ORIGINAL

IN THE SUPREME COURT OF OHIO
Case No. 2011-0673

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
Appellant,	:	
v.	:	
ROGER CONNERS, et al,	:	
Appellee.	:	

MERIT BRIEF OF APPELLANT BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI

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I. INTRODUCTION

This case involves a deed restriction that the Board of Education of the City School District of the City of Cincinnati ("CPS") included in the sale of real property at public auction. Ohio jurisprudence has long upheld the right to freely enter into contracts with the expectation that the terms of a contract will be enforced—by courts, if necessary. Ohio courts consistently recognize the enforceability of deed restrictions as long as their terms are clear and unambiguous.

Ignoring these very basic principles regarding contracts and deed restrictions, the trial court and the First District Court of Appeals found a deed restriction in a freely-entered contract to be "void as against public policy" in contradiction to basic contract law. The support that the Court of Appeals provided for its public policy exception is that the deed restriction purportedly violates R.C. 3313.41(G). It does nothing of the sort. Nowhere in the statute does it state, or even infer, that clear and unambiguous deed restrictions are inconsistent with public policy. The Court of Appeals created a new, overbroad, "public policy" in favor of placing unused school buildings into the hands of charter[1] schools where no such public policy existed.

This Court has long held that the development of public policy within the State of Ohio, especially as regards to the "thorough and efficient system of common schools throughout the state," is within the purview of the Ohio legislature.[2] The General Assembly has passed no statute setting forth or stating a broad public policy of unequivocal support for charter schools such as that espoused by the Court of Appeals in this case. In fact, the General Assembly is continually in the process of determining the appropriate rights and obligations for charter

[1] Although the Ohio statutes use the term "community" schools, these schools are more commonly recognized throughout the country as charter schools.
[2] See Ohio Constitution Section 2, Article 4. See also *State ex rel. Ohio Congress of Parents and Teachers v. State Board of Education* (2006), 111 Ohio St.3d 568, 2006 Ohio 5512, 87 N.E.2d 1148.

schools – and then codifying its determinations through revisions to the statutes governing those entities. Where there is no clear, unambiguous, overwhelming public policy rooted in statute or legal precedent, it is inappropriate for the Court of Appeals to usurp the General Assembly's legislative, policy-making authority or to restrict CPS's ability to enter into a freely negotiated contract provision.

II. STATEMENT OF FACTS

R.C. 3313.41 sets forth a specific three-step process by which a public school district may dispose of real property. In 2009, R.C. 3313.41(G)(1) initially required a public school district to make a first offer of any real property that is "suitable for use as classroom space" to the governing authorities of charter schools.[3] (Appx. 14) Second, R.C. 3313.41(A) permits the public school district to sell the property to the public at large at public auction if no charter school accepts the first offer. (Appx. 13) Finally, R.C. 3313.41(B) entitles the public school district to sell the property at private sale if the property does not sell at public auction. (Appx. 13)

In conjunction with the Ohio School Facilities Commission, CPS used specific and objective criteria to determine that particular former school buildings were no longer suitable for use as classroom space. (Supp. 2) For this reason, the first-offer requirement did not apply to these buildings, including the property at issue in this case. CPS offered nine of the properties, including the property at issue in this case, at public auction in June 2009 pursuant to R.C. 3313.41(A). (Supp. 2, 6-11)

At the auction, Appellees Roger and Deborah Conners ("the Conners"), who at the time were individuals unaffiliated with any charter school, were the only ones to bid upon the dilapidated and obsolete former Roosevelt School. (Supp. 2) Because of the unsuitable state of

[3] Note that the most recent budget bill removed the qualifying language from this statutory section. Public school districts are now obligated to make a first offer of all real property, regardless of suitability.

the building and because of the terms of the contract, including the deed restriction at issue in this case, the Conners were able to purchase the property for $30,000, even though the appraised value of the building exceeded $250,000.00. (Supp. 2)

All of the printed marketing materials, the plain language of the Purchase and Sale Agreement, and the deed itself put the Conners on explicit notice that the property would be sold subject to a deed restriction. (Supp. 2, 11) The deed restriction specifically states that the Conners covenant "to use the Property for 'commercial development'...[and] not to use the Property for school purposes, now or at any time in the future." (Supp. 2, 22) When the Conners were asked in the Purchase and Sale Agreement to describe the intended use for the property, they stated "not sure" and "possible re-sale to another interest [sic] buyer." (Supp. 2, 21) The Conners' declaration was false at the time they wrote and signed it; they intended all along to lease or sell the property to a charter school, and took immediate steps after the purchase to make that a reality. (Supp. 3, 28-38)

