ORIGINAL

IN THE SUPREME COURT OF OHIO

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI,	:	**Case No. 2011-673**
	:	**On Appeal from the Hamilton County Court of Appeals, First Appellate District**
Appellants,	:	
-VS-	:	
ROGER CONNERS, *et al.*	:	
Appellees.	:	

MERIT BRIEF OF APPELLEES ROGER AND DEBORAH CONNERS

Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State Street
Columbus, OH 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
MThompson@OhioConstitution.org
Counsel for Appellees

Douglas R. Dennis (0065706)
Frost Brown Todd LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Tel: (513) 651-6727
Fax: (513) 651-6981
DDennis@ftblaw.com
Counsel for Appellants

Chad Readler (0068394)
Jones Day
325 John H. McConnell Blvd, Suite 600
Columbus, OH 43215
Tel: (614) 281-3891
Fax: (614) 461-4198
CAReadler@JonesDay.com
Counsel for Amici Ohio Alliance for Public Charter Schools, School Choice Ohio, The Black Alliance for Educational Options, National Association for Public Charter Schools, and Ohio Coalition for Quality Education.

Mark Landes (0027227)
Isaac, Brant, Ledmon & Teetor, LLP
250 E. Broad, Suite 900
Columbus, OH 43215
Tel: (614) 221-2121
Fax: (614) 365-9616
ML@IsaacBrant.com
Counsel for Amicus Ohio School Boards Association.

FILED
NOV 18 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....

I. INTRODUCTION.....2

II. FACTS.....3

A. Theodore Roosevelt Public Charter School.....4

B. Community Schools in Ohio.....5

C. State Funding of Community Schools.....9

D. CPS Divestiture of School Buildings.....11

E. Evidence of CPS Intentions.....12

III. STATEMENT OF THE CASE.....14

IV. ARGUMENT.....17

Appellees' Response to Appellant's Sole Proposition of Law

CPS' deed restriction is void because it hinders and impedes Ohio's public policy in favor of transferring unused and dormant taxpayer-owned school buildings to community schools.....17

A. The contractual remedy of public policy is well-established in Ohio, and its utilization is not "judicial activism".....19

B. CPS' The public's interest in confining the scope of an agreement is heightened when the contract is not between purely private parties, but, as here, public entities clothed in the public interest.....21

i. CPS is a state actor, empowered only to advance the public interest in Ohio.....22

ii. CPS must contract subject to the public interest.....23

iii. CPS does not enjoy an absolute fundamental right to contract.....24

C. A contact term is void by public policy, and therefore unenforceable, when it seeks to suppress, hinder, or impede a result that an Ohio statute seeks to create.....26

D. Ohio maintains a public policy in favor of facilitating community school acquisition of public school buildings.....30

E. The CPS deed restrictions impede Ohio's public policy in favor of effectuating parental choice and educational opportunity through community schools.....36

F. Once the deed restriction is stricken, the conveyance must remain otherwise intact..38

V. CONCLUSION.....40

TABLE OF AUTHORITIES

Cases

Bellarmine Hills Ass'n v. The Residential Systems Co. (1978), 84 Mich.App. 554, 269 N.W.2d 673, *lv. den.* (1979) 405 Mich. 836

Bryan v. Darlington (Tex.Civ.App. 1947), 207 S.W.2d 681

Clifton George Co. v. Great Southern Life Ins. Co. (Tex.App. 1923), 247 S.W. 912

Crye v. Smolak, 110 Ohio App.3d 504, 512, 674 N.E.2d 779

Dixon v. Van Sweringen Co., (1929), 121 Ohio St. 56, 166 N.E. 887

Doan v. Cleveland Short Line RY. CO. (1915), 92 Ohio St. 461, 112 N.E. 505, 13 Ohio Law Rep. 173, 13 Ohio Law Rep. 575.

Eagle v. Fred Martin Motor Co. (2004) 157 Ohio App.3d 150, 809 N.E.2d 1161

Grange Mut. Cas. Co. v. Lindsey (1986) 22 Ohio St.3d 153, 489 N.E.2d 281

Hurd v. Hodge (1948), 334 U.S. 24, 68 S.Ct. 847

J.F. v. D.B. (2007), 116 Ohio St.3d 363, 879 N.E.2d 740

John Hancock Mut. Life Ins. Co. v. Hicks (1931), 43 Ohio App. 242, 183 N.E. 93

Key v. Vattier (1823), 1 Ohio 132

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

Loblaw v. Warren Plaza, Inc. (1955), 163 Ohio St. 581

McMillan v. Iserman (1982), 120 Mich.App. 785, 327 N.W.2d 559

McMullen v. Hoffman (1899), 174 U.S. 639, 19 S.Ct. 839

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney (1916), 95 Ohio St. 64, 115 N.E. 505

Ratcliff v. Dick Johnson School Tp., 204 Ind. 525, 185 N.E. 143; 110 A.L.R. 792

State ex rel. Bishop v. Board of Ed. of Mt. Orab Village School Dist., Brown County (1942), 139 Ohio St. 427, 40 N.E.2d 91

State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn. (2006), 111 Ohio St.3d 568, 857 N.E.2d 1148

State Farm Mutual Insurance Co. v. Grace (2009) 123 Ohio St.3d 471, 918 N.E.2d 135

Thomas v. Sun Furniture and Appliance Co., 61 Ohio App.2d 78, 81, 399 N.E.2d 567

Twin City Pipe Line Co. v. Harding Glass Co. (1931), 283 U.S. 353, 51 S.Ct. 476

United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc. (1987), 484 U.S. 29, 108 S.Ct. 364

W.R. Grace & Co. v. Rubber Workers (1983), 461 U.S. 757, 103 S.Ct. 2177

Xenia City Bd. of Ed. v. Xenia Ed. Ass'n, 52 Ohio App.2d 373, 370 N.E.2d 756

Statutes and other authorities

R.C. 3313.17

R.C. 3313.41

R.C. 3314.01

R.C. 3318.08

R.C. 3318.50

R.C. 3318.52

Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043

INTRODUCTION

In this action, Cincinnati Public Schools ("CPS") seeks to insulate itself from "competition" for public funds by limiting the capacity of state community schools to open in the city of Cincinnati. To accomplish this end, it insists upon deed restrictions on all public school buildings that it is legally required to sell. These restrictions prohibit charter and private schools from using the school buildings to educate Cincinnati children. At the same time, they reserve for CPS the option of using the school for educational purposes.

All the while, state statutes have been crafted not simply to facilitate the growth of community schools in cities such as Cincinnati, but more specifically, to do so by facilitating and promoting conveyance of public school buildings to community schools. The CPS deed restriction on Theodore Roosevelt School is void because it deliberately undermines the statewide public policy in favor of conveying unused and dormant public school buildings to community schools.

This issue presents precisely the type of scenario for which the public policy exception to contracting is intended: a local political subdivision is undermining a state policy, abridging educational choice and opportunity for its citizens in the process, simply to maximize its receipt of state funds. This Court must affirm the Trial and Appellate Courts' clearly-justified holdings, and abstain from closing the door on school choice in Cincinnati, and on the futures of the over 200 children served by the school.

FACTS

Cincinnati Public Schools seeks to shut down Theodore Roosevelt Community School, a state community school, with a curriculum focused on individualized attention and technology, that opened in one of the city's most-troubled neighborhoods in August of 2010. On June 30, 2009, CPS sold Theodore Roosevelt School to Dr. Conners.[1] In doing so, CPS insisted upon a deed restriction prohibiting any private or charter school, but not CPS, from using the property as a school.[2] That restriction appears in the June 9, 2009 Purchase and Sale Agreement, and the June 30, 2009 Quit Claim Deed, respectively, as follows:

> Buyer agrees not to use Property for school purposes, and that the deed to the property will be restricted to prohibit future use of the Property for school purposes. Such deed restriction shall not apply to [CPS], and will not prevent [CPS] from repurchasing any portion of the property in the future and using the Property for school purposes.[3]
>
> Grantee covenants not to use the property for school purposes, now or at any time in the future * * * this restriction does not apply to [CPS], and will not prevent [CPS] from repurchasing any portion of the Property in the future and using the Property for school purposes.[4]

When Dr. Conners indicated his intent to defy the unlawful deed restriction because it is void the state's public policy in favor of facilitating conveyance of unused public school buildings to community schools, CPS filed its Complaint, to which Dr. Conners promptly responded with a Motion for Judgment on the Pleadings.

---

[1] Dr. Conners' mother, Deborah Conners, is also named as a Defendants, as she was a co-signer on the purchase. However, Defendants-Appellees will be referred to herein as "Dr. Conners."

[2] CPS' Complaint in Case No. A1001252, paragraphs 7, 8.

[3] June 9, 2009 Purchase and Sale Agreement, attached to Plaintiff's Complaint as Exhibit 2.

[4] June 30, 2009 Quit Claim Deed, attached to Plaintiff's Complaint as Exhibit 3.

A. Theodore Roosevelt Public Charter School

Theodore Roosevelt Public Charter School, offering a unique individualized and technology-centered curriculum, is located in Cincinnati's Fairmount neighborhood. This neighborhood represents precisely the type of community that the Ohio General Assembly envisioned assisting through the Ohio Community Schools Act: (1) 36 percent of its households make less than $10,000 per year, and 77 percent make less than $35,000 per year; (2) 70 percent of its residents are minorities; (3) 90 percent of schools' students would belong to a socioeconomic status that is eligible for free and reduced price lunches; and most importantly (4) local Cincinnati Public Schools that serve this low income minority community are in *academic emergency*, giving Fairmount residents little opportunity to escape poverty through educational opportunity.[5]

By the time CPS filed is Complaint, Dr. Conners had (1) invested $300,000 in improvements to Roosevelt Schools (2) secured a federal grant of $225,000 through the Public Charter School Program; (3) secured a Universal Service Administrative Company grant of $80,000 for technology upgrades; (4) made arrangements to acquire state of Ohio monthly foundation funding of $50,000, which was set to begin, and did begin, on July 1, 2010; (5) entered into contracts with a school sponsor, operator, and treasurer; (6) enrolled over 200 students for the upcoming school year; and (7) entered into contracts with 35 employees.[6]

Currently, the school is in its second year of operations. City of Cincinnati authorities and experts have deemed the school not only safe, but beneficial. It has obtained a certificate of occupancy from the City of Cincinnati Building Department, verifying that it is ready and safe

---

[5] See Exhibit 5, p. 5, attached to Plaintiff's Complaint.

[6] June 18, 2010 Affidavit of Roger Conners, Paragraphs 4-15, attached hereto as "Exhibit A."

for occupancy as a school (the certificate of occupancy was issued on July 23, 2010); while zoning permits were issued to Theodore Roosevelt School in October of 2009, with a ruling by the City of Cincinnati that "the proposed school is compatible with the surrounding residential neighborhood and will positively contribute to the economic growth and revitalization of the neighborhood."[7] The School has also passed a health and safety inspection, and a fire inspection.[8] The state and federal governments also approve of the school: it has received, and invested in student instructional materials, $47,000 per month state foundation payments from the state of Ohio, and a $225,000 installment of a federal grant from the federal government.[9]

B. Community Schools in Ohio

Theodore Roosevelt Public Charter Schools is a "community school," or "charter school," which exists pursuant to the Ohio Community Schools Act, codified in R.C. 3314.01 *et seq*. Community schools are privately-governed *public* schools, which are independent of any school district, and part of the State of Ohio's program of education.[10] Although community schools must comply with many statewide academic standards,[11] they are otherwise exempt from most state regulations.[12]

---

[7] See October 8, 2009 Report and Decision of the City of Cincinnati Office of the Zoning Hearing Examiner, Case No. ZH20090075, attached hereto to Dr. Conners' Affidavit.

