

IN THE SUPREME COURT OF OHIO

Board of Education of the City	:	
School District of the City of	:	Case No. 2011-0673
Cincinnati,	:	
	:	On Appeal from the Hamilton County Court
	:	of Appeals, First Appellate District
Appellant,	:	
	:	
vs.	:	
	:	
Roger Connors, <i>et al</i> ,	:	
	:	
Appellees.	:	

MERIT BRIEF OF THE OHIO SCHOOL BOARDS ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI

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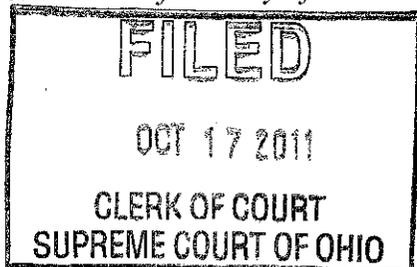


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I. INTRODUCTION

In the instant matter, Appellant, the Board of Education of the City School District of the City of Cincinnati (CPS) and Appellees, Roger and Deborah Connors (the Connors), freely entered into a contract regarding certain property (the Property) which was sold by CPS to the Connors at public auction. Following the sale, CPS attempted to enforce a freely negotiated deed restriction that was placed on the Property. The trial and appellate courts held that the deed restriction was void as against public policy. CPS asks this Court to reverse the trial court's unfounded conclusion that a public policy exists in favor of charter schools, which would prohibit CPS from enforcing the freely negotiated deed restriction.

This case involves two of the most basic and fundamental rights granted to parties under both federal and Ohio law—the right to own property and the right to freely contract. *Amicus curiae*, the Ohio School Boards Association (OSBA), is a private, 501(c)(4) not-for-profit statewide association of public school boards founded in 1955 to encourage and advance public education through local citizen responsibility. Membership is open to all public boards of education in Ohio. OSBA has a total membership of 716 public school boards across the state. As the trial court's decision would significantly impact school districts' rights to freely negotiate contracts which they are legally entitled to enter, OSBA's members have a strong interest in this case.

II. STATEMENT OF FACTS

A complete discussion of the facts leading to the instant action may be found in CPS's Merit Brief. However, OSBA directs the Court's attention to the following facts for the purposes of the arguments asserted in its brief:

After concluding the Property was not suitable for school purposes, CPS used reasonable discretion, coupled with its rights as a property owner, to create a reasonable deed restriction on the Property. The deed restriction clearly stated that a purchaser would not “use the Property for school purposes, now or at any time in the future.” The Conners freely and voluntarily entered into a Purchase and Sale Agreement with CPS to purchase the Property for \$30,000. All relevant sales documents indisputably placed the Conners on notice that a deed restriction was included in any sale of the Property. The Deed transferring the Property to the Conners was executed on June 30, 2009. In direct contradiction to the deed restriction, the Conners opened, and are currently operating, a community school on the Property.

III. ARGUMENT

Proposition of Law: The Ohio legislature has not expressed a public policy in favor of community schools over public schools with regard to a public school district’s disposal of real property; to the extent any public policy has been established, it is expressly stated in R.C. 3313.41(G) and R.C. 3313.411, and does not permit a court of law to unilaterally abridge a public school district’s statutory right to negotiate arm’s-length contract terms, including deed restrictions in a contract to sell real property to private citizens.

A. A court should not impose a restriction on a board of education’s power to contract that the General Assembly did not include in the enabling statute.

It is a well-settled principle of law that boards of education are creatures of statute, and therefore, only have the authority and powers expressly conferred upon them by the General Assembly. “Boards of education are created by statute, and their jurisdiction is conferred only by statutory provision. Just as any other administrative board or body, they have such powers *only* as are clearly and expressly granted.”¹ Thus, in order to appropriately examine the legal issues presented in this matter, this Court must examine the specific statute that grants boards of

¹ *Verberg v. Board of Education of City School Dist. Of Cleveland* (1939), 135 Ohio St.246, Syllabus ¶1, 20 N.E.2d 368 (emphasis added); see also *Wolf v. Cuyahoga Falls City School Dist. Bd. Of Edn.* (1990), 52 Ohio St.3d 222, 556 N.E.2d 511.

education the power and authority to contract and dispose of real and personal property – R.C. 3313.17.

