In the
Supreme Court of Ohio

SILTSTONE RESOURCES, LLC,	:	Case No. 2020-0031
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Belmont County
v.	:	Court of Appeals,
	:	Seventh Appellate District
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.	:	

MERIT BRIEF OF DEFENDANT-APPELLEE
STATE OF OHIO, PUBLIC WORKS COMMISSION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

INTRODUCTION

The Guernsey County Development Corporation accepted Ohio taxpayer dollars for the purpose of acquiring and conserving a large plot of land. In exchange, it agreed to two deed restrictions. The first restriction, which this brief calls the "Transfer Restriction," required the Development Corporation to retain ownership and control of the land unless the Ohio Public Works Commission approved the land's transfer. Deed; Siltstone Complaint, Ex.1. at 3; Tr. R.1. The second restriction, the "Use Restriction," prohibited any activities on the acquired land that would be inconsistent with its use as a greenspace park. *Id.* at 2. The terms of the Development Corporation's agreement were memorialized in the recorded deed for all the world to see.

The Development Corporation did not hold up its end of the bargain. Several years after acquiring the land, it transferred an interest in the land to oil and gas developers. The Ohio Public Works Commission responded by seeking an injunction invalidating the transfers and reuniting the various interests in the land. That gives rise to the two questions in this case. *First*, is the Transfer Restriction void on the ground that it is contrary to public policy? *Second*, does state law bar the Commission from obtaining equitable relief enforcing the terms of a deed? The Development Corporation and the oil and gas developers insist the answer to both questions is "yes," and that the Public Works Commission's suit thus fails. In fact, the answer to both questions is "no," as the Seventh District correctly held.

Start with the question whether the Transfer Restriction is valid. To answer in the affirmative, this Court need only apply its long-settled precedent. The Court has repeatedly emphasized that when interpreting a deed, courts must give effect to the deed's plain language. *Koprivec v. Rails-To-Trails*, 153 Ohio St. 3d 137, 2018-Ohio-465 ¶23; *see also Jolliff v. Hardin Cable Television Co.*, 26 Ohio St. 2d 103, 106 (1971). It has also made clear that when "the intention of the parties is apparent from an examination of the deed from its four corners, it will be given effect regardless of technical rules of construction." *Hinman v. Barnes*, 146 Ohio St. 497, 508 (1946) (quotation omitted). Here, the Transfer Restriction expressly forbids the transfer of any interest; on that point, the parties all apparently agree.

That ought to end the case. But it does not, because the three appealing parties, Siltstone, American Energy - Utica Minerals, and Eagle Creek Farm Properties, Inc. (collectively, "the Oil and Gas Companies"), argue that transfer restraints are invalid as against public policy. That argument fails. "A restraint on alienation of property conveyed to a trustee to be held for charitable or other public uses *will usually be given effect*." *Ohio Soc. for Crippled Children & Adults, Inc. v. McElroy*, 175 Ohio St. 49, syl. ¶4 (1963) (emphasis added). And indeed, public policy here favors the Transfer Restriction's enforcement. The Clean Ohio Conservation Fund, which was the source of the funds that the Development Corporation used to purchase the land at issue in this case, was first approved by Ohio voters in 2000. *See* Ohio Bonds for Environmental Conservation

Amendment 1 (2000), *available at* https://perma.cc/2DD7-VTAD (last visited July 20, 2020). Eight years later, over two-thirds of Ohio voters voted to renew the Clean Ohio Conservation Fund. *See* Official Amended Results, State Issue 2: November 2008, *available at* https://perma.cc/399W-GQ42 (last visited July 20, 2020). By their votes, the citizens of Ohio determined that the public interest favored using public money to promote conservation. The Transfer Restriction does just that: by giving the Ohio Public Works Commission the power to veto any transfers, the Restriction empowers the Commission to ensure that the citizens of Ohio are getting the conservation they paid for. Thus, if public policy is to play any role in the Court's decision in this case, it favors this particular restraint on alienation.

Now turn to the question whether the Public Works Commission has the power to enforce the deed restrictions through injunctive relief. The plain language of the deed again makes that clear. It states that the Public Works Commission may enforce the restrictions in "any proceedings at law *or in equity*." Deed; Siltstone Complaint, Ex.1. at 2; Tr. R.1 (emphasis added). And the power to seek an injunction would be implicit even without that deed provision. An "injunction" has long been the "proper remedy" to "restrain an irreparable injury" resulting from the "breach of [a restrictive] covenant." *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, syl. ¶2 (1900). Nothing in the relevant statutory law denies the Ohio Public Works Commission the power to seek this traditional remedy. The General Assembly even ordered the Commission to "establish policies

related to the need for long-term ownership, or long-term control through a lease or the purchase of an easement" on property purchased with grants from the Clean Ohio Conservation Fund. R.C. 164.26(A). It would be surprising if the General Assembly required the Commission to establish policies governing the long-term control of properties only to deny it the power to enforce those policies in equity.

The Oil and Gas Companies argue that the General Assembly did just that in R.C. 164.26(A), which says that the just-discussed policies "shall provide for proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements." According to them, this means the Commission may pursue *only* liquidated damages. This misunderstands the statute. R.C. 164.26(A) expands, rather than constricts, the relief that the Public Works Commission may seek. Courts have long recognized that "[s]pecific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty." Restatement of Contracts 2d, §361. The General Assembly would have been well aware of this settled principle when it adopted R.C. 164.26(A). *See Wayt v. DHSC*, L.L.C., 155 Ohio St. 3d 401, 2018-Ohio-4822 ¶23. Therefore, though the statute requires that the Public Works Commission seek liquidated damages from a Conservation Fund grant recipient if that recipient gives up long-term ownership or control of a property, that requirement cannot be read as an implicit limitation on the Commission's ability to seek

other relief—the requirement simply imposes a duty to assure the availability of a certain type of relief that the Commission might not otherwise pursue.