[8] See attachments to November 18, 2010 Affidavit of Roger Conners.

[9] Affidavit of Roger Conners.

[10] R.C. 3314.01(B).

[11] R.C. 3314.03(A)(11).

[12] R.C. 3314.04.

In enacting the OCSA, the Ohio General Assembly declared its purpose includes "providing parents a choice of academic environments for their children and providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting."[13] This is consistent with Community Schools' practice of targeting and tailoring programs for small student populations such as learning-disabled students or dropouts from traditional schools.[14]

The OCSA limits local political authority over charters schools by enacting its own comprehensive internal controls.[15] The Ohio Supreme Court has aptly described them:

> The Ohio Community-Schools Act was drafted with the intent that parental choice and sponsor control would hold community schools accountable, in a fashion similar to traditional school management. *In exchange for enhanced flexibility, community schools face heightened accountability to parents and sponsors.* Either can threaten shutdown, sponsors by suspending operations pursuant to R.C. 3314.072, and parents by withdrawing their children. Traditional

---

13 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. (emphasis added).

14 (R.C. 3314.06(B), 3314.03(A)(2), and 3314.04) .

15 For example, each community school must be formed as either a nonprofit corporation or a public-benefit corporation. R.C. 3314.03(A)(1). Community schools cannot charge tuition, R.C. 3314.08(I), and must be nonsectarian, R.C. 3314.03(A)(11)(c), with enrollment policies that comply with R.C. 3314.06. While community schools are exempt from certain state laws and regulations, R.C. 3314.04, they must comply with many of the same statewide academic standards, R.C. 3314.03(A)(11). Community schools contract with sponsors, which are responsible for monitoring their performance and compliance with applicable standards and requirements. R.C. 3314.03(A)(4). In turn, sponsors are monitored and overseen by the Ohio Department of Education ("ODE"). R.C. 3314.015. Under R.C. 3314.015(A), the ODE must approve sponsors, monitor the effectiveness of their oversight of their schools, and issue reports on the effectiveness of the schools' academic programs, operations, and legal compliance and on their financial condition. Sponsors must seek ODE approval, according to criteria, procedures, and deadlines established by ODE. R.C. 3314.015(B). If a sponsor becomes unwilling or unable to complete its duties, ODE may revoke approval to act as a sponsor and assume direct sponsorship of the community school in question for up to two years. R.C. 3314.015(C).

> schools, on the other hand, may not be shut down no matter how poorly they perform (although they will face decreased funding). Because community schools may serve a targeted student population, their requirements may be more narrowly tailored.[16]

Further, every community school must have a sponsor approved by the Department of Education, and the governing authority of the community school and this sponsor must enter into a contract, which must be filed with the Superintendent of Public Instruction. Under the contract, the sponsor's duties include monitoring the school's compliance with the contract and all applicable laws and the academic and fiscal performance of the school. The contract is required to address a great number of the state's concerns and interests, including the school's *facilities to be used and their locations.*[17]

If problems arise in the school's overall performance, the sponsor must take steps to intervene in the school's operation in order to correct such problems: A sponsor may place a community school on probationary status, suspend operation of a school, choose not to renew a contract, or choose to terminate a contract prior to its expiration if the school fails to meet student performance standards, fails to meet fiscal management standards, violates any provision of the contract or applicable laws, or for other good cause.[18]

In enacting R.C. 3314.072, addressing the suspension of operations just mentioned, the General Assembly specifically indicated that the purposes of the provision were "to promote the public health, safety, and welfare by establishing procedures under which the governing

---

[16] *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.* (2006), 111 Ohio St.3d 568, 857 N.E.2d 1148. Emphasis added.

[17] R.C. 3314.03(A).

[18] R.C. 3314.03(D); R.C. 3314.07(B)(1); R.C. 3314.072(C), (D); R.C. 3314.073.

authorities of community schools established under this chapter will be held accountable for their compliance with the terms of the contracts they enter into with their school's sponsors and the law relating to the school's operation."[19] Schools that are in academic emergency and fail to demonstrate adequate academic growth for a specified number of years must be permanently closed; meanwhile a community school may lose its funding if the Auditor of State finds the school to be "unauditable." These threats, rather than local public school district's policing the adequacy of community schools physical facilities, constitute the accountability function by which community schools operate.

In fact, R.C. 3314.04 *specifically exempts* community schools from traditional restrictions related to facilities. It states as follows:

> Except as otherwise specified in this chapter and in the contract between a community school and a sponsor, *such school is exempt from all state laws and rules pertaining to schools, school districts, and boards of education*, except those laws and rules that grant certain rights to parents. (Emphasis added).

Those rules "otherwise specified in this chapter," as it pertains to facilities, are articulated in R.C. 3314.19(J). That Division implements the *only* facilities requirements for Ohio's community schools, and states as follows:

> The sponsor of each community school annually shall provide the following assurances in writing to the department of education not later than ten business days prior to the opening of the school:
>
> (J) That the school holds all of the following:
>
> (1) Proof of property ownership or a lease for the facilities used by the school;
>
> (2) A certificate of occupancy;

[19] See *State ex rel. Rogers v. New Choices Community School*, 2009-Ohio-4608.

(3) Liability insurance for the school, as required by division (A)(11)(b) of section 3314.03 of the Revised Code, that the sponsor considers sufficient to indemnify the school's facilities, staff, and governing authority against risk;

(4) A satisfactory health and safety inspection;

(5) A satisfactory fire inspection;

(6) A valid food permit, if applicable.

Thus, by state law, a school building used or to be used by a community school is suitable for use as community school classroom space so long as the building is ostensibly able to (1) obtain a certificate of occupancy; (2) pass a health and safety inspection; (3) pass a fire inspection; (4) obtain liability insurance; and (5) obtain a food permit, if applicable.

C. State Funding of Community Schools

This matter cannot be understood outside the context of the state funding mechanism for community schools, and traditional public school districts' perception of the threat that this poses to them. Ohio's public community schools are funded through a "pass through" mechanism. In each instance where a student and his family choose to leave Cincinnati Public Schools for a community school, Ohio's school funding formula redirects approximately $5,553 from CPS, and to the community school.[20] As the Ohio Department of Education explains, "payments to community schools are deducted from the foundation payment of the school district where the community school student resides."[21]

---

[20] See Ohio Department of Education – Funding for Community Schools, available at http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=878&ContentID=2305&Content=52515. Last checked November 18, 2011. Note: the number above reflects average state foundation funding in 2010.

[21] Id.

CPS and many other school districts perceive the need defend this $5,653 per pupil by attempting to limit the number of students who attend community schools within their district. CPS and other school boards initially attacked the constitutionality of community schools and the Ohio Community Schools Act altogether. In *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, CPS and others argued that the Community Schools Act was unconstitutional, specifically alleging that "the funding method used to support community schools diverts funds from city school districts, depriving them of the ability to provide a thorough and efficient system of common schools," and that "the community schools have made urban districts more reliant on local property taxes because *when a student leaves a district for a community school, the state reduces the state funding that the district receives for the student.*"[22]

However, the Supreme Court of Ohio concluded that "[n]othing in the Constitution, however, prohibits the General Assembly from reducing funding because a school district's enrollment decreases,"[23] and accordingly, upheld the constitutionality of the Ohio Community Schools Act and charter school funding. Having lost its battle to entirely eradicate charter

---

22 *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.* (2006), 111 Ohio St.3d 568, 857 N.E.2d 1148. Emphasis added.

23 Id. (stating "If a child moves out of the district altogether, the state is permitted to reduce its funding to that child's district because state money follows the child. For example, if a child leaves a school district to attend private school, or to be schooled at home, the state is required to reduce its funding to that district. The same thing occurs when a child opts to attend a community school. R.C. 3314.08. Whenever a student leaves, for any reason, the school district's funding is decreased, and the district continues to receive state funding based on the students actually attending. Traditional schools still receive the full amount of state funds for the actual number of students enrolled." Further, "the state adjusts its level of funding to a school district based on enrollment, but the local share works differently, as a constant. The local share of funding remains the same no matter who attends the district school. If district enrollment decreases, the local share, being constant, constitutes a higher percentage of district funding. On the other hand, if district enrollment increases, the local share constitutes a lower percentage of district funding."

schools, CPS has, in recent years, turned to more subtle efforts to prohibit the aforementioned approximate $5,653 per pupil in funding from being redirected to community schools.

D. CPS Divestiture of School Buildings

In 2009, Cincinnati Public Schools was required to divest itself of nine public school buildings, and did so without first offering those buildings for sale to community schools. Many, if not all, of these school buildings, have been used as schools in the past several years, and are self-evidently suitable for use as community school classroom space.

CPS advertised *each* of the nine buildings as unavailable for use as a school, irrespective of their condition. That Advertisement prominently stated "**RESTRICTION:** Building[s] may not be used as any type of educational facility."[24] Any possibility that this restriction was related to the adequacy of these buildings for use as community schools is undermined by the facts that (1) the state has promulgated the specific facility regulations for community schools articulated above, and left no role for CPS in determining the adequacy of community school facilities; and (2) CPS has acknowledged that the buildings are suitable for schools if *it* uses them as such.

Two of the nine schools have been purchased by community school operators, despite CPS efforts to prohibit this. Bramble School, built in just 1964, was used a school until 2008.[25] It was sold without a reserve price, at absolute auction, for $250,000.[26] The CPS advertisement

---

[24] Promotional Advertisement for June 9, 2009 Auction of Cincinnati Public Schools, attached to CPS' February 10, 2010 Complaint as Exhibit 1.1.

[25] Id.; Affidavit of Lisa K. Hamm.

[26] Affidavit of Lisa K. Hamm.

of the school features pictures displaying pristine classroom and gymnasium space, and advertises the property as a "school building."[27]

Recently, that building has been purchased by Dr. Lisa K. Hamm, operator of highly-rated Cincinnati College Preparatory Academy, who opened it as a community school in August of 2011. Hamm was forced to pay $500,000 for the school, a premium of $250,000 above what the original purchaser paid at auction, because CPS prohibited her from purchasing the school building at public auction, due to her known status as a community school operator.[28]

Meanwhile, Theodore Roosevelt School is now being used as a community school. Dr. Conners was able to quickly and inexpensively purchase and rehabilitate the school.[29] He spent less than $300,000 to do so - - an amount that easily renders operating Theodore Roosevelt Community School an economically viable venture.[30]

E. Evidence of CPS Intentions

Evidence surrounding CPS' refusal to offer each of the nine school buildings to community schools, and subsequent decision to insist upon deed restrictions prohibiting their use as charter or private schools, demonstrates that concern over the actual usability of the facilities played virtually no role in the decision(s). Most prominently, *CPS itself implicitly acknowledges that these school buildings were suitable for use as classroom space when it explicitly claims the right, in the agreement of each sold school building, to reacquire the school building and use it*

---

[27] Promotional Advertisement for June 9, 2009 Auction of Cincinnati Public Schools, attached to CPS' February 10, 2010 Complaint as Exhibit 1.1.

