvements (Refs & Annos)

R.C. § 164.261

164.261 Repayment of grant

Effective: September 15, 2014

Currentness

All of the following apply to any repayment of a grant awarded under sections 164.20 to 164.27 of the Revised Code:

(A) The Ohio public works commission shall deposit the grant repayment into the clean Ohio conservation fund created in section 164.27 of the Revised Code.

(B) The commission shall return the grant repayment to the natural resource assistance council that approved the grant application.

(C) The grant repayment shall be used for the same purpose as the grant was originally approved for, as provided in section 164.22 of the Revised Code.

CREDIT(S)

(2014 H 483, eff. 9-15-14)

R.C. § 164.261, OH ST § 164.261
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document

R.C. § 3769.01

3769.01 Horse-racing permit required

Currentness

No person, association, corporation, or trust shall hold, conduct, assist, or aid and abet in holding or conducting any meetings, at which horse racing is permitted for any stake, purse, or award unless such person, association, corporation, or trust secures a permit to conduct a horse-racing meeting and complies with sections 3769.01 to 3769.14 of the Revised Code.

Such sections shall apply only to the racing of horses and do not prevent the use of any grounds, enclosure, or race track, whether or not owned or controlled by a permit holder, for any county or state fair, agricultural or livestock exhibition, horse show, or any horse racing where the pari-mutuel system of wagering upon the result of such horse racing is not permitted or allowed. This section does not permit the pari-mutuel method of wagering upon any race track unless a permit is secured as provided in sections 3769.04 to 3769.06 of the Revised Code.

CREDIT(S)

(1975 H 287, eff. 10-30-75; 1953 H 1; GC 1079-1)

Notes of Decisions (3)

R.C. § 3769.01, OH ST § 3769.01
Current through File 30 of the 133rd General Assembly (2019-2020).

End of Document

Baldwin's Ohio Revised Code Annotated
Title XLVII. Occupations--Professions (Refs & Annos)
Chapter 4763. Real Estate Appraisers (Refs & Annos)

R.C. § 4763.11

4763.11 Complaints against certificate holders, registrants, and licensees; investigations; disciplinary action

Effective: December 14, 2018

Currentness

(A) Within ten business days after a person files a written complaint against a person certified, registered, or licensed under this chapter with the division of real estate, the superintendent of real estate shall acknowledge receipt of the complaint by sending notice to the certificate holder, registrant, or licensee that includes a copy of the complaint. The acknowledgement to the complainant and the notice to the certificate holder, registrant, or licensee may state that an informal mediation meeting will be held with the complainant, the certificate holder, registrant, or licensee, and an investigator from the investigation and audit section of the division, if the complainant and certificate holder, registrant, or licensee both file a request for such a meeting within twenty calendar days after the acknowledgment and notice are mailed.

(B) If the complainant and certificate holder, registrant, or licensee both file with the division requests for an informal mediation meeting, the superintendent shall notify the complainant and certificate holder, registrant, or licensee of the date of the meeting, by regular mail. If the complainant and certificate holder, registrant, or licensee reach an accommodation at an informal mediation meeting, the investigator shall report the accommodation to the superintendent, the complainant, and the certificate holder, registrant, or licensee and the complaint file shall be closed upon the superintendent receiving satisfactory notice that the accommodation has been fulfilled.

(C) If the complainant and certificate holder, registrant, or licensee fail to agree to an informal mediation meeting or fail to reach an accommodation agreement, or fail to fulfill an accommodation agreement, the superintendent shall assign the complaint to an investigator for an investigation into the conduct of the certificate holder, registrant, or licensee against whom the complaint is filed.

(D) Upon the conclusion of the investigation, the investigator shall file a written report of the results of the investigation with the superintendent. The superintendent shall review the report and determine whether there exists reasonable and substantial evidence of a violation of division (G) of this section by the certificate holder, registrant, or licensee.

(1) If the superintendent finds evidence exists showing a violation of division (G) of this section by a certificate holder, registrant, or licensee, the superintendent shall notify the complainant and certificate holder, registrant, or licensee of the determination. The certificate holder, registrant, or licensee may enter into a settlement agreement with the superintendent. The settlement agreement is subject to board approval, and the board shall prescribe requirements by rule for such settlement agreements. The certificate holder, registrant, or licensee may request a hearing pursuant to Chapter 119. of the Revised

Code. If a formal hearing is conducted, the hearing examiner shall file a report that contains findings of fact and conclusions of law with the division hearing administrator. The division hearing administrator shall serve the hearing examiner report on the superintendent, the assistant attorney general representing the superintendent in the matter, the board, the complainant and the certificate holder, licensee, or registrant, and if applicable, counsel representing the complainant, certificate holder, licensee, or registrant. Service of the hearing examiner report on the complainant and on the certificate holder, licensee, or registrant shall comply with division (K) of this section. Service of the hearing examiner's report on the superintendent, the assistant attorney general representing the superintendent in the matter, and the board shall be by either regular mail or electronic means. Service of the hearing examiner report on counsel representing the complainant, certificate holder, licensee, or registrant shall be by regular mail.

