

IN THE OHIO SUPREME COURT

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

**REPLY BRIEF APPELLANTS SILTSTONE RESOURCES, LLC AND
AMERICAN ENERGY – UTICA MINERALS, LLC**

Andrew P. Lycans (0077230) (COUNSEL OF RECORD)
CRITCHFIELD, CRITCHFIELD & JOHNSTON, LTD.
225 North Market Street, P.O. Box 599
Wooster, OH 44691
Phone No: 330-264-4444; Fax No.: 330-263-9278
Email: lycans@ccj.com

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

COUNSEL FOR APPELLANT SILTSTONE RESOURCES, LLC

Kevin L. Colosimo (0090002)
Christopher W. Rogers (0091843) (COUNSEL OF RECORD)
Daniel P. Craig (0088891)
FROST BROWN TODD LLC
501 Grant Street, Suite 800
Pittsburgh, PA 15219
Phone No.: 412-513-4300; Fax No.: 412-513-4299
Email: kcolosimo@fbtlaw.com; crogers@fbtlaw.com; dcraig@fbtlaw.com

COUNSEL FOR APPELLANT AMERICAN ENERGY – UTICA MINERALS, LLC

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

COUNSEL FOR APPELLANT EAGLE CREEK FARM PROPERTIES, INC.

Dave Yost (0056290)
Benjamin M. Flowers (0095284) (COUNSEL OF RECORD)
Samuel C. Peterson (0081432)
James Patterson (0024538)
Rachel O. Huston (0074934)
Christie Limbert (0090897)
Cory Goe (0090500)
Lidia Mowad (0097973)
Joshua Nagy (0097099)
Michelle Pfefferle (0081642)
OHIO ATTORNEY GENERAL'S OFFICE
30 East Broad Street, 26th Floor
Columbus, OH 43215
Phone No.: 614-728-0768; Fax No.: 866-909-3632
Email: bflowers@ohioattorneygeneral.gov; Samuel.Peterson@ohioattorneygeneral.gov;
James.Patterson@ohioattorneygeneral.gov; Rachel.Huston@ohioattorneygeneral.gov;
Christie.Limbert@ohioattorneygeneral.gov; Cory.Goe@ohioattorneygeneral.gov;
Lidia.Mowad@ohioattorneygeneral.gov; Joshua.Nagy@ohioattorneygeneral.gov;
Michelle.Pfefferle@ohioattorneygeneral.gov

COUNSEL FOR APPELLEE STATE OF OHIO, PUBLIC WORKS COMMISSION

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INTRODUCTION

The Seventh District rendered a broad decision, holding naked alienation restraints are enforceable as a matter of general contract law. Specifically, it held the OPWC could enforce the Alienation Restriction solely because the CDC agreed to the restriction. This holding was not tied to Property being purchased with a Clean Ohio fund grant, nor was the holding based upon an effort to protect the public purpose underlying the Clean Ohio program. Rather, the holding was based upon the Seventh District's rejection of the trial court's conclusion that naked alienation restraints are generally illegal—a conclusion which expressly rested on precedent from this Court. As a result, the Seventh District also rejected the trial court's efforts to make the Alienation Restriction reasonable by limiting its enforcement to instances where alienation would threaten the Use Restriction and the public purpose underlying the Clean Ohio program.

The OPWC initially defends the indefensible conclusion that naked alienation restraints are enforceable as a matter of general contract law, before introducing the argument, *for the first time*, that the Clean Ohio grant falls within an exception for lands dedicated to public use. Both arguments should be rejected, the former because it fails to acknowledge over a century of precedent and the latter because it fails to acknowledge that the trial court (without citing to the specific case relied upon by the OPWC) fashioned a remedy which specifically tied enforcement of the Alienation Restriction to the public use rationale underlying the Clean Ohio program.

The Seventh District also held that the OPWC could seek enforcement of the Alienation Restriction through both injunctive relief and monetary relief, notwithstanding the General Assembly's directive to seek grant repayment and liquidated damages in the event that a grant recipient fails to maintain long-term ownership or control of a property purchased with grant funds. This decision again relied upon a general legal principle that deed restrictions can be

enforced through injunctions. The OPWC's brief supports the Seventh District's decision by citing to cases enforcing *use* restrictions through injunctive relief. The OPWC also cites to precedent from other jurisdictions for the proposition that the OPWC will be irreparably harmed absent injunctive relief, notwithstanding the fact that the legislature specifically indicated it should seek grant repayment and liquidated damages in instances such as this. Again both arguments should be rejected.