R.C. 3313.17 states, “the board of education of each school district shall be a body politic and corporate, and, as such, capable of...*contracting and being contracted with*, acquiring, holding, possessing, and *disposing of real and personal property*.” (emphasis added). In enacting R.C. 3313.17, the General Assembly conferred upon boards of education the discretionary capability to contract with other parties. When the General Assembly grants discretion to boards of education, the exercise of that discretion is unqualified or plenary. Indeed, as early as 1919, the Ohio Supreme Court held: “a court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of such board, upon any question it is authorized by law to determine.”² Thus, when a board of education is vested with discretion, as it is by R.C. 3313.17, that discretion cannot be circumscribed by the courts so long as the exercise of the same is reasonable, in good faith and not clearly shown to be an abuse of discretion.³

R.C. 3313.17 grants boards of education clear discretionary power to enter into contracts and dispose of real and personal property, and there is no question about the scope or application of this authority. Therefore, there is no basis for the Court to re-write the statute. More importantly, this Court cannot construe R.C. 3313.17 in any manner that would constrain, undermine, diminish, or circumvent the unequivocal grant of discretion and authority that the General Assembly has bestowed upon boards of education to freely enter into contracts and dispose of real and personal property. Under a straightforward reading of R.C. 3313.17, this

² *Brannon v. Board of Education of Tiro Consol. School Dist.* (1919), Ohio St. 369, Syllabus, ¶2, 124 N.E. 235.

³ *Greco v. Roper* (1945), 145 Ohio St. 243, 250, 61 N.E.2d 307; *State ex rel. Greisinger v. Grand Rapids Bd. of Edn.* (1949), 88 Ohio App. 364, 369, 100 N.E.2d 294.

Court should affirm CPS's contention that it is permitted to freely negotiate contracts on property it owns.

If the Court upholds the trial and appeals courts' decisions to undermine CPS's reasonable discretion to include a valid deed restriction in the contract for sale, adverse financial consequences inevitably will result for school districts. If courts are permitted to look over the shoulder of every contract decision made by a board of education, this will have a chilling effect on a board of education's ability to do business with other parties. Vendors, suppliers, builders and potential property purchasers, just to name a few, will be less inclined to conduct transactions with boards of education if they know that a board does not possess the discretion to enter into contracts of its choosing, and if there is an inherent threat that the contract they are entering into may be declared void by a court. At a time where school districts are facing huge state deficits and deep state funding cuts, any erosion of a board of education's discretion by courts will have direct adverse financial consequences on school districts. The result of the trial and appeals courts' decisions would be imprudent public policy at any time, but it would be especially burdensome to boards of education during the period of economic stagnation that Ohio currently faces.

Further, it is grossly inefficient for courts to be second-guessing reasonable decisions made by boards of education, such as the decision at issue, and for boards to be required to defend every decision they make. Put in the position to defend every decision it is legally entitled to make, boards of education will be forced to bear the time and expense of fully litigating countless claims which will threaten the budgets of every school district, because it will force them to spend public monies in situations where they ought not be required to do so. By upholding a board of education's discretion, the Court will prevent the needless waste of finite

public dollars and overburdened judicial resources. In addition, such a finding will permit school districts to spend their scant resources on education, instead of litigation. Therefore, public policy exists in supporting the enforcement of this deed restriction.

Policy decisions are best left to the legislative branch of the government. The General Assembly is uniquely situated to consider all aspects of policy decisions before making law on the subject. It is in a position to consider the economic impact of a policy to be given the effect of law. Having considered the impact of a policy provision, the General Assembly can set forth the law in a clear, concise manner rather than making a nebulous statement that a policy exists without detailing the nature and parameters of the policy. Certainty and predictability in the law are adversely affected by judicial activism. Certainty and predictability are crucial when the law in question serves as the basis for commercial transactions in Ohio. For this reason, the resort to public policy by the trial and appellate courts, without the benefit of the type of study and debate which serves as the basis for statutory law, is a dangerous brand of judicial activism.

It is a well-established principle in American jurisprudence that the right to contract is generally the right to contract freely with the expectation that the terms of the contract will be enforced.⁴ Such a right is “as fundamental to our society as the right to write and to speak without restraint. Responsibility for the exercise, however improvident, of that right is one of the roots of its preservation.”⁵ Ohio contract law, property law and R.C. 3313.17 all support CPS’s position. The trial court’s self-admittedly quick decision patently contradicts CPS’s fundamental right and discretion, granted to it by the General Assembly, to freely contract.