[28] November 20, 2010 Affidavit of Dr. Lisa K. Hamm, attached hereto as Exhibit B.

[29] November 19, 2010 Affidavit of Dr. Roger Conners.

[30] Id.

as a school. That clause is contained in the last sentence of the deed restrictions CPS insisted upon at the point of sale for each of these buildings:

> Buyer agrees not to use Property for school purposes, and that the deed to the property will be restricted to prohibit future use of the Property for school purposes. **Such deed restriction shall not apply to [CPS], and will not prevent [CPS] from repurchasing any portion of the property in the future and using the Property for school purposes.**[31]

The restriction also appears in the June 30, 2009 Quit Claim Deed related to that same school building:

> Grantee covenants not to use the property for school purposes, now or at any time in the future * * * **this restriction does not apply to [CPS], and will not prevent [CPS] from repurchasing any portion of the Property in the future and using the Property for school purposes.**[32]

The deed to Bramble School, now owned by Ms. Hamm and Cincinnati College Preparatory Academy, creates the same restrictions, and the same opportunities for CPS. Concomitantly, CPS representatives have noted that "[f]rankly, we are not that keen on the idea of our buildings going for additional charter schools,"[33] and that the Cincinnati Public Schools opposes "competition" from private and community schools.[34] These latter points are reiterated in the CPS Merit Brief, where it likens itself to a private gas station operator, and Ohio's community schools to private competitors for funds.

---

[31] June 9, 2009 Purchase and Sale Agreement, attached to Plaintiff's Complaint as Exhibit 2.

[32] June 30, 2009 Quit Claim Deed, attached to Plaintiff's Complaint as Exhibit 3.

[33] August 22, 2005 statement of Cincinnati Public Schools Public Affair Officer Janet Walsh to Cincinnati Business Courier.

[34] Letter from Appellees' Counsel to CPS, attached to CPS' Complaint, citing June 3, 2009 statements of Cincinnati Public Schools Real Estate Agent Andy Kahn to Rick Voss; See also November 19, 2010 affidavit of Dr. Roger T. Conners.

STATEMENT OF THE CASE

On February 10, 2010, CPS filed its Complaint in this matter, seeking (1) a declaration that "the Restrictive Covenant included in the Deed to the Defendants is valid and enforceable;" (2) a declaration that "the Defendants may only use Property for commercial development and may not use the Property for school purposes;" (3) preliminary and permanent injunctive relief to "enjoin Defendants from taking any action in preparation for opening a school at the Property; and (4) "reasonable attorneys fees, its costs and any other relief * * *."

On February 19, 2010, Dr. Conners filed his Answer, which articulated four Affirmative Defenses to CPS' claims, amongst them a defense that the deed restriction CPS seeks to enforce is void by public policy. Soon thereafter, on March 3, 2010, Dr. Conners filed his Motion for Judgment on the Pleadings, further arguing that the deed restriction at issue is void by public policy. CPS filed a Memorandum in Opposition on March 16, 2010, and Dr. Conners a Reply on March 24, 2010.

On May 5, 2010, this Court granted the Plaintiff's Motion to consolidate Case No. A1001587 with this Case.[35] In doing so, the Court took jurisdiction over a then-pending Motion for Judgment on the Pleadings in that case, asserting that the Plaintiffs therein, Dr. Roger Conners and the Ohio Coalition for Quality Education lacked standing to pursue the matter. In doing so, the Court took notice of Plaintiffs' Response in Opposition to that Motion, and Defendants' Reply.

On May 27, 2010, this Court held a consolidated hearing on each of the two Motions for Judgment on the Pleadings. Present were counsel for all parties. Soon thereafter, on June 3,

[35] "Plaintiff" is actually a Defendant in that case, along with several others, and one of the Defendants in this case is a Plaintiff in that case.

2010, after considerable briefing of the matter, the Trial Court granted Dr. Conners Motion for Judgment on the Pleadings recognizing that the deed restriction was void by Ohio's public policies in favor of conveyance of unused public school buildings to public charter schools. Shortly thereafter, and again after considerable briefing, the Trial Court denied CPS' Motion to Stay. CPS then applied for a stay and/or injunction to the Appellate Court, and Dr. Conners responded. This application was also summarily denied.

While CPS alludes that the Trial Court may not have carefully considered the case, the Court indicated that it had carefully reviewed the considerable briefing of this issue prior to reaching its conclusion. On March 3, 2010, Dr. Conners filed a Motion for Judgment on the Pleadings that was 18 pages in length, virtually all of which was committed to the meticulous demonstration that CPS deed restriction was void by public policy.[36] On March 16, 2010, CPS filed a Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings that was 17 pages in length.[37] On March 24, 2010, Dr. Conners filed a Reply in Support of Defendants' Motion for Judgment on the Pleadings that was 13 pages in length.[38] On April 2, 2010, CPS filed a six-page Sur-Reply Brief, opposing the Motion for Judgment on the Pleadings.[39] Further, the Court held a hearing on the matter, and heard the arguments of counsel for each party. Only after this hearing, and after reviewing over 50 pages of briefings on the issue of whether CPS' deed restriction is void by public policy, did the Court issue its June 3,

---

36 Trial Court's Docket.

37 Trial Court's Docket.

38 Trial Court's Docket.

39 Trial Court's Docket.

2010 Order and Entry granting Dr. Conners' Motion for Judgment on the Pleadings. Consequently, the notion that the Trial Court's decision may have been uninformed, thoughtless, or ill-considered is an unreasonable one.

Moreover, the Appellate Court confirmed the Trial Court's ruling on the same grounds. While CPS contends that the Appellate Court concluded that "the deed restriction purportedly violates R.C. 3313.41(G)," this is simply a straw man argument - - the Court did not need to address whether the statute itself was transgressed. The truth is that the Court explicitly noted that "here, rather than bringing about a result that the state has sought to prevent, the deed restriction acts to prevent a result that the state seeks to facilitate."[40] The Appellate Court continued "despite the statute's clear indication of the state's policy preference of making classroom space available to community schools, CPS argues that public policy is not clear on the subject. * * * We conclude that the trial court properly determined that the facilitation of community schools having access to classroom space was clear Ohio public policy. And the deed restriction that sought to prevent the use of the property for educational purposes was void as against this clear policy."[41] These clear, narrow, and adept conclusions undermine CPS' "slippery slope" argument that "it is not even clear how broadly the Court of Appeals would intend for this public policy to apply."[42]

---

40 Appellate Court Decision, p. 4.

41 Id.

42 CPS Merit Brief, p. 4.

Unsurprisingly, the Appellate Court added that CPS' argument was "belied by the deed restriction itself, which allows the possibility that the restriction would not apply should CPS itself decide to use the property for school purposes in the future."[43]

ARGUMENT

Appellees' Response to Appellant's Sole Proposition of Law

CPS' deed restriction is void because it hinders and impedes Ohio's public policy in favor of transferring unused and dormant taxpayer-owned school buildings to community schools

Cincinnati Public Schools' deed restriction, restricting private schools, charter schools, and anyone other than CPS from using Theodore Roosevelt School building as a school is void by the public policy. Specifically, the restriction conflicts with a statewide public policy, manifested through statutes, in favor of conveying unused and dormant public school buildings to charter schools. Consequently, that restriction must be stricken from the contract between Dr. Conners and CPS.

In reviewing this matter, this Court must first remain cognizant that deeds are contracts, and that rudimentary contract law applies to transactions of real property. Thus, while CPS spends a considerable portion of its brief trying to convince this Court that it must take account of the knowingness and voluntariness of the deed restriction, these factors are not relevant: the voluntary and knowing nature of the Agreement only serves to show that it is *otherwise* valid. The public policy exception *then* applies to such otherwise valid contracts, to void terms that are otherwise validly agreed upon and binding.[44] CPS's deed restriction clearly cannot be enforced

---

43 Id.

44 See *Brown v. Best Products Co* (1985), 18 Ohio St.3d 32, 479 N.E.2d 852; *International Lottery Inc. v. Kerouac*, (1995), 102 Ohio App.3d 660, 657 N.E.2d 820; and *Marsh v. Lampert* (1998), 129 Ohio App.3d 685, 718 N.E.2d 997.

simply because it was voluntarily agreed upon - - by this rationale, a murder-for-hire contract would be enforceable (in the absence of criminal prohibition), so long as the putative murder and hirer had a sufficient meeting of the minds.

For much the same reason, no additional evidence was or is required in this matter - - the intent of the parties is evidenced by the contractual language.[45] One of the "cardinal rules of contract interpretation" is that a court should not "go outside the four corners of the contract to ascertain the intent of the parties when the contract language is clear and unambiguous."[46] Contract language is ambiguous if the meaning cannot be determined from the four corners of the contract, or if the contract language could be interpreted in more than one conflicting, but reasonable, way.[47] Here, there is no need to inquire into the parties' intent, because no provision of the contract is, or has been alleged to be, unclear or ambiguous. In sum, it is a matter of law whether a public policy (1) exists; and (2) voids a contract term.[48] Consequently, intentions and further evidence are irrelevant, and CPS' deed restriction can and must be judged on its face.

Finally, as it embarks on its analysis, this Court should remain mindful that deed restrictions "regarding the use of property are generally disfavored and will be strictly construed against limitation upon the free use of the property."[49]

---

[45] *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 247, 313 N.E2d 374.

[46] *Covington v. Lucia* (2003), 151 Ohio App.3d 406, 415, 784 N.E.2d 186, 191.

[47] Id.

[48] *Painter v. Graley* (1994), 70 Ohio St.3d 377, 639 N.E.2d 51, syllabus at 3, quotations omitted.

[49] *Loblaw v. Warren Plaza, Inc.* (1955), 163 Ohio St. 581, at paragraph two of the syllabus.

A. **The contractual remedy of public policy is well-established in Ohio, and its utilization is not "judicial activism."**

Appellant's Brief attempts to cast Dr. Conners' public policy claim as novel and unprecedented, asserting that the Trial Court and Court of Appeals decisions, by employing public policy, "usurp the General Assembly's legislative, policymaking authority,"[50] and constitute "judicial activism."[51] These assertions ignore reality: that a contract may not transgress public policy has been firmly-rooted in Ohio contract law for several hundred years.