STATEMENT OF CASE AND FACTS

1. Ohio voters created the Clean Ohio Conservation Fund in 2000. They did so through a constitutional amendment, which added to the Constitution a provision authorizing the sale of bonds for "protect[ing] water and other natural resources," conserving and preserving natural areas and open spaces, and "enhanc[ing] the availability, public use, and enjoyment of natural areas and resources." *See* Ohio Const., Art. VIII, §02o(A). The General Assembly gave effect to the new constitutional amendment by adopting a series of statutes governing its operation. The legislature outlined the purposes for which the public dollars authorized under the Constitution could be used, R.C. 164.22, and specified that only political subdivisions and nonprofit organizations are eligible to receive that money, R.C. 164.23.

The General Assembly also made the Ohio Public Works Commission responsible for administering the Clean Ohio Conservation Fund. R.C. 164.26(B) and 164.27(A). It instructed the Public Works Commission to (among other things) adopt "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" purchased with a grant. R.C. 164.26(A). And although it left the development of most of those policies to the Public Works Commission, the General Assembly required, at a minimum, that the Commission provide for "liquidated

damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements." *Id.*

Ohio voters reauthorized the Clean Ohio Conservation Fund in 2008. Support for the Fund had grown since its initial creation. Nearly 70 percent of voters—over three and a half million Ohioans—voted for reauthorization. Official Amended Results, State Issue 2: November 2008, *available at* https://perma.cc/399W-GQ42 (last visited July 20, 2020).

2. The Guernsey County Community Development Corporation applied for a grant from the Clean Ohio Conservation Fund to help pay for the purchase of 228 acres of land in Belmont County, which this brief will call "the Park." *See* Deed; Siltstone Complaint, Ex.1. at 1; Tr. R.1. The Park, the Development Corporation asserted, would create a corridor along Leatherwood Creek that would protect the creek "from encroachment by development" and would "allow a natural habitat corridor to develop and local wildlife to have a safer environment." Grant Application; Public Works Commission Mtn. for Summary Judgment; Bonner Affidavit, Ex.1; Ex.A at 000005; Tr. R.196. Preservation of the Park was necessary, the Development Corporation wrote, because "the Leatherwood Creek has been used and abused via coal mining and all types of other economic plundering." *Id.* at 000018. The Development Corporation indicated in its grant application that it intended to acquire *all* rights to the Park—surface and subsurface rights alike. *See id.* at 000013.

The Public Works Commission awarded the Development Corporation the grant that it sought. In exchange for public funding, the Public Works Commission required the Development Corporation to agree to certain deed restrictions. Several are relevant here.

First, the Use Restriction prohibited any use of the Park that would conflict with its use "as a green space park." Deed; Siltstone Complaint, Ex.1 at 2; Tr. R.1.

Second, the Transfer Restriction required the Development Corporation to retain ownership and control of the Park, and forbade the transfer of any interest in the Park without prior approval from the Public Works Commission. *Id.* at 3. It is worth quoting the Transfer Restriction in full, as much of this case will hinge on its wording:

> Restriction on transfer of the Property. Grantee acknowledges that the Grant is specific to Grantee and that OPWC's approval of Grantee's application for the Grant was made in reliance on Grantee's continued ownership and control of the Property. Accordingly, Grantee shall not voluntarily or involuntarily sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of OPWC, which consent may be withheld in its sole and absolute discretion.

Id.

Finally, the Enforcement Provision provided that the Public Works Commission could "enforce by any proceedings at law or in equity, all restrictions, conditions and covenants set forth [in the deed]." *Id.* at 2. The Enforcement Provision included a liquidated damages clause that was "intended to compensate for damages suffered in the event of a breach." *Id*. The deed also provided that all of the restrictions were perpetual,

that they were enforceable by the Public Works Commission, and that they would "run with the land" for the Commission's benefit. *Id.*

3. After the shale-gas boom in Ohio, the Development Corporation decided that it no longer wanted to abide by the deed's terms. Where it had once valued the Park for its environmental benefits and sought to protect it from "all types of … economic plundering," Grant Application; Public Works Commission Mtn. for Summary Judgment, Bonner Affidavit, Ex.1; Ex.A at 000018; Tr. R.196, the Development Corporation now saw an opportunity to profit through oil and gas development. Disregarding its prior commitment to the State of Ohio and Ohio voters, the Development Corporation leased portions of its oil and gas interests to Patriot Land Company, LLC. Patriot Lease; Siltstone Complaint Ex.2; Tr. R.1. The lease did not just transfer rights to the subsurface minerals. It gave Patriot permission to conduct a variety of activities on the surface of the Park as well. Among other things, the lease allowed Patriot to drill oil and gas wells, install roads and pipelines, drill a water well, and remove timber. *Id.* at Ex."a" ¶¶6–7 and 17.

The Development Corporation purported to sell many of its remaining rights in the Park's minerals to a variety of additional parties. Many of those rights went to Siltstone, another oil and gas developer. Mineral Deed; Siltstone Complaint, Ex.3; Tr. R.1. Several of the parties to whom the Development Corporation had sold or leased its rights in turn transferred some or all of *their* interests to still other parties. *See* Motion to Add Parties; Tr. R.19; *see also* Public Works Commission Answer, Crossclaim, and

Counterclaim at ¶109; Tr. R.18. By the time all was said and done, more than ten private entities claimed some sort of interest in land that originally had been purchased with public dollars. *See* Motion to Add Parties; Tr. R.19.

With the property interests fractured and numerous parties claiming various interests in the Park, litigation commenced. Prompted by a dispute over royalties with Gulfport Energy Corporation, which had purchased the Park's oil and gas lease from Patriot, Siltstone filed a complaint seeking a declaration of its rights with respect to the other entities claiming an interest in the Park. Siltstone Complaint; Tr. R.1. In its complaint, Siltstone sought a declaration that the Development Corporation's decision to lease the Park's oil and gas rights did not violate the Use and Transfer Restrictions and that, by extension, Siltstone's subsequent purchase of those rights was consistent with the deed. *Id*. at 10. Siltstone sought a further declaration that, even if the deed restrictions were enforceable, the Public Works Commission could seek liquidated damages but not injunctive relief and, even then, that the only party from whom the Commission could seek relief was the Development Corporation. *Id.* at 10–11.

