REL: September 17, 2021

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1190343

Sumter County Board of Education

v.

University of West Alabama; Dr. Richard Holland, individually and in his official capacity as former president of the University of West Alabama; and Dr. Kenneth Tucker, individually and in his official capacity as president of the University of West Alabama

Appeal from Sumter Circuit Court
(CV-18-900027)

MENDHEIM, Justice.

The Sumter County Board of Education ("the SCBE") appeals from the Sumter Circuit Court's dismissal of its complaint asserting claims of reformation of a deed, breach of contract, and fraud, as well as seeking declaratory and injunctive relief, against the University of West Alabama ("UWA"); UWA's president Dr. Kenneth Tucker, in his individual and official capacities; and UWA's former president, Dr. Richard Holland, in his individual and official capacities. We affirm the judgment of the circuit court.

I. Facts

At the outset of this rendition of the facts, we observe that in their briefs the parties reference some facts gleaned from the preliminary-injunction hearing. Although some of those facts shed further light on this dispute, we cannot consider them in assessing the circuit court's disposition of the motion to dismiss because, "[i]n considering whether a complaint is sufficient to withstand a motion to dismiss, this Court must accept the allegations of the complaint as true." Creola Land Dev., Inc. v. Bentbrooke Hous., L.L.C., 828 So. 2d 285, 288 (Ala. 2002).

On a related note, the SCBE attached to its operative third amended complaint several exhibits containing authenticated documents referenced in the complaint, including a copy of the sales contract for the property transaction at the heart of this dispute and an affidavit from the former superintendent of the SCBE, who was the superintendent at the time the transaction occurred. In its judgment granting the motion to dismiss, the circuit court expressly stated that it had considered the attachments to the SCBE's complaint in rendering its judgment. "Exhibits attached to a pleading become part of the pleading. See Rule 10(c), Ala. R. Civ. P. ('A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.')." Ex parte Price, 244 So. 3d 949, 955 (Ala. 2017). Moreover, "[a] trial court does not treat a Rule 12(b)(6)[, Ala. R. Civ. P.,] motion [to dismiss] as a summary-judgment motion by considering authenticated documents that are attached to the motion to dismiss if ' " 'the document[s are] referred to in the complaint and [are] central to the plaintiff[s'] claim[s].' " ' " Newson v. Protective Indus. Ins. Co. of Alabama, 890 So. 2d 81, 86 (Ala. 2003) (quoting Donoghue v. American Nat'l Ins. Co., 838 So. 2d 1032, 1035 (Ala. 2002), quoting in turn other cases).

Therefore, the facts included in the SCBE's attachments to its complaint are incorporated into our rendition of the facts, and our consideration of them does not alter the standard of review we apply. With those observations in mind, we turn to relating the facts before us.

Because a new high school had been built, in early 2010 the SCBE closed Livingston High School ("LHS"). Shortly thereafter, officials from UWA approached the SCBE about the possibility of purchasing the LHS property. On May 17, 2010, then UWA president Dr. Holland sent then SCBE superintendent Dr. Fred Primm a letter concerning the possible purchase:

> "I am writing on behalf of the University of West Alabama to express our desire to purchase the Livingston High School property on School Street in Livingston, Alabama, when and if it becomes available. ...
>
> "The University plans to use the Livingston High School Property to house the faculty and students of the Julia Strudwick College of Education and the administrative offices for the School of Graduate Studies, the Division of Online Programs, and the Office of Teacher Certification. As I have stated on numerous occasions, the University of West Alabama will not open a charter school or K-12 program in this facility. The University has no intention of operating such programs through the University."

(Emphasis added.)

In his affidavit discussing the LHS-property transaction, Dr. Primm stated that he had "prepared a memo entitled Discussion Terms for Sale Transaction of Livingston High School," and he attached a copy of that memo to his affidavit. A portion of the memo labeled "K-12 Competition" stated that "[t]he university will not start any lab, campus or charter K-12 school in the facility" and that

> "[t]he Sumter County Board of Education will not consider any offer that would allow the property currently housing Livingston High School to be utilized for any private, charter, or other pre-K-12 school entity that is not under the control or supervision of the Sumter County Board of Education, or a part of the school system that the Sumter County Board of Education controls, supervises, or manages. Therefore, any sale of the subject property will be done pursuant to a deed that contains a covenant that runs with the land, and which shall last so long as there continues to be a Sumter County Board of Education, or any successor to the Sumter County Board of Education, that may be created by the State of Alabama to control, supervise, or manage public education in Sumter County, Alabama, or any successor political subdivision of the State of Alabama, which encompasses the geographical region now organized as Sumter County, Alabama."

The memo also contained terms concerning facilities and maintenance as well as financing for the sale of the LHS property. The last entry in the

memo stated: "Special Note: These terms have not been approved by the [Alabama State] Board of Education. As we have more in-depth discussions, there may be additional proposals by the Board."