To the extent that the Alienation Restriction is deemed enforceable at all, such enforceability hinges upon the legislature implicitly setting aside long-standing public policy barring alienation restraints when it adopted R.C. § 164.26(A). Critically, in addition to providing for liquidated damages, R.C. § 164.26(A) also provides for grant repayment. Thus, allowing the OPWC to obtain injunctive relief in addition to the statutorily mandated relief would mean the OPWC can obtain a refund of the consideration it provided in exchange for the deed restrictions, obtain liquidated damages to compensate it for any damages beyond what it originally paid, *and* obtain the benefit of the bargain for which it negotiated when making the grant. In short, the OPWC argues for a common law remedy that, when combined with the mandatory statutory remedy, would create a windfall, allowing the OPWC to have its cake (an injunction enforcing the deed restrictions) and eat it too (by recouping what the OPWC gave up in exchange for the deed restrictions).

Additionally, accepting the OPWC's arguments regarding R.C. § 164.26(A) would give the OPWC absolute discretion to require local political subdivisions (who along with nonprofit organizations are the only eligible grantees) to maintain ownership of park property in perpetuity. Numerous sections of the Revised Code deal with this exact issue and none of them support the OPWC's position that continued ownership can be enforced through the courts.

Finally, the Seventh District held that the deed provisions drafted by the OPWC purporting to allow the OPWC the option of enforcing the alienation restriction through equitable means served as an independent basis for the court's conclusion that injunctive relief is appropriate. Incredibly, the OPWC argues that, in the event grant repayment and liquidated damages would prevent it from suffering the irreparable harm necessary for injunctive relief, it would have the option to elect injunctive relief under the deed rather than the monetary damages mandated by statute. The OPWC is an administrative agency and it does not have authority to contract around legislative requirements. This argument should be rejected.

Reply in Support of Proposition of Law No. 1:

A. The courts routinely refuse to enforce the plain language of deed restrictions, when those deed restrictions violate public policy.

The OPWC admits that the courts will not enforce deed restrictions that are determined to be contrary to public policy. (Appellee's Brief at 17.) In fact, this Court has noted that the privilege of entering into a real covenant must be restrained when the parties attempt to accomplish something against the public law, general public policy, or public justice. *Fairfield Twp. Bd. of Trustees v. Testa*, 153 Ohio St.3d 255, 2018-Ohio-2381, 104 N.E.3d 749, ¶ 20. In that event, the covenant becomes unenforceable, no matter how explicit or plain the language used in the covenant. *Id.* Contrary to the OPWC's argument, enforcing the remainder of a contract after severing an unenforceable provision does not impermissibly rewrite the parties' contract. *See McDonald v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. Cuyahoga No. 76808, 2000 WL 1144972, at *3 (Aug. 10, 2000) citing Restatement of the Law 2d, Contracts, § 184 (1981); *see also State ex rel. Allen v. Southington Local School Dist. Bd. of Edn.*, 11th Dist. Trumbull No. 2014-T-0082, 2015-Ohio-959, ¶ 27 (inclusion of an unenforceable deed restriction does not invalidate the entire contract or render the sale void).

Despite this, the OPWC nevertheless attempts to sidestep this insurmountable obstacle by arguing throughout its brief that this Court’s analysis should begin and end with the “plain language” of the deed restriction barring the CDC from alienating any interest in the property without the OPWC’s permission. In making this argument, the OPWC continues to cite to use restriction cases for the proposition that deed restrictions that clearly intend to bar alienation must be enforced. None of these cases actually support OPWC’s position.

In *Scovil*, this Court enforced a restriction limiting the *use* of the property to private residences because the restriction was both “valid” and the language used “clear.” *Cleveland Baptist Assn. v. Scovil*, 107 Ohio St. 67, 70-72, 140 N.E. 647 (1923); *see also Brown v. Huber*, 80 Ohio St. 183, 201, 88 N.E. 322 (1909) (describing the deed restriction as a limitation on the use of the real property); *Ashland v. Greiner*, 58 Ohio St. 67, 75, 50 N.E. 99 (1898) (noting the stipulation stated the estate could only be *used* for particular purposes). These cases have no bearing on whether an alienation restraint can be enforced merely because it is clear, when the dispute is whether such a restraint violates public policy, i.e., whether it is “valid.” That an alienation restriction was included in a deed as a result of an arms-length transaction has no bearing on whether such restriction is void as against public policy.

Koprivec is likewise inapposite to the matter at hand, as it dealt with deed *construction* rather than the validity of a restriction found within the deed. *Koprivec v. Rails-to-Trails of Wayne Cty.*, 153 Ohio St.3d 137, 2018-Ohio-465, 102 N.E.3d 444, ¶ 29. Appellants do not ask the Court to *construe* the Alienation Restriction. Rather, the appeal asks the Court to hold that such a restraint on alienation is unenforceable and void as against public policy, an issue totally unrelated to whether the parties to the deed intended to bar alienation. Appellants’ public policy argument does not invoke a “technical rule[] of construction” that can be trumped by the

intention of the parties; rather, the argument assumes the Court will construe the provision as purporting to bar any alienation of the Property without the OPWC's permission and asks the Court to hold the provision unenforceable as a result.