The Public Works Commission filed a crossclaim and counterclaim in which it sought declaratory relief, injunctive relief, and damages. In its pleading, the Commission sought a declaration that all transfers of the mineral rights, and any related encumbrances of the surface property, were invalid in light of the deed restrictions. *See* Public Works Commission Amended Crossclaim, and Counterclaim at 32; Tr. R.42. It sought an

injunction enforcing the deed restrictions against all parties claiming an interest in the Park and reuniting the Park's surface rights and mineral rights. *Id.* at 31. As provided for in the deed and under R.C. 164.26, the Public Works Commission also sought liquidated damages. *Id.* at 33.

4. The trial court held that the Public Works Commission was not entitled to any of the relief it sought. Order; Tr. R.212 and Final Judgment Entry; Tr. R.214. It declined at first to address the question whether the deed restrictions were enforceable. The trial court initially held only that the Public Works Commission was limited to seeking damages and thus could not obtain equitable relief. Order, Oct. 13, 2017; Tr. R.121; Order and Judgment Entry, Nov. 6, 2017; Tr. R. 129; and Conclusions of Law, Dec. 18, 2017; Tr. R.140.

Recognizing that the enforceability of the deed restrictions was a threshold question that it was required to answer before it could resolve many of the remaining disputes between the parties, the trial court asked for briefing on that question. Order, Mar. 7, 2018; Tr. R.166. It instructed the parties to file simultaneous briefs and did not permit responses or replies. *See id.* The parties filed briefs as ordered, many of which were captioned as motions for summary judgment. *See* Motions; Tr. R. 196, 197, 200, 201, 202, 203, 204 and 208. The trial court denied the Public Works Commission's motion for summary judgment and granted the competing motions filed by many of the oil and gas developers. *Siltstone Resources, LLC v. State of Ohio, Public Works Comm'n*, Belmont Cty., No. 17 CV 128 (July 20, 2018) ("Tr.Op.").

The trial court held that none of the parties had violated the Use Restriction and that the Transfer Restriction was not enforceable. *Id.* at 4. The trial court held that the Use Restriction (which, recall, forbade uses incompatible with the Park's use as "green space") applied only to the surface of the Park, because "green space is not underground." *Id.* at 3. Although the Public Works Commission had alleged that the lease allowed activity to take place on the surface of the Park, *see* Public Works Commission Mtn. for Summary Judgment at 24–27; Tr. R. 196, the trial court wrote that the Commission "ha[d] not contended that the opposing parties have made any use of the surface," Tr.Op.3.

The trial court did not dispute that the parties had violated the Transfer Restriction, but it held that the Public Works Commission was not entitled to relief because that restriction was unenforceable. Citing a general public policy in favor of the "free use" of property and against restrictions on alienation, the trial court held that the Transfer Restriction was an illegal restraint on alienability. Tr.Op.3–4.

5. The Public Works Commission appealed and the Seventh District reversed. A majority of the appellate panel held that the trial court erred in granting the motions for summary judgment filed by the oil and gas developers and that it instead "should have granted summary judgment in favor of" the Public Works Commission. *Siltstone Res., LLC v. State Pub. Works Comm'n*, 7th Dist. No. 18 BE 0042, 2019-Ohio-4916 ¶54

("App.Op."). The language of the deed, the appellate court determined, was unambiguous and the Public Works Commission was entitled to an injunction enforcing its terms.

Turning first to the Use Restriction, the court of appeals held that that restriction applied only to the surface of the Park. App.Op. ¶43. Unlike the trial court, the court of appeals acknowledged that the oil and gas lease that the Development Corporation had signed purported to allow activities, such as drilling a water well and the removal of timber, that would impermissibly affect the Park's surface. App.Op. ¶45. And even if the lease had not *explicitly* authorized surface activity, the appellate court noted, a mineral interest holder also has an implied right of access to a property's surface—access that would violate the Use Restriction. App.Op. ¶¶44, 45. Rather than invalidate the lease in its entirety, however, the court severed the offending lease terms and prohibited any surface activity. App.Op. ¶45.

Considering the Transfer Restriction next, the Seventh District held that the restriction applied to the subsurface minerals and that Development Corporation's decision to lease those minerals violated the restriction's "clear and unambiguous" terms. App.Op. ¶53. The Transfer Restriction explicitly prohibited the sale, assignment, transfer, lease, exchange, or conveyance of the Park without the consent of the Public Works Commission. *Id.* And there could be no question, the court of appeals held, that the Development Corporation violated that restriction when it leased and sold rights to the Park's minerals. *Id.* Criticizing the trial court's refusal to enforce the Transfer Restriction,

the Seventh District noted that the trial court offered "no law or explanation" to support its conclusion that the restriction was an illegal restraint on alienability. *Id.*

Finally, the Seventh District held that the Public Works Commission was entitled to an injunction enforcing the deed restrictions. App.Op. ¶¶59–60, 68–70. An injunction, the court noted, was authorized by the deed itself. The appellate court further held that equitable relief was not prohibited by statute. True, R.C. 164.26(A) required the Public Works Commission to use liquidated-damages requirements to enforce the statutorily-required land-use policies. But the statute "does not include an exclusive list of remedies," and so its allowing liquidated damages could not be read to *forbid* other forms of relief. App.Op. ¶¶66–67.