In January 2010, CPS became aware of the Conners' intent and filed a Complaint for Declaratory Judgment and Injunctive Relief in the Hamilton County Court of Common Pleas to enforce the clear and unambiguous terms of the deed restriction to which the Conners had agreed at the time of the sale. (Supp. 1-4) The Conners filed a Motion for Judgment on the Pleadings and the trial court quickly granted that motion, explaining that it was deferring to the Court of Appeals: "This is the kind of case that should go up [to the Court of Appeals]. That's why I decided it quickly, whether I'm right or wrong. It's going to be appealed – no matter how I rule it's going to be appealed. That's why I wanted to do it quickly." (Supp. 42)

The First District affirmed. The only legal support that the Court of Appeals provided for its decision was R.C. 3313.41(G), which the Court described as a statute that "favors school

boards first offering classroom space that is not being used to community schools." (Appx. 8) Expanding on the plain language of the statute, the Court of Appeals incredibly continued to find 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 property for educational purposes was void as against this clear policy." (Appx. 8)

Aside from its citation to R.C. 3313.41(G), the Court of Appeals provided no legal support for its finding of public policy in favor of charter schools. Nor did the Court of Appeals ever provide any analysis to explain how it leapt from the narrowly-tailored statutory language of R.C. 3313.41(G) to its very broad statement of public policy. It is not even clear how broadly the Court of Appeals would intend for this public policy to apply. The only support that the Court of Appeals offered to support its decision to void a freely-negotiated contract and make a determination of public policy was a statute that is not even applicable to the property at issue in this case.

III. ARGUMENT

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

A. Where the language of a statute is unambiguous, courts should defer to the policy as expressed by the General Assembly in that statute.

The Court of Appeals and the trial court both ignored this Court's long-held acknowledgement that "a court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of government."[4] This Court recently reaffirmed

[4] *State ex rel. Bishop v. Bd. of Ed. Of Mt. Orab Village School Dist.* (1942), 139 Ohio St. 427, 438, 40 N.E.2d 913.

that same concept when it noted that "the General Assembly is charged with making the difficult policy decisions on such issues and codifying them into law. This Court is not the forum in which to second-guess such legislative choices."[5] Rather, "where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom."[6]

The Conners' only support for their assertion that there exists a public policy in favor of getting unused school buildings into the hands of charter schools arises from four specific statutes, all but one of which are unrelated to a public school district's disposal of real property.[7] Of those statutes, the Court of Appeals only cited to a single statute: 3313.41(G). As enacted in June 2009, R.C. 3313.41(G)(1) stated:

> When a school district board of education decides to dispose of real property suitable for use as classroom space, 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 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.[8]

Nowhere in this statute or anywhere else in the Revised Code has the General Assembly qualified either the public auction or private sale processes with a constraint that public school districts may not utilize deed restrictions in those situations. If the General Assembly had wanted

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[5] *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 71.
[6] *Terry v. Sperry* (July 12, 2011), 2011-Ohio-3364, --- N.E.2d ---, ¶ 15, citing *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324, ¶ 14 (quoting *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 14).
[7] R.C. 3313.41(G) is discussed above. R.C. 3318.50 and R.C. 3318.52 describe the manner in which community (charter) schools may receive loan assistance when they desire to acquire property. R.C. 3318.08 obligates public school districts to comply with R.C. 3313.41(G) in order to receive continued assistance from the Ohio School Facilities Commission.
[8] R.C. 3313.41(G)(1).

to prevent public school districts from the use of deed restrictions in their contracts to sell real roperty to the public at large or to private purchasers, the General Assembly could have said so in the statute. It did not.

A plain reading of this statutory language demonstrates that the public policy intended by the General Assembly was no more and no less than what the statute actually says – that charter schools should have a preliminary opportunity to purchase real property from public school districts **before** that property is made available to the public at large through auction. Here, the deed restriction was placed on the property **after** it had already passed the first-offer phase. The deed restriction was placed on the property because it was being offered at public auction and was sold to an individual purchaser, not a charter school. There is nothing in R.C. 3313.41(G) to say that a public school district may not put a deed restriction on property when offered at public auction.