The "special note" in Dr. Primm's memo hinted at the fact that in July 2010, per the power invested in the Alabama State Board of Education ("the ASBE") by § 16-6B-4, Ala. Code 1975, the ASBE had intervened and had assumed control of the Sumter County school system due to the SCBE's financial difficulties.[1] As a result, when the SCBE

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[1]Section 16-6B-4, Ala. Code 1975, provides, in part:

> "Following the analysis of the financial integrity of each local board of education as provided in subsection (a) or (b) of Section 16-13A-2, [Ala. Code 1975,] if a local board of education is determined to have submitted fiscally unsound financial reports, the State Department of Education shall provide assistance and advice. ... If after a reasonable period of time the State Superintendent of Education determines that the local board of education is still in an unsound fiscal condition, a request shall be made to the State Board of Education for the direct control of the fiscal operation of the local board of education. If the request is granted, the State Superintendent of Education shall present to the State Board of Education a proposal for the implementation of management controls necessary to restore the local school system to a sound financial condition. Upon approval by the State Board of Education, the State Superintendent of

executed a "Sales Contract" with UWA on May 19, 2011, for the purchase of the LHS property, the contract was signed on the SCBE's behalf by then State Superintendent of Education Dr. Joseph Morton. The total purchase price for the LHS property was $4 million. The sales contract contained a section addressing restrictive covenants that provided, in part:

> Education shall appoint an individual to be chief financial officer to manage the fiscal operation of the local board of education, until such time as the fiscal condition of the system is restored. The chief financial officer shall perform his or her duties in accordance with rules and regulations established by the State Board of Education in concert with applicable Alabama law. Any person appointed by the State Superintendent of Education to serve as chief financial officer to manage the fiscal operation of a local board of education ... shall not be required to receive approval of the local superintendent to expend monies. ... The State Superintendent of Education, directly or indirectly through the chief financial officer, may direct or approve such actions as may in his or her judgment be necessary to: (1) Prevent further deterioration in the financial condition of the local board; (2) restore the local board of education to financial stability; and (3) enforce compliance with statutory, regulatory, or other binding legal standards or requirements relating to the fiscal operation of the local board of education. ..."

> "6. CONVEYANCE The Seller agrees to convey the Property to Purchaser by statutory warranty deed, free of encumbrances, except as herein set forth, and Seller agrees that encumbrances not herein exempted as assumed will be cleared at the time of Closing. The Property is sold and is to be conveyed subject to:
>
> "....
>
> "(d) the following covenants, which shall be included as covenants in the statutory warranty deed from Seller to Purchaser:
>
> "i. The University of West Alabama shall not permit the Property to be utilized for any private, charter, or other school entity serving students in kindergarten through twelfth grade or in pre-kindergarten educational programs, unless said school or programs are under the control or supervision of the Sumter County Board of Education, or are a part of the school system that the Sumter County Board of Education controls, supervises, or manages."

(Emphasis added.) Section 6(d)(i) of the sales contract is hereinafter referred to as "the restrictive covenant." In his affidavit, Dr. Primm stated that he received a copy of the sales contract in May 2011.

On May 24, 2011, a "Statutory Warranty Deed" conveying the LHS property from the SCBE to UWA ("the deed") was executed, and it was signed on the SCBE's behalf by Dr. Morton. The deed did not contain any restrictions on the LHS property or its use. The deed was recorded in the Sumter Probate Court on June 27, 2011. The deed indicated that it was prepared by attorney James H. Patrenos, Jr. The SCBE alleged in its complaint that Patrenos "was hired by UWA to draft the Sales Contract and the Deed for the old Livingston High School property." After UWA acquired the LHS property, it renamed the LHS building Lyon Hall. It is undisputed that in July 2011 the ASBE returned control of the Sumter County school system to the SCBE.

In March 2015, the Alabama Legislature enacted the Alabama School Choice and Student Opportunity Act ("the Act"), § 16-6F-1 et seq., Ala. Code 1975.

> "Generally speaking, the [Act], for the first time, established state authority for the creation of 'public charter schools,' which, unlike 'non-charter public schools' that are 'under the direct management, governance, and control of a local school board or the state,' are governed by 'independent governing board[s]' and exercise 'autonomy over ... decisions concerning finance, personnel, scheduling, curriculum, instruction, and

> procurement.' Compare Ala. Code 1975, § 16-6F-4(14), with Ala. Code 1975, § 16-6F-4(16), Ala. Code 1975. The [Act] provides, however, that a public charter school 'shall not be established in this state' unless duly authorized by either (a) '[a] local school board, for chartering of schools within the boundaries of the school system under its jurisdiction,' if such a local school board registers itself as an 'authorizer' under the [Act], or (b) the [Alabama Public Charter School] Commission. Ala. Code 1975, § 16-6F-6(a)."