One judge dissented. The dissent acknowledged that it was permissible to restrain the use of the Park's surface. Accordingly, that judge would have upheld the Transfer Restriction to the extent that it applied to the Park's surface. App.Op. ¶76. But applying the Transfer Restriction to the subsurface was, in the dissent's view, impermissible, as it contradicted a public policy favoring oil and gas development. *Id.*

6. The Guernsey County Development Corporation and Gulfport filed untimely motions for reconsideration, which the court of appeals denied. *See* Opinion and Judgment Entry Denying Reconsideration; App. R.40. The appellate court concluded that neither party had established the type of extraordinary circumstances that, under Appellate Rule 14(B), would warrant additional time to seek reconsideration. *Id.* at 3–4. Gulfport,

the appellate court noted, did "not provide any reason for its late filing." *Id.* at 4. And while the Development Corporation had asserted that its filing was late because it had not received prompt notice of the court's decision, the appellate court concluded that any such delay did not constitute an "extraordinary circumstance." *Id.*

Several other parties—the Oil and Gas Companies—filed a timely appeal with this Court. They challenged the Seventh District's determination that the deed restrictions are enforceable, and also the court's conclusion that the Public Works Commission can enforce those restrictions in equity by obtaining injunctive relief. The Oil and Gas Companies did not challenge the appellate court's determination that portions of the oil and gas lease violated the Use Restriction, or its decision to sever the offending lease terms. The Court accepted the case. *Siltstone Res., L.L.C. v. Ohio Pub. Works Comm'n*, 158 Ohio St. 3d 1443, 2020-Ohio-1032.

ARGUMENT

Appellee's Proposition of Law No. 1:

> *When the recipient of a Clean Ohio Conservation Fund grant agrees to clear and unambiguous deed restrictions in exchange for the award of public funds, those restrictions can and must be enforced.*

Courts must give effect to the plain language in deeds. *Koprivec v. Rails-To-Trails*, 153 Ohio St. 3d 137, 2018-Ohio-465 ¶23. Just as a court "cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties" to a contract, *Long Beach Ass'n v. Jones*, 82 Ohio St. 3d 574, 577 (1998); *see Skivolocki v East*

Ohio Gas Co., 38 Ohio St. 2d 244, 247 (1974), it may not create a new deed by finding an intent nowhere expressed, *see Koprivec*, 153 Ohio St. 3d 137, ¶23.

This principle applies even in cases where the terms of a deed impose a restraint on alienation. Although the Court has generally interpreted deeds in a way that will promote the free use of property, it has not done so when the clear and plain language of a deed has required otherwise. In *Cleveland Baptist Association v. Scovil*, 107 Ohio St. 67 (1923), for example, the Court announced that it "fully agree[d]" with the principle announced that, when there is doubt about the meaning of the deed, "restrictions in deeds must be construed in favor of the free use of the real estate." *Id*. at 71–72. The Court held, however, that that interpretative principle has no role to play when a deed is clear. When there is no question about the meaning of a deed, the deed's plain language, not general common-law principles, takes precedence. *Id*.

A. Interests in the Park cannot be transferred under the unambiguous language of the Transfer Restriction

Every transfer of the Park violated the Transfer Restriction. Indeed, the parties do not even dispute that the Development Corporation transferred the land in violation of that restriction. Nor could they. Again, the Transfer Restriction says, in full:

> Restriction on transfer of the Property. Grantee acknowledges that the Grant is specific to Grantee and that OPWC's approval of Grantee's application for the Grant was made in reliance on Grantee's continued ownership and control of the Property. Accordingly, Grantee shall not voluntarily or involuntarily sell, assign, transfer, lease, exchange, convey or otherwise encumber the Property without the prior written consent of OPWC, which consent may be withheld in its sole and absolute discretion.

Deed; Siltstone Complaint, Ex.1. at 3; Tr. R.1.Prohibitions on transferring property do not get much more "clear and unambiguous" than that. *See* App.Op. ¶53. The Restriction prohibits transferring *any* rights in or to the Park without the prior consent of the Public Works Commission. Deed; Siltstone Complaint, Ex.1. at 3; Tr. R.1. The Development Corporation ignored the Transfer Restriction's explicit prohibition. It transferred a property interest in the Park each time it leased or sold the rights to the Park's oil and gas. And it did so without notifying the Public Works Commission, let alone obtaining its consent. *See* Public Works Commission Amended Crossclaim, and Counterclaim at ¶¶68, 78, 81, and 86; Tr. R.42. Many of the entities who claimed an interest in those minerals violated the Transfer Restriction as well. Because the Transfer Restriction runs with the land, *any* party that purported to transfer an interest in the Park without first obtaining consent from the Public Works Commission violated the deed's clear prohibition.

That should be the end of the matter: the deed expressly prohibits transfers and so the transfers were invalid.

B. Neither the traditional hostility toward restraints on alienation, nor the public-policy exception to terms in deeds, permits this Court to ignore the Transfer Restriction's plain text.

Rather than contest the violations of the Transfer Restriction, the Oil and Gas Companies argue that the Court should not enforce the Restriction at all. In the proceedings below, the parties offered two reasons why the Transfer Restriction should not be enforced. First, they argued that the Transfer Restriction did not apply to the subsurface of

the property. Second, they argued that the Transfer Restriction was void because it was inconsistent with public policy. The Oil and Gas Companies appear to have abandoned the first argument. They challenge the Seventh District's decision only on the basis that the Transfer Restriction is inconsistent with public policy. They are wrong.

1. This Court has declined to enforce explicit deed restrictions that it has determined were contrary to public policy. *See Fairfield Twp. Bd. of Trs. v. Testa*, 153 Ohio St. 3d 255, 2018-Ohio-2381 ¶¶18–22. But this public policy exception is a narrow one—much narrower than the rule for which the Oil and Gas Companies now argue. Under the public-policy exception, abstract notions of property law and general principles of common law do not take precedence over clear deed language. Only express and explicit statements of public policy will trump a deed's plain language. And because the "legislative branch is 'the ultimate arbiter of public policy,'" the Court has looked to the General Assembly when determining whether such a policy exists. *Cincinnati City Sch. Dist. Bd. of Educ. v. Conners*, 132 Ohio St. 3d 468, 2012-Ohio-2447 ¶17 (quoting *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶21); *see also Fairfield Twp. Bd. of Trs. v. Testa*, 153 Ohio St. 3d 255, ¶20. It has held that, "[i]n order that restrictive agreements in a deed may be declared void as against public policy, the same must violate some statute, or be contrary to judicial decision, or against public health, morals, safety or welfare, or in some form be injurious to the public good." *Dixon v. Van Sweringen Co.*, 121 Ohio St. 56, syl. ¶2 (1929).