⁴ *City of Cleveland v. Clements Bros. Const. Co.* (1902), 67 Ohio St. 197, 219-220, 65 N.E.885.

⁵ *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 381, 613 N.E.2d 183, quoting *Blount v. Smith* (1967), 12 Ohio St.2d 41, 231 N.E.2d 301

A school board's right to contract is no less weighty than that of an individual citizen. The same important factors are at play in both scenarios. The enforceability of freely entered agreements lies at the heart of our economic system. A system of law for the enforceability of contracts furthers a reliable economic system in that it encourages people to enter into worthwhile transactions. This is no less important in the case of a public body, such as a school board, than it is in the case of private parties. Chief Justice Marshall of this Court recognized this fact in *City of Columbus v. The Public Utilities Comm'n* (1921), 103 Ohio St. 79, 133 N.E. 800. That opinion recognized that the right to contract for the City of Columbus, much like a school board's right to contract, was a right granted and controlled by statutes enacted by the General Assembly.⁶ In discussing a statutory right to contract, Chief Justice Marshall stated:

“There is nothing arbitrary or compulsory about this statute. The consent is a matter of mutual and voluntary contract, involving all the necessary elements of valid contracts, to-wit, parties, consideration and subject-matter. Such contracts are to be enforced in the same manner and construed according to the same principles as other commercial contracts, and are protected by the same constitutional guaranties against impairment of obligations. The contracts being mutually binding and enforceable, and the parties being subject to no disabilities, their solemn obligations are not logically or constitutionally subject to review or termination at the hands of the state or any agency of the state.”⁷

Likewise, CPS's contract in this case is no less worthy of protection and freedom from state interference than “other commercial contracts.”

The same arguments regarding CPS's right to freely contract apply to the Connors. As the Court knows, there were *two* voluntary parties to the agreement – CPS and the Connors. The

⁶ *City of Columbus v. The Public Utilities Comm'n*, 103 Ohio St. at 92, 133 N.E. at 806. (Quoting the U.S. Supreme Court in *Columbus Railway, Power & Light Co. v. City of Columbus*, 249 U.S. 399 as follows: “The authority under which the City acted came from the State, and was granted by proper statutes passed for that purpose.”) (Marshall, C.J., concurring).

⁷ *City of Columbus v. The Public Utilities Comm'n*, 103 Ohio St. at 89, 133 N.E. at 805 (Marshall, C.J., concurring) (emphasis added).

Connors, like the Board of Education, are legally competent adults with the ability to bargain and enter into contracts, such as the contract for the sale of the Property with the bargained-for deed restriction. The Court should recognize both CPS's and the Connors' ability to enter into a business transaction and should honor the sanctity of the bargained-for contract – for the sake of both parties' right to freely contract.⁸

B. CPS had the right to include a valid deed restriction in the contract for sale of the Property, and such an inclusion was reasonable.

For many years, CPS has been renovating and/or replacing most of its school buildings. In reliance on building assessments and studies provided by the Ohio School Facilities Commission (OSFC),⁹ CPS determined that some of its properties were no longer suitable for school purposes. The Property was one of the properties CPS determined was no longer suitable for school purposes. The low price accepted for the property, \$30,000, is another indication that it was unsuitable – as this is an extraordinarily low price for the purchase of a school building. These assessments, coupled with CPS's basic freedom to contract and property rights, gave CPS a reasonable basis to create a valid deed restriction on the Property.

The power of an owner to dispose of property as it sees fit is an incident to, and one of the essential attributes of, property.¹⁰ It is a fundamental principle of the ownership of property. An owner of property may dispose of such property as it sees fit, provided that the disposition is

⁸ In addition to the Property being unsuitable for school purposes, it was logical for CPS to sell the property as a commercial property – because any developed structure would have added to their tax base. Perhaps the Connors had a plan to develop the Property for commercial purposes and that plan did not work out for some reason, maybe because of the state of the economy. Regardless, the Court should not speculate as to what the parties' intended when they voluntarily and unambiguously agreed to the deed restriction. Both parties had the right to contract and the Court should honor the contract the parties made.

