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IN THE FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI	**Case No. C100399**
Plaintiff-Appellant,	**Trial Case No. A1001252 (Consolidated with Case No. A1001587)**
-VS-	
DR. ROGER CONNERS, *et al.*	
Defendants-Appellees.	

APPELLEES' BRIEF ON THE MERITS

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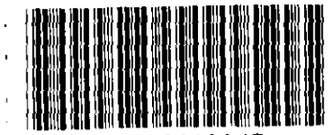

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. FACTS AND STATEMENT OF THE CASE	1
A. Background	1
B. Key Facts	4
C. Procedural History	6
II. ARGUMENT	8
A. Cincinnati Public Schools' deed restriction is void by public policy	8
1. The contractual remedy of public policy is well-established in Ohio	8
2. The public's interest in confining the scope of an agreement is heightened when the contract is not private, but, as here, public	9
3. CPS' deed restriction is void because it hinders and impedes Ohio's public policy in favor of transferring taxpayer-owned school buildings to community schools	11
a. The Proper Standard	11
b. Ohio's Public Policy in favor of Community School Acquisition of Public School Buildings	15
c. Ohio's Public Policy in Favor of Effectuating Parental Choice and Educational Opportunity through Community Schools	17
B. The deed restriction must be stricken, and the conveyance must otherwise remain intact	19
C. Cincinnati Public Schools' remaining arguments are frivolous	20
a. Intentions of the Parties and Further Evidence	21
b. The Remedy of Public Policy	22
c. The Public Policy at Issue	22
III. CONCLUSION	24

TABLE OF AUTHORITIES

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R.C. 3313.41.

R.C. 3314.01.

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.

I. FACTS AND STATEMENT OF THE CASE

A. Background

Theodore Roosevelt Community School, at Theodore Roosevelt School in Fairmount, opened in August 2010. However, since its conception, Cincinnati Public Schools (CPS) has endeavored to protects its own turf by keeping Theodore Roosevelt School from opening. CPS now endeavors to shut it down.

This lawsuit by CPS is simply the latest in a long line of improper attacks on school choice in Ohio. CPS has continuously flouted Ohio's community school laws, and in a bold new policy initiative, now seeks to insulate itself from school choice and competition by essentially spot-zoning community schools out of the city of Cincinnati. The reason for this animus is simple: Ohio's public community schools are funded through a "pass through" mechanism. In each instance where a student and his family choose to leave CPS for a community school, Ohio's school funding formula redirects approximately $5,732 from CPS, and to the community school. [1] 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."[2] Accordingly, CPS and many other school districts perceive the need defend this $5,732 per pupil by attempting to limit the number of students who attend community schools within their district.

The initial tactic of CPS and other school boards was to attack the constitutionality of charter schools and the Ohio Community Schools Act, the statute which created them, altogether.

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[1] See Ohio Department of Education website: http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=878&ContentID=2305&Content=52515.

[2] Id.

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.*"[3] Unfortunately for CPS, 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,"[4] and accordingly, upheld the constitutionality of the Ohio Community Schools Act and charter school funding.

Having lost its battle to entirely eradicate charter schools, CPS has, in recent years, turned to more subtle attacks. In May 2009, CPS elected to offer nine buildings at public auction, and two, including Roosevelt School, at absolute auction. Despite the statutory right of first refusal granted to charter schools, none of these nine buildings were offered for sale to

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[3] *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.

[4] 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."

charter schools. Meanwhile, *all nine* were advertised with the "restriction" that they "may not be used as any type of educational facility [unless so used by CPS]."[5]

CPS sold one of these buildings, Roosevelt School, to Dr. Conners.[6] After (1) failing to offer Roosevelt school for sale to charter schools; and (2) advertising Roosevelt school as further unavailable for school use, CPS insisted upon certain deed restrictions, at the time of auction, to forbid Roosevelt School for being used as a private school or community school.