Importantly, restraints on alienation are not *per se* injurious to the public good and are not *per se* invalid. It is true that the common law has long disfavored restraints on the alienability of property. But, even then, restraints have been treated as enforceable when the general policies favoring the alienability of property did not apply. Restatement of Property 2d, Donative Transfers, §4.1. And today, restraints on alienation are unenforceable only when those restraints are unreasonable. Restatement of Property 3d, Servitudes, §3.4; *see also First Federal Sav. & Loan Asso. v. Perry's Landing, Inc.*, 11 Ohio App. 3d 135, 142 (6th Dist. 1983) ("As a general matter … the law disfavors restraints on alienation, *unless reasonable*." (emphasis added)). The reasonableness of a restraint is to be judged "by weighing the utility of the restraint against the injurious consequences of enforcing the restraint." Restatement of Property 3d, Servitudes, §3.4.

2. Here, that weighing has already been done. It was done first by the People when they adopted, and then reauthorized, the Clean Ohio Conservation Fund; surely the People would not have agreed to spend public funds on conserving lands if they had believed the State would be barred from protecting that expenditure by placing restrictions on the funded land's transfer. *See* Ohio Const. Art. VIII, §§02o and 02q. And the interests were weighed again by the General Assembly when it implemented the People's wishes by codifying the requirements that govern the administration of the Fund.

The statutes that the General Assembly adopted for that purpose justify the Transfer Restriction. Among other things, to ensure that the money that the People authorized

to be spent would be used for its intended purpose, the General Assembly directed the Public Works Commission to "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 [Clean Ohio Conservation Fund] grant." R.C. 164.26(A). The Commission has fulfilled that statutory mandate by requiring those receiving public dollars to agree to transfer restrictions like the one at issue here.

The Transfer Restriction is therefore unlike restrictions that were invalidated in many of the decisions on which the Oil and Gas Companies rely. There are at least two important distinctions. *First*, the Transfer Restriction was imposed as part of an arms-length commercial transaction. By comparison, many of the restrictions at issue in the cases the Oil and Gas Companies cite involved testators' attempts to exert dead-hand control over their property long after they had passed away. *See Anderson v. Cary*, 36 Ohio St. 506, 514 (1881); *Bragdon v. Carter*, 2017-Ohio-8257 ¶1 (4th Dist.), and *Durbin v. Durbin*, 106 Ohio App. 155, 156 (3d Dist. 1957). The difference is significant. "When evaluating the reasonableness of any agreement placing a restraint on alienation, courts should be reluctant to invoke common law principles disfavoring restraints to invalidate a bargained for contract freely agreed to by the parties." *Alby v. Banc One Fin.*, 156 Wn.2d 367, 374 (2006). When imposed in such a case, a restrictive covenant "'is consented to by the grantee, and it is no hardship on him and his assigns, to be compelled to observe the

covenants contained in the deed.'" *Brown v. Huber*, 80 Ohio St. 183, 201–02 (1909) (quoting *Ashland v. Greiner*, 58 Ohio St. 67, 75 (1898)).

Second, the Transfer Restriction was not imposed by an individual seeking to pursue his or her own private interest; it was required by a statute that the General Assembly adopted to protect the *public's* interest. The Court has recognized that alienation restrictions are permissible when those restrictions exist for the benefit of the public. It held in *Ohio Society for Crippled Children & Adults, Inc. v. McElroy*, 175 Ohio St. 49 (1963), that "[a] restraint on alienation of property conveyed to a trustee to be held for charitable or other public uses will usually be given effect," syl. ¶4. In so doing, the Court distinguished prior decisions such as *Anderson*, where it had declined to enforce alienation restrictions. *Id.* at 53–54. Those decisions, the Court held, were inapplicable when a restriction was attached to land for a public purpose. *Id.* The contrast makes sense: those inclined to give away property for the public's benefit would be deterred from doing so if they were denied the ability to assure the furtherance of their goals.

A restriction raises even fewer concerns when it is authorized by statute. Unlike a unilateral restriction imposed as part of a donative transfer, a restriction *created* pursuant to statute can be *changed* pursuant to statute. That means that if a future legislature decides that a restraint on alienability is no longer in the public's interest, it may free the land from that restraint. It is in that way similar to a charitable trust, which courts may modify if it is no longer possible to accomplish the charitable purpose. In both cases, the

fact that a restriction can be changed prevents the "property from being completely inalienable." *Ohio Soc. For Crippled Children*, 175 Ohio St. at 53.

3. The Oil and Gas Companies point to a number of cases they say support their broad interpretation of the public-policy exception. Siltstone Br. 8–12; Eagle Creek Br. 22–24. None does. Indeed, the decisions they cite do little more than recite the same general principles that the Court already distinguished in *Ohio Society for Crippled Children & Adults*. *See* Siltstone Br. 10–11; Eagle Creek Br. 24. Again, that case upheld a deed restriction that prohibited the sale of property used as a home for children served by the Ohio Society for Crippled Children. Distinguishing prior decisions that had invalidated prohibitions on sale, the Court held that an alienation restriction is generally permissible when it is imposed for a charitable or other public purpose. *Ohio Soc. For Crippled Children*, 175 Ohio St. 49 at syl. ¶4. "[I]t is a normal characteristic of property devoted to charitable purposes," the Court noted, "that it is inalienable." *Id.* at 53 (quotation and citation omitted). Although the Oil and Gas Companies cite *Ohio Society for Crippled Children & Adults* for the opposite proposition, they misread the case. The language on which they rely is not the Court's holding, but rather its summary of the general property law principles that the Court distinguished. *See Ohio Soc. for Crippled Children & Adults*, 174 Ohio St. at 52–54.