Nor does *McElroy* support the OPWC's cause. The *McElroy* Court expressly rejected the argument that clear alienation restraints are enforceable as a general matter. *Ohio Soc. for Crippled Children & Adults, Inc. v. McElroy*, 175 Ohio St. 49, 53, 191 N.E.2d 543 (1963). It went on to address the narrow question of whether, when an individual conveys property to the trustee of a testamentary trust to be held for charitable purposes, the settlor may bar his trustee from further alienating the property. *Id.* at 51-53. While the Court answered this question in the affirmative, *Ohio law specifically allows a charitable organization bound by such a restraint to file a petition to sell, lease, or otherwise encumber the property.* See R.C. § 1715.39. The OPWC issued a grant for only a portion of the purchase price, and the real property in question was then conveyed by a third party to the CDC. This case does not involve either the seller of the Property or the OPWC creating a charitable trust with the grant funds, and the Alienation Restriction which purports to allow the OPWC the right to block the sale, lease, or other encumbrance of the Property in its "absolute discretion" is inconsistent with the Revised Code provision which governs real property held in trust by a charitable organization.

Further, the Seventh District's holding that clear alienation restraints may be enforced was not based in any way upon an alleged charitable trust (an argument not made below)¹ but rather a general application of contract interpretation principles. Indeed, had the Seventh District

¹ This argument apparently found its genesis in the related case of *Siltstone Services, LLC v. The Guernsey Cty. Community Dev. Corp.*, 2020-Ohio-3877, ___ N.E.3d ___ (5th Dist.). That case raised some of the same issues as this case. The Fifth District acknowledged that alienation restraints are generally void as against public policy (which supports Appellants' first proposition of law), before equating the Clean Ohio program to a charitable trust. *Id.* at ¶ 47.

applied the holding in *McElroy* to the facts of this case, it would have been compelled to uphold the trial court's narrow decision tying the alienation restraint to the public use requirement. Further, even if *McElroy* would otherwise authorize a limited alienation restraint, R.C. § 164.26(A) nevertheless dictates grant repayment and liquidated damages rather than compelling the grantee to maintain ownership of the property. *See Cincinnati City School Dist. Bd. of Edn. v. Conners*, 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78, ¶ 12 (holding that deed restriction barring *use* of property for school purposes could not be enforced because of contrary intent expressed in a statute).

Finally, the OPWC asserts that the Property is not completely inalienable because the statute could be amended, but its own arguments undercut this position. First, the OPWC contends throughout its brief that the negotiated deed restrictions should be enforced regardless of what the statute says—and amending the statute would not change what the deed says. Further, the OPWC has made it clear that it will never consent to any alienation of an interest in the Property, as it believes that doing so would gut the Clean Ohio program. Second, the OPWC refuses to acknowledge that the current statute calls for grant repayment and liquidated damages in the event a grantee fails to maintain long-term ownership, which is inconsistent with its desired remedy of injunctive relief. In fact, the OPWC contends that awarding only the monetary relief provided for by statute would leave it without authority to enforce the statute. (Appellees' Brief at 23.) Even though both of the lower courts held that the CDC complied with the Use Restriction, the OPWC has nevertheless pursued a multi-million dollar award that would almost certainly bankrupt the non-profit CDC because it violated only the Alienation Restriction—and then claims that this monetary award alone would not allow it to enforce the statute! The OPWC's pursuit of this litigation only reinforces the fact that the OPWC considers inalienability

a goal in and of itself, rather than as a way to protect an alleged public use, even if it means destroying a grantee who complied with the use restriction.

B. The *McElroy* decision supports the trial court's judgment allowing enforcement of the alienation restriction only where doing so would be reasonable in light of the public use.

The OPWC contends the Alienation Restriction protects the voters' conservation intent and the utility of the Alienation Restriction should be the deciding factor. (Appellee's Brief at 3, 18.) If the utility of the Alienation Restriction is the deciding factor, the Seventh District clearly erred in upholding a naked restraint on alienation because it is the *Use Restriction* that actually protects the property from development. The Use Restriction bars building any new structures on the Property as well as any development of the Property that would conflict with the use of the Property as a green space park area or the historical significance of the Property. While the OPWC contends that it has merely sought to enforce the rights granted by the deed, both the trial court and the Seventh District rejected the OPWC's claim that the Use Restriction applies to the subsurface. As both those courts found, the OPWC got exactly what it bargained for in relation to conservation efforts, i.e., so long as the surface is not disturbed and the Property can continue to be used as a park, the extraction of oil and gas from underneath the Property is consistent with the Use Restriction. Both courts also noted that the Use Restriction runs with the land, such that the OPWC could pursue a violation of the Use Restriction, regardless of the alienation.