Ex parte Alabama Pub. Charter Sch. Comm'n, 256 So. 3d 98, 99-100 (Ala. Civ. App. 2018).

In its complaint, the SCBE alleged: "On April 3, 2017, Defendant UWA's counsel James Hiram Patrenos, Jr. recorded a 'Scrivener's Affidavit' in the Probate Court of Sumter County. In the Affidavit, Mr. Patrenos declared ... that the private/charter school restrictive covenant[s] were inadvertently omitted from the Deed."[2] The "scrivener's affidavit" stated that it was "given to correct the omission of these covenants in the Deed ...."

[2]The second restrictive covenant referred to in the "scrivener's affidavit" stated that "[t]he University of West Alabama's Campus School will not be moved to the Property." That covenant is not in issue in this appeal.

In May 2017, the University Charter School ("UCS") filed an application with the Alabama Public Charter School Commission ("the APCSC") to establish a charter school in Sumter County. In its application, UCS stated that the LHS property was its first choice for the location of the school. The APCSC approved UCS's application in July 2017. In October 2017, it was publicly announced that UWA had an agreement with UCS for UCS to use the LHS property to house its school.[3] The SCBE's complaint alleged that in November 2017 the SCBE contacted UWA president Dr. Tucker and "requested that Defendant UWA honor its covenant not to use Livingston High School property as a K-12 charter

[3]We note that in its complaint the SCBE alleged that, "[i]n October 2017, UWA publicly announced that it would open a K-12 charter school on the old Livingston High School property." The SCBE also makes several references in its brief to UWA's operating a charter school on the LHS property. However, UCS is a separate entity from UWA. Section 16-6F-4(16)b. & f.1., Ala. Code 1975, of the Act specifically state that "[a] public school formed pursuant to [the Act]" must be "governed by an independent governing board that is a 501(c)(3) tax-exempt organization" and "[p]rovide[] an educational program" that "[i]ncludes any grade or grades from prekindergarten to 12th grade." In contrast, UWA is an institution of higher learning created by a different statutory scheme. See § 16-53-1 et seq., Ala. Code 1975. Under the Act, UWA cannot operate or control UCS.

school." However, UCS continued its preparations, and in August 2018 UCS opened its charter school on the LHS property with over 300 students attending.

On May 17, 2018, the SCBE filed a complaint in the Sumter Circuit Court against UWA; Dr. Tucker, in his individual and official capacities; Dr. Holland, in his individual and official capacities; each of the members of the UWA Board of Trustees; UCS; and each member of UCS's Governing Board. The original complaint alleged a claim of fraud and sought preliminary and permanent injunctive relief preventing the operation of the UCS charter school on the LHS property.

On June 22, 2018, UCS and its board members ("the UCS defendants") filed a motion to dismiss the complaint for a number of reasons. On July 11, 2018, the SCBE filed a notice of dismissal of the UCS defendants from the action. On July 12, 2018, UWA, Dr. Tucker, Dr. Holland, and the UWA board members ("the UWA defendants") filed a motion to dismiss the complaint. The motion contended that the UWA board members were due to be dismissed for several reasons and that the action as a whole was due to be dismissed for failing to join an

indispensable party -- namely, UCS. On the same date, the SCBE filed a withdrawal of its notice of dismissal of the UCS defendants.

On July 12, 2018, a hearing was held on the SCBE's application for a preliminary injunction in which testimony was taken from several witnesses and evidence was submitted by the SCBE and UWA. On July 13, 2018, the circuit court entered two orders. In the first order, the circuit denied the SCBE's application for a preliminary injunction. In the second order, the circuit court recognized that, based upon an agreement between the SCBE and the UCS defendants, the SCBE's fraud claim against the UCS defendants was dismissed. The SCBE did not appeal the circuit court's denial of its application for a preliminary injunction.

On October 26, 2018, the SCBE filed an "Amended Complaint" that listed the same defendants as in the original complaint, but it asserted claims of breach of contract against most of the UWA defendants, fraud against some of the UWA defendants, and unjust enrichment against some of the UWA defendants and sought a permanent injunction against all the defendants preventing them "from allowing and/or operating a K-12 school on the [LHS] property." On January 25, 2019, the SCBE filed

a "Second Amended Complaint" that again listed the same defendants and the same claims, except that it added a claim seeking reformation of the deed because of a "mutual mistake" based on the "scrivener's affidavit."