⁹ The Ohio School Facilities Commission (OSFC) administers the state's comprehensive Kindergarten through 12th Grade public school construction program. The agency helps school districts fund, plan, design, and build or renovate schools. See <http://osfc.ohio.gov>

¹⁰ *National Cash Register Co. v. Cervone* (1907), 76 Ohio St. 12, 23, 80 N.E. 1033.

not unlawful or for an unlawful purpose. CPS exercised its right to freely negotiate a contract and dispose of its property when it included a deed restriction in the sale of the Property to the Conners. The deed restriction clearly stated that the Conners covenant “to use the Property for ‘commercial development’ ... [and] *not to use the Property for school purposes*, now or at any time in the future.”¹¹ The inclusion of this valid deed restriction was based on the reasonable conclusion that the Property was no longer suitable for school purposes, and thus was included in good faith.

Moreover, there is no evidence the deed restriction was targeted at community schools. CPS had no ulterior motive to restrict community schools’ access to facilities. Instead, the deed restriction was implemented because the Property was found by CPS in the exercise of its reasonable discretion to be not suitable for *any* educational facility. If CPS had chosen to use the Property in the future for school purposes, it would have renovated the building to provide a safe and effective learning environment for its students. However, the Property was not suitable for school purposes when placed for sale at auction.¹² In paragraph 3 of its Decision, the Court of Appeals referenced the fact that the building was in use as a community school. In paragraph 10 of its Decision, it relied on the fact that the deed restriction indicated that CPS might be able to use the Property in the future as the basis to override CPS’s discretionary decision that the Property was not suitable for classroom use. The court substituted its judgment for that of the Board of Education when it made this decision. Hypothetically, had CPS determined that raw land was not suitable for classroom use, it is possible that the land could, in the future, be

¹¹ Complaint, ¶8 (emphasis added).

¹² At the time of the trial court’s decision, Revised Code Section 3313.41(G)(1) provided that when a board of education “decides to dispose of real property suitable for use as classroom space,” it is required to follow certain rules with regards to first offering the property for sale to start-up community schools. Because the Property at issue was not “suitable for use as classroom space” the statute as then written is inapplicable to the Property at issue.

improved for classroom use by CPS or by another entity. Nonetheless, the validity of CPS's decision at the time it was made cannot be questioned; just as raw land is not suitable for classroom use, but may be improved to be so, the Property was not suitable for classroom use. By concluding that the Property was suitable for classroom use, the court substituted its judgment for that of CPS in contravention of the long honored rule that the Board's discretion cannot be circumscribed by the courts so long as the exercise of the same is reasonable, in good faith and not clearly shown to be an abuse of discretion.¹³

C. Appellees' public policy argument is unpersuasive because it invokes a very narrow doctrine, and it is merely a diversion from the fundamental issues.

The public policy argument advanced by the Connors is merely a distraction from the fundamental issues at stake in this case – the right of a board of education to freely negotiate contracts and dispose of property as it sees fit. While the general rule calls for broad rights to freely contract, a *narrow* juridical power does exist to declare a particular contract void as contrary to public policy. However, at best, public policy is an *uncertain and indefinite term*.¹⁴ When courts apply this doctrine, they must not infringe on the rights of the parties to make contracts that are not clearly opposed to a specific principle of law.¹⁵ In considering whether a provision in a contract is against public policy, courts must remember that the freedom to contract is *fundamental*, and that they should not rewrite a binding agreement, unless it clearly contravenes some established or otherwise reasonable public interest.¹⁶ In fact, the vast majority of cases where a court has invalidated a contract concern extreme violations of a clear public

¹³ *Greco v. Roper* (1945), 145 Ohio St. 243, 250, 61 N.E.2d 307; *State ex rel. Greisinger v. Grand Rapids Bd. of Edn.* (1949), 88 Ohio App. 364, 369, 100 N.E.2d 294.

¹⁴ *Lamont Bldg. Co. v. Court* (1946), 147 Ohio. St. 183, 185, 70 N.E.2d 447.