Faced with the Use Restriction that would prevent development of the surface in anyway, the trial court then looked to whether a total bar on alienation was reasonable. As other courts have noted, while some incidental restraints on alienation will be deemed reasonable, a naked restraint upon alienation is not reasonable and should not be enforced even in the context of a charitable trust, because it is not tied to ensuring the property will be used for a certain purpose.

See Brown v. First Presbyterian Church of Mt. Gilead, 5th Dist. Morrow No. 586, 1981 WL 6458 at *3 (Oct. 23, 1981). The trial court held that a broad reading of the Alienation Restriction would render it an illegal unreasonable restraint on alienability, precisely because such a reading would bar any alienation of interests in the property without regard to the public use in question. Thus, it did exactly what the *McElroy* and *Brown* decisions would dictate—it explicitly held that the Alienation Restriction could only be enforced to the extent it was necessary to effectuate the Use Restriction. The Seventh District inexplicably stated that the trial court had offered no law or explanation for this decision, then reversed based upon its holding that naked alienation restraints can be enforced so long as they are clear—a decision that did not rely upon *McElroy* in any way and that was not based upon a charitable trust or public use exception to the American Rule.

The propriety of the trial court’s decision is ironically established by the OPWC’s insistence on referring to the Property as “the Park.” While the OPWC apparently chose this term in an attempt to engender sympathy for its position,² it merely serves to demonstrate that the legitimate interests of the state are protected by the trial court’s decision without undermining the longstanding public policy barring naked restraints on alienation. The OPWC states that “the Park” could not be sold, transferred, or leased without the OPWC’s consent. (Appellee’s Brief at 12.) Notably, the park (referring to the park use required by the deed) was not affected by any of the transactions at issue. The oil and gas is far below the park and the Use Restriction bars any development that would conflict with using the Property as a park.

The OPWC now contends this Court should uphold the Seventh District’s reversal of the

² This is not the only instance in which the OPWC chooses an inaccurate appellation in an apparent attempt to engender sympathy. For instance, the OPWC refers to the Appellants collectively as “the Oil and Gas Companies” even though all Appellants are mineral holders rather than oil and gas producers. The fact that they own oil and gas rights does not make them oil and gas companies any more than the State of Ohio is an oil and gas company merely because it has signed oil and gas leases.

trial court's decision because oil and gas development is conceptually inconsistent with conservation and, therefore, inconsistent with the constitutional amendment which led to the Clean Ohio program. This argument is flawed for two distinct reasons. First, while the constitutional amendment may reference broad aspirational goals regarding conservation, those goals were implemented in this case through a specific use restriction that two courts have now found was not violated—a decision that the OPWC chose not to appeal to this Court.

Second, while the OPWC contends in this case that oil and gas development is fundamentally inconsistent with conservation as a theoretical matter, the State's own actions belie that contention. As the OPWC acknowledges, the Revised Code states that: "It is the policy of the state to provide access to and support the exploration for, development of, and production of oil and natural gas resources owned or controlled by the state in an effort to use the state's natural resources responsibly." R.C. § 1509.71(A). The Revised Code establishes an Oil and Gas Leasing Commission for the purposes of determining what state owned lands can (and should) be leased for oil and gas development purposes. R.C. §§ 1509.71-1509.73. That commission has signed oil and gas leases for property in 503 wildlife areas, 31 state parks, 20 preserves and 10 state forests. *See* The Columbus Dispatch, *Ohio Oil and Gas Leasing Commission to Recommend Changes to Law Covering Fracking on Public Land*, <https://www.dispatch.com/news/20191106/ohio-oil-and-gas-leasing-commission-to-recommend-changes-to-law-covering-fracking-on-public-land> (accessed July 31, 2020). It is disingenuous to argue that Ohio public policy allows oil and gas development under state parks but not in a park owned by a nonprofit organization partially paid for with state funds. Certainly the public trust does not impose greater restrictions on privately owned land purchased with public funds than it does on land which is actually owned by the public.

The OPWC's brief in general fails to recognize the extent to which Ohio public policy favors oil and gas development when arguing that such public policy should not be taken into consideration when determining whether the Alienation Restriction is enforceable. For instance, the OPWC states that landowners who refuse to lease their property for oil and gas development purposes would not be found to have violated Ohio public policy. A mineral owner, however, can be forced to allow oil and gas development on their property pursuant to a mandatory pooling order when the chief of the division of oil and gas resources management determines such is necessary to provide effective development of oil and gas. R.C. § 1509.27. Thus, while the mineral owner may not be "violating public policy" by refusing to sign an oil and gas lease, the public policy favoring oil and gas development is strong enough to overcome a mineral owner's conscious refusal to sign a lease, even if that refusal is based upon a decision not to develop, i.e., conserve, the property.