On February 27, 2019, the SCBE filed a "Third Amended Complaint for Reformation of Deed and Declaratory Judgment." That complaint, which is the operative one for this appeal, significantly pared down the defendants, alleging claims against only UWA; Dr. Tucker, in his individual and official capacities; and Dr. Holland, in his individual and official capacities ("the University defendants"). The complaint alleged claims of reformation of the deed because of a mutual mistake, fraud, and breach of contract. Additionally, the SCBE sought a judgment declaring "that there was a mutual mistake in failing to include the restrictive covenant in the Deed conveying the old Livingston High School property to the University of West Alabama" and a permanent injunction "to immediately cease and desist from operating a private, charter, or any K-12 school on the site of the old Livingston High School without the approval of the Sumter County Board of Education." On March 7, 2019, the University defendants filed a Rule 12(b)(6), Ala. R. Civ. P., motion to

dismiss the third amended complaint, arguing, among other things, that the restrictive covenant prohibiting the operation of a charter school on the LHS property was void based on the public policy advanced in the Act. On April 5, 2019, the University defendants filed a Rule 12(b)(7) motion to dismiss for failing to join indispensable parties because the UCS defendants were no longer named as defendants in the action.

On April 5, 2019, the circuit court held a hearing on all pending motions to dismiss. In the hearing, the SCBE agreed to voluntarily dismiss all defendants not named in the third amended complaint. On April 26, 2019, the circuit court entered an order recognizing that "all parties and all claims not named in the Third Amended Complaint ... have been voluntarily dismissed by [the SCBE]."

On April 26, 2019, the circuit court entered a judgment granting the University defendants' motions to dismiss the SCBE's action with prejudice. Specifically, the circuit court stated:

> "UWA, Dr. Tucker, and Dr. Holland moved for dismissal of the Third Amended Complaint on multiple grounds. Each of these grounds, standing alone, are sufficient reason for dismissal of all or part of the Third Amended Complaint's claims. One ground for dismissal is that the relief sought by

> the Sumter County Board of Education violates the public policy of the State of Alabama described in the Alabama School Choice and Student Opportunity Act, Alabama Code §§ 16-6F-1 (1975) et seq., and particularly Alabama Code § 16-6F-11(b)(1).
>
> "Additionally, U WA, Dr. Holland, and Dr. Tucker are the sole remaining Defendants in the Third Amended Complaint. Considering the relief sought by the Sumter County Board of Education, an injunction, a party needed for a just adjudication, the University Charter School, is no longer a party in the Third Amended Complaint. See Ala. R. Civ. P. 19."

On May 24, 2019, the SCBE filed a postjudgment motion to alter, amend, or vacate the circuit court's judgment. On August 22, 2019, the SCBE's postjudgment motion was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. The SCBE appealed the circuit court's judgment on October 3, 2019.

II. Standard of Review

> " 'On appeal, a dismissal is not entitled to a presumption of correctness. The appropriate standard of review under Rule 12(b)(6)[, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. We note that a Rule 12(b)(6) dismissal is

> proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.' "

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 791 (Ala. 2007) (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

III. Analysis

The SCBE contends that the circuit court erred in accepting each of the University defendants' arguments for dismissal of the action. The University defendants' primary argument -- and the first one expressly mentioned in the circuit court's dismissal order -- was that the restrictive covenant is void based on the public policy expressed in the Act that charter schools should be encouraged and promoted in Alabama. In particular, the circuit court noted § 16-6F-11(b), Ala. Code 1975, which provides:

> "(b) Access to local school system facilities and land.
>
> > "(1) A public charter school shall have a right of first refusal to purchase or lease at or below fair market value a closed or unused public school facility or property located in a school system from which it draws its students if the school system decides to sell or lease the public school facility or property.

> "(2) Unused facility means a school building or other local board of education owned building that is or could be appropriate for school use, in which more than 60 percent of the building is not being used for direct student instruction or critical administration purposes and for which no offer to purchase has been executed.
>
> "(3) The department shall publish the names and addresses of unused facilities on its website in a list that is searchable at least by each facility's name and address. This list shall be updated at least once a year by May 1."

(Emphasis added.) In addition to § 16-6F-11(b), the University defendants highlighted in their argument to the circuit court, and reiterate to this Court, several other sections of the Act. Subsection (a) of § 16-6F-2, Ala. Code 1975, declares that the purpose of the Act is that "[p]ublic charter schools may be established in Alabama in accordance with [the Act]," and subsection (b) provides that "[the Act] shall be interpreted to support the findings and purposes of [the Act] and to advance the continued commitment of the state to the mission and goals of public education." Section 16-6F-3, Ala. Code 1975, titled "Legislative findings," states, in part:

> "The Legislature finds and declares all of the following:

"(1) It is in the best interests of the people of Alabama to provide all children with access to high quality public schools.

"(2) It is necessary to continue to search for ways to strengthen the academic performance of elementary and secondary public school students.

"....

"(6) Public school programs, whenever possible, should be customized to fit the needs of individual children.

"(7) Students of all backgrounds are entitled to access to a high quality education.

"(8) Therefore, with [the Act], the Legislature intends to accomplish all of the following:

"a. Provide school systems and communities with additional tools that may be used to better meet the educational needs of a diverse student population.