Within ten calendar days of receipt by the assistant attorney general representing the superintendent of the copy of the hearing examiner's report served by the division hearing administrator, the assistant attorney general may file with the board written objections to the hearing examiner's report, which shall be considered by the board before approving, modifying, or rejecting the hearing examiner's report. Within ten calendar days of receipt by the certificate holder, licensee, or registrant of the copy of the hearing examiner's report served by the division hearing administrator, the certificate holder, licensee, or registrant may file with the board written objections to the hearing examiner's report, which shall be considered by the board before approving, modifying, or rejecting the hearing examiner's report. Within ten calendar days of receipt by the superintendent of the copy of the hearing examiner's report served by the division hearing administrator, the superintendent may grant an extension of time to file written objections to the hearing examiner's report for good cause shown.

(2) If the superintendent finds, following the conclusion of the investigation, that evidence does not exist showing a violation of division (G) of this section by the certificate holder, registrant, or licensee, the superintendent shall notify the complainant and certificate holder, registrant, or licensee of that determination and the basis for the determination. Within fifteen business days after the superintendent notifies the complainant and certificate holder, registrant, or licensee that such evidence does not exist, the complainant may file with the division a request that the real estate appraiser board review the determination. If the complainant files such request, the board shall review the determination at the next regularly scheduled meeting held at least fifteen business days after the request is filed but no longer than six months after the request is filed. The board may hear the testimony of the complainant, certificate holder, registrant, or licensee at the meeting upon the request of that party. If the board affirms the determination of the superintendent, the superintendent shall notify the complainant and the certificate holder, registrant, or licensee within five business days thereafter. If the board reverses the determination of the superintendent, the matter shall be returned to the superintendent for additional investigation or review.

(E) The board shall review the hearing examiner's report and the evidence at the next regularly scheduled board meeting held at least fifteen business days after receipt of the examiner's report. The board may hear the testimony of the complainant, certificate holder, registrant, or licensee upon request. If the complainant is the Ohio civil rights commission, the board shall review the complaint.

(F) If the board determines that a licensee, registrant, or certificate holder has violated this chapter for which disciplinary action may be taken under division (G) of this section, after review of the hearing examiner's report and the evidence as provided in division (E) of this section, or after review of a settlement agreement entered into pursuant to division (D)(1) of this section, the board shall order the disciplinary action the board considers appropriate, which may include, but is not limited to, any of the following:

(1) Reprimand of the certificate holder, registrant, or licensee;

(2) Imposition of a fine, not exceeding, two thousand five hundred dollars per violation;

(3) Requirement of the completion of additional education courses. Any course work imposed pursuant to this section shall not count toward continuing education requirements or prelicense or precertification requirements set forth in section 4763.05 of the Revised Code.

(4) Suspension of the certificate, registration, or license for a specific period of time;

(5) Revocation or surrender of the certificate, registration, or license.

The decision and order of the board is final, except that following the review of the hearing examiner report and the evidence as provided in division (E) of this section, the decision and order of the board is subject to review in the manner provided for in Chapter 119. of the Revised Code and appeal to any court of common pleas. If the board orders a disciplinary action as provided in division (F)(2) or (3) of this section, the superintendent may grant an extension of time to satisfy the board-ordered disciplinary action for good cause shown.

(G) The board shall take any disciplinary action authorized by this section against a certificate holder, registrant, or licensee or an applicant who obtains a certificate, registration, or license pursuant to this chapter who is found to have committed any of the following acts, omissions, or violations:

(1) As an applicant, procuring or attempting to procure a certificate, registration, or license pursuant to section 4763.05, 4763.06, or 4763.07 of the Revised Code by knowingly making a false statement, submitting false information, refusing to provide complete information in response to a question in an application for certification, registration, or licensure, or by any means of fraud or misrepresentation;

(2) Paying, or attempting to pay, anything of value, other than the fees or assessments required by this chapter, to any member or employee of the board for the purpose of procuring a certificate, registration, or license;

(3) In a criminal proceeding, being convicted of or pleading guilty or no contest to a felony; a crime involving moral turpitude; or a crime involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, drug trafficking, or any criminal offense involving money or securities, including a violation of an existing or former law of this state, any other state, or the United States that is substantially equivalent to such an offense;

(4) Dishonesty, fraud, or misrepresentation, with the intent to either benefit the certificate holder, registrant, or licensee or another person or injure another person;

(5) Violation of any of the standards for the development, preparation, communication, or reporting of an appraisal report set

forth in this chapter and rules of the board;

(6) Failure or refusal to exercise reasonable diligence in developing, preparing, or communicating an appraisal report;

(7) Negligence or incompetence in developing, preparing, communicating, or reporting an appraisal report;

(8) Violating this chapter or the rules adopted thereunder;