This is not the OPWC's only questionable argument regarding public policy. Faced with over a century of case law recognizing that naked restraints on alienation are void as against public policy, the OPWC claims this Court looks only to the General Assembly when determining whether a public policy exists. (Appellee's Brief at 17.) This Court, however, has explicitly recognized "clear public policy" is not limited to public policy expressed by the General Assembly in the form of statutes. *Painter v. Graley*, 70 Ohio St.3d 377, 383–84, 639 N.E.2d 51 (1994). Indeed, after implying only a statute would be able to establish a public policy sufficient to void a deed restriction, the OPWC itself cites to case law indicating a deed restriction which is "contrary to a judicial decision" may be declared void. (Appellee's Brief at 17.) Nevertheless, the OPWC goes on to cite a Washington state case for the proposition that the plain language of a deed should control over common law principles barring alienation restraints,

i.e., that parties to a deed can contract around public policy.³

Moreover, these statements contradict the OPWC's own arguments as to why it can seek injunctive relief in the face of a statute that provides *only* for grant repayment and liquidated damages. The entire argument that injunctive relief is normally available to enforce a deed restriction is based upon the common law, not a statute. Further, the OPWC emphasizes that the General Assembly legislates against the backdrop of court decisions and should not be presumed to override common-law principles unless it does so explicitly. (Appellee's Brief at 28.) The common law and public policy are not switches the OPWC can turn on when they favor the OPWC's arguments and turn off when they do not. The common law generally allows the enforcement of use restrictions via an injunction, but bars naked restraints on alienation. R. C. § 164.26(A) does not explicitly override either of those common law principles.

Ultimately, the question before the Court is whether the competing public policies at issue in this case can be reconciled. Both the statutory public policy favoring oil and gas development and the common-law public policy prohibiting naked restraints on alienation counsel against enforcing the Alienation Restriction. The OPWC contends that the Ohio Constitution contains an implicit public policy in support of an alienation restraint because the voters would not have approved the amendment, if the expenditures could not be protected. However, it is the Use Restriction that protects the expenditure made by the voters. Nothing

³ The *Alby* Court held that a reverter clause in a deed was not an undue or unreasonable restraint on alienation. *Alby v. Bank One Fin.*, 156 Wash.2d 367, 128 P.3d 181 (2006). In Washington, “reasonable restraints on ... are valid if justified by the *legitimate interests of the parties.*” (Emphasis sic). *Id.* at 373 quoting *McCausland v. Bankers Life Ins. Co.*, 110 Wash.2d 716, 722, 757 P.2d 941 (1988). The *Alby* Court did not hold that a naked restraint on alienation barring any transaction affecting the property in perpetuity could be enforced merely because the parties negotiated for that result. To the contrary, the court explicitly stated that unreasonable restraints on alienation are invalid. *Id.* at 373. An outright ban on any form of alienation is not a “reasonable” restraint under any definition of that term.

supports setting aside the public policy against alienation restraints when doing so will not protect the Use Restriction or the alleged public policy favoring conservation. To the extent the OPWC's real problem is with the CDC generating revenue from the Property, this is simply not a valid grievance. The Use Restriction does not bar generating funds from the Property, so long as doing so would not interfere with the use of the Property as a park. There is no reason to find the public policies are in conflict, let alone a basis to find that such a well-accepted public policy as barring naked restraints on alienation should be set aside.

Reply in Support of Proposition of Law No. 2:

A. The policies adopted by the OPWC are inconsistent with the statutory language.

Revised Code § 164.26(A) *requires* the OPWC to establish policies that “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 divisions.” The OPWC contends this expressly authorizes injunctive relief to enforce long-term ownership, and that the statute's mandate for adoption of policies relating to long-term ownership is different from saying what happens in the event the policies are not complied with. Yet, the remedy portion of the statute is fundamentally at odds with an alienation restraint and enforcement via injunction. Logically, if a naked restraint on alienation can be enforced, then there can be no alienation of the Property and, therefore, no way a grantee could “fail to comply” with the long-term ownership provisions.

The absurdity of the OPWC's argument is best demonstrated by its contention that the Alienation Restriction “runs with the land,” such that any party who transfers an interest in the property violates the deed restrictions and becomes subject to the grant repayment and liquidated damages provision. If the Property is indeed inalienable without the OPWC's consent, then the restriction does not run with the land *because the land does not “run.”* The very fact that the

statute acknowledges the long-term ownership requirement can be violated vitiates any argument that the statute explicitly or implicitly allows the OPWC to bar alienation. If the statute meant to bar alienation, then no subsequent party in the “chain of title” ever held good title and the long-term ownership requirement was never violated. In effect, the grantee cannot “fail to comply” because the OPWC will force compliance through an injunction.