"b. Encourage innovative educational ideas that improve student learning for students at all academic levels.

"c. Empower educators to be nimble and strategic in their decisions on behalf of students.

> "d. Provide additional high quality educational options for all students, especially students in low performing schools.
>
> "e. Create public schools with freedom and flexibility in exchange for exceptional results.
>
> "f. Foster tools and strategies to close achievement gaps between high-performing and low-performing groups of public school students."

Section 16-6F-6(c)(2), Ala. Code 1975, provides that the mission of the APCSC, which approved UCS's application to establish a charter school in Sumter County, "is to authorize high quality public charter schools, in accordance with the powers expressly conferred on the [APCSC] in [the Act]." Subsection (e) of § 16-6F-6 explains:

> "If a local school board chooses not to register as an authorizer, all applications seeking to open a start-up public charter school within that local school board's boundaries shall be denied. Applicants wishing to open a public charter school physically located in that local school system may apply directly to the [APCSC]."

UCS filed its application directly with the APCSC, meaning that the SCBE has chosen not to register as an authorizer of charter schools within

the boundaries of the school system it oversees. Subsections (p)(1) and (p)(2) of § 16-6F-6 state that among the "essential powers and duties" of all "authorizers" of public charter schools are "[s]oliciting and evaluating charter applications based on nationally recognized standards" and "[a]pproving quality charter applications that meet identified educational needs and promote a diversity of high-quality educational choices." Similarly, § 16-6F-7(a)(1), Ala. Code 1975, provides:

> "To solicit, encourage, and guide the development of quality public charter school applications, every local school board, in its role as public charter school authorizer, shall issue and broadly publicize a request for proposals for public charter school applications by July 17, 2015, and by November 1 in each subsequent year. The content and dissemination of the request for proposals shall be consistent with the purposes and requirements of [the Act]."

Thus, authorizers not only are to accept and consider charter-school applications, but also are to actively encourage and solicit qualified organizations to apply for establishing public charter schools in Alabama.

The SCBE's primary response to the University defendants' public-policy argument is not to question the nature of the public policies advanced by the Act -- the SCBE repeatedly states in its brief that "the

Legislature's intent" in enacting the Act was "to encourage [the] creation and growth of public charter schools." The SCBE's brief, p. 15; see also id., pp. 17 and 39. Instead, the SCBE argues that the circuit court's application of those public policies to the restrictive covenant constitutes an improper retroactive application of the Act to the sales contract. "In Alabama, retrospective application of a statute is generally not favored, absent an express statutory provision or clear legislative intent that the enactment apply retroactively as well as prospectively." Jones v. Casey, 445 So. 2d 873, 875 (Ala. 1983). The SCBE observes that the Act does not contain any language indicating that it should apply retroactively. As we noted in the rendition of the facts, the sales contract was executed on May 19, 2011, and the Act became effective in March 2015. Thus, the SCBE argues that the circuit court erred in applying the public policies of the Act to void the restrictive covenant in the sales contract.

However, the SCBE misunderstands what the circuit court was being asked to do in this case. The circuit court was not being asked to assess the meaning of the sales contract at the time it was executed or to determine whether actions taken at the time of the sale conformed to the

law at that time, i.e., in 2011. Instead, the circuit court was being asked to assess whether a provision of the sales contract that the SCBE sought to enforce against the University defendants at the time the judgment was rendered was contrary to Alabama public policy at that time, i.e., in 2019. Black's Law Dictionary states that the term "retroactive," in reference to a statute, concerns "extending [a law's] scope or effect to matters that have occurred in the past." Black's Law Dictionary 1575 (11th ed. 2019). The SCBE's lawsuit does not concern matters that occurred in the past but, rather, seeks enforcement of the restrictive covenant at the present time. As the University defendants observe, this Court previously has stressed that when the void-for-public-policy defense is invoked with respect to a contract, we are concerned with the law at the time of the contract's enforcement, not its formation. See the University defendants' brief, pp. 28-29. For example, in Ex parte PT Solutions Holdings, LLC, 225 So. 3d 37, 43 (Ala. 2016), the Court stated:

> "The problem with this argument is that White misunderstands the statement in M/S Bremen[v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)]. The Supreme Court stated that a forum-selection clause 'should be held unenforceable if enforcement [of the

> clause] would contravene a strong public policy of the forum in which suit is brought.' Id. In other words, the Court was saying that enforcement of the forum-selection clause must contravene a state's public policy, not that the clause should be held unenforceable if enforcement of the contract that contains the clause would contravene a state's public policy."

(Emphasis altered.) See generally Limestone Creek Devs., LLC v. Trapp, 107 So. 3d 189, 193 (Ala. 2012) ("[T]he judicial system may not be used to enforce illegal contracts.").