(9) Accepting an appraisal assignment where the employment is contingent upon the appraiser preparing or reporting a predetermined estimate, analysis, or opinion, or where the fee to be paid for the appraisal is contingent upon the opinion, conclusion, or valuation attained or upon the consequences resulting from the appraisal assignment;

(10) Violating the confidential nature of governmental records to which the certificate holder, registrant, or licensee gained access through employment or engagement as an appraiser by a governmental agency;

(11) Entry of final judgment against the certificate holder, registrant, or licensee on the grounds of fraud, deceit, misrepresentation, or gross negligence in performing any appraisal of real estate;

(12) Violating any federal or state civil rights law;

(13) Having published advertising, whether printed, radio, display, or of any other nature, which was misleading or inaccurate in any material particular, or in any way having misrepresented any appraisal or specialized service;

(14) Failing to provide copies of records to the superintendent or failing to maintain records as required by section 4763.14 of the Revised Code. Failure of a certificate holder, licensee, or registrant to comply with a subpoena issued under division (C)(1) of section 4763.03 of the Revised Code is prima-facie evidence of a violation of division (G)(14) of section 4763.11 of the Revised Code.

(15) Failing to provide notice to the board as required in division (I) of this section;

(16) In the case of a certificate holder acting as a supervisory appraiser, refusing to sign an appraiser experience log required by rule for a person making application for an initial state-certified general real estate appraiser certificate, state-certified residential real estate appraiser certificate, or state-licensed residential real estate appraiser license, unless there is reasonable and substantial evidence that there is false information contained within the log;

(17) Being sanctioned or disciplined in another jurisdiction as a real estate appraiser;

(18) Failing to provide assistance, whenever possible, to the members and staff of the board or to the division of real estate in the enforcement of this chapter and the rules adopted under it.

(H) The board immediately shall notify the superintendent of real estate of any disciplinary action taken under this section against a certificate holder, registrant, or licensee who also is licensed under Chapter 4735. of the Revised Code, and also shall notify any other federal, state, or local agency and any other public or private association that the board determines is responsible for licensing or otherwise regulating the professional or business activity of the appraiser. Additionally, the board shall notify the complainant and any other party who may have suffered financial loss because of the certificate holder's, registrant's, or licensee's violations, that the complainant or other party may sue for recovery under section 4763.16 of the Revised Code. The notice provided under this division shall specify the conduct for which the certificate holder, registrant, or licensee was disciplined and the disciplinary action taken by the board and the result of that conduct.

(I) A certificate holder, registrant, or licensee shall notify the board within fifteen days of the agency's issuance of an order revoking or permanently surrendering any professional license, certificate, or registration by any public entity other than the division of real estate. A certificate holder, registrant, or licensee who is convicted of or pleads guilty or no contest to a crime as described in division (G)(3) of this section shall notify the board of the conviction or plea within fifteen days of the conviction or plea.

(J) If the board determines that a certificate holder, registrant, or licensee has violated this chapter for which disciplinary action may be taken under division (G) of this section as a result of an investigation conducted by the superintendent upon the superintendent's own motion or upon the request of the board, the superintendent shall notify the certificate holder, registrant, or licensee of the certificate holder's, registrant's, or licensee's right to a hearing pursuant to Chapter 119. of the Revised Code and, if applicable, to an appeal of a final determination of such administrative proceedings to any court of common pleas.

(K) Notwithstanding section 119.07 of the Revised Code, acknowledgment of complaint notices issued under division (A) of this section and continuance notices associated with hearings conducted under this section may be sent by regular mail and a certificate of mailing shall be obtained for the notices. All other notices issued to a complainant and to a certificate holder, registrant, licensee, or other party pursuant to this section shall be mailed via certified mail, return receipt requested. When any notice is sent by certified mail, return receipt requested, and is returned because the notice was unclaimed, then that notice is deemed served if the superintendent subsequently sends the notice by regular mail and a certificate of mailing is obtained for the notice. If a notice, whether sent by certified mail, return receipt requested, or by regular mail with a certificate of mailing, is returned for failure of delivery, then the superintendent shall make personal delivery of the notice by an employee or agent of the department of commerce or shall cause a summary of the substantive provisions of the notice to be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the last known address of the party is located. When notice is given by publication, a proof of publication affidavit, with the first publication of the notice set forth in the affidavit, shall be mailed by regular mail to the party at the party's last known address. The notice shall be deemed received as of the date of the last publication of the summary. An employee or agent of the department of commerce may make personal delivery of the notice upon the party at any time. Refusal of delivery by personal service or by mail is not failure of delivery and service is deemed to be complete. Failure of delivery occurs only

when a mailed notice is returned by the postal authorities marked undeliverable, address or addressee unknown, or forwarding address unknown or expired.

CREDIT(S)

(2018 H 213, eff. 12-14-18; 2009 H 1, eff. 10-16-09; 1995 H 304, eff. 3-5-96; 1992 S 359, eff. 12-22-92; 1989 S 202)

Notes of Decisions (8)

R.C. § 4763.11, OH ST § 4763.11
Current through File 30 of the 133rd General Assembly (2019-2020).

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