Further, the OPWC consistently fails to acknowledge that the statute requires that its policies provide for *both grant repayment and liquidated damages*. A grant can only be “repaid” once, and it is only the grant recipient who can “repay” the grant. The statutory requirement for grant repayment distinguishes this case from the case law relied upon by the OPWC. The OPWC contends that injunctive relief to enforce deed restrictions is customary, citing case law from other jurisdictions for the proposition that a party suing to enforce a deed restriction can simultaneously seek to enforce a liquidated damages provision.⁴ Set aside the fact that injunctive relief is not the “customary” way to enforce naked restraints on alienation and the inherent inconsistency of arguing that the statutory requirement for grant repayment and liquidated damages was meant to expand the relief available to the OPWC, even though the OPWC itself contends such monetary relief would be available to it regardless of the statute. Instead, focus on the contention that the statute requires grant repayment and liquidated damages, while the

⁴ The OPWC’s broad reading of such case law would render it inconsistent with Ohio law on this issue. *See Mesarvey, Russell & Co. v. Boyer*, 10th Dist. Franklin No. 91AP-974, 1992 WL 185656, at *5 (July 30, 1992) (money damages in the form of liquidated damages are adequate compensation for the harm suffered, unless the irreparable harm is established by clear and convincing evidence). “It is difficult to conceive how damages can be irreparable when the parties have agreed to the amount of damages [should the specific breach at issue occur].” *Id.* The OPWC itself quotes the relevant deed restriction as saying it can be enforced at law “or” equity, not at law “and” in equity. (Appellee’s Brief at 3.)

common law allows the OPWC to seek injunctive relief requiring the grantee to maintain ownership of the property. A private party attempting to stack statutory remedies with common law remedies in this manner would certainly not prevail on the argument it is entitled to both.

A simple example illustrates exactly why the relief the OPWC seeks exceeds what the common law would allow. Assume the legislature passed a statute authorizing parents who give their children money to buy the family farm to include deed restrictions saying, in the event child fails to maintain long-term ownership of the farm, the child must repay the parent and pay liquidated damages. Mother gives her child \$430,200 to buy the family farm, and includes deed restrictions requiring repayment of that amount and liquidated damages of twice the purchase amount or 200% of the fair market value of the farm at the time it is sold. Child later sells the farm for \$3,707,162.54, and mother sues for monetary damages of \$7,844,525.08—the amount she originally gave her child plus twice the sale price. At the same time, mother seeks to enforce the long-term ownership requirement by obtaining an injunction forcing the buyer to convey the property back to the child. In doing so, mother argues that injunctive relief is the customary relief for violation of the deed restrictions, and the legislature would have realized this when passing the statute, thus it was implied that mother could get an injunction for the child to maintain ownership of the farm, in addition to getting all of her money back along with liquidated damages. No court would provide the mother with such relief on the theory that the General Assembly implicitly meant to authorize equitable enforcement of the alienation restriction on top of the statutorily authorized relief and that mother could show (by clear and convincing evidence) that she had been irreparably harmed despite getting *eighteen times* what she had given the child to purchase the property. The OPWC is asking the Court to distort the clear meaning of the statute because it expects special treatment as an arm of the state—not because general

common-law principles would allow such relief to anyone appearing before the Court.

The OPWC repeatedly contends that liquidated damages are not inconsistent with equitable enforcement of the deed restrictions, yet repeatedly ignores the fact that the statute also requires grant repayment. Liquidated damages are a stipulated estimation of *actual damages*. See *Anna Holdings, LLC v. McClanahan*, 2019-Ohio-4697, 148 N.E.3d 1255, ¶ 16 (2nd Dist.). Thus, the liquidated damages should fully compensate the OPWC for any monetary damages. In such an event, granting an injunction along with the required grant repayment transforms the liquidated damages into a penalty, money on top of the amount necessary to compensate the OPWC for its actual damages. The fact that the “liquidated damages” clause crafted by the OPWC estimates future damages far in excess of what those actual damages are likely to be may obscure another salient point. If the OPWC gets the grant money back (as required by statute) *and* gets an injunction requiring the grantee to take back all ownership interests in the property and maintain such ownership in perpetuity, this creates an irreconcilable conflict—if everything is unwound, there are no damages and no liquidated damages. Moreover, for the OPWC to get back all the consideration it paid for the deed restrictions, still be able to enforce the deed restrictions, *and then* get millions of dollars more in “liquidated damages” is clearly beyond what the General Assembly authorized or anticipated.

Thus, the better reading of the statute is that it sets forth the legislature’s view that rescission is the appropriate response to failure to maintain long-term control. “The primary purpose of rescission is to restore the status quo and return the parties to their respective positions had the contract not been formed.” *Rosepark Properties, Ltd. v. Buess*, 2006-Ohio-3109, 167 Ohio App.3d 366, 855 N.E.2d 140, ¶ 51 (10th Dist.). Rescission is an equitable remedy. *Meyer v. Chieffo*, 2011-Ohio-1670, 193 Ohio App.3d 51, 950 N.E.2d 1027, ¶ 33 (10th

Dist.). The statute provides for a return to the status quo ante. The OPWC gets back the grant money. It gets liquidated damages to cover any estimated damages it incurred, such as the administrative costs associated with the initial grant and going through the grant process to award the returned funds again. Thus, the OPWC is returned to the position it was in prior to granting funds to the party who failed to comply with long-term ownership requirements. This is already a form of equitable relief, and the legislature has elected that remedy on behalf of the state. The statute simply does not allow the OPWC to seek all of the benefit of the contract, while not having to bear any of the burden. When the OPWC argues that the legislature acts against the backdrop of the common law, this necessarily includes the well-established contractual concept that you cannot recoup all the consideration paid under a contract while simultaneously enforcing the other party's obligations under the contract.