The other decisions that the Oil and Gas Companies cite also fail to support their position. The decision in *Terry v. Born*, for example, recited the modern understanding

of alienation restrictions already discussed above. It recognized that "reasonable restraints [on alienation] that are justified by legitimate interests of the parties are not necessarily void." 24 Wash. App. 652, 654 (Wash App. Ct. 1979) (quotations omitted). And the Court in *Cincinnati City School District* did not rely on general property law principles when it invalidated a deed restriction that prevented the buyer of an unused school building from using it as "any type of educational facility." 132 Ohio St. 3d 468, ¶2. The Court based its decision on a *statutory* requirement that school buildings be offered for sale to charter schools. *Id.* at ¶¶11–12, 21, and 23. The Court even reaffirmed "the narrowness of the doctrine on public policy," and invalidated the deed restriction because it was "at odds" with the General Assembly's specific statutory instructions. *Id.* at ¶¶23–24. The absence of a conflicting statutory command makes this case unlike *Cincinnati City School District*. And the existence of a statute *permitting* restraints on alienation, *see* R.C. 164.26(A), makes this case and *Cincinnati City School District* even less analogous.

The Oil and Gas Companies recognize the problem that R.C. 164.26(A) creates for them, but cannot avoid its grasp. Again, the statute says:

> 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 [the Clean Ohio Conservation Fund] and establish requirements for documentation to be submitted by grant applicants that is necessary for the proper administration of this division. …

The Oil and Gas Companies insist that this language requires only that the Public Works Commission adopt policies to guide its decision about when grant-funded

property can be alienated and when alienation should be prohibited. Siltstone Br. 16; Eagle Creek Br. 26. But that is not the most natural reading of the statute. Indeed, it is a strange reading: Why would the General Assembly authorize the Commission to adopt policies regarding when properties should be inalienable without also giving the Commission authority to enforce those policies? The better reading is the one offered above: It is a direct command from the General Assembly, instructing the Public Works Commission to impose the conditions that the legislature has deemed necessary to protect the public's investment. R.C. 164.23(B)(3) reinforces this reading. That statute conditions grant eligibility on "compliance with division (A) of section 164.26 of the Revised Code related to the long-term ownership or control of the property that is the subject of the grant application." If R.C. 164.26(A) did not impose any requirements on deed recipients—if it just required the Public Works Commission to develop policies regarding alienation—then R.C. 164.23(B)(3)'s condition mandating compliance with that statute would be meaningless.

But even if the Oil and Gas Companies were correct about R.C. 164.26(A)'s meaning, it would make no difference. Their reading of R.C. 164.26(A) would *still* allow the Public Works Commission to impose transfer restrictions like the one at issue here. The only difference is that, under their reading, it is the Commission, not the General Assembly that would ultimately decide when a transfer restriction should be required as a condition of a Conservation Fund grant. Under either reading of R.C. 164.26(A), the Public

Works Commission would have still had the power to impose the Transfer Restriction at issue in this case.

The Oil and Gas Companies' attempt to explain away the requirements of the Ohio Constitution fares no better than their attempt to explain away R.C. 164.26(A). They argue that Article VIII, Section 2o of the Ohio Constitution is concerned not just with conservation, but with economic development as well. Siltstone Br. 15; Eagle Creek Br. 25. They misread the Constitution. The provision that the Oil and Gas Companies cite relates to the Clean Ohio *Reclamation* Fund, which has as its purpose the remediation and development of contaminated property. Ohio Const. Art. VIII, §02o(A)(2). The Reclamation Fund is distinct from the Conservation Fund, which has as its purpose the preservation of natural areas, open spaces, and farmlands. Ohio Const. Art. VIII, §02o(A)(1). And although they at least acknowledge that the Clean Ohio Conservation Fund and the Reclamation Fund are authorized by separate constitutional provisions, *see* Siltstone Br. 15; Eagle Creek Br. 25, the Oil and Gas Companies nevertheless make arguments that are based on the Reclamation Fund's goal of promoting economic development, and not on the Conservation Fund's goal of protecting and preserving the environment, *see* Siltstone Br. 16; Eagle Creek Br. 26.

Finally, some of the *amici* in this case identify a second public policy that they claim the Transfer Restriction contradicts. Gulfport and a handful of other oil and gas developers argue that there is a general public policy in favor of oil and gas exploration and

development. Gulfport Br. 2–3. It is true enough that Ohio has adopted any number of policies designed to support the extraction of oil and gas. It does not follow, however, that these policies trump all other policies—including conservation—to such a degree that they override the clear language in a deed adopted as part of a constitutionally established conservation program. None of the authorities on which Gulfport relies suggest otherwise. Several of its cases addressed the obligations that exist between the parties to an oil and gas lease, which the deed here is not. *See Ionno v. Glen-Gery Corp.*, 2 Ohio St. 3d 131 (1983). Another involved an explicit statutory preemption of local regulatory authority (and interpreted a statute that has since been repealed), which hardly suggests that deed restrictions *permitted* by state law must give way to energy development. *See Newbury Twp. Bd. of Twp. Trs. v. Lomak Petroleum Ohio*, 62 Ohio St. 3d 387 (1992). No case supports elevating the State's interest in energy development over all others.

The statutes on which Gulfport relies are equally unhelpful. For example, it points to R.C. 1509.71(A) as evidence that the General Assembly has adopted a broad policy favoring oil and gas development. But Gulfport takes that statute out of context. That statute creates the Oil and Gas Leasing Commission, to which the General Assembly gave the responsibility of identifying state-owned lands that should be eligible for oil and gas development. *See* R.C. 1509.71–73. And R.C. 1509.71(A) explains *why* the General Assembly created the Leasing Commission: to oversee the responsible use of natural resources on *state-owned* land. *See* R.C. 1509.73 (governing leasing of state-owned mineral

rights); R.C. 1509.74 (instructing the Ohio and Gas Leasing Commission to adopt rules governing its operations). Putting aside the fact that it does not even apply to the Park, the statute also does not create a new statewide policy favoring oil and gas development above all other uses of property. And it certainly does not contradict the General Assembly's more specific instructions in R.C. 164.26(A). Even if there were tension between the two statutes, R.C. 164.26 is the more specific statute and must therefore take precedence. *See* R.C. 1.51.