Amongst all of the Cincinnati neighborhoods that CPS could have chose to deny an additional educational opportunity to parents and children, it has chosen the Fairmount neighborhood. This part of the city, where Theodore Roosevelt School is located, is 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 change escape poverty through educational opportunity.[7]

Conversely, Theodore Roosevelt Community School, through an individualized, technology-focused curriculum, has the capacity to create and improve lifelong opportunities available to the children of Fairmount. However, the realization of this capacity, precisely what is envision by the OCSA, is derailed when those who would bring school choice to Fairmount

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[5] Promotional Materials pursuant to Auction of Cincinnati Public Schools Surplus Properties, at p. 6, attached to Plaintiff's Complaint as Exhibit 1.1.

[6] 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."

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

are denied their statutory right to acquire basic facilities necessary to educate Fairmount children. Yet this is precisely what CPS' deed restriction, and accompanying lawsuit, attempt to accomplish.

Meanwhile, CPS representatives have noted that "[f]rankly, we are not that keen on the idea of our buildings going for additional charter schools,"[8] and that the Cincinnati Public Schools opposes "competition" from private and community schools.[9] Meanwhile, CPS has even dedicated a page on its website toward the derision of community schools.[10]

B. Key Facts

On June 30, 2009, CPS transferred the Roosevelt School to Dr. Conners. The agreement included a deed restriction prohibiting any private or charter school, but not CPS, from using the property as a school.[11] That restriction appears in the June 9, 2009 Purchase and Sale Agreement:

> 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.[12]

It also appears in the June 30, 2009 Quite Claim Deed:

> 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

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

9 June 3, 2009 statements of Cincinnati Public Schools Real Estate Agent Andy Kahn to Rick Voss.

10 http://www.cps-k12.org/schools/charter/charter.htm

11 CPS' Complaint in Case No. A1001252, paragraphs 7, 8.

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

> [CPS] from repurchasing any portion of the Property in the future and using the Property for school purposes.[13]

When Dr. Conners indicated his intent to defy the unlawful deed restriction, CPS filed its Complaint, to which Dr. Conners promptly responded with a Motion for Judgment on the Pleadings.

By the time CPS case reached the Trial Court, 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 set to being on July 1, 2010; (5) entered into binding, and considerably costly, contracts with a school sponsor, operator, and treasurer; (6) enrolled over 150 students for the upcoming school year; and (7) entered into contracts with 35 employees.[14]

In addition, since the Trial Court's denial of CPS' tactical motion to stay, Theodore Roosevelt School has (1) achieved a total enrollment of 201 students; (2) upon inspection, obtained a certificate of occupancy from the City of Cincinnati Building Department, verifying that it is ready and safe for occupancy as a school (the certificate of occupancy issued on July 23, 2010); and (3) received, and invested in student instructional materials, a $47,000 state foundation payment from the state of Ohio and a $225,000 installment of a federal grant from the federal government.[15] The school's teacher contracts began on August 9, 2010, and the first day of school was August 18, 2010.[16]

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

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

15 August 3, 2010 supplemental affidavit of Roger Conners.

16 Id.

C. Procedural History

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.[17] 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 thereaftrer, on June 3, 2010, after considerable briefing of the matter, the Trial Court granted Dr. Conners Motion for

[17] "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.

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 this 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.[18] On March 16, 2010, CPS filed a Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings that was 17 pages in length.[19] 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.[20] On April 2, 2010, CPS filed a six-page Sur-Reply Brief, opposing the Motion for Judgment on the Pleadings.[21] 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, 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.

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[18] Trial Court's Docket.

[19] Trial Court's Docket.

[20] Trial Court's Docket.

[21] Trial Court's Docket.