The United States Supreme Court highlighted the importance of judicial enforcement of restrictive covenants in Shelley v. Kraemer, 334 U.S. 1 (1948), when it declared that judicial enforcement of racially discriminatory restrictive covenants violated the Fourteenth Amendment to the United States Constitution.

> "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the

> community and being accorded full enjoyment of those rights on an equal footing."

Shelley, 334 U.S. at 19 (emphasis added). In other words, judicial enforcement of a racially discriminatory restrictive covenant was the state action that produced a conflict with the Fourteenth Amendment, i.e., the racially discriminatory restrictive covenants had no force absent judicial enforcement of them. See Hutton v. Shamrock Ridge Homeowners Ass'n, No. 3:09-CV-1413-O, Dec. 14, 2009 (N.D. Tex. 2009) (not reported in Federal Supplement) (explaining that the Shelley Court had held that "[t]he state action was found in the judicial enforcement that gave life to the covenants' threatened discrimination" (emphasis added)). See also Callahan v. Weiland, 291 Ala. 183, 190, 279 So. 2d 451, 457 (1973) (noting that a "racially restrictive covenant is unenforceable since Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 [(1948)] ...."). Thus, the law at the time of the judicial enforcement of a restrictive covenant is what matters with respect to the viability of the covenant in relation to

state public policy.[4] See generally Farshad Ghodoosi, The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Neb. L. Rev. 685, 696 (2016) (noting that "[t]he public policy exception .... does not bear on the formation of contracts but on their effects").

This understanding is in keeping with the principle that when a contract is legal at the time of formation, and a subsequent enactment of law renders the subject of the contract illegal before the time for performance expires, the contract is void.

> "The general rule is that, where the performance of a contract becomes impossible subsequent to the making of same, the promisor is not thereby discharged. ... But this rule has its exceptions, and these exceptions are where the performance becomes impossible by law, either by reason of a change in the law, or by some action or authority of the government. ... It is generally held that, where the act or thing contracted to be done is subsequently made unlawful by an act of the

[4]That the law at the time of enforcement of the restrictive covenant is what is relevant is also reflected in applications of the change-in-the-neighborhood test. See, e.g., AmSouth Bank, N.A. v. British W. Fla., L.L.C., 988 So. 2d 545, 550 (Ala. Civ. App. 2007) (explaining that, "[u]nder the change-in-the-neighborhood test, a restrictive covenant will not be enforced if the character of the neighborhood has changed so radically that the original purpose of the covenant can no longer be accomplished").

> Legislature, the promise is avoided. Likewise, where the performance depends upon the continued existence of a thing which is assumed as a basis of the agreement, the destruction of the thing by the enactment of a law terminates the obligation."

Greil Bros. v. Mabson, 179 Ala. 444, 450-51, 60 So. 876, 878 (1912). See also Garrett v. Colbert Cnty. Bd. of Educ., 255 Ala. 86, 92, 50 So. 2d 275, 279 (1950) (explaining that "[w]hile the law as it now stands would enter into the contract, ... it would do so subject to the reserved power of the State to legislate, which would be a part of it as well as its terms"). Greil Brothers is an excellent example, a situation in which

> "the plaintiff leased premises in the City of Montgomery to the defendant, '"for occupation as a bar, and not otherwise."' Thereafter, on November 23, 1907, the General Assembly of Alabama enacted a prohibition law, making it unlawful to sell liquor. The defendant abandoned the premises, and refused to pay rent. The plaintiff brought an action to collect on rent notes, and had judgment.
>
> "On appeal, this court reversed, holding that the bar operator was excused from performance of his contract because such performance had been prohibited by the Legislature."

Hawkins v. First Fed. Sav. & Loan Ass'n, 291 Ala. 257, 261, 280 So. 2d 93, 96 (1973). Thus, in Greil Brothers the landlord could not obtain judicial enforcement of the lease agreement's rental-payment obligation against

the tenant because the purpose for which the premises had been rented was rendered illegal by a legislative enactment subsequent to when the contract was executed.

In this case, the restrictive covenant was permissible under the law when the sales contract was executed in 2011, but subsequently the legislature enacted the Act, and the SCBE now seeks to enforce the restrictive covenant at a time when the Act governs public policy with respect to charter schools. Under that scenario, the University defendants are correct that the law at the time of enforcement of the restrictive covenant is what governs, and applying the public policies of the Act to the restrictive covenant does not constitute retroactive application of the law.[5]

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[5]No argument has been raised concerning whether the application of the Act to the restrictive covenant constitutes an improper impairment of the obligation of contracts. See, e.g., U.S. Const., Art. I, § 10, cl. 1; Art. I, § 22 & Art. IV, § 95, Ala. Const. of 1901. We note, however, that the state's general police powers are not inhibited by those constitutional provisions. See, e.g., Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983) ("Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934))); Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 108-09 (1938) ("[E]very contract is made subject to the implied condition that its