The other statute that Gulfport cites, R.C. 1509.02, is likewise irrelevant. That statute gives the Department of Natural Resources "exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within" Ohio. R.C. 1509.02. The Commission has not suggested otherwise. It has merely sought to enforce the rights granted to it by the deed to the Park. The fact that those rights might serve as an incidental barrier to the extraction of oil and gas does not mean that the Commission has in any way intruded on the Department of Natural Resources' exclusive regulatory authority. One would not say, after all, that a landowner who refused to lease his or her oil and gas rights intrudes on the Department's permitting authority simply because that refusal prevents the Department from allowing an oil or gas company to drill on his or her land.

* * *

Because the Transfer Restriction validly and unambiguously forbids transferring any interests in the Park, all such transfers are invalid.

Appellee's Proposition of Law No. 2:

> *Where the recipient of a Clean Ohio grant records clear and unambiguous deed restrictions permitting the Ohio Public Works Commission to enforce the restrictions in law or in equity, and where no statute says otherwise, a court may enforce those restrictions through declaratory and injunctive relief.*

Just as the Court has been clear that courts will enforce the plain language of a deed, it has been equally clear that an injunction is the proper tool for enforcing that language. *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, syl. ¶2 (1900). Here, the Public Works Commission has sought to avail itself of that remedy: it sought declaratory and injunctive relief enforcing the Park's deed restrictions. This case presents the question whether the deed itself or some statute prohibits the Commission from pursuing injunctive relief. The answer is no; neither does.

A. Neither the terms of the deed nor statutory law bar the Commission from enforcing the deed's restrictions in suits at equity.

The Park's deed expressly allows the Public Works Commission to enforce its terms "by any proceedings at law or in equity." Deed; Siltstone Complaint, Ex.1. at 2; Tr. R.1. Thus, the parties all agree that the deed permits the Commission to seek declaratory and injunctive relief. *See* Siltstone Br. 26; *see also* Eagle Creek Br. 1 (deed restrictions "provid[e] for both monetary and equitable remedies"). That leaves only the question whether some *statute* prohibits the Commission from pursuing this relief.

None does. The General Assembly gave the Public Works Commission broad authority to administer the Clean Ohio Conservation Fund program. R.C. 164.27(A). The legislature, among other things, authorized the Commission to enforce the requirements of the Fund using all the powers granted to it by statute. R.C. 164.26(B). Those powers include the ability to "[d]o all other acts, enter into contracts, and execute all instruments necessary or appropriate" to carry out its duties. R.C. 164.05(A)(9). As discussed above, one of those duties is ensuring that grant recipients maintain long-term ownership and control of property purchased with public funds. *See* R.C. 164.26(A).

Once the legislature gave the Public Works Commission the power to require deed restrictions under R.C. 164.26, it implicitly conferred the power to enforce those restrictions through injunctions. It is well-established that the remedy for a breach of a deed restriction is an injunction. "Upon a breach of the covenants, and to restrain an irreparable injury resulting therefrom, injunction is a proper remedy." *Linwood Park Co.*, 63 Ohio St. 183, syl. ¶2; *see also Brown*, 80 Ohio St. 183, syl. ¶1. The General Assembly legislated against this backdrop, and so its grant of authority to impose deed restrictions carries with it the traditional mode for enforcing such restrictions. *See Mann v. Northgate Investors, LLC*, 138 Ohio St. 3d 175, 2014-Ohio-455 ¶17; *Wayt*, 155 Ohio St. 3d 401 at ¶23. Indeed, given this background rule, the General Assembly would have expressly barred the Commission from pursuing injunctive relief if that is what it wanted: "the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common

law unless the language employed by it clearly expresses or imports such intention." *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, syl. ¶3 (1909).

As even some of the parties to this appeal acknowledge, the General Assembly imposed no explicit limitation on pursuing injunctive relief. *See* Eagle Creek Br. 18 (R.C. 164.26 does not "expressly prohibit the use of injunctive relief."). While the legislature instructed the Commission to "provide for proper liquidated damages and grant repayment for entities that fail to comply with the long-term ownership or control requirements," it never indicated that damages were to be an *exclusive* remedy. The requirement that the Public Works Commission provide for liquidated damages in the event of a breach of R.C. 164.26's long-term ownership and control requirement therefore expands, rather than contracts, the forms of relief that the Commission may seek.

Liquidated damages and injunctive relief are separate, complementary remedies: an injunction protects against future harm while liquidated damages provide compensation for "the actual harm that has already accrued." *In re Udell*, 18 F.3d 403, 409 (7th Cir. 1994); *see also Ewing v. Davis*, 2 Ohio C.C. (n.s.) 90, 91–92 (7th Dist. 1903). That is why it has long been recognized that "[s]pecific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty." Restatement of Contracts 2d, §361. And it is why courts have consistently refused to interpret liquidated damages as an adequate remedy at law that would make an injunction unavailable. *See Vacold LLC v. Cerami*, 545 F.3d 114, 130–31 (2d Cir. 2008); *Logue*

v. Seven-Hot Springs Corp., 926 F.2d 722, 724–25 (8th Cir. 1991); *U-Haul Co. of North Carolina, Inc. v. Jones*, 269 N.C. 284, 287 (1967); *Simenstad v. Hagen*, 22 Wis. 2d 653, 663 (1964); *Bauer v. Sawyer*, 8 Ill. 2d 351, 358 (1956).