First, CPS' continuous brandishing of the buzz-phrase "judicial activism" can be instantly discarded: the Supreme Court of the United States has repeatedly affirmed that "the question of whether a contract is contrary to public policy is 'ultimately one for resolution by the courts."[52] So deeply ingrained is this judicial authority that nearly 200 years ago, the Ohio Supreme Court explained that "the right of making contracts at pleasure is a personal privilege of great value, and ought not to be slightly restrained; but it must be restrained where contracts are attempted against the public law, general policy, or public justice."[53] The Court still holds fast to this principle, observing that "[l]iberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare. * * * [t]he public welfare is safeguarded, not

---

50 CPS Merit Brief, p. 2.

51 Id., p. 6.

52 See W.R. Grace & Co., 461 U.S. at 766, 103 S.Ct. 2177.

53 *Key v. Vattier* (1823), 1 Ohio 132, *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 184-185, 34 O.O. 73, 74, 70 N.E.2d 447, 448; *John Hancock Mut. Life Ins. Co. v. Hicks* (1931), 43 Ohio App. 242, 247, 183 N.E. 93, 95.

only by Constitutions, statutes, and judicial decisions, but by sound and substantial public policies underlying all of them."[54]

Thus, traditionally, contract terms that violate public policy may not be enforced by Ohio courts. Over 110 years ago, this Court defined "public policy" to mean the following:

> Public policy is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like. Again, public policy is that principle of law which holds that **no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.** Moreover, actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations.[55]

Thus, Ohio's traditional understanding and application of public policy is in accordance with the United States Supreme Court's expressions on the matter: "the public's interest in confining the scope *of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.*[56]

These well-established principles of law clearly negate CPS assertions of "judicial activism" and "novelty." Moreover, they defang the repeated mantra that a contract term cannot

---

54 *J.F. v. D.B.* (2007), 116 Ohio St.3d 363, 879 N.E.2d 740, 2007 Ohio 6750, citing *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney* (1916), 95 Ohio St. 64, 115 N.E. 505. Note also, the that three dissenting justices in *J.F.* displayed the desire to nullify contract terms against public polices as broad as "safeguarding children." (Cupp, dissenting).

55 *Eagle v. Fred Martin Motor Co.* (2004) 157 Ohio App.3d 150 809 N.E.2d 1161 (quoting *King v. King* (1900), 63 Ohio St. 363, 372, 59 N.E. 111).

56 *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.* (1987), 484 U.S. 29, 108 S.Ct. 364, citing *W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983); *Hurd v. Hodge,* 334 U.S. 24, 34-35, 68 S.Ct. 847, 852-853, 92 L.Ed. 1187 (1948); *McMullen v. Hoffman,* 174 U.S. 639, 654-655, 19 S.Ct. 839, 845, 43 L.Ed. 1117 (1899); *Twin City Pipe Line Co. v. Harding Glass Co.,* 283 U.S. 353, 356-358, 51 S.Ct. 476, 477-478, 75 L.Ed. 1112 (1931).

be voided unless it transgresses the explicit terms of a statute (CPS maintains that the General Assembly's failure to explicitly envision and prohibit these pernicious deed restrictions opens and closes the matter).[57] Quite conversely, the above demonstrates that contract terms may be void where they afflict "public justice," "the community common sense and common conscience," and most importantly here "substantial public policies underlying [Ohio statutes]."

Further, the standard CPS seeks to advance ignores that "no one can lawfully do that which has a tendency to be injurious to the public * * * or bring about results that the law seeks to prevent." Consequently, this Court should maintain little hesitation regarding its capacity to ascertain and apply the public policy exemption to contract terms. And when reviewing that statutes that comprise the policy at issue in this case, this Court must ultimately answer the following question: what else could the legislature have possibly intended, other than to promote conveyance of underutilized public school buildings to community schools?

B. The public's interest in confining the scope of an agreement is heightened when the contract is not between purely private parties, but, as here, public entities clothed in the public interest.

CPS briefs this matter as though it were a private business operating with its own funds, and as though this were a purely private transaction, with no public implications. When applying public policy to the contract term at issue here, this Court must engage the issue with heightened review because this contract cannot be properly characterized as private: (1) one of the parties is a political subdivision acting on behalf of its citizens; (2) the transaction at issue must be conducted pursuant to the public interest objective of providing public education; and (3) boards of education clearly do not possess the same fundamental contractual rights that private parties maintain.

---

[57] CPS Merit Brief, p. 6.

i. CPS is a state actor, empowered only to advance the public interest in Ohio.

Unsurprisingly, every case that CPS cites to support its overly-narrow reading of the public policy doctrine involves purely private parties.[58] However, CPS is a state actor carrying out a public function, rather than a private party. Section 2, Article VI of Ohio's Constitution requires the Ohio General Assembly to "secure a thorough and efficient system of common schools throughout the State." Meanwhile, CPS and other schools districts are purely a creature of positive law: they arise from Section 3, Article VI of Ohio's Constitution, which requires the General Assembly to provide for "the organization, administration and control of the public school system of the state supported by public funds." Thus, CPS was created by the state to assist in organizing and administering Ohio's system of common schools.

CPS predicates the defense of its pernicious deed restriction on the hope that a court may overlook such a distinction: it likens itself to a privately-owned gas station that may "protect its own property interest" by deed restricting property it sells from being used by other gas stations.[59] CPS apparently needs to be reminded that it is neither a private individual nor a private business: it is a taxpayer supported entity that enjoys state-conferred monopoly status, and is in the "business" of *public education*. Moreover, such an entity has no business targeting the state's program of education, i.e. community schools, as "competing"[60] - - public school districts and community schools are akin to siblings in the same family, the state's program of public education, rather than bitterly-competitive private business rivals: as the law itself states:

---

[58] See CPS Brief, p. 8, footnote 18, citing seven cases between purely private parties for the proposition that no "overwhelming public policy concern" was present in those cases.

[59] See CPS Merit Brief, p. 12.

[60] See CPS Merit Brief, p. 12.

"[a] community school created under this chapter is a public school, *independent of any school district, and is part of the state's program of education.*"[61]

ii. CPS must contract subject to the public interest.

Next, CPS relies on precedent where there was no finding of a public interest, public effect, or injury to the public.[62] However, CPS operates in a field of great public interest. Through the "public interest doctrine," Courts more stringently apply public policy when the contract term in dispute is "amongst those affected with a public interest," such as those in "a business of the type generally thought suitable for public regulation," or "performing a service of great importance to the public."[63] Given the requirements of Article VI of the Ohio Constitution, the provision of public education is quite clearly such a field. Public education, boards of education, and contracts they make must serve a public interest - - they exist to benefit Ohio's parents, children, taxpayers, and the public in general. This reality squares with the very purpose of the public policy exception to contract enforcement: "the public's interest in confining the scope of private agreements to which is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements."[64]

Accordingly, Ohio courts have affirmed that while a "board of education of each school district is capable of contracting and being contracted with," at the same time, it "has a duty to

---

61 R.C. 3314.01(B). (Emphasis added).

62 See CPS Merit Brief, p.8, citing, respectively *Chickerneo v. Society Nat. Bank of Cleveland* (1979), 58 Ohio St. 3d 315; *Lamont Building Co. v. Court* (1946), 147 Ohio St.183; *Dixon v. Van Sweringen Co* (1929), 121 Ohio St. 56.

63 See *Tunkl v. Regents of University of Cal.* (1963), 60 Cal.2d 92, 383 P.2d 441.

64 *United Paperworkers Union Intern.*, supra.

manage the schools in the public interest."[65] For this reason, Ohio courts have been vigilant in voiding terms of school district contracts that fail to take account of the public interest. For instance, in *Xenia City Bd. Of Ed.*, the court concluded that a contract term dictating that "each new employment contract could eventually be written by arbitrators in perpetuity upon an impasse being reached in negotiations for each new employment contract * * * is contrary to public policy."[66] Thus, because CPS represents parents, children, and taxpayers when it contracts, and contracts regarding the important public interest of providing public education, this Court must employ heightened scrutiny when determining whether term of adhesion contained in CPS contracts, such as the deed restriction here, violate public policy.

iii. CPS does not enjoy an absolute fundamental right to contract.

Surprisingly, CPS contends that "boards of public school districts enjoy the fundamental right and discretion to enter into contracts * * * for the benefit of their districts."[67] While "the fundamental right to contract" that CPS alludes to is rightfully entrenched in our history and worthy of respect, it is an *individual* right - - a right of private individuals and entities to contract free from government interference. Political subdivisions simply do not have fundamental rights. And this is true of CPS' authority to contract: the source of this authority is not natural law, but instead a statute: R.C. 3313.17. As such, this statutory authority must always be exercised in harmony with other Ohio public policies.

---

65 *Xenia City Bd. of Ed. v. Xenia Ed. Ass'n*, 52 Ohio App.2d 373, 370 N.E.2d 756.

66 Id., at 377.

67 CPS Merit Brief, p. 11.

In fact, the Supreme Court of Ohio has explicitly dispensed with the notion that school districts have a freedom of contract that is on equal footing with that of individuals:

> Clearly, the General assembly possesses the power to prescribe the system of education which shall prevail throughout the state, and in pursuance of such authority may direct those agencies created by it, viz., the various boards of education, to enter into continuing contracts with qualified teachers, terminable for cause. Such legislation has uniformly been held not to offend constitutional inhibitions against interference with the freedom of contract.[68]

Thus, CPS contracts at the pleasure of the state and its policies, not as a matter of fundamental right or natural law. Accordingly, this Court must employ heightened scrutiny when determining whether term of adhesion contained in CPS contracts, such as the deed restriction here, violate public policy, rather than defer to CPS' fabricated "fundamental right of a public school board to contract."

C. A contact term is void by public policy, and therefore unenforceable, when it seeks to suppress, hinder, or impede a result that an Ohio statute seeks to create.

Deed restrictions are void by public policy when they hinder or impede a result that a statute seeks to bring about. In one prominent example, the United States Supreme Court considered the propriety of a deed restriction in a case where "the plaintiffs ask[ed] to enjoin white property owners who [were] desirous of selling their houses to Negro buyers simply because the houses were subject to an original agreement not to have them pass into Negro ownership."[69] In refusing to enforce the racially-restrictive covenant, the Court reasoned as follows:

---

68 *State ex rel. Bishop v. Board of Ed. of Mt. Orab Village School Dist., Brown County* (1942), 139 Ohio St. 427, 40 N.E.2d 91. See also *Ratcliff v. Dick Johnson School Tp.*, 204 Ind. 525, 185 N.E. 143; 110 A.L.R. 792.

69 *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948).

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.[70]

Further, deed restrictions prohibiting use of property for activities that the state encourages, such as education or care for the handicapped, are commonly void. Recently, a highly analogous Michigan case adjudicated the propriety of a deed restriction that prohibited the use of property as housing for the mentally disabled. In *McMillan v. Iserman,* a Michigan appellate court applied state contract law to conclude that because Michigan statutes favored "the development and maintenance of quality programs and facilities for the care and treatment of the mentally handicapped,"[71] the deed restriction was void. The Court further noted that the "deed restriction here, *specifically prohibiting state-licensed residential facilities for the mentally handicapped*, is manifestly against the public interest and thus unenforceable on public policy grounds."[72]

With respect to education, in *Clifton George Co. v. Great Southern Life Ins. Co.,*[73] a Texas court held that a deed restriction against commercial use was unenforceable against the use of property to operate a for-profit school.[74] The court reasoned that such a restriction would

---

[70] Id., at 34, 35.

[71] *McMillan v. Iserman* 120 Mich.App. 785, 327 N.W.2d 559 Mich.App.,1982 (quoting *Bellarmine Hills Ass'n v. The Residential Systems Co.,* 84 Mich.App. 554, 558, 269 N.W.2d 673 (1978), *lv. den.* 405 Mich. 836 (1979)).

[72] Id., at 564. Emphasis added.

[73] (Tex.App. 1923), 247 S.W. 912.

[74] Id., at 914.

violate Texas public policy of *encouraging education.*[75] Another Texas court of appeals applied *Clifton George* to reason that a restrictive covenant against using property for business purposes was void per public policy when applied to a teacher who used the property to operate a day school.[76]

Finally, *this* Court has explicitly held that "while the owners may so contract as to control private business, * * * restrictive covenants in deeds or a general plan for the improvement of an allotment cannot be construed to prevent the use of the lots for public purposes."[77] Such a public purpose cannot be defeated by "only a mere act of conveyancing."[78] Thus, any deed restriction that attempts to do so "is clearly against public policy, and is therefore illegal and void."[79] This legal conclusion is supported by sound reasoning: private owners could otherwise essentially extinguish the state's capacity to meet its obligation of providing for a thorough and efficient education through community schools, even though "[a] community school created under this chapter is a public school, *independent of any school district, and is part of the state's program of education.*"[80]

Even if this Court were to ignore the rules above, general principles of public policy still wield force when applied here: Ohio courts have commonly applied public policy in a myriad of

---

[75] Id.

[76] *Bryan v. Darlington* (Tex.Civ.App. 1947), 207 S.W.2d 681, 682, 1947 Tex. App. LEXIS 1040.

[77] *Doan v. Cleveland Short Line RY. CO.* (1915), 92 Ohio St. 461, 112 N.E. 505, 13 Ohio Law Rep. 173, 13 Ohio Law Rep. 575.

[78] Id.

[79] Id.

[80] R.C. 3314.01(B). (Emphasis added).

contexts, well beyond the limited contexts that CPS specified in its brief.[81] In the process, Ohio's courts have articulated somewhat discrepantly-worded tests to describe when a contract term is void by public policy.

Recently, in *Grange Mut. Cas. Co. v. Lindsey,* the Supreme Court of Ohio found a contract term void by public policy because it was "*in derogation of the public policy and purpose* of a statute."[82] In *Eagle v. Fred Martin Motor Co.,* the court found a contract term to violate public policy because it was "injurious to the interests of the State."[83] More specifically, the court ruled that a confidential arbitration agreement for a dispute covered by the Consumer Sales Practices Act ("CSPA") was against public policy.[84] The court determined that, because the Ohio General Assembly enacted the CSPA, it intended to "helps society become aware of unfair business acts and practices."[85] Since enforcing the contract would work against this state interest, the court determined that the confidentiality agreement violated Ohio's public policy and could not be enforced.[86]

The *Eagle* Court articulated several further guideposts for Ohio courts to rely upon when assessing a contractual term against public policy: the court, attempting to summarize past Ohio

---

[81] See CPS Brief, p. 9 (arguing that public policy has no application beyond discrimination, the right to marry, or contracts injurious to health or safety).

[82] *Grange Mut. Cas. Co. v. Lindsey* (1986) 22 Ohio St.3d 153 at 155, 489 N.E.2d 281. See also *State Farm Mutual Insurance Co. v. Grace* (2009) 123 Ohio St.3d 471, 476, 918 N.E.2d 135 (recognizing that later legislation superseded the result in *Grange*).

[83] *Eagle v. Fred Martin Motor Co.* 157 Ohio App.3d 150 809 N.E.2d 1161.

[84] Id.

[85] Id.

[86] Id.

precedent, reasoned that the particular term before it was void because it (1) impeded functions set forth in Ohio law; (2) brought about a result that Ohio law sought to prevent; and (3) directly hindered the purpose of an Ohio statute.[87]

Finally, even broader articulations of when a contract term is void by public policy can be found in earlier Ohio decisions. In *Dixon v. Van Sweringen Co.,* the Supreme Court of Ohio explained that a term is void when it "violate[s] 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.*"[88] In *Key v. Vattier*, the Supreme Court of Ohio voided a term because it was "against the public law, general policy, or public justice."[89]

Amongst all of these slightly differing rules, two firm principles of law can be discerned: (1) deed restrictions are disfavored, as against public policy, when they are used to prohibit public services the state tries to encourage, such as education; and (2) a contact term is void by public policy, and therefore unenforceable, when it seeks to suppress, hinder, or impede the spirit an Ohio enactment, or the a result that an Ohio statute seeks to create.

---

[87] *Eagle,* supra. (voiding a contract term for "impeding the remedial function of the CSPA," because it "brings about a result that the CSPA seeks to prevent," and because it "directly hinders the consumer protection purposes of the CSPA), citing *Crye v. Smolak* 110 Ohio App.3d 504, 512, 674 N.E.2d 779 and *Thomas v. Sun Furniture and Appliance Co.,* 61 Ohio App.2d 78, 81, 399 N.E.2d 567.

[88] *Dixon v. Van Sweringen Co.,* (1929), 121 Ohio St. 56, 166 N.E. 887.

[89] *Key v. Vattier* (1823), 1 Ohio 132; *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 184-185, 70 N.E.2d 447; *John Hancock Mut. Life Ins. Co. v. Hicks* (1931), 43 Ohio App. 242, 247, 183 N.E. 93.

D. Ohio maintains a public policy in favor of facilitating community school acquisition of public school buildings.

CPS attempts to sway this Court by advancing the absurd and false notions that Dr. Conners has asked for, and the Appellate Court has declared a "broad view of favoritism for charter schools against public schools,"[90] "a new overbroad public policy,"[91] "a broad public policy of unequivocal support for charter schools,"[92] and "public policy in favor of charter schools."[93] These bold assertions come on the heels of similar assertions in its initial appeal, where CPS asserted that the Courts had declared "an overarching public policy in favor of unlimited school choice;" "new non-statutory rights to charter schools... and new severe restrictions upon CPS' statutory right to negotiate contracts;" and in doing so has "usurped the policymaking legislative role."[94]

Instead, the deed restriction prohibiting Roosevelt school from being used as a school, unless so used by CPS, directly hinders the results that are sought to be created by R.C. 3313.41, R.C. 3313.411, R.C. 3318.08, R.C. 3318.50, R.C. 3318.52 and the Ohio Community Schools Act, i.e. getting unused, taxpayer-owned school buildings into the hands of community schools who will use the building to provide school choice for largely underprivileged youth. The clear rationale underlying these statutes is to facilitate the growth of school choice and educational opportunities through community schools, and since this is done by creating legal entitlements to

---

[90] CPS MERIT BRIEF, P. 13.

[91] Id., at p. 1.

[92] Id., at p. 1.

[93] Id., at p. 4.

[94] Appellant's Brief, pp. 9-11.

the acquisition of public school buildings, there is a public policy in favor of transferring taxpayer-owned school buildings to charter schools for their use as schools.[95]

First, R.C. 3318.08(U) specifically conditions Ohio Schools Facility Commission funding on (1) a school district board's notification of "the Ohio Community Schools Association when the board plans to dispose of facilities by sale * * *;" and (2) compliance with R.C. 3313.41. R.C. 3313.41 is entitled "sale or donation of real or personal property," and governs school districts' discretionary sale of school buildings. R.C. 3313.41(G)(1) requires that, prior to a school district disposing of a school building, "it shall offer that property for sale to the governing authorities of the start-up community schools established under R.C. 3314 * * * at a price that is not higher than the appraised fair market value of the property." That same section only allows the school district to sell the school building to a party other than a community school "if no community school governing authority accepts the offer within sixty days * * *."

Meanwhile, R.C. 3313.41(G)(2) actually *forces* school districts to offer school buildings for sale to charter schools: when a school district has not used real property suitable for classroom space for one year, and has no plans for using the property, "it *shall* offer that property for sale to the governing authorities of the start-up community schools * * * located within the territory of the school district," and, again, must do so at "not higher than the appraised fair market value of that property."

R.C. 3313.411, enacted after the initiation of this litigation, and effective as of June 30, 2011 (after the Appellate Court's ruling) only further establishes Ohio's policy in favor of conveying unused public school buildings to community schools. First, it dispenses with the qualification that real property must be "suitable for use as classroom space" before it *must* be

offered for sale to community schools under R.C. 3313.41(G)(1) or (G)(2). Instead, it requires that *any* real property that has been used for academic instruction, but has not been used in that capacity for at least two years, must be offered for sale or lease to community schools.[96] As above, public school districts may not charge above fair market value when selling or leasing this property,[97] and may only sell to an entity other than a community school after sixty days has passed.[98] Thus, the General Assembly continues to strengthen and clarify the policy that any school building owned by public school districts, and not used for academic instruction, should be conveyed to community schools whenever possible - - a policy fundamentally at odds with the CPS deed restriction.

Beyond requiring the conveyance of unused school buildings to community schools, the state of Ohio also gains, financially, when community schools acquire suitable facilities, such as former school buildings, and loses when less suitable facilities must be converted. The state has established the "Community School Classroom Facilities Loan Guarantee Program" and the "Community School Classroom Facilities Loan Guarantee Fund" to help charter schools acquire school buildings at a lower cost.[99] The program supplies funds to charter schools to assist them with "acquiring, improving, or replacing classroom facilities for the community school by lease, purchase, remodeling of existing facilities, or any other means including new construction."[100]

---

[96] See R.C. 3313.411(A), (B).

[97] See. R.C. 3313.411(B)(1).

[98] See R.C. 3313.411(B)(5).

[99] R.C. 3318.50; R.C. 3318.52.

[100] R.C. 3318.50(B).

The more frequently that charter schools can acquire traditional school buildings, the more Ohio's taxpayers save on renovation costs.

This case is not about whether CPS has complied with some of the above statutes (although it certainly has not: none of the nine schools CPS sought to auction in 2009, which includes Roosevelt School, were offered to community schools prior to the deed restricted offers of sale to the general public). This case *is* about the rationale underlying these statutes: the state of Ohio has evidenced a clear desire to get unused taxpayer-owned school buildings into the hands of charter schools, which are "part of the state's program of education,"[101] so that those charter schools can use them as educational facilities. In aggregate, these statutes reflect a state policy and legislative will to (1) *require* boards of education to sell under-utilized school buildings to community schools so that community schools can use them as classroom space; (2) suppress the price that boards of education may charge community schools for public school buildings; (3) hold community schools' window of opportunity to purchase (essentially a "right of first refusal") open for a lengthy period (60 days); (4) financially assist community schools with the acquisition of school buildings.

These policies operate with the tacit acknowledgement that cost-effective acquisition of a suitable school building is the preeminent factor in determining whether a community school sprouts up to bring a new opportunity to Ohio's children. Ron Adler, President of the Ohio Coalition for Quality Education, a non-profit organization dedicated to advancing school choice through community schools, observes that "the ability to acquire an appropriate facility is the most serious challenge that community schools face in Ohio," and "former public school

---

101 R.C. 3314.01(B). (Emphasis added).

buildings are ideal facilities for use as community schools."[102] Using a former public school building as a community school, even if some renovation is required is still "much less [expensive] than the cost of attempting to renovate a building that was not previously a school."[103]

Thus, deed restrictions of the type CPS insists upon render it less likely that a particular community school can, would, or will open in the City of Cincinnati. And of course, CPS acknowledges that this is the very purpose of deed restriction: protecting "its" funding by excluding "competition." Moreover, given that the State of Ohio is statutorily responsible, under R.C. 3318.50 and R.C. 3318.52, for providing funding and other financial assistance to community schools' acquisition and/or renovation of facilities, CPS deed restrictions, by driving up the costs of acquiring and preparing such facilities for community school educators, only drives up the cost for the State of Ohio and its taxpayers. Nothing could more clearly impede and hinder the purpose of defraying the cost of community school facility acquisition than driving up its cost.

Further, derogation from these policies only serves to waste funds that would otherwise be available for educating the children of Ohio. For instance, Cincinnati College Preparatory Academy purchased Bramble School, another CPS school building deed-restricted at the same time as Roosevelt School, for $500,000.[104] This was only after it was forbidden from bidding on the school, standing by as a third party that was not a community school purchased the property

---

102 November 20, 2010 Affidavit of Ron Adler, Paragraphs 4, 5.

103 November 22, 2010 Affidavit of Lisa K. Hamm, Paragraph 24.

104 November 22, 2010 Affidavit of Ron Adler, Paragraphs 4-7; November 22, 2010 Affidavit of Lisa K. Hamm, Paragraphs 20-26.

for $250,000, and then "flipped" the property to CCPA for double the price. This $250,000 could have been applied to the public education of Ohio's children, but was instead collected by a shrewd private investor.

This $250,000 could also have been contributed CPS' treasury, for the benefit educating the school district's children or relieving its taxpayers, rather than having been contributed to the bottom line of a third party. Likewise, the record reflects that Dr. Conners was willing to pay up to $200,000 for Roosevelt School, but because no other schools bid on the deed-restricted school building, he was able to acquire the building for just $30,000. Thus, between just *these two* school buildings, the CPS deed restrictions resulted in the squandering of $420,000 in public funds that could have been used to educate children or relieve taxpayers. This is an entirely foreseeable result of such a deed restriction: if one cannot use a property for its highest and best use, in this case, as a school, it is worth considerably less on the open market. In fact, CPS even admits that its deed restriction resulted in the sale of "the property for $30,000, even though the appraised value of the building exceeded $250,000."[105]

In its last public policy case, this Court found "a lack of a declared public policy for or against surrogacy contracts," and concluded "as far as we can tell, neither the General Assembly nor any other governmental body in Ohio has ever enunciated a public policy concerning gestational surrogates."[106] Given the statues above, nothing could be further from the truth here: the Ohio General Assembly quite obviously would have banned such deed restrictions, if only it could have imagined that one of its school districts would engage in such counterproductive behavior.

---

[105] CPS Merit Brief, p. 3.

[106] *J.F. v. D.B.* (2007), 116 Ohio St.3d 363, 879 N.E.2d 740.

CPS' deed restriction is in derogation of, and impedes and hinders each of the policies embraced by the statutes above. In fact, it seeks to prohibit the very things that these policies seek to create: the acquisition of a preexisting public school building at a reasonable cost, so that it may be used as a charter school. Accordingly, the deed restriction prohibiting Roosevelt's use as a school, alongside CPS' system-wide policy of denying purchasers from using public school buildings as alternative schools, is void by public policy, and may not be enforced. Since enforcement of this void deed restriction is precisely what CPS seeks, it can prove no set of facts in support of its claim that would entitle it to relief, and the Trial and Appellate Courts' astute conclusions must be upheld.

E. The CPS deed restrictions impede Ohio's public policy in favor of effectuating parental choice and educational opportunity through community schools.

This is anything but an innocuous discussion of facilities acquisition, detached from real-world consequences: increasing barriers to entry into the educational marketplace is an affront to the very core of that which the Ohio Community Schools Act seeks to accomplish. Put another way, by arbitrarily limiting community schools' capacity to acquire and use taxpayer-owned school buildings as schools, CPS' deed restriction creates barriers, or at minimum increases costs, to opening a community school. This artificially diminishes the number of community schools available in Cincinnati to serve the states' avowed purposes for them: supplying educational options and opportunities in diverse settings.

Indeed, the explicit purpose that community schools were created to serve is suppressed, hindered, and impeded by the CPS deed restrictions. Through enacting the Ohio Community Schools Act, the Ohio General Assembly declared that the purpose of the Act includes "providing parents a choice of academic environments for their children and providing the

education community with the opportunity to establish limited experimental educational programs in a deregulated setting."[107] The legislative declaration of the Act's purposes, including "choice" for parents and students and "opportunity" for the educational community,[108] display that the OCSA and community schools exist to enhance, through school choice, the general welfare of parents, children, and all Ohioans. The Supreme Court of Ohio has further elaborated on the policy behind the act, and community schools:

> [t]o achieve the goal of improving and customizing public education programs, the General Assembly has augmented the state's public school system with public community schools. The expressed legislative intent is to provide a chance of educational success for students who may be better served in their educational needs in alternative settings.[109]

Axiomatically, it must be financially feasible to open, if community schools are to achieve these purposes of (1) "improving and customizing public education programs;" (2) providing "a chance of educational success for students who may be better served in their educational needs in an alternative setting;" (3) "providing parents a choice of academic environments for their children;" and (4) "providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting." It is further self-evident that this financial feasibility depends largely on the opportunity to acquire a school building at a reasonable cost.

To the extent that CPS deed restrictions impair the very likelihood that a charter school may open in Cincinnati, they impair the purposes of the OCSA itself. Here in particular, CPS

---

107 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. (emphasis added).

108 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043.

109 *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.* (2006), 111 Ohio St.3d 568, 857 N.E.2d 1148.

seeks to close down a community school providing a unique educational opportunity that over 200 disadvantaged students have already chosen to pursue. And one can easily see why. While CPS schools most closely geographically situated to Roosevelt School are all in "academic emergency," Roosevelt School offers exactly what is envisions by the OCSA: a non-traditional curriculum focused on individual attention, technology, and a uniquely safe environment. Consequently, the deed restriction is void by public policy and therefore unenforceable because it is an affront to the growth of the very choice and opportunity that the OCSA seeks to effectuate.

F. Once the deed restriction is stricken, the conveyance must remain otherwise intact.

In upholding the Trial and Appellate Courts' sound conclusions that the deed restriction is void by public policy, this Court must then tailor its ruling to renders such deed restrictions inoperative while preserving the conveyance of the property: compelling precedent, policy reasons, and applicable contract terms dictate that the voiding of a contract term, due to public policy, does not void the entire contract. First, where a deed restriction is void, it would be antithetical to the voiding of the restriction to void the conveyance of the property. For instance in both *Hurd v. Hodge* and *McMillan v. Iserman*, *supra*, the courts abstained from invalidating the conveyance of the properties to those who sought to use them in ways that initially violated the deed restrictions.

The rationale for doing so is clear: if the party who seeks to unlawfully restrict a use can prevent the purchaser who desires that same use from continuing to *possess* the property, then it can prevent the use *de facto*, by simply having a court entirely divest the purchaser of the property. In *Hurd,* for example, this would have meant that African-Americans would have been divested of their interests in property containing racially restrictive covenants - - a result that

would have accomplished the *very purpose* of denying African-Americans access to the property. In fact, the District Court in that case tried to do just that,[110] prompting the United States Supreme Court to hold that the District Court's order (divesting the African Americans of title based on the racial restriction) "could not stand."[111]

This rationale clearly applies to this case: if this Court were to void the entire transaction, then CPS will reap the full benefit of its unlawful deed restriction, for it will have prevented Dr. Conners from using the property for school purposes. Moreover, in the future, CPS could simply continue to use the restriction without concern for consequences: if the deed restriction is upheld, the property is not used as a school, while if the deed restriction is stricken, any party who seeks to use the property for a charter school is divested of title before it may do so.

Ohio precedent also squarely addresses the matter. In *Xenia City Bd. of Ed. v. Xenia Ed. Ass'n*, the Court struck, as violative of public policy, several terms from a collective bargaining agreement between the school district and its union. In doing so, it explicitly left the remainder of the contract intact.[112] And in *Suesskind v. Wilson* , this Court emphasized that promises which can be separated from the illegality of a contract should remain valid.[113]

---

110 (1948) 334 U.S. 24, 68 S.Ct. 847.

111 Id. at 34, 68 S.Ct. 852. See also *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836 (upholding conveyance when racially-restrictive deed restriction is held violative of public policy).

112 See *Xenia City Bd. of Ed. v. Xenia Ed. Ass'n*, 52 Ohio App.2d 373, 370 N.E.2d 756.

113 *Suesskind v. Wilson* (1931) 124 Ohio St. 54, 176 N.E. 889; *Preston v. First Bank of Marietta* (1983), 16 Ohio App.3d 4, 473 N.E.2d 1210

In any event, the conveyance must be upheld because the Purchase and Sale Agreement between Dr. Conners and CPS contains a severability clause. Specifically, Section 18(E) of the Agreement, page seven, states as follows:

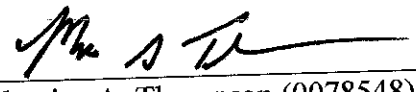
> In case one or more of the provisions contained in this agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision(s) had never been contained.[114]

Accordingly, upon striking the invalid deed restriction, the remainder of the conveyance to Dr. Conners must stand.

CONCLUSION

For the foregoing reasons, Cincinnati Public Schools' Complaint for enforcement of its deed restriction fails to state a viable claim because the deed restriction is void by public policy, and may not be enforced. The well-justified decision of the trial and appellate courts must be upheld.

Respectfully submitted,

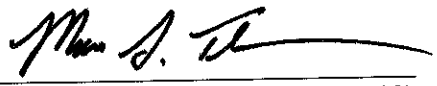


Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State St.
Columbus, Ohio 43215
Tel: (614) 940-9817
Fax: (614) 365-9564
Email: mthompson@OhioConstitution.org

[114] CPS attached the Purchase and Sale Agreement to its Complaint as "Exhibit 2," and it is therefore part of the record in this case.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the parties specified below this 18th day of November, 2011.



Maurice A. Thompson (0078548)

Douglas R. Dennis (0065706)
Frost Brown Todd LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Tel: (513) 651-6727
Fax: (513) 651-6981
DDennis@ftblaw.com
Counsel for Appellants

Mark Landes (0027227)
Isaac, Brant, Ledmon & Teetor, LLP
250 E. Broad, Suite 900
Columbus, OH 43215
Tel: (614) 221-2121
Fax: (614) 365-9616
ML@IsaacBrant.com

APPENDIX

Page's Ohio Revised Code Annotated:
Copyright (c) 2011 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 49
*** Annotations current through July 22, 2011 ***
The provisions of 2011 HB 194 are not yet in effect as they are subject
to a referendum upon verification of petition signatures

TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3313. BOARDS OF EDUCATION
MISCELLANEOUS POWERS AND DUTIES

Go to the Ohio Code Archive Directory

ORC Ann. 3313.41 (2011)

§ 3313.41. Disposal of real or personal property; exchange or acquisition of real property

(A) Except as provided in divisions (C), (D), (F), and (G) of this section, when a board of education decides to dispose of real or personal property that it owns in its corporate capacity and that exceeds in value ten thousand dollars, it shall sell the property at public auction, after giving at least thirty days' notice of the auction by publication in a newspaper of general circulation in the school district, by publication as provided in section 7.16 of the Revised Code, or by posting notices in five of the most public places in the school district in which the property, if it is real property, is situated, or, if it is personal property, in the school district of the board of education that owns the property. The board may offer real property for sale as an entire tract or in parcels.

(B) When the board of education has offered real or personal property for sale at public auction at least once pursuant to division (A) of this section, and the property has not been sold, the board may sell it at a private sale. Regardless of how it was offered at public auction, at a private sale, the board shall, as it considers best, sell real property as an entire tract or in parcels, and personal property in a single lot or in several lots.