Where "the Legislature...imposed no conditions or limitations on such power...this court may not amend the statute by construction and add limitations or conditions not imposed by the Legislature."[9] The decision of the Court of Appeals expands well beyond the actual language of the statute. It effectively amends the statutory process by which school districts are to dispose of real property by adding an overarching, extra-statutory restriction that has never been expressed by the General Assembly. If the General Assembly intended to prohibit public school districts from utilizing deed restrictions, it would be very simple for it to have done so.

The Court of Appeals' judicial activism contravenes this Court's position that the judiciary should defer to plain language developed by the General Assembly on issues regarding charter schools. In *State ex rel. Ohio Congress of Parents and Teachers v. State Board of Education*, even as it confirmed the constitutionality of charter schools, this Court noted that

"[t]hese policy decisions are within the purview of [the General Assembly's] legislative responsibilities, and that legislation is entitled to deference."[10] The Court reaffirmed this position in the more recent decision of *Anderson/Maltbie Partnership v. Levin*, where it held that caselaw and legal precedent requires that when a property owner leases the property to a charter school for a profit, that property is not tax-exempt.[11] Noting that this could disadvantage charter schools, Justice Lundberg-Stratton's concurring opinion demonstrated the proper process for public policy related to charter schools to be declared: "although I concur in the holding in this case, I invite the General Assembly to amend [the statute] if its members share my concern."[12]

Policy decisions, such as the rights and privileges granted to charter schools, are matters of policy to be determined by the General Assembly.[13] If charter schools do not like the actual statutory language, or feel that they should be given additional rights, their proper recourse is to work through the legislative process in an attempt to have the governing statutes amended. It is not appropriate for them to petition the courts in an attempt to have the courts express a broader public policy than is expressed anywhere in the statutes. This Court should not stray from the statutory language used by the General Assembly on matters of public policy—and especially when the policy concerns the framework of the state's public educational system.[14]

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[9] *Dixon v. Van Sweringen* (1929), 121 Ohio St. 56, 66, 166 N.E. 887.
[10] (2006), 111 Ohio St.3d 568, 2006 Ohio 5512, 87 N.E.2d 1148, at ¶ 73.
[11] 127 Ohio St.3d 178, 2010-Ohio-4904, 937 N.E.2d 547.
[12] *Id.*, at ¶ 45.
[13] *Ohio Congress* at ¶ 34 ("The General Assembly is the branch of state government charged by the Ohio Constitution with making education policy choices for the education of our state's children. Our personal choices are not relevant to this task.").
[14] *Id.*

B. The doctrine of void-as-against-public-policy is a very narrow doctrine, not to be overused by courts and applicable only when it is rooted in well-established law or legal principles.

Courts utilizing the public policy doctrine, and even the Court of Appeals in this case, universally acknowledge that "public policy" itself is always difficult to define, and that this doctrine must therefore be used sparingly and only in the most egregious of circumstances. "At best, public policy is an uncertain and indefinite term."[15] Absent some obvious violation of Ohio law, or an "**overwhelming** public policy concern," the public policy doctrine is not applicable.[16] When judges come to apply the principle of public policy, they must proceed with caution so as to not infringe on the parties' rights to make contracts which are not **clearly opposed** to some principle or policy of the law."[17] Where the General Assembly has not clearly articulated a broad, overwhelming public policy interest that has previously been expressed through law or legal precedent, Ohio courts routinely reject the argument that a contract should be void as against public policy.[18]

The United States Supreme Court reinforced the high standard that a party must meet in order to void a contract under this doctrine in *United Paperworkers International Union v. MISCO*.[19] There, the Court specified that a prior Supreme Court decision to void a contract on public policy grounds was justified primarily because the contract violated Title VII of the Civil Rights Act and also involved an issue of obedience to judicial orders.[20] The Court noted that "our