Having addressed the SCBE's objection on retroactivity, we come to the central issue of whether the public policies of the Act render enforcement of the restrictive covenant void. On that question, we recognize that "[p]ublic policy is a phrase of exceeding great generality, and in every case needs definition with reference to the facts involved." Anderson v. Blair, 202 Ala. 209, 211, 80 So. 31, 33 (1918). In that regard, we find it compelling that the University defendants heavily rely upon

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fulfillment may be frustrated by a proper exercise of the police power, but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end ...."); First Nat'l Bank of Birmingham v. Jaffe, 239 Ala. 567, 571, 196 So. 103, 106 (1940) ("The police power which will enable the legislature to impair a vested or contract right, does not exist unless it be for an end which is in fact public, and the means adopted must be reasonably adapted to that end."); City of Mobile v. Mobile Elec. Co., 203 Ala. 574, 577, 84 So. 816, 818 (1919) ("[A] legitimate use of th[e] police power does not impair the obligation of a contract"), overruled on other grounds by Alford v. City of Gadsden, 349 So. 2d 1132 (Ala. 1977). It is axiomatic that the establishment and regulation of public schools is included within the state's police powers. See, e.g., Barbier v. Connolly, 113 U.S. 27, 31 (1884) (defining the "police power" in part as "the power of the state ... to prescribe regulations to promote the health, peace, morals, education, and good order of the people" (emphasis added)); City of Bessemer v. Bessemer Theatres, Inc., 252 Ala. 117, 120-21, 39 So. 2d 658, 661 (1949) (holding that an ordinance apportioning tax revenues for " 'the operation and maintenance of public schools' " was permissible "under the police power").

Cincinnati City School District Board of Education v. Conners, 132 Ohio St. 3d 468, 974 N.E.2d 78 (2012), a case that -- aside from the fact that it was decided in another jurisdiction -- is nearly on all fours with the facts of the present case. Indeed, the only distinction the SCBE draws between Conners and this case is that

> "the deed restriction in the Cincinnati case was entered into after the applicable statute was already in place. [132 Ohio St. 3d at 469, 974 N.E.2d] at 80. Here, [the SCBE] and UWA freely entered into the Sales Contract with the restrictive covenant before any legislation was enacted that encouraged the growth and support of charter schools."

The SCBE's brief, p. 17. However, as we already have explained, the date the sales contract was executed is irrelevant with respect to the current enforcement of the restrictive covenant. Therefore, the SCBE's attempt to distinguish Conners fails, and because Conners is so pivotal to the University defendants' argument, we will quote at length from the Ohio Supreme Court's decision.

The Conners court summarized the relevant facts as follows:

> "In June 2009, CPS [the Cincinnati City School District Board of Education] conducted a public auction for nine of its vacant school buildings. The promotional materials for the auction advised that the auctioned buildings 'may not be used

> as any type of educational facility.' In the June 9, 2009 purchase and sale agreement, the buyer agreed to 'use the Property for "commercial development" ' and 'not to use the Property for school purposes.' The buyer further agreed 'that the deeds to the Property will be restricted to prohibit future use of the Property for school purposes,' but the agreement added that this provision does not apply to CPS, which would be allowed to repurchase the property 'for school purposes.' Because CPS had decided that the school buildings were 'not suitable for use as classroom space' pursuant to former [Ohio Rev. Code] 3313.41(G), 151 Ohio Laws, Part V, 8764, 8788-8789, CPS did not offer them for sale to community[6] schools before auction.
>
> "The appellees, Dr. Roger Conners and his mother, Deborah Conners, were the only bidders to bid at auction on the former Roosevelt School located on Tremont Street in Cincinnati. They bid $30,000 for the property and on June 9, 2009, entered into the purchase and sale agreement containing the deed restriction. On an exhibit attached to the purchase agreement entitled 'Intended use,' appellees were asked to describe how they would use the property. They responded, 'Not sure' and 'possible re-sale to another interest buyer.' Title was conveyed by a quitclaim deed on June 30, 2009. On October 8, 2009, the appellees received conditional-use approval from Cincinnati's Office of the Zoning Hearing Examiner to 'reopen the school as a charter school.' The following January, appellees, through counsel, notified the CPS school board and its chief legal counsel that the deed restriction was void as against public policy and that they intended to open a charter school in August 2010."

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[6]"Community school" is the term Ohio law uses to refer to charter schools. Ohio Rev. Code Ann. § 3314.01(B).

Conners, 132 Ohio St. 3d at 468-69, 974 N.E.2d at 79-80. The Conners court then described some of the statutes pertaining to the right of Ohio's public schools to sell their old school buildings.