The OPWC's position on the Alienation Restriction is also in conflict with other laws. For instance, this Court has held local governments have the right (under the Ohio Constitution) to sell public ground, even though that would extinguish public rights in that ground. *See Babin v. City of Ashland*, 160 Ohio St. 328, 346, 116 N.E.2d 580 (1953) citing Ohio Constitution, Article XVIII, Section 10. Further, the Revised Code has specific provisions governing the sale of unused park lands by each level of local government. *See* R.C. § 307.82 (sale of unused park lands by a county); R.C. § 511.25 (sale and disposition of lands by a township park district); R.C. § 715.21 (power of municipal corporations to sell, lease or donate public grounds and parks). While the grantee in this case may be a non-profit, R.C. § 164.26(A) applies equally to local political subdivisions that obtain Clean Ohio grant funds. Appellants reading of R.C. § 164.26(A) is consistent with the Ohio Constitution and other statutes which set forth specific procedures for selling park or public lands. In the event park lands purchased with Clean Ohio

funds are to be sold, the local governmental entity would follow the relevant statute, while having to pay back the grant money and make the Clean Ohio fund whole through liquidated damages. Under the OPWC's reading of the statute, however, R.C. § 164.26(A) implicitly grants OPWC the unfettered right to force local political subdivisions to maintain ownership of park lands purchased with Clean Ohio funds (in perpetuity) in its sole and absolute discretion, regardless of what the Constitution and other provisions of the Revised Code say. For the OPWC's position to make sense, one must read a lot into a statute that never even expressly sets aside public policy barring alienation restraints or expressly allows enforcement through an injunction. This fact alone counsels against OPWC's argument.

Accepting the OPWC's contention that the customary remedy for breach of a deed restriction is an injunction, this would explain why the General Assembly specifically provided for a different remedy. It was not to grant the OPWC relief beyond the "well-established" remedy. It was to ensure that the limited relief available under the statute was consistent with the Constitution and other statutes that specifically deal with the issue of selling park lands.

Finally, Appellants' interpretation of R.C. § 164.26(A) has the benefit of being practical. As this case makes abundantly clear, the OPWC is not actively monitoring properties purchased with Clean Ohio grant funds. The OPWC contends that ten different entities gained some right in the Property over a decade-long period. Yet the OPWC did nothing to enforce its interpretation of the statute and deed until Siltstone took action when Gulfport stopped paying royalties. "Restrictive covenants become unenforceable in Ohio when there is a waiver or abandonment of the restrictions." *Snell v. Englefield*, 5th Dist. Knox No. 96 CA 13, 1996 WL 752800, at *5 (Nov. 14, 1996). However, it has generally been held that laches should not apply against the state, since the public should not suffer due to the inaction of public officials. *Still v. Hayman*,

2003-Ohio-4113, 153 Ohio App.3d 487, 794 N.E.2d 751, ¶ 11 (7th Dist.). A grant repayment and liquidated damages system avoids harm to the public and avoids the problems created by allowing the OPWC to come in years (or decades) after the fact, contending that transactions it failed to monitor should be set aside.

B. The OPWC ignores both the structure of Chapter 164 and the history of this case.

The OPWC argues it is seeking to enforce the bargained for deed restrictions rather than R.C. § 164.26. Appellants address the OPWC's claim that it can ignore statutory requirements in the third proposition of law. For now, it should be noted that the OPWC affirmatively alleged in its counterclaim against Siltstone that the director was required to establish policies providing for grant repayment and liquidated damages pursuant to R.C. § 164.26(A). *See* OPWC Amended Counterclaim at ¶¶ 29-30 (Index of Record on Appeal filed 4/8/2020 at Common Pleas Docket p. 14, No. 59.) The OPWC's current position that R.C. § 164.26(A) is irrelevant is inconsistent with the OPWC's counterclaim pleading the statutory requirements.

The OPWC also discounts the significance of R.C. § 164.09(F)(6), again contending that the existence of a statute in the same chapter that expressly provides for relief both in equity and an action at law is irrelevant to the matter at hand, because it predates the Clean Ohio program. This statute, however, makes clear that the General Assembly was aware of how to authorize both monetary damages and equitable relief when that was its intention. The fact that this statute predates the Clean Ohio program only serves to emphasize this point, as the General Assembly could have included the same language in the later adopted provision.

Finally, the OPWC continues to rely upon the general grant of authority in R.C.

§ 164.26(B) for the proposition it can do whatever it deems “necessary.”⁵ If this were correct, the remainder of the chapter is entirely superfluous, as the OPWC could simply deem whatever it chooses to do as “necessary.” Such a general grant of authority, however, does not grant an agency the unfettered right to do whatever it wants—particularly where what the agency deems “necessary” reaches a legislative function balancing social and economic concerns. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 250, at ¶ 41; *Ohio Licensed Beverage Assn. v. Ohio Dept. of Health*, 10th Dist. Franklin No.07AP-490, 2007-Ohio-7147, ¶¶ 40-41. Likewise, authorizing the director to do what is “necessary” does not authorize action in contravention of common law principles or well-established public policy.

Reply in Support of Proposition of Law No. 3:

The OPWC does not directly respond to the third proposition of law, instead making the remarkable claim that it has the right to choose between the relief mandated by statute and the equitable relief it “bargained for.” The statute provides that the director “shall” adopt policies that provide for grant repayment and liquidated damages. It is, quite simply, incredible that the OPWC would acknowledge that it must adopt policies providing for such relief, yet also argue that it does not have to comply with those policies when it prefers an alternative form of relief.

This is exactly the situation faced by the *San Allen* Court. The governing statute directs that an administrative agency “shall” take a specified action. The administrative agency contends that it does not have to take that action, and can instead take an inconsistent approach. As the Eighth District held, an administrative agency that defies the General Assembly in this manner is

⁵ The OPWC also cites R.C. § 164.27(A) for the proposition that the General Assembly granted it broad authority to administer the Clean Ohio program. This statute simply indicates that the “clean Ohio conservation fund shall be administered by the Ohio public works commission.” It is unclear why the OPWC believes this sentence grants it authority to ignore express statutory provisions found elsewhere in the chapter.

acting in “direct and clear” violation of the statute. *San Allen, Inc. v. Buehrer*, 2014-Ohio-2071, 11 N.E.3d 739, ¶ 79 (8th Dist.).

The OPWC continually returns to the argument it “bargained” for something more than the statute provides because its preferred relief is inconsistent with the statute. To use the OPWC’s analogy, monetary relief is the broccoli the legislature has required the OPWC to eat and injunctive relief is the ice cream the OPWC would prefer. The OPWC previously argued, when the legislature ordered it to eat its broccoli, it was nevertheless implicit the OPWC could also have ice cream. The OPWC is now arguing, if it can only have one or the other, then the OPWC gets to choose ice cream over broccoli. This Court cannot allow such arguments to succeed. A statutory provision requiring the OPWC to accept almost *\$3 million* to make up for the roughly \$400,000 it granted initially does not also allow the OPWC to obtain injunctive relief, nor does it allow the OPWC to elect injunctive relief only to avoid the obvious conclusion that it has not suffered irreparable damages if it gets *eighteen times* its apparent actual damages.

CONCLUSION

For the foregoing reasons, the decision of the Seventh District Court of Appeals should be reversed.

Respectfully submitted,
Andrew P. Lycans, Counsel of Record

/s/ Andrew P. Lycans
Andrew P. Lycans
COUNSEL FOR APPELLANT, SILTSTONE RESOURCES, LLC

Christopher W. Rogers, Counsel of Record

/s/ Christopher W. Rogers
COUNSEL FOR APPELLANT, AMERICAN ENERGY – UTICA MINERALS, LLC

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing *Reply Brief Appellants Siltstone Resources, LLC and American Energy – Utica Minerals, LLC* was served upon the following by electronic mail this 10th day of August, 2020:

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

Benjamin M. Flowers
Samuel C. Peterson
James Patterson
Rachel O. Huston
Christie Limbert
Cory Goe
Lidia Mowad
Joshua Nagy
Michelle Pfefferle
Assistant Attorney General
bflowers@ohioattorneygeneral.gov;
samuel.peterson@ohioattorneygeneral.gov;
rachel.huston@ohioattorneygeneral.gov;
christie.limbert@ohioattorneygeneral.gov;
james.patterson@ohioattorneygeneral.gov;
cory.goe@ohioattorneygeneral.gov;
lidia.mowad@ohioattorneygeneral.gov;
joshua.nagy@ohioattorneygeneral.gov;
michelle.pfefferle@ohioattorneygeneral.gov
Attorneys for State of Ohio, Public Works Commission

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

Maribeth Meluch
Dale D. Cook
ISAAC WILES BUKHOLDER &
TEETOR, LLC
mmeluch@isaacwiles.com
dcook@isaacwiles.com
Attorneys for The Guernsey County Community Development Corporation

/s/ Andrew P. Lycans
Andrew P. Lycans