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[15] *Allman v. Simmers* (Nov. 16, 1999), 5th Dist. App. No. 1999AP030014, 1999 WL 1072200.
[16] *Brandon/Wiant Co. v. Teamor* (1998), 125 Ohio App.3d 442, 449, 708 N.E.2d 1024 (emphasis added).
[17] *Allman v. Simmers* (Nov. 16, 1999), 5th Dist. App. No. 1999AP030014, 1999 WL 1072200 (emphasis added); *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 184, 70 N.E.2d 447.
[18] See *J.F. v. D.B.*, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740; *Lake Ridge Academy v.Carney* (1993), 66 Ohio St.3d 376, 613 N.E.2d 183; *Chickerneo v. Society Nat'l Bank of Cleveland* (1979), 58 Ohio St.2d 315, 390 N.E.2d; *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 70 N.E.2d 447; *Dixon v. Van Sweringen* (1929), 121 Ohio St. 56, 166 N.E. 887; *Lake Pointe Townhomes v. Bruce*, 178 Ohio App.3d 756, 2008-Ohio-5264, 900 N.E.2d 636; *Brandon/Wiant Co. v. Teamor* (1998), 125 Ohio App.3d 442, 449, 708 N.E.2d 1024.
[19] (1987), 484 U.S. 29, 108 S.Ct. 364.
[20] *Id.* at 43.

decision [to void the contract] turned on our examination of whether the [contract] created any explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public interest.'"[21] Accordingly, where a Court has "made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well-defined and dominant' policy", the contract must be enforced.[22]

This Court has consistently applied the same high standard when presented with the void-as-against-public-policy doctrine, and even when considering issues that are of extreme public interest has demonstrated considerable restraint in applying the doctrine. This Court most recently declined to void a surrogacy contract, largely on the basis that there is no clear public policy within the state on that topic.[23] Other examples of contracts that were not void for public policy included a contract requiring parents to pay full tuition even when their children ended up not attending that school,[24] and a lease that restricted occupancy of an apartment to adults. [25] In sum, the doctrine of void-as-against public policy is inapplicable unless there is a clear public policy that has been expressed in laws or legal precedents.

The overwhelming majority of cases in which Ohio Courts of Appeals and the Supreme Court have voided a deed restriction or other contract as against public policy involve egregious violations of some very clear national public policy or statute, such as discrimination against some constitutionally-protected class,[26] the contractual waiver of a constitutional right such as the right to marry,[27] or contracts that are potentially injurious to the health and safety of a large

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[21] *Id.*
[22] *Id.* at 44.
[23] *J.F. v. D.B.*, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740.
[24] *Lake Ridge Academy v.Carney* (1993), 66 Ohio St.3d 376, 613 N.E.2d 183
[25] *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 70 N.E.2d 447.
[26] *Hurd v. Hodge* (1948), 334 U.S. 24, 68 S.Ct. 847.
[27] *King v. King* (1900), 60 Ohio St. 363, 59 N.E. 111.

class of persons.[28] CPS's utilization of a deed restriction does not rise to the same level of broad, overwhelming, public policy as any of these situations.

Absent one of these extreme scenarios, Ohio courts are cautious only to apply the doctrine if a contract provision directly contradicts the language of a statute. For example, the contract in *Eagle v. Fred Martin Motor Co.* contained a confidentiality clause and a clause eliminating a private individual's ability to bring a lawsuit through a class action, both of which directly contradicted specific provisions of the Consumer Sales Practices Act.[29] Similarly, the Court in *Pittsburgh, C., C. & St. L. Ry. Co. v. Kinney*, found that an employment contract that required the employee to indemnify the employer for any injuries suffered on the job completely defeated the purpose underlying the variety of legislation that "has been enacted imposing the duty upon the employer to provide a reasonably safe place for the employee to work."[30] Finally, in the context of deed restrictions, the principal situation where the Ohio Supreme Court has found that a deed restriction should be void as against public policy on the basis of a statute is when the restriction directly contradicted a railroad's statutory power of eminent domain.[31] If, on the other hand, a contract does not completely and directly defeat the purpose of a statute, it is not void as against public policy.