There is no reason to apply a different rule here. The General Assembly is presumed to "know[] the existing condition of the law, whether common law or statute law." *Jacobson v. Kaforey*, 149 Ohio St. 3d 398, 2016-Ohio-8434 ¶51 (Kennedy, J., concurring in judgment only) (compiling authority); *see also Wayt*, 155 Ohio St. 3d 401 at ¶23 (General Assembly presumed to have knowledge of judicial decisions). Thus, when the General Assembly expressly gave the Commission the authority to add a liquidated-damages clause, it would not have thought itself to be *preventing* the Commission from pursuing injunctive relief. Neither would the ordinary English speaker: "You may do X" hardly connotes "You may not do anything except X." When a mother tells her child he may have an ice cream cone, she does not thereby forbid him from eating his broccoli.

B. The appellants' contrary arguments all fail.

The Oil and Gas Companies acknowledge that the deed's Enforcement Provision allows the Public Works Commission to seek both injunctive relief and liquidated damages. *See* Siltstone Br. 26; Eagle Creek Br. 10. But they say the Provision is invalid on the ground that it exceeds the Commission's statutory authority. The Public Works Commission, they argue, is barred by R.C. 164.26 from pursuing injunctive relief. Their argument is based on a mistaken premise: they incorrectly interpret R.C. 164.26 as limiting

the Commission to seeking *only* liquidated damages, even though it is best read as *allowing* the Commission to seek such damages in addition to whatever other relief it may pursue.

Most of the cases which the Oil and Gas Companies cite in support of their argument are irrelevant. Many of them stand for the uncontroversial principle that an administrative agency cannot exceed its statutory authority. *See* Siltstone Br. 26–28; Eagle Creek Br. 19–21. No one here contests that principle. The only question is whether R.C. 164.26 deprives the Commission of authority to seek injunctive relief. And for the reasons discussed above, it does not.

Equally irrelevant are the cases holding that when the General Assembly creates a cause of action by statute, it implicitly forbids plaintiffs from seeking relief through any other means. R.C. 164.26 does not create a cause of action: it requires the Commission to enforce its conservation policies with liquidated-damages clauses. *Cf. Fuller v. Rock*, 125 Ohio St. 36, 41–42 (1932) ("The right to enforce [a contract] is not dependent upon statute, but exists at common law."). And here, the Public Works Commission is not seeking to enforce R.C. 164.26; it is seeking to enforce the bargained-for deed restrictions that are contained in the Park's deed. To be sure, the General Assembly *could have* barred the Commission from seeking the injunctive relief that has always been available to enforce the terms of a deed. But as already discussed, the statute is not plausibly read to do that.

The statutes that the Oil and Gas Companies cite are no more relevant. Eagle Creek, for example, lists many statutes that it claims show that the General Assembly knows how to authorize statutory remedies for statutorily-created rights. *See* Eagle Creek Br. 15–16. But the enforcement of a deed is *not* a statutory right—it is a common-law right akin to the right to enforce the terms of a contract. *See Fuller*, 125 Ohio St. at 41–42. And the statutes that Eagle Creek cites, such as the Consumer Sales Practices Act, restrictions on telephone solicitations, and the regulation of pesticides, are all creatures of statute. For similar reasons, R.C. 164.09(F)(6) also has little to say about the scope of the Public Works Commission's authority. It establishes a statutory process for the sale of state bonds, complete with *statutory* remedies. It also predates R.C. 164.26 and was not adopted as part of the same legislation, *see* 149 HB 3 (2001) (implementing the Clean Ohio grantmaking program and enacting R.C. 164.26), making it even less relevant to the interpretation of that statute.

Although all of the *parties* to this appeal concede that the deed to the Park allows the Public Works Commission to seek injunctive relief, *see* Siltstone Br. 26; Eagle Creek Br. 10, Gulfport, an *amicus*, disputes that fact. Gulfport Br. 11. Because the deed provides for liquidated damages, Gulfport argues, the Public Works Commission has an adequate remedy at law and therefore is not entitled to injunctive relief. But like Gulfport's other arguments, this one too lacks any legal basis. Gulfport's argument is not even supported by the decisions it cites. At least one of those decisions acknowledges that "[e]quitable

relief and damages are not necessarily mutually exclusive remedies." *See Mesarvey Russel & Co. v. Boyer*, No. 91AP-974, 1992 Ohio App. LEXIS 3947 *12–13 (July 30, 1992). As it must. The presence of a liquidated-damages provision will not bar equitable relief "absent an express provision to this effect." *Vacold*, 545 F.3d at 130–31; *see also Kelley v. Leucadia Fin. Corp.*, 846 P.2d 1238, 1242–43 (Utah 1992); Restatement of Contracts 2d §361.

Gulfport's argument that parties cannot both rescind a contract and enforce it, suffers from a similar flaw. The enforcement of a liquidated-damages clause does not constitute a rescission. *Chung, Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043, 1055 (11th Cir. 1985). "Merely by providing for liquidated damages, the parties are not taken to have fixed a price to be paid for the privilege not to perform." Restatement of Contracts 2d §361, Cmt. a; *see also In re Udell*, 18 F.3d at 409.

Even if Gulfport were right, however, it would mean that, *at most*, the Public Works Commission may need to choose between an injunction and liquidated damages. The Commission need not make that choice now, however. Recall, the trial court held first that the deed restrictions could not be enforced through injunctive relief and then held that the restrictions could not be enforced at all. The Seventh District reversed the trial court's decision on both counts. The Public Works Commission has thus never been presented with a choice of relief. And so, if it must choose, it may do so on remand.

One last point. If the Oil and Gas Companies are correct, and if the Public Works Commission can seek liquidated damages but not injunctive relief, then their challenge

to the substance of the Transfer Restriction in their first Proposition of Law must fail. Siltstone argues that recipients of a Conservation Fund grant can buy their way out of the deed restriction by paying liquidated damages. At that point, Siltstone argues, a grant recipient "may transfer ownership or control of a property." Siltstone Br. 24; *see also id.* at 30. But, if that is the case, then the Park *is* alienable and the Court has no basis on which to invalidate the challenged deed restriction.

CONCLUSION

The Court should affirm the Seventh District's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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