(C) If a board of education decides to dispose of real or personal property that it owns in its corporate capacity and that exceeds in value ten thousand dollars, it may sell the property to the adjutant general; to any subdivision or taxing authority as respectively defined in divisions (A) and (C) of section 5705.01 of the Revised Code, township park district, board of park commissioners established under Chapter 755. of the Revised Code, or park district established under Chapter 1545. of the Revised Code; to a wholly or partially tax-supported university, university branch, or college; or to the board of trustees of a school district library, upon such terms as are agreed upon. The sale of real or personal property to the board of trustees of a school district library is limited, in the case of real property, to a school district library within whose boundaries the real property is situated, or, in the case of personal property, to a school district library whose boundaries lie in whole or in part within the school district of the selling board of education.

(D) When a board of education decides to trade as a part or an entire consideration, an item of personal property on the purchase price of an item of similar personal property, it may trade the same upon such terms as are agreed upon by the parties to the trade.

(E) The president and the treasurer of the board of education shall execute and deliver deeds or other necessary instruments of conveyance to complete any sale or trade under this section.

(F) When a board of education has identified a parcel of real property that it determines is needed for school purposes, the board may, upon a majority vote of the members of the board, acquire that property by exchanging real prop-

erty that the board owns in its corporate capacity for the identified real property or by using real property that the board owns in its corporate capacity as part or an entire consideration for the purchase price of the identified real property. Any exchange or acquisition made pursuant to this division shall be made by a conveyance executed by the president and the treasurer of the board.

(G) When a school district board of education decides to dispose of real property , prior to disposing of that property under divisions (A) to (F) of this section, it shall first offer that property for sale to the governing authorities of the start-up community schools established under Chapter 3314. of the Revised Code located within the territory of the school district, at a price that is not higher than the appraised fair market value of that property. If more than one community school governing authority accepts the offer made by the school district board, the board shall sell the property to the governing authority that accepted the offer first in time. If no community school governing authority accepts the offer within sixty days after the offer is made by the school district board, the board may dispose of the property in the applicable manner prescribed under divisions (A) to (F) of this section.

(H) When a school district board of education has property that the board, by resolution, finds is not needed for school district use, is obsolete, or is unfit for the use for which it was acquired, the board may donate that property in accordance with this division if the fair market value of the property is, in the opinion of the board, two thousand five hundred dollars or less.

The property may be donated to an eligible nonprofit organization that is located in this state and is exempt from federal income taxation pursuant to 26 U.S.C. 501(a) and (c)(3). Before donating any property under this division, the board shall adopt a resolution expressing its intent to make unneeded, obsolete, or unfit-for-use school district property available to these organizations. The resolution shall include guidelines and procedures the board considers to be necessary to implement the donation program and shall indicate whether the school district will conduct the donation program or the board will contract with a representative to conduct it. If a representative is known when the resolution is adopted, the resolution shall provide contact information such as the representative's name, address, and telephone number.

The resolution shall include within its procedures a requirement that any nonprofit organization desiring to obtain donated property under this division shall submit a written notice to the board or its representative. The written notice shall include evidence that the organization is a nonprofit organization that is located in this state and is exempt from federal income taxation pursuant to 26 U.S.C. 501(a) and (c)(3); a description of the organization's primary purpose; a description of the type or types of property the organization needs; and the name, address, and telephone number of a person designated by the organization's governing board to receive donated property and to serve as its agent.

After adoption of the resolution, the board shall publish, in a newspaper of general circulation in the school district or as provided in section 7.16 of the Revised Code, notice of its intent to donate unneeded, obsolete, or unfit-for-use school district property to eligible nonprofit organizations. The notice shall include a summary of the information provided in the resolution and shall be published twice. The second notice shall be published not less than ten nor more than twenty days after the previous notice. A similar notice also shall be posted continually in the board's office . If the school district maintains a web site on the internet, the notice shall be posted continually at that web site.

The board or its representatives shall maintain a list of all nonprofit organizations that notify the board or its representative of their desire to obtain donated property under this division and that the board or its representative determines to be eligible, in accordance with the requirements set forth in this section and in the donation program's guidelines and procedures, to receive donated property.

The board or its representative also shall maintain a list of all school district property the board finds to be unneeded, obsolete, or unfit for use and to be available for donation under this division. The list shall be posted continually in a conspicuous location in the board's office, and, if the school district maintains a web site on the internet, the list shall be posted continually at that web site. An item of property on the list shall be donated to the eligible nonprofit organization that first declares to the board or its representative its desire to obtain the item unless the board previously has established, by resolution, a list of eligible nonprofit organizations that shall be given priority with respect to the item's donation. Priority may be given on the basis that the purposes of a nonprofit organization have a direct relationship to specific school district purposes of programs provided or administered by the board. A resolution giving priority to certain nonprofit organizations with respect to the donation of an item of property shall specify the reasons why the organizations are given that priority.

Members of the board shall consult with the Ohio ethics commission, and comply with Chapters 102. and 2921. of the Revised Code, with respect to any donation under this division to a nonprofit organization of which a board member, any member of a board member's family, or any business associate of a board member is a trustee, officer, board member, or employee.

HISTORY:

GC § 4834-13; 120 v 475 (521); 124 v 32; Bureau of Code Revision, 10-1-53; 131 v 771 (Eff 9-6-65); 134 v S 396 (Eff 2-17-72); 136 v H 789 (Eff 12-30-75); 137 v H 1060 (Eff 1-5-79); 140 v S 39 (Eff 10-13-83); 140 v H 130 (Eff 9-20-84); 140 v H 676 (Eff 10-10-84); 141 v H 428 (Eff 12-23-86); 145 v S 81 (Eff 8-19-94); 148 v S 269 (Eff 9-22-2000); 149 v H 94. Eff 11-4-2001; 150 v H 323, § 1, eff. 9-23-04; 151 v H 79, § 1, eff. 3-30-07; 2011 HB 153, § 101.01, eff. Sept. 29, 2011.

3313.411 Lease or sale of unused school facilities.

(A) As used in this section, "unused school facilities" means any real property that has been used by a school district for school operations, including, but not limited to, academic instruction or administration, since July 1, 1998, but has not been used in that capacity for two years.

(B) On and after the effective date of this section, any school district board of education shall offer any unused school facilities it owns in its corporate capacity for lease or sale to the governing authorities of community schools established under Chapter 3314. of the Revised Code that are located within the territory of the school district.

(1) If, not later than sixty days after the district board makes the offer, the governing authority of one community school located within the territory of the school district notifies the district treasurer in writing of its intention to purchase the property, the district board shall sell the property to the community school for the appraised fair market value of the property.

(2) If, not later than sixty days after the district board makes the offer, the governing authorities of two or more community schools located within the territory of the school district notify the district treasurer in writing of their intention to purchase the property, the board shall conduct a public auction in the manner required for auctions of district property under division (A) of section 3313.41 of the Revised Code. Only the governing authorities of all community schools located within the territory of the school district are eligible to bid at the auction. The district board is not obligated to accept any bid for the property that is lower than the appraised fair market value of the property.

(3) If the governing authorities of two or more community schools located within the territory of the school district notify the district treasurer in writing of their intention to lease the property, the district board shall conduct a lottery to select the community school to which the district board shall lease the property.

(4) The lease price offered by a district board to the governing authority of a community school under this section shall not be higher than the fair market value for such a leasehold.

(5) If no community school governing authority accepts the offer to lease or buy the property within sixty days after the offer is made, the district board may offer the property to any other entity in accordance with divisions (A) to (F) of section 3313.41 of the Revised Code.

(C) Notwithstanding division (B) of this section, a school district board may renew any agreement it originally entered into prior to the effective date of this section to lease real property to an entity other than a community school. Nothing in this section shall affect the leasehold arrangements between the district board and that other entity.

Added by 129th General Assembly File No. 28, HB 153, § 101.01, eff. 6/30/2011.

4

Page's Ohio Revised Code Annotated:
Copyright (c) 2011 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 49
*** Annotations current through July 22, 2011 ***
The provisions of 2011 HB 194 are not yet in effect as they are subject
to a referendum upon verification of petition signatures

TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3318. SCHOOL FACILITIES
BOND ISSUES AND TAX LEVIES

Go to the Ohio Code Archive Directory

ORC Ann. 3318.08 (2011)

§ 3318.08. Agreement for construction and sale of project; sale of bonds and notes

Except in the case of a joint vocational school district that receives assistance under sections 3318.40 to 3318.45 of the Revised Code, if the requisite favorable vote on the election is obtained, or if the school district board has resolved to apply the proceeds of a property tax levy or the proceeds of an income tax, or a combination of proceeds from such taxes, as authorized in section 3318.052 of the Revised Code, the Ohio school facilities commission, upon certification to it of either the results of the election or the resolution under section 3318.052 of the Revised Code, shall enter into a written agreement with the school district board for the construction and sale of the project. In the case of a joint vocational school district that receives assistance under sections 3318.40 to 3318.45 of the Revised Code, if the school district board of education and the school district electors have satisfied the conditions prescribed in division (D)(1) of section 3318.41 of the Revised Code, the commission shall enter into an agreement with the school district board for the construction and sale of the project. In either case, the agreement shall include, but need not be limited to, the following provisions:

(A) The sale and issuance of bonds or notes in anticipation thereof, as soon as practicable after the execution of the agreement, in an amount equal to the school district's portion of the basic project cost, including any securities authorized under division (J) of section 133.06 of the Revised Code and dedicated by the school district board to payment of the district's portion of the basic project cost of the project; provided, that if at that time the county treasurer of each county in which the school district is located has not commenced the collection of taxes on the general duplicate of real and public utility property for the year in which the controlling board approved the project, the school district board shall authorize the issuance of a first installment of bond anticipation notes in an amount specified by the agreement, which amount shall not exceed an amount necessary to raise the net bonded indebtedness of the school district as of the date of the controlling board's approval to within five thousand dollars of the required level of indebtedness for the preceding year. In the event that a first installment of bond anticipation notes is issued, the school district board shall, as soon as practicable after the county treasurer of each county in which the school district is located has commenced the collection of taxes on the general duplicate of real and public utility property for the year in which the controlling board approved the project, authorize the issuance of a second and final installment of bond anticipation notes or a first and final issue of bonds.

The combined value of the first and second installment of bond anticipation notes or the value of the first and final issue of bonds shall be equal to the school district's portion of the basic project cost. The proceeds of any such bonds shall be used first to retire any bond anticipation notes. Otherwise, the proceeds of such bonds and of any bond

anticipation notes, except the premium and accrued interest thereon, shall be deposited in the school district's project construction fund. In determining the amount of net bonded indebtedness for the purpose of fixing the amount of an issue of either bonds or bond anticipation notes, gross indebtedness shall be reduced by moneys in the bond retirement fund only to the extent of the moneys therein on the first day of the year preceding the year in which the controlling board approved the project. Should there be a decrease in the tax valuation of the school district so that the amount of indebtedness that can be incurred on the tax duplicates for the year in which the controlling board approved the project is less than the amount of the first installment of bond anticipation notes, there shall be paid from the school district's project construction fund to the school district's bond retirement fund to be applied against such notes an amount sufficient to cause the net bonded indebtedness of the school district, as of the first day of the year following the year in which the controlling board approved the project, to be within five thousand dollars of the required level of indebtedness for the year in which the controlling board approved the project. The maximum amount of indebtedness to be incurred by any school district board as its share of the cost of the project is either an amount that will cause its net bonded indebtedness, as of the first day of the year following the year in which the controlling board approved the project, to be within five thousand dollars of the required level of indebtedness, or an amount equal to the required percentage of the basic project costs, whichever is greater. All bonds and bond anticipation notes shall be issued in accordance with Chapter 133. of the Revised Code, and notes may be renewed as provided in section 133.22 of the Revised Code.