II. ARGUMENT

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. More 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 its review of this matter, this Court must be cognizant that deeds are contracts, and that rudimentary contract law applies to transaction of real property. Moreover, 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."[22]

A. Cincinnati Public Schools' deed restriction is void by public policy.

1. The contractual remedy of public policy is well-established in Ohio

Although Appellant's Brief attempts to cast Dr. Conners' public policy claim as novel and unprecedented, the notion that a contract[23] cannot transgress public policy has been firmly-rooted in Ohio contract law for several hundred years. 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."[24] The Court still holds fast to

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

24 *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

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 only by Constitutions, statutes, and judicial decisions, but by sound and substantial public policies underlying all of them."[25]

Accordingly, contract terms that violate public policy may not be enforced by Ohio courts. "Public policy" means 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.[26]

Thus, to quote the United States Supreme Court 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.*[27]

2. The public's interest in confining the scope of an agreement is heightened when the contract is not private, but, as here, public.

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[25] *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).

[26] *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).

[27] *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).

When applying public policy to the contract term at issue here, this Court should apply heightened scrutiny because this term cannot be properly characterized as private: one of the parties is a political subdivision, the property being sold is owned by the taxpayers, and the term seeks to deprive an entire community of a legally mandated public education opportunity that may otherwise exist. Indeed, 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 manage the schools in the pubic interest."[28] For this reason, Ohio courts have been eager to void terms of school district contracts that fail to take account of the public interest. For instance, in *Xenia City Bd. Of Ed.* and several other Ohio cases, 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."[29]

Moreover, 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. 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.

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

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

29 Id., at 377.

> for cause. Such legislation has uniformly been held not to offend constitutional inhibitions against interference with the freedom of contract.[30]

However, CPS ignores this key distinction, instead speaking volumes by likening of itself to a hotel or gas station that may "protect its own property interest."[31] CPS is neither a private individual nor a private business: it is a taxpayer supported entity that should not target the state's program of education, i.e. community schools, as "competing."[32] Yet this is clearly the approach that CPS has chosen to take, and its deed restriction, prohibiting taxpayer-owned buildings from being used for private and community schools, is nothing more than a manifestation of this self-interested competitive spirit.

Meanwhile, public policy exists precisely because "the public's interests 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."[33] Thus, this Court must employ heightened scrutiny when determining whether terms of adhesion contained in CPS contracts, such as the deed restriction here, violate public policy.

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

a. The Proper Standard

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30 *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.

31 See Plaintiff's Memorandum in Opposition, p. 8.

32 Id.

33 *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).

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."[34] In refusing to enforce the racially-restrictive covenant, the Court reasoned as follows:

> 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.[35]

More 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,"[36] 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."[37]

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

35 Id., at 34,35.

36 *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)).

37 Id., at 564. Emphasis added.

Also analogous, in *Clifton George Co. v. Great Southern Life Ins. Co.*,[38] the court held that a deed restriction against commercial use was unenforceable against the use of property to operate a for-profit school.[39] The court reasoned that such a restriction would violate Texas public policy of encouraging education.[40] 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.[41]

However, this Court need not rely upon, or even utilize federal or out-of-state law: Ohio courts have commonly applied public policy in a myriad of contexts. In the process, Ohio's courts have articulated somewhat differently-worded tests to describe when a contract term is void by public policy. 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."[42]

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."[43] 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.[44] The court determined that, because the Ohio General

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38 (Tex.App. 1923), 247 S.W. 912,.

39 Id., at 914.

40 Id.

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

42 *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*).

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

44 Id.

Assembly enacted the CSPA, that it intended to "helps society become aware of unfair business acts and practices."[45] 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.[46]

The *Eagle* Court articulated several further guideposts for Ohio courts to rely upon when assessing a contractual term against public policy: the court, drawing upon past Ohio cases, 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.[47]

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."[48] In *Key v. Vattier*, the Supreme Court of Ohio voided a term because it was "against the public law, general policy, or public justice."[49]

Amongst all of these slightly differing rules is a common denominator that this court should employ: 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.

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45 Id.

46 Id.

47 *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.

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

49 *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.

b. Ohio's public policy in favor of facilitating community school acquisition of public school buildings.

In this instance, there can be no doubt that the deed restriction prohibiting Roosevelt school from being used as a school, unless by CPS, directly hinders the results that are sought to be created by R.C. 3313.41, 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 to inner city youth. The clear rationale underlying these statutes is to facilitate the growth of school choice through community schools, and since this is done by creating legal entitlements to 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.

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. 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."

The state of Ohio has even 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.[50] 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."[51]

This case is not about whether CPS has complied with some of the above statutes (although it certainly appears that it has not). 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,"[52] 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.

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50 R.C. 3318.50; R.C. 3318.52.

51 R.C. 3318.50(B).

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

CPS' deed restriction is in derogation of, and impedes and hinders each of these policies. 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 form 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 Court's decision, granting Dr. Conners' Motion for Judgment on the Pleadings, must be upheld.

c. Ohio's public policy in favor of effectuating parental choice and educational opportunity through community schools.

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.

To reiterate the legal principles above, 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. Here, it must first be remembered that "[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.*"[53] Through enacting the Ohio Community Schools Act, 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

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

educational programs in a deregulated setting."[54] The legislative declaration that the Act's purposes include "choice" for parents and students and "opportunity" for the educational community[55] display that the OCSA exists to enhance, through school choice the general welfare of parents, children, and all Ohioans. The Supreme Court of Ohio has further elaborated on this mission:

> [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.[56]

Axiomatically, community schools can only 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" if it is financially feasible for the schools to open. It is further self-evident that this financial feasibility depends largely on the opportunity to acquire a school building at a reasonable cost.

CPS' deed restriction impairs the school choice purposes of the Ohio Community Schools Act by impairing the very likelihood that a charter school may open in Cincinnati, so as to effectuate them. Consequently, the deed restriction is void by public policy and therefore

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

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

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

unenforceable. The Trial Court properly granted Dr. Conners' Motion for Judgment on the Pleadings, and must be upheld.

B. <u>The deed restriction must be stricken, and the conveyance must otherwise remain intact.</u>

Compelling Ohio legal 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 entire conveyance of the properties to those who sought to use them in ways that violated the deed restrictions.

The rationale for doing so is clear: if the party who seeks to unlawfully restrict a use can prevent the grantee who covets 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 grantee 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,[57] prompting the United States Supreme Court held that the District Court's order (divesting the African Americans of title based on the racial restriction) "could not stand."[58]

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,

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57 (1948) 334 U.S. 24, 68 S.Ct. 847.

58 Id. at 34, 68 S.Ct. 852.

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.

Further, CPS' Brief, yet again burying its head in the sand, ignores the fact that this contract contains a severability clause, even though it drafted that clause. Indeed, 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.[59]

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

Finally, even if this Court ignored the plain language of the contract, the cases cited above, and the enormous policy rationales for upholding the conveyance, and Ohio case law still 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.[60]

C. <u>Cincinnati Public Schools' remaining arguments are frivolous.</u>

CPS peppers a myriad of unserious observations and arguments throughout its brief, ranging from attacking arguments that Dr. Conners has never made to trying to make irrelevant

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

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

matters relevant. For the following concise reasons, none of these matters warrant this Court's time.

a. Intentions of the Parties and Further Evidence.

First, 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. This assertion is patently false. 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.[61] CPS's deed restriction clearly cannot be enforced simply because it was voluntarily agreed upon - - by this rationale, a murder-for-hire contract would be enforceable, so long as the putative murder and hirer had a sufficient meeting of the minds.

For much the same reason, no further discovery was or is required in this matter. The Court does not need further evidence to decide the case, because the intent of the parties is evidenced by the contractual language.[62] 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."[63] 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.[64] Here, there is no need to inquire into the parties' intent, because no provision of the contract is, or has

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61 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.

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

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

64 Id.

been alleged to be, unclear or ambiguous. In sum, whether a public policy (1) exists; and (2) voids a contract term is a matter of law.[65] Consequently, intentions and further evidence are irrelevant, and CPS' deed restriction can and must be judged on its face.

b. The Remedy of Public Policy.