¹⁵ *Id.*

¹⁶ *Zivich v. Mentor Soccer Club Inc.* (April 18, 1997), 11th Dist. App., 1997 WL 203646.

policy, the Constitution, or a statute, such as violations of the Fourteenth Amendment¹⁷ and/or the Civil Rights Act.¹⁸

The Seventh District Court of Appeals highlighted the narrowness of the public policy doctrine by stating, “it should be remembered that it is the policy of the law to encourage freedom of contract, and that the courts should not interfere with this right unless it clearly appears that the execution of the contract will prejudice the public interest.”¹⁹ The court went on to describe the narrowness of the public policy doctrine by stating, “the power of courts to declare a contract void as being against public policy is a delicate and undefined one, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.”²⁰ The court concluded by stating that prior to a court determining that a contract is void as against public policy of the state, “it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.”²¹

The body of law applicable to community schools in Ohio is hardly an area in which a clear public policy exists. The law was initiated as an experiment and has been under repeated revision by the General Assembly ever since.²² There have been numerous statutory changes

¹⁷ See, for example, *Shelley v. Kraemer* (1948), 344 U.S. 1, 68 S.Ct. 836, where the United States Supreme Court invalidated racial restrictive covenants based on the Fourteenth Amendment.

¹⁸ See, for example, *Hurd v. Hodge* (1948), 334 U.S. 24, 68 S.Ct. 847, where the United States Supreme Court invalidated a racial restrictive covenant based on the Equal Rights Act.

¹⁹ *Gross v. Campbell* (Jan. 17, 1927), 7th Dist. App., 26 Ohio App. 460, 471, 160 N.E. 511.

²⁰ *Id.*

²¹ *Id.*

²² See *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn* (2006), 111 Ohio St.3d 568, 569-570, 875 N.E.2d 1148, 1152-1153.

which were both favorable and unfavorable to community schools.²³ The frequent changes to the law should not lead to the conclusion that there is a clear policy favoring community schools. To the contrary, the changes should lead a court to the conclusion that this is an area of the law where the General Assembly is still speaking and thus the court should refrain from trying to define policy.

As discussed above, CPS used reasonable discretion in including its deed restriction in the contract for sale of the Property. The decision to include the deed restriction was a reasonable determination based on CPS's right to freely contract and its conclusion that the building was unsuitable for school purposes. Certainly a court cannot be satisfied that there is an advantage accrued to the public by transferring school buildings – *unsuitable for school purposes* – to a buyer to be used *for* school purposes. It is troubling that the trial court essentially placed a rubber stamp on the Property being used to educate students when CPS had previously determined that the Property was not suitable for school purposes. The trial court lightly disregarded a binding agreement made between CPS and Connors by applying a doctrine that is only applied in very limited circumstances, and it did so without articulating a valid public policy. Certainly, there is no public policy for placing school children in a building unsuitable for school purposes – if anything, there is a public policy against the Property being used for school purposes.

In their inchoate public policy argument, the Connors highlight the importance of parental choice and how community schools play an important role in giving parents options outside of the traditional public school system. However, it strains credulity to suggest that

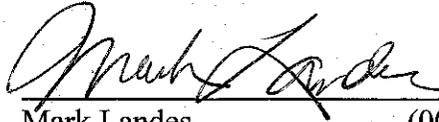
²³ Changes to the laws in the area are recounted on the Ohio Department of Education's website at: <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=879&ContentID=3364&Content=104960>

parents would knowingly choose to place their children in a building like the Property when it previously had been determined to be unsuitable for school purposes. Again, the Conners' school choice argument is merely a tactic to distract the Court from the real issues in this case – the rights of boards of education to set reasonable deed restrictions as a matter of contract and property law, and R.C. 3313.17. Any claims regarding the financial position of community schools are equally irrelevant. It is not the job of the courts to address the financial circumstances of community schools through limiting a board of education's right to contract and freely dispose of property. Rather, the financial matters should be left to the General Assembly.

III. CONCLUSION

The Conners' attempt to distract the Court from the real issue in this case – the right of boards of education to freely contract and dispose of property as a board deems reasonable – by making straw men arguments based on public policy. Even if the Court looks to public policy, it must be conscious that the doctrine is a very narrow one and must not be applied lightly. There is no public policy in Ohio to support the trial court's decision to thoroughly undermine CPS's rights to contract freely and impose reasonable deed restrictions on its property. Instead, a compelling public policy exists to support a board of education's discretion to freely dispose of property as it sees fit. CPS's decision to include its deed restriction in the Conners' contract was reasonable and the deed restriction is clear, valid and enforceable. For all of the foregoing reasons, the trial court's Order and Entry granting the Conners' motion for judgment on the pleadings should be reversed.

Respectfully submitted,



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I hereby certify that a copy of this Brief of Amicus Curiae the Ohio School Boards Association was served by ordinary U.S. Mail, postage prepaid, on October 17th, 2011 on the following:

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