CPS agrees that it would be absurd, and directly violative of the intent of the statute, if a public school district were to place a deed restriction on properties at the time they are offered to charter schools pursuant to the first offer requirement. But when a public school district sells property at public auction **after** the first offer requirement has already passed, its use of a deed

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[28] *Pittsburgh, Cincinnati, Chicago & St. Louis Rwy. Co. v. Kinney* (1916), 95 Ohio St. 64,115 N.E. 505.
[29] *Eagle v. Fred Martin Motor Co.* (2004), 157 Ohio App.3d, 2004-Ohio-829, 809 N.E.2d 1161 at ¶¶72-74 (citing to R.C. 1345.09, which discusses the ability of a consumer to commence a class action, and R.C. 1345.05, which obligates the Attorney General to make the public aware of consumers and suppliers of acts that violate the Consumer Sales Practices Act). *Id.* at ¶ 25.
[30] (1916) 95 Ohio St. 64, 70, 115 N.E. 505.
[31] *Doan v. Cleveland Short Line Ry. Co.* (1915), 92 Ohio St. 461, 112 N.E. 505.

restriction does not hinder the first offer purpose of the statute in any way. Any more expansive reading of this statute in an attempt to create a broader public policy is judicial activism and distorts the clear statutory language expressing the intent of the General Assembly.

C. Ohio courts enforce valid deed restrictions in accordance with to the long-standing principle of freedom to contract, which is a right enjoyed by CPS.

In Ohio "[p]arties of equal bargaining power are free to enter into any agreement the terms of which are enforceable by law."[32] Where parties enter into "[a]greements voluntarily and fairly made [they] will be held valid and enforced in the courts."[33] This Court has recently reinforced the importance of this concept within the arena of education by declaring that "[t]he right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint."[34] Where, as here, two parties voluntarily enter into a contract containing terms that are clear and unambiguous to both, the terms of that agreement should be enforced.

CPS's right to rely on these general principles is in no way curtailed by the fact that it is a statutory public entity. The statutory rights of a public board of education are enumerated primarily in Chapter 3313 of the Ohio Revised Code. R.C. 3313.17 states that CPS is a corporate body, capable of "contracting and being contracted with...[and] disposing of real and personal property." This statute is a clear statement by the General Assembly that boards of public school districts enjoy the fundamental right and discretion to enter into contracts with other persons and entities for the benefit of their districts. Where the legislature has granted a board of education this discretion, "a court has no authority to control the discretion...or to substitute its judgment

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[32] *Brandon/Wiant Co. v. Teamor* (1998), 125 Ohio App.3d 442, 449, 708 N.E.2d 1024.
[33] *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 184, 70 N.E.2d 447.
[34] *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 381, 613 N.E.2d 183.

for the judgment of such board, upon any question it is authorized by law to determine."[35] The discretion of the board cannot be circumscribed so long as the discretion was exercised reasonably, in good faith, and was not clearly an abuse of discretion. Nowhere in the Ohio Revised Code or in Ohio case law is there any authority that prohibits CPS from using a deed restriction when contracting with other entities.

With regard to deed restrictions specifically, Ohio courts have recognized for over 100 years that a grantor-landowner may protect its own property interest by imposing limitations or restrictions upon the future use of real property when that real property is conveyed to another.[36] It has been held permissible for a grantor to prohibit land from later being used as a competing hotel.[37] The Ohio Turnpike Commission was also permitted to restrict the sorts of signs that may be put on land that it previously owned.[38] Finally, it has been held permissible for a gas station owner to enforce a deed restriction that prohibited land from being used as a competing gas station.[39]

Where a deed restriction is clear and unambiguous, that restriction is treated as any other contract.[40] Any ambiguities regarding the construction of a deed restriction should be resolved in favor of the free use of land, but the deed restriction at issue in this case was clear and unambiguous on its face.[41] The Conners were aware of the existence of the deed restriction at the time they purchased the property, have never claimed an uncertainty with regard to the deed restriction, and enjoyed the benefit of that bargain by purchasing the property at a fraction of the appraised value. The Conners entered the contract stating that they were not sure of the future

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[35] *Brannon v. Bd. of Educ. Of Tiro Consol. School Dist.* (1919), 99 Ohio St. 369, syllabus, ¶ 2, 124 N.E. 235.
[36] *Stines v. Dorman* (1874), 25 Ohio St. 580, 1874 WL 117.
[37] *Id.*
[38] *Ohio Turnpike Comm'n v. Goodnight Inn, Inc.* (1990), 69 Ohio App.3d 361, 590 N.E.2d 1270.
[39] *Hi-Lo Oil Co. v. McCollum* (1987), 38 Ohio App.3d 12, 526 N.E.2d 90.
[40] *Loblaw v. Warren Plaza* (1955), 163 Ohio St. 581, 592, 127 N.E.2d 754.
[41] *Id.*

use of the property when they purchased it, but they immediately set on a course to sell or lease it to a charter school in direct violation of the deed restriction.

The First District has encouraged the Conners' behavior in two ways: (1) by providing the opportunity to benefit from the lower sale price subject to the deed restriction, and (2) by allowing the Conners to sell or lease the property to a charter school. In so doing, the Court of Appeals has invited other charter schools to bring a lawsuit anytime that they feel that a validly-negotiated contract no longer works to their benefit—and has stated that there is a valid public policy reason for doing so. This broad view of favoritism for charter schools against public schools was never articulated by the General Assembly—nor would any expect it would be.

D. The policy of the state regarding charter schools and public schools has been created, and is continuing to be modified, by the General Assembly through statute.

In addition to creating a new public policy well beyond the otherwise plain language and intent of the statute, the decision of the Court of Appeals also contradicts the general policy of the state with regard to charter schools. The General Assembly is still determining how best to work charter schools into the system of public education in the state. As with any other statutory entity, including traditional public schools, charter schools are bound to the rights and obligations expressly given them by the General Assembly.

The General Assembly's approach to community schools has been one of measured caution. Ever since passage of the Ohio Community Schools Act, the General Assembly has limited both the total number of charter schools that are permitted and has limited the areas within which those schools may operate.[42] In fact, there have consistently been bills put before both the Ohio House and the Ohio Senate proposing a moratorium upon charter schools.[43] The

[42] R.C. 3314.02.
[43] See 125 H.B. 447; 126 S.B. 110.

Ohio Department of Education's "2008-2009 Annual Report of Ohio Community Schools" indicates that charter schools statewide still underperform traditional school districts,[44] and as a result of this underperformance, the more recent legislative push has been for forced closure of some charter schools, in southwest Ohio.[45] The Ohio Department of Education just recently posted its first annual ranking of charter school sponsors, and listed nine that are not permitted to open any new charter schools until their existing schools perform better.[46] Interestingly, the sponsor for the Conners' charter school is included among those nine.

These actions hardly demonstrate a broad, overwhelming public policy in favor of charter schools. The true public policy of the General Assembly regarding charter schools is not to provide them with unlimited access, resources, and advantages, but instead to cautiously allow for limited competition between charter schools and public school districts within the bounds of strict statutory guidelines.[47] Rather than defer to the framework created by the General Assembly, the Court of Appeals relied upon a single subsection of a statutory provision to justify its creation of an extra-statutory right for charter schools.

IV. CONCLUSION

It is wholly inappropriate for the Court of Appeals to ignore the intent of the Ohio legislature as stated in R.C. 3313.41(G) at the time the contract was entered, usurp its role, and dictate public policy without any basis in law or legal precedent. The correct remedy for the Conners is quite simple: have the General Assembly revise the governing statutes to develop the rule that they seek. This Court should reverse the decision of the Court of Appeals with an order

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[44] See Docket Transcript 10, at Exhibit B.
[45] R.C. 3314.35.
[46] R.C. 3314.016.
[47] *State ex rel Congress v. State Board of Education*, 111 Ohio St.3d 568, 2006-Ohio-5512; 857 N.E.2d 1148 at ¶ 30 ("Community schools were designed to give parents a choice and give educators 'the opportunity to establish **limited** experimental educational programs.'"), citing 1997 Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043.

enforcing the deed restriction that CPS and the Conners bargained for in their sale of real property contract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Merit Brief of Appellant Board of Education of the City School District of the City of Cincinnati was served by ordinary U.S. mail, postage prepaid, on October 14, 2011 on the counsel listed below:

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ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 11-0673

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI,	On Appeal from the Hamilton County Court of Appeals, First Appellate District
Appellant,	Court of Appeals No. C100399
v.	
ROGER CONNERS, et al,	
Appellee.	

NOTICE OF APPEAL OF APPELLANT BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI

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Notice of Appeal of Appellant Board of Education of the City School District of the City of Cincinnati

Appellant Board of Education of the City School District of the City of Cincinnati hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C-100399 on March 11, 2011.

This case is one of public or great general interest.

Respectfully submitted,

Douglas R. Dennis / by ARH 0085470

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Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail on April 25, 2011 to the counsel listed below:

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI,	:	APPEAL NO. C-100399 TRIAL NO. A-1001252
Plaintiff-Appellant,	:	*JUDGMENT ENTRY.*
vs.	:	
ROGER T. CONNERS	:	
and		
DEBORAH CONNERS,	:	
Defendants-Appellees.	:	

ENTERED
MAR 11 2011

D92231792

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on March 11, 2011 per Order of the Court.

By: Patrick Dinkelacker
Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI,	:	APPEAL NO. C-100399 TRIAL NO. A-1001252
Plaintiff-Appellant,	:	*DECISION.*
vs.	:	
ROGER T. CONNERS	:	
and	:	
DEBORAH CONNERS,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 11, 2011

Frost Brown Todd LLC, *Scott D. Phillips*, and *Austin W. Musser*, for Plaintiff-Appellant,

1851 Center for Constitutional Law, *Maurice Thompson*, and *Tyler Kahler*, for Defendants-Appellees,

Jones Day and *Chad A. Readler*, for Amicus Curiae Ohio Alliance for Public Charter Schools.

Please note: This case has been removed from the accelerated calendar.

SUNDERMANN, Judge.

{¶1} The Board of Education of the City School District of the City of Cincinnati ("CPS") appeals the trial court's entry of judgment on the pleadings in favor of Roger and Deborah Conners. Because we conclude that the deed restriction that CPS sought to enforce against the Connerses was void as against public policy, we affirm the judgment of the trial court.

{¶2} In June 2009, CPS offered nine properties for public auction. The printed marketing materials for the auction, the purchase and sale agreement, and the quitclaim deed all provided that conveyance of any of the properties would include a deed restriction that would prohibit the use of the property for school purposes. At the auction, Roger Conners was the only person to bid on the former Roosevelt School, located at 1550 Tremont Street in Cincinnati. Subsequent to the bid, the Connerses entered into a purchase and sale agreement with CPS to purchase the property for $30,000. Title to the property was conveyed to the Connerses by a quitclaim deed on June 30, 2009.

{¶3} In October 2009, the Connerses received conditional approval from Cincinnati's Office of the Zoning Hearing Examiner to "reopen the school as a charter school." In January 2010, CPS received a letter from the Buckeye Institute for Public Policy Solutions informing it that the Connerses would be opening a charter school at the site.

{¶4} CPS filed a complaint for declaratory judgment and injunctive relief, seeking a declaration that the deed restriction prohibiting the use of the property as a school was valid and enforceable and seeking to enjoin the Connerses from taking any action toward opening a school on the property. The trial court concluded that

the deed restriction was against public policy and entered judgment on the pleadings in favor of the Connerses.

{¶5} In its sole assignment of error, CPS asserts that the trial court erred in granting judgment on the pleadings to the Connerses. Under Civ.R. 12(C), the trial court could grant judgment on the pleadings only if there was no material issue of fact and if the moving party was entitled to judgment as a matter of law. We review the trial court's entry of judgment on the pleadings de novo.[1]

{¶6} CPS argues that, by granting judgment on the pleadings, the trial court interfered with CPS's statutory right to contract. According to CPS, the deed restriction was clear and unambiguous and was agreed to by the Connerses. CPS is correct that, under R.C. 3317.17, it was capable of "contracting and being contracted with * * * [and] disposing of real and personal property." But Ohio courts have long recognized that contract terms that are contrary to public policy are void.[2]

{¶7} The long history of the application of the public-policy exception has included the corresponding struggle to determine what public policy is. "[P]ublic 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."[3]

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[1] *Mayfield Clinic, Inc. v. Fry*, 1st Dist. No. C-030885, 2004-Ohio-3325, ¶6.
[2] See, generally, *King v. King* (1900), 63 Ohio St. 363, 59 N.E. 111; *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney* (1916), 95 Ohio St. 64, 115 N.E. 505; *J.F. v. D.B.*, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740.
[3] 17 Ohio Jurisprudence 3d (1980) 528, Contracts, Section 94.

{¶8} 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. R.C. 3313.41 provides for the disposal of real or personal property by a school board. Under R.C. 3313.41(G)(1), "[w]hen a school district board of education decides to dispose of real property suitable for use as classroom space, 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."

{¶9} 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. CPS points to other statutes that regulate the operation of community schools as evidence that Ohio public policy is not clearly on the side of community schools. But that the legislature has regulated community schools does not negate its enactment of a statute that clearly favors school boards first offering classroom space that is not being used to community schools. 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.

{¶10} We note also that we are not persuaded by CPS's argument that the property was not "suitable" for classroom use. This argument is 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.

{¶11} Because the deed restriction was void as against public policy, the Connerses were entitled to judgment as a matter of law. We therefore affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., and CUNNINGHAM, J., concur.

Please Note:

The court has recorded its own entry this date.

D88568484

JUDGE ROBERT P. RUEHLMAN
Court of Common Pleas
Hamilton County, Ohio

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI

Plaintiff,

-VS-

Dr. ROGER CONNERS, *et al.*
3491 Hillside Avenue
Cincinnati, OH 45204

Defendants

~~Case No. A1001252~~

(Consolidated with Case No. A1001587)

JUDGE RUEHLMAN

ORDER AND ENTRY GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS IN CASE NO. A1001252, AND DENYING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS IN CASE NO. A1001587

ENTERED
JUN - 3 2010

This matter is before the Court on Defendants' Motion for Judgment on the Pleadings. On February 10, 2010, Plaintiff 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, Defendants filed their Answer, which articulated four Affirmative Defenses to Plaintiff's claims, amongst them a defense that the deed restriction Plaintiff's seek to enforce is void by public policy. Soon thereafter, on March 3, 2010, Defendants filed their Motion for Judgment on the Pleadings, further arguing that the deed

restriction at issue is void by public policy. Plaintiff filed a Memorandum in Opposition on March 16, 2010, and Defendants 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.[1] 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.

This Court finds Defendants' Motion for Judgment on the Pleadings in Case No. A1001252 well-taken, and hereby grants it (the subject deed restriction is void by public policy), and Defendants' Motion for Judgment on the Pleadings in Case No. A1001587 not well-taken, and hereby denies it (Plaintiffs in that case have standing).

IT IS ORDERED THAT the March 3, 2010 Motion for Judgment on the Pleadings of Defendants Roger and Deborah Conners is granted.

IT IS ORDERED THAT the February 10, 2010 Complaint of Plaintiff Board of Education of the City School District of the City of Cincinnati is dismissed. Costs to be paid by Plaintiff.

IT IS ORDERED THAT the March 23, 2010 Motion for Judgment on the Pleadings of Defendants Board of Education of the City School District of the City of Cincinnati, Cincinnati Public Schools, Eileen Reed, and Mary Ronan is denied.

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[1] "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.

IT IS ORDERED THAT the claims asserted in Case No. A1001587 remain pending before this Court, however, this is a final appealable order, and there is no just reason for delay as to the appeal of this Court's Order on its ruling on Defendants' March 3, 2010 Motion for Judgment on the Pleadings.

Hon. Robert P. Ruehlman

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the parties specified below this _____ day of _____, 2010.

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Baldwin's Ohio Revised Code Annotated Currentness
Title XXXIII. Education--Libraries
Chapter 3313. Boards of Education (Refs & Annos)
Schoolhouses and Lands; Equipment
→→ 3313.41 Sale or donation of real or personal 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 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 property 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)(1) When a school district board of education decides to dispose of real property suitable for use as classroom space, 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.

(2) When a school district board of education has not used real property suitable for classroom space for academic instruction, administration, storage, or any other educational purpose for one full school year and has not adopted a resolution outlining a plan for using that property for any of those purposes within the next three school years, it shall 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.

(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, 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 at least twice. The second and any subsequent 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, and, 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.

CREDIT(S)

(2006 H 79, eff. 3-30-07; 2004 H 323, eff. 9-23-04; 2001 H 94, eff. 11-4-01; 2000 S 269, eff. 9-22-00; 1994 S 81, eff. 8-19-94; 1986 H 428, eff. 12-23-86; 1984 H 676, H 130; 1983 S 39; 1978 H 1060; 1975 H 789; 1971 S 396; 131 v H 67; 1953 H 1; GC 4834-13)

Current through 2011 Files 1 to 27, 29 to 47, and 49 of the 129th GA (2011-2012), apv. by 9/26/2011, and filed with the Secretary of State by 9/26/2011

END OF DOCUMENT