> "Ohio boards of education are creations of statute, and their authority is derived from and strictly limited to powers that are expressly granted by statute or clearly implied therefrom. Schwing v. McClure, 120 Ohio St. 335, 166 N.E. 230 (1929), syllabus. A board of education is 'a mere instrumentality of the state to accomplish its purpose in establishing and carrying forward a system of common schools throughout the state.' Cincinnati Bd. of Edn. v. Volk, 72 Ohio St. 469, 485, 74 N.E. 646 (1905).
>
> "In enacting [Ohio Rev. Code] 3313.17, the General Assembly gave boards of education the discretionary authority to contract with other parties in order to administer Ohio's system of education. When a board of education is vested with discretion, that discretion should not be disturbed by the courts as long as the exercise of it is reasonable, in good faith, and not clearly shown to be an abuse of discretion. Greco v. Roper, 145 Ohio St. 243, 250, 61 N.E.2d 307 (1945). A board of education, however, also has a duty 'to manage the schools in the public interest.' Xenia City Bd. of Edn. v. Xenia Edn. Assn., 52 Ohio App. 2d 373, 377, 370 N.E.2d 756 (2d Dist.1977). Thus, while a board of education has the authority to contract, it must do so with the public in mind.
>
> "The General Assembly also enacted legislation that placed restrictions on a board of education's authority to dispose of property. [Ohio Rev. Code] 3313.41 governs school districts' discretionary sale or donation of school buildings. The statute in effect at the time this suit was filed, former

[Ohio Rev. Code] 3313.41(G)(1), 151 Ohio Laws, at 8788-8789, required that before a school district sells a school building

> " '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 ... at a price that is not higher than the appraised fair market value of that property.'
>
> "....

"These statutes show that the General Assembly did not intend that a board of education have an unfettered right to dispose of its property. They also indicate a legislative preference for giving charter schools the opportunity to operate out of unused public school buildings, a rational choice because charter schools are themselves ' "public schools ... and part of the state's program of education." ' State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn., 111 Ohio St. 3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 26, quoting [Ohio Rev. Code] 3314.01(B).

"Legislation on charter schools was adopted when the General Assembly enacted [Ohio Rev. Code] Chapter 3314 in 1997, referred to as 'the Community Schools Act.' Am. Sub. H.B. No. 215, 147 Ohio Laws, Part I, 909, 1187. In enacting [Ohio Rev. Code] Chapter 3314, the General Assembly declared that its purposes included 'providing parents a choice of academic environments for their children and providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting.' Am. Sub. H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043. The General Assembly defined what

> it meant by community schools and explained, '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.' [Ohio Rev. Code] 3314.01(B)."

Conners, 132 Ohio St. 3d at 470-72, 974 N.E.2d at 81-82 (emphasis added). The Conners court then

> "turn[ed] to the deed restriction to determine whether including it in CPS's contracts violates a stated public policy.
>
> "....
>
> "Deed restrictions are generally disfavored and will be 'strictly construed against limitations upon ... use, and ... all doubts should be resolved against a possible construction thereof which would increase the restriction upon the use of such real estate.' Loblaw, Inc. v. Warren Plaza, Inc., 163 Ohio St. 581, 127 N.E.2d 754 (1955), paragraph two of the syllabus. The restriction in Section 8 of the purchase and sale agreement states:
>
> > " 'B. Buyer agrees not to use the 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 will not apply to the Seller, and will not prevent the Seller from repurchasing any portion of the Property in the future and using the Property for school purposes.'
>
> "The restriction, on its face, prevents the free use of the property for educational purposes. The language thus directly frustrates the state's intention to make classroom space

available to community schools, as evidenced by [Ohio Rev. Code] 3313.41(G). Furthermore, the restriction is not neutral; it seeks to thwart competition by providing that the restriction applies to all buyers except CPS itself. This consequence hinders the results that the General Assembly has created under [Ohio Rev. Code] 3313.41, 3318.08, 3318.50, 3318.52, and the Ohio Community Schools Act -- that is, allowing unused school buildings to be transferred to community schools that will use the building to provide school choice.

"In 2001, the state established the 'Community School Classroom Facilities Loan Guarantee Program' and the 'Community School Classroom Facilities Loan Guarantee Fund' to help charter schools acquire buildings at a lower cost. [Ohio Rev. Code] 3318.50 and 3318.52. 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.' [Ohio Rev. Code] 3318.50(B).

"In our view, the statutes reflect the General Assembly's purpose of requiring boards of education to sell unused school buildings to community schools by giving them first refusal, ensuring that the price is fair, and financially assisting them through a loan program to purchase adequate classroom space. The General Assembly continues to clarify its intent that unused public school buildings should be offered to community schools without restriction, as evidenced by the recent changes to the language of [Ohio Rev. Code] 3313.41(G), where the General Assembly removed the term 'suitable for classroom space' from the law. The deed restriction in this case is at odds with these statutes. The restriction adds barriers to building purchases that the legislature seeks to prevent.

> "....
>
> "We emphasize that we continue to uphold the importance of the freedom to contract and recognize the narrowness of the doctrