IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

STATE OF OHIO, EX REL. MARCELLA GAYDOSH 9250 Liberty Rd. Twinsburg, OH 44087, Relator, vs. CITY OF TWINSBURG 10075 Ravenna Rd, Twinsburg, OH 44087, Respondents.	CASE NO.: CV-2017-12-5055 JUDGE TAMMY O'BRIEN MAGISTRATE KANDI O'CONNOR REPLY TO RESPONDENT'S OPPOSITION BRIEF

Now Comes Relator Marcella Gaydosh, through counsel, submits a reply brief in opposition to the Respondent's Brief in Opposition to Relator's Motion for Preliminary Injunction submitted on December 15, 2017. Concurrent with this filing Relator amends her Complaint to bring it under R.C. § 733.59

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REPLY TO RESPONDENT'S OPPOSITION BRIEF

I. Introduction

The City of Twinsburg (City) unlawfully allocated funds to demolish the historic Old School. The Twinsburg School District (School District) owns a property interest in the Old School, but the City never obtained a waiver from the School District to demolish the Old School. Gaydosh sued to enjoin the City from violating conditions and restrictions in the Old School's deed, and to provide clarity to the City and School District regarding the property interests of each respective party.

II. Statement of Facts

In 1998, the City and the School District entered a joint "land-swap" transaction whereby the City conveyed the Old School to the School District. (Transcript at 31:25 – 32:5). The Deed contains the following provision:

> To have and to hold the premises aforesaid, with the appurtenances thereunto belonging, to the said grantee, its heirs and assigns, so that neither the said grantor, nor its heirs, nor any other persons claiming title through or under it, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and everyone of them shall by these presents be excluded and forever barred subject to the school remaining a public building so long as it is owned by the Grantee. *Complaint Ex. 1.*

The record does not reveal extrinsic evidence to aid in interpreting the phrase "subject to the school remaining a public building so long as it is owned by the Grantee." From 1998 to 2013, the City leased the Old School to Chrysler and Kent State for educational purposes (Transcript 33:13-19). When Kent State's lease expired, the City applied to the Architectural Review Board ("ARB") to begin demolition (Transcript 37:10-17). After the ARB approved demolition in 2013, the City left the Old School vacant, failed to maintain it, and made little

effort to either rehabilitate it or find a private developer to rehabilitate it (Transcript 25:15-25). The City also failed to list the Old School in the National Register of Historic Places, which would have made it eligible for a tax credit program, nor aid a private group of citizens to have it listed. (Transcript 48:17-25).

The City did not bring the deed language to the School District's attention before initiating demolition legislation. The issue was first raised at a council meeting on November 14, 2017. (Transcript 22:8-12). Rather than halt the legislative process to insure the City's proposed action complied with the deed language, the law director sent a letter to the School District superintendent the next day, which concluded, "Nothing in the deed prohibits the City from demolishing the building." *Complaint Ex. 4.* The School District superintendent responded, stating the deed issue could not be considered at the next board meeting due to short notice, but would be forwarded to the School District's legal counsel. *Complaint Ex. 5.*

The School District's counsel only examined whether there was a reversionary interest, but not whether there was a covenant or easement. *Compliant Ex. 6.* On the incomplete advice of counsel, the School Board did not object to the demolition, but also extended no formal executed written waiver of any restrictions. *Id.* Under R.C. § 3313.41, a school district may not sell or donate real property interests without following certain procedures. The City is still in violation of the deed's language.

III. Law and Argument

For this Court to grant a preliminary injunction, it must find (a) the deed's language grants the School District a property interest in the Old School, and the City must obtain an express written waiver to demolish the Old School; (b) Gaydosh has standing, as a taxpayer of the City, to enjoin the City from demolishing the Old School without an express written waiver

from the School District; (c) City taxpayers will suffer irreparable injury without the injunction; (d) third parties will not be unjustifiably harmed if the injunction is granted; and (e) the public interest will be served by the injunction.

a. Interpretation of the Deed's Language

Courts must give effect to every clause in a deed and, if possible, to read into the deed the intention of the parties. *Metzger v. Joyce,* 41 N.E.2d 261, 262 (1st Dist.1941). Where terms in a deed are clear and unambiguous, this Court cannot create a new contract by finding an intent not expressed in the clear language employed by the parties. *Violante v. Village of Brady Lake,* 11th Dist. Portage No. 2012-P-0054, 2012-Ohio-6220, ¶ 21. A court may consider extrinsic evidence if the terms are ambiguous or unclear. *Id.* The rule that the instrument will be construed most strongly against the grantor and those claiming under him are only called into use as a last resort to resolve ambiguity. *Metzger,* at 262. When interpreting deed language, a court must seek to find the intent of the parties even if it involves extrinsic evidence. A court cannot immediately default to resolving the ambiguity for the grantee.

Deeds which reserve property interests for the grantor fall into two groups of property interests: (1) fee simple determinable and fee simple subject to a condition subsequent; (2) fee simple absolute subject to a real covenant or an easement. The former property interests allow the grantor to take back the property due to an event or violation of a condition, while the latter property interests give the grantor a right to sue for damages due to the violation of a condition. Courts often hold words of condition, standing alone, create only covenants or easements. C*hurch of God v. Glann*, 114 N.E.2d 98, 101 (6th Dist.1952). When interpreting conditional deed language, if a court finds no fee simple determinable or fee simple subject to condition

subsequent, then it must determine whether the the language creates a covenant or easement, rather than assume a mere statement of purpose.

i. Fee Simple Determinable

In a fee simple determinable, the estate automatically terminates on the happening of a stated event and goes back to the grantor. *P C K Properties, Inc. v. City of Cuyahoga Falls*, 176 N.E.2d 441, 444 (9th Dist.1960). It is frequently urged that express words of reverter are necessary to create a determinable fee. *Id.* However, case law shows no such express words are required, but mere expression of the purpose for which the land is conveyed creates no possibility of reverter. *Id.* A possibility of reverter is created by using durational, adverbial language such as 'for so long as', 'while', 'during', or 'until'. *Id.*

The language of the deed does not use the express words typically used to create a fee simple determinable, but uses the phrase "subject to," which means "being dependent or conditional upon something." By the plain meaning of the deed language the estate is 'dependent or conditional upon' the "school remaining a public building so long as it [the property] is owned by the Grantee [the City]." The deed language shows the parties intended the conveyance to be conditioned on the Old School remaining a public building, and if the City did not use it as a public building for the School District to take it back. Adding the durational word 'remaining,' coupled with the conditional phrase 'subject to,' creates a reverter interest. If the court finds the School District has a right of reverter, then the City has a clear legal duty enforceable by a writ of mandamus to convey it to the School District; the City no longer satisfies the condition of the school remaining a public building if the City demolishes it.

ii. Fee Simple Subject to Condition Subsequent.

If the transferor conveys an estate of the same quantum as his own, and, in addition, provides that he will have an election to terminate the transferee's estate upon the occurrence or non-occurrence of the event, then his future interest is called a right of entry for breach of condition. If the limitation uses language of condition like "on condition that," "provided that," or "but if," then the limitation is likely to be construed as a condition subsequent rather than a special limitation. *C K Props* at 444. The phrase 'subject to' is conditional language, so the interest can be construed as a fee simple subject to condition subsequent. Using 'subject to' demonstrates intent to create a condition; the choice to not use a durational phrase shows a preference towards a right of re-entry.

The City relies on *Petition of Copps Chapel M.E.Church*, which states deeds that "fail to include any provision providing for forfeiture, reversion, or other divestment of the property, do not contain a condition or limitation on the fee interest conveyed, thereby defeating any claim that the grantee's title would divest upon failure to comply with the alleged condition." *Petition of Copps Chapel M.E. Church*, 166 N.E. 218 (1929). The court continues, "general mere statements in the deed that the property is conveyed for school purposes, or is to remain for such purposes, and similar statements, are not construed as conditions or limitations of the grant." *Id*. The deed language here differs from *Petition* and the other cases the City relies on because there is no use of the word 'purpose' or 'use' in the deed. If the language is there to show purpose only, this language is required[1].

To create a fee simple subject to a condition subsequent, it is necessary to use a conditional phrase like 'subject to' and a condition such as 'school remain a public building.'

[1] In *Miller v. Village of Brookville*, the deed only states "forever for use in perpetuity as a public park" with no conditional words. In *C K Props., Inc. v. City of Cuyahoga Falls* the deed states "as long as used as hereinafter set forth, the following-described premises, to wit…".

Only if the deed contains no conditional words and uses the words 'purpose' or 'use' does it become a fee simple absolute. If this Court finds the deed language grants the School District a right of re-entry, then the School District, as a public body, cannot give up this property interest without following a statutory process. *R.C. § 3313.41*. The City put the School District in legal peril by not giving it time to determine what interest it had.

iii. Fee Simple Subject to Restrictive Covenant or Easement

Whether a provision in a deed constitutes a covenant or a condition depends on the intention of the parties, as gathered from the entire instrument; in case of doubt, a covenant is favored rather than a condition. C*hurch of God v. Glann,* 114 N.E.2d 98, 101 (6th Dist.1952). In multiple Ohio cases, courts have interpreted the phrase 'subject to' to mean the condition following the phrase is a restrictive covenant or easement. In *Miller v. Romanauski,* the court observed Black's Law Dictionary defines the term "subject to" as "subordinate" and "subservient," which connotes a servient estate[2]. *Miller v. Romanauski,* 8th Dist. Cuyahoga No. 100120, 2014-Ohio-1517, ¶ 19. *Mansfield v. Richardson,* 4 Ohio Law Abs. 319 (9th Dist.1926). *Clark v. Butler,* 4th Dist. Ross No. 12CA3315, 2012-Ohio-5618, ¶ 11. If the Court finds the deed language creates a fee simple absolute, then it must next examine whether it creates a covenant or easement.

A real covenant is "a clause or agreement in a deed whereby either party may ... bind himself to perform, or give something to or for the others." *Gardner v. Letson*, 5 Ohio N.P. 112, 8 Ohio Dec. 256, 258 (C.P.1897). No particular words are necessary to make a covenant. Any words will be sufficient which purport an agreement. *Brachman v. Warden,* 1852 WL 3125, *1 (Nov. 1852). It is often difficult to determine whether a provision in a deed is a covenant or a

[2] The court ruled in *Miller* the deed language "subject to all legal highways and 25 feet off the south side thereof for Fernhall Road, proposed" to be an easement. The court ruled in *Mansfield* the deed language "subject to an eight-foot drive on property adjoining on the south."

condition absent a clause of forfeiture or of reentry; under these circumstances, the same words may create a condition or to create a covenant. *Monnett v. Columbus*, S. & H. Ry. Co., 1904 WL 645, *7 (1904). Covenants are classified as express or implied based on the form in which they are established. Express covenants are those stated in words distinctly expressing the intent to covenant; implied covenants are those concluded by the legal construction of certain words. *Northern Ohio Traction & Light Co. v. Quaker Oats Co*., 152 N.E. 5, 4 Ohio Law Abs. 258 (1926). If the court finds the condition 'school remaining a public building' creates a fee simple absolute, then it must consider the condition by itself to be a restrictive covenant whereby the City promised the School District to keep the Old School as a public building. This promise included maintenance of the Old School which cannot remain a public building if it is a pile of rubble.

An easement is a grant of a use on the land of another or it is an impingement on one's right to the exclusive use and enjoyment of his or her property. *City of Norwood v. Forest Converting Co*., 476 N.E.2d 695, 700 (1st Dist.1984). An easement in gross is a right held by an individual, and does not run with the land. An express easement may be created by grant, or by reservation or exception in a deed. *Merrill Lynch Mtge. Lending, Inc. v. Wheeling & Lake Erie Ry.* Co., 9th Dist. Summit No. 24943, 2010-Ohio-1827. The use of the phrase 'subject to' could create an easement, which would grant the School District an easement in using the Old School by restricting it to use as a public building. Using easements to preserve historical buildings is now a common tool in real estate, whereby a third party will purchase a conservation easement from a historic property owner that gives the third party the right to enforce use conditions surrounding the historic property. *R.C. § 5301.68*. The School District could have intended to create a conservation easement with the deed language "subject to the school remaining a public

building so long the Grantee owns it" because 'subject to' connotes an easement, 'school remaining a public building' impinges use, and 'so long as the Grantee owns it' falls in line with the rules surrounding an easement in gross not running with the land.

iv. Conclusion on Interpretation of Deed Language

The deed language demonstrates the intent of the parties to restrict the Old School's use to a public building. What is ambiguous is the property interest the deed language grants to the School District to enforce such a restriction. The deed language alone may not determine the original intent of the parties, so the Court should grant the preliminary injunction to permit more discovery to determine intent. The Court must determine the parties' intent before imposing the presumption favoring the grantee.

b. Taxpayer Standing

The City relies on *Westbrook v. Prudential Ins. Co* in stating a common law taxpayer action may not be filed when a statutory taxpayer action would be available. Gaydosh does not seek to contest this case law, but chooses to exercise her rights under the Civil Rules to amend the Complaint. W*estbrook v. Prudential Ins. Co. of Am.*, 524 N.E.2d 485 (1988). The Amended Complaint, filed concurrently with this reply brief, changes the suit from a common law taxpayer suit to a statutory suit, and alleges the written requirement for a statutory lawsuit is exempted on the grounds of futility.

i. Statutory Taxpayer Action

R.C. § 733.58 provides for a statutory taxpayer action, whereby a taxpayer may sue on behalf of a municipality for an injunction to stop the misapplication of funds:

> If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in

> which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

R.C. § 733.56 gives the law director authority to file an "order of injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made on behalf of the municipal corporation in contravention of the laws or ordinance governing it. If the law director refuses to order the injunction upon the written request of the taxpayer, then the taxpayer may sue on behalf of the municipal corporation.

The condition precedent to a statutory taxpayer's action requiring a prior written request of, and refusal by, the law director to sue may be waived or excused. Futility is an exception to the written-notice requirement when it can be shown that written notice would have been useless because the law director would not have acted. *State ex rel. White v. City of Cleveland*, 295 N.E.2d 665, 666 (1973). The futility exception must be established from events which occur *before* the action is commenced and not reconstructed from hindsight through materials elicited during discovery. *Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C.*, 782 N.E.2d 1225 (1st Dist. 2002). Where the law director has advised a council there is no duty for them to act, and advises them to not act, a taxpayer need not request the solicitor institute suit as a condition to commencing a taxpayer's suit, since the request would be unavailing. *State ex rel. Nimon v. Village of Springdale*, 215 N.E.2d 592, 593 (1966).

Gaydosh submitted no written request to the Twinsburg law director because the effort would have been futile. In a public records request prior to suing, Relator obtained the letter from City Law Director Maistros to the School District asking whether the School District had an interest. In that letter the Law Director , "Nothing in the deed prohibits the City from

demolishing the building." *Complaint Ex. 4.* Relator knew the Law Director did not believe demolishing the Old School violated the Deed, and would not file an injunction to stop the misapplication of funds. Further, R.C. § 733.56 requires that the law director have a reasonable time to answer the written request. Due to Ordinance 111-2017 having emergency language, Gaydosh thought the contract would be accepted immediately and demolition would follow shortly. Gaydosh had to quickly file a Complaint to halt demolition. Like *Nimon*, the Law Director had advised the council that the deed language did not contain restrictions against demolishing the building prior to its voting on Ordinance 111-2017 on December 5, 2017. (Transcript 23:16-23). Gaydosh is exempt from a written request on the grounds of futility.

ii. Misapplication of Funds and Abuse of Corporate Powers

Any unlawful exercise of power by council, not conferred by the constitution or statutes is an abuse of corporate power. *Village of Warrensville Hts. v. Cleveland Raceways*, 116 N.E.2d 837, 838 (8th Dist.1954). A taxpayer may maintain an action to enjoin public officers or a public body from misapplying funds by the performance of acts in excess of legal authority, which contemplate or may result in the expenditure of public money. *Walker v. Village of Dillonvale*, 92 N.E. 220, 222 (1910). As a taxpayer, Gaydosh has standing to sue Twinsburg for acts that abuse its corporate powers or misapply public funds by making appropriations in excess of legal authority.

Section 2.02 of the Twinsburg Charter states, "the powers of the City may also be exercised, except if a contrary intent or implication appears in this Charter or in the enactments of the Council, in such manner as may now or hereafter be provided by the general laws of the State of Ohio." R.C. § 715.01 is the general law by which Ohio grants municipal corporation powers. It states:

> Each municipal corporation is a body politic and corporate, which shall have perpetual succession, may use a common seal, sue and be sued, and acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any authorized municipal purpose, and may hold, manage, and control such property and make any rules and regulations, by ordinance or resolution, required to fully carry out the provisions of any conveyance, deed, or will, in relation to any gift or bequest, or the provisions of any lease by which property may be acquired.

Embedded in this grant of power is the ability of municipal corporations to pass ordinances or resolutions required to fully carry out the provisions of any conveyance and deed. Ohio municipal corporations are authorized and empowered to accept grants of real estate, subject to reasonable restrictions and conditions, and when a grant is so accepted, the municipality is bound by restrictions and conditions. *Henry H. Stambaugh Auditorium Ass'n v. City of Youngstown*, 55 N.E.2d 672, 675 (7th Dist.1943). *Rapp v. City of Norwalk*, 6th Dist. Huron No. H-90-11, 1991 WL 137015, *4.

When Twinsburg passed Res. 135-1996 'Authorizing an agreement between the City and the Twinsburg City School District Board of Education to exchange certain parcels of real property,' and the Old School deed was conveyed to the City, the City became bound by the restrictions and conditions of the deed. When Twinsburg passed Ordinance 111-2017 authorizing a contract to demolish the Old School it violated the restrictions and conditions of the Old School deed. To avoid violating the deed, the City should have engaged the School District in the decision-making process, given it time to ascertain its property interests, and negotiated a waiver of those property interests. Instead, the City willfully ignored the language until two weeks before the final reading, sent a letter to the superintendent, passed the ordinance without a waiver of the School District's conditions and restrictions, and violated the conditions and restrictions in the deed. This abuse of corporate power exceeds Twinsburg's authority. Therefore, Gaydosh has

standing and a legal right to seek an injunction to stop Twinsburg from violating the conditions and restrictions of the Old School deed.

c. Irreparable Harm to the City Taxpayers

Since Gaydosh is suing for all City taxpayers, it must be shown that the City taxpayers will suffer irreparable injury absent the injunction. The City taxpayers will suffer irreparable injury in two ways: (1) the City taxpayers will forever lose the benefit of a historic public building by the demolition, and (2) the title to the underlying property of the Old School will be clouded by the demolition. The Old School has a long history in the City, and has been a centerpiece of the City's townsquare for nearly a century. This history makes it eligible to be placed on the National Register of Historic Places, which would then make it eligible for federal tax credit programs that would aid its rehabilitation. Once the Old School is demolished, and the underlying property sold to a private developer, the City taxpayers will forever lose the possible uses and benefits of the Old School.

d. No third parties will be unjustifiably harmed

R.C. § 733.58 makes any harm to third parties contracter justifiable, because the statute protects from unjustifiable harm by applying a one-year statute of limitations to taxpayer suits seeking to enjoin contracts. W*estbrook v. Prudential Ins. Co. of America*, 37 Ohio St.3d 166, 524 N.E.2d 485 (1988). Gaydosh sued before any contract between the City and Bertolini Trucking Company, Inc. has been executed

e. It is in the public interest to grant this injunction

As stated in section III(c), City taxpayers would be harmed without an injunction, so, inversely, they benefit from its granting. The City contends the public would be harmed because the bid for the next demolition contract would increase. This assumes the demolition would be

performed in non-winter months and that a second round of bidding would result in collusion by the contractors to bid up the price. (Transcript 42:1-25). The first assumption is entirely within the City's control because there is no reason the demolition could not be delayed until next winter when bidding prices are low. There is no public health emergency surrounding the Old School or danger of it harming any member of the public in its current state. The City would cause itself harm if it rebid the demolition early, and the injunction has nothing to do with this. The second assumption is without merit because assumes contractor behavior that could easily be the reverse. Given the same conditions of the first secret bidding process, the second secret bidding process could cause a lower bid.

IV. Conclusion

Words have meaning that must be determined by this Court. Gaydosh is likely to succeed on the merits because the deed language shows intent for the Old School property to be subject to conditions or restrictions in a possibility of reverter, right of reentry, restrictive covenant, or easement. Further, Gaydosh has standing to enjoin the misapplication of funds that violate those conditions or restriction since the School District provided no express written waiver. It is in the interest of the City, the School District, the City taxpayers, and the public for this Court to grant this injunction. This Court should grant Gaydosh an injunction to halt the demolition of the Old School and the spending of the misapplied funds until the School District acts under R.C. § 3313.41.

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CERTIFICATE OF SERVICE

I certify that on December 18th, 2017 a copy of the foregoing was served by electronic mail upon Respondents' counsel at:

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