(B) The transfer of such funds of the school district board available for the project, together with the proceeds of the sale of the bonds or notes, except premium, accrued interest, and interest included in the amount of the issue, to the school district's project construction fund;

(C) For all school districts except joint vocational school districts that receive assistance under sections 3318.40 to 3318.45 of the Revised Code, the following provisions as applicable:

(1) If section 3318.052 of the Revised Code applies, the earmarking of the proceeds of a tax levied under section 5705.21 of the Revised Code for general permanent improvements or under section 5705.218 of the Revised Code for the purpose of permanent improvements, or the proceeds of a school district income tax levied under Chapter 5748. of the Revised Code, or the proceeds from a combination of those two taxes, in an amount to pay all or part of the service charges on bonds issued to pay the school district portion of the project and an amount equivalent to all or part of the tax required under division (B) of section 3318.05 of the Revised Code;

(2) If section 3318.052 of the Revised Code does not apply, one of the following:

(a) The levy of the tax authorized at the election for the payment of maintenance costs, as specified in division (B) of section 3318.05 of the Revised Code;

(b) If the school district electors have approved a continuing tax for general permanent improvements under section 5705.21 of the Revised Code and that tax can be used for maintenance, the earmarking of an amount of the proceeds from such tax for maintenance of classroom facilities as specified in division (B) of section 3318.05 of the Revised Code;

(c) If, in lieu of the tax otherwise required under division (B) of section 3318.05 of the Revised Code, the commission has approved the transfer of money to the maintenance fund in accordance with section 3318.051 of the Revised Code, a requirement that the district board comply with the provisions that section. The district board may rescind the provision prescribed under division (C)(2)(c) of this section only so long as the electors of the district have approved, in accordance with section 3318.063 of the Revised Code, the levy of a tax for the maintenance of the classroom facilities acquired under the district's project and that levy continues to be collected as approved by the electors.

(D) For joint vocational school districts that receive assistance under sections 3318.40 to 3318.45 of the Revised Code, provision for deposit of school district moneys dedicated to maintenance of the classroom facilities acquired under those sections as prescribed in section 3318.43 of the Revised Code;

(E) Dedication of any local donated contribution as provided for under section 3318.084 of the Revised Code, including a schedule for depositing such moneys applied as an offset of the district's obligation to levy the tax described in division (B) of section 3318.05 of the Revised Code as required under division (D)(2) of section 3318.084 of the Revised Code;

(F) Ownership of or interest in the project during the period of construction, which shall be divided between the commission and the school district board in proportion to their respective contributions to the school district's project construction fund;

(G) Maintenance of the state's interest in the project until any obligations issued for the project under section 3318.26 of the Revised Code are no longer outstanding;

(H) The insurance of the project by the school district from the time there is an insurable interest therein and so long as the state retains any ownership or interest in the project pursuant to division (F) of this section, in such amounts and against such risks as the commission shall require; provided, that the cost of any required insurance until the project is completed shall be a part of the basic project cost;

(I) The certification by the director of budget and management that funds are available and have been set aside to meet the state's share of the basic project cost as approved by the controlling board pursuant to either section 3318.04 or division (B)(1) of section 3318.41 of the Revised Code;

(J) Authorization of the school district board to advertise for and receive construction bids for the project, for and on behalf of the commission, and to award contracts in the name of the state subject to approval by the commission;

(K) Provisions for the disbursement of moneys from the school district's project account upon issuance by the commission or the commission's designated representative of vouchers for work done to be certified to the commission by the treasurer of the school district board;

(L) Disposal of any balance left in the school district's project construction fund upon completion of the project;

(M) Limitations upon use of the project or any part of it so long as any obligations issued to finance the project under section 3318.26 of the Revised Code are outstanding;

(N) Provision for vesting the state's interest in the project to the school district board when the obligations issued to finance the project under section 3318.26 of the Revised Code are outstanding;

(O) Provision for deposit of an executed copy of the agreement in the office of the commission;

(P) Provision for termination of the contract and release of the funds encumbered at the time of the conditional approval, if the proceeds of the sale of the bonds of the school district board are not paid into the school district's project construction fund and if bids for the construction of the project have not been taken within such period after the execution of the agreement as may be fixed by the commission;

(Q) Provision for the school district to maintain the project in accordance with a plan approved by the commission;

(R) Provision that all state funds reserved and encumbered to pay the state share of the cost of the project and the funds provided by the school district to pay for its share of the project cost, including the respective shares of the cost of a segment if the project is divided into segments, be spent on the construction and acquisition of the project or segment simultaneously in proportion to the state's and the school district's respective shares of that basic project cost as determined under section 3318.032 of the Revised Code or, if the district is a joint vocational school district, under section 3318.42 of the Revised Code. However, if the school district certifies to the commission that expenditure by the school district is necessary to maintain the federal tax status or tax-exempt status of notes or bonds issued by the school district to pay for its share of the project cost or to comply with applicable temporary investment periods or spending exceptions to rebate as provided for under federal law in regard to those notes or bonds, the school district may commit to spend, or spend, a greater portion of the funds it provides during any specific period than would otherwise be required under this division.

(S) A provision stipulating that the commission may prohibit the district from proceeding with any project if the commission determines that the site is not suitable for construction purposes. The commission may perform soil tests in its determination of whether a site is appropriate for construction purposes.

(T) A provision stipulating that, unless otherwise authorized by the commission, any contingency reserve portion of the construction budget prescribed by the commission shall be used only to pay costs resulting from unforeseen job conditions, to comply with rulings regarding building and other codes, to pay costs related to design clarifications or corrections to contract documents, and to pay the costs of settlements or judgments related to the project as provided under section 3318.086 of the Revised Code;

(U) Provision stipulating that for continued release of project funds the school district board shall comply with section 3313.41 of the Revised Code throughout the project and shall notify the department of education and the Ohio community school association when the board plans to dispose of facilities by sale under that section;

(V) Provision that the commission shall not approve a contract for demolition of a facility until the school district board has complied with section 3313.41 of the Revised Code relative to that facility, unless demolition of that facility is to clear a site for construction of a replacement facility included in the district's project.

HISTORY:

127 v 396 (Eff 6-22-57); 128 v 505 (Eff 8-5-59); 131 v S 238 (Eff 11-18-65); 135 v S 174 (Eff 12-4-73); 138 v H 44 (Eff 1-16-80); 140 v H 180 (Eff 5-15-84); 141 v H 201 (Eff 7-1-85); 143 v H 230 (Eff 10-30-89); 145 v H 152 (Eff 7-1-93); 146 v H 748 (Eff 9-17-96)*; 147 v S 102 (Eff 5-20-97); 147 v H 650 (Eff 7-1-98); 147 v H 770 (Eff 7-1-98); 148 v H 282 (Eff 9-28-99); 148 v S 272 (Eff 9-14-2000); 149 v H 94 (Eff 9-5-2001); 149 v H 524 (Eff 6-28-2002); 149 v H 675. Eff 3-14-2003; 150 v H 95, § 1, eff. 9-26-03; 150 v H 362, § 1, eff. 3-31-05; 151 v S 321, § 101.01, eff. 9-5-06; 2011 HB 153, § 101.01, eff. Sept. 29, 2011.

Page's Ohio Revised Code Annotated:
Copyright (c) 2011 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 49
*** Annotations current through July 22, 2011 ***
The provisions of 2011 HB 194 are not yet in effect as they are subject
to a referendum upon verification of petition signatures

TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3318. SCHOOL FACILITIES
MISCELLANEOUS

Go to the Ohio Code Archive Directory

ORC Ann. 3318.50 (2011)

§ 3318.50. Classroom facilities loan guarantee program

(A) As used in this section and in section 3318.52 of the Revised Code, "classroom facilities" means buildings, land, grounds, equipment, and furnishings used by a community school in furtherance of its mission and contract entered into by the school's governing authority under Chapter 3314. of the Revised Code.

(B) There is hereby established the community school classroom facilities loan guarantee program. Under the program, the Ohio school facilities commission may guarantee for up to fifteen years up to eighty-five per cent of the sum of the principal and interest on a loan made to the governing authority of a community school established under Chapter 3314. of the Revised Code for the sole purpose of assisting the governing authority in acquiring, improving, or replacing classroom facilities for the community school by lease, purchase, remodeling of existing facilities, or any other means including new construction.

The commission shall not make any loan guarantee under this section unless the commission has determined both that the applicant is creditworthy and that the classroom facilities that have been acquired, improved, or replaced under the loan meet applicable health and safety standards established by law for school buildings or those facilities that will be acquired, improved, or replaced under the loan will meet such standards.

The commission shall not guarantee any loan under this section unless the loan is obtained from a financial institution regulated by the United States or this state.

(C) At no time shall the commission exceed an aggregate liability of ten million dollars to repay loans guaranteed under this section.

(D) Any payment made to a lending institution as a result of default on a loan guaranteed under this section shall be made from moneys in the community school classroom facilities loan guarantee fund established under section 3318.52 of the Revised Code.

(E) The commission may assess a fee of up to five hundred dollars for each loan guaranteed under this section.

(F) Not later than ninety days after September 5, 2001, the commission shall adopt rules that prescribe loan standards and procedures consistent with this section that are designed to protect the state's interest in any loan guaranteed by this section and to ensure that the state has a reasonable chance of recovering any payments made by the state in the event of a default on any such loan.

Page's Ohio Revised Code Annotated:
Copyright (c) 2011 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 49
*** Annotations current through July 22, 2011 ***
The provisions of 2011 HB 194 are not yet in effect as they are subject
to a referendum upon verification of petition signatures

TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3318. SCHOOL FACILITIES
MISCELLANEOUS

Go to the Ohio Code Archive Directory

ORC Ann. 3318.52 (2011)

§ 3318.52. Community school loan guarantee fund

There is hereby established the community school classroom facilities loan guarantee fund. The fund shall consist of such moneys as the general assembly appropriates for the purpose of guaranteeing loans to community schools under section 3318.50 of the Revised Code. Investment earnings on moneys in the fund shall be credited to the fund.

HISTORY:

149 v H 94. Eff 6-6-2001.

LEXSTAT

Page's Ohio Revised Code Annotated:
Copyright (c) 2011 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 49
*** Annotations current through July 22, 2011 ***
The provisions of 2011 HB 194 are not yet in effect as they are subject
to a referendum upon verification of petition signatures

TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3313. BOARDS OF EDUCATION
POWERS; REGULATIONS

Go to the Ohio Code Archive Directory

ORC Ann. 3313.17 (2011)

§ 3313.17. Corporate powers of board

The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

HISTORY:

GC § 4834; 120 v 475 (518); Bureau of Code Revision. Eff 10-1-53.