CPS would read public policy out of the common law. In CPS's Memorandum in Opposition, it states:

> [t]he majority of cases whereby a court has voided a contract as against public policy involve some particularly egregious violations of some very clear national public policy or statute, such as discrimination against some constitutionally-protected class.[66]

First, CPS offers no support for this claim. Second, Dr. Conner's Motion for Judgment on the Pleadings, and this Brief, cites to numerous Ohio cases where a court has found a contract term to violate a public policy other than discrimination against some constitutionally-protected class.[67] Those include the public education cases cited herein.

c. The Public Policy at Issue.

Finally, CPS attempts to sway this Court by advancing the absurd and false notion that Dr. Conners has asked for, and the Trial Court has declared "a broad overwhelming policy in favor of charter schools." Although CPS devotes its Fourth and Fifth Assignments of Error to this crusade, the issue can be dispensed with cursorily, as this is a boogey-man that simply does not exist.

First, the Trial Court's Order and Entry simply does not declare such a policy. Instead, it austerely states that "This Court finds Defendants' Motion for Judgment on the Pleadings in

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

66 Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings, at 9.

67 Defendants' Motion for Judgment on the Pleadings at 10-11, citing *Grange Mut. Cas. Co., supra; Eagle, supra; Dixon, supra; Key, supra; Lamont Bldg. Co, supra; John Hancock Mut. Life Ins. Co, supra.*

Case No. A1001252 well-taken, and hereby grants it (the subject deed restriction is void by public policy)." In reaching this conclusion, the Court explicitly and implicitly relies upon the arguments made in Dr. Conners' Motion for Judgment on the Pleadings. That Motion makes the same arguments that are made in this brief: Ohio maintains a narrow public policy in favor of conveying dormant and/or unused taxpayer-owned public school buildings to Ohio Community Schools, so that they may be used to facilitate and improve this state educational program.

From this relatively transparent and easily understood argument, CPS deduces that Dr. Conners has argued for, and the Court has 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."[68] Further, CPS contends that "[t]he only basis for Conners' request that the Court void this deed restriction is the vague notion that the contract does not 'effectuate school choice through community schools.'"[69]

These contentions are not simply wildly reckless. They are reprehensibly false, and worthy of sanction. They are easily disproven by the arguments made by Dr. Conners, herein, by the bulk of the argument made in Dr. Conners' March 3, 2010 Motion for Judgment on the Pleadings, and by the arguments made by Dr. Conners at the May 27, 2010 hearing of this matter. Its seems as though CPS has simply chosen to clothes its eyes, clasp its hands over its ears, and ignore an argument for which it has no answer: Ohio has a clear public policy in favor of conveying unused public school building to community schools, and CPS' deed restriction flagrantly violates that policy.

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

[69] Id., p. 12.

It is only when this policy assailed that public policy is violated, and a contract or term may be rendered void. The Trial Court did not expand the rights of community schools or render unenforceable future contracts with community schools- - it simply rightfully applied public policy analysis to this deed restriction. Consequently CPS' flurry of irrelevant and frivolous arguments must be separated out from the substance of this matter, and the Trial Court's decision, striking the unlawful deed restriction, must be upheld.

III. CONCLUSION

CPS is not a private business or individual: it is a taxpayer supported entity that should not target the state's program of education, i.e. community schools, as "competing."[70] Yet this is clearly the approach that CPS has chosen to take, and its deed restriction, prohibiting taxpayer-owned buildings from being used for private and community schools, while retaining that right for itself, is nothing more than a manifestation of this self-interested competitive spirit. The remedy of public policy exists to externalities associated with such contracts impact on the pubic interest."[71] Consequently, CPS' effort to enforce the deed restriction fails to state a claim upon which relief can be granted, the Trial Court correctly granted Dr. Conners' Motion for Judgment on the Pleadings, and it must be upheld.

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[70] Id.

[71] *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).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the parties specified below this 14th day of October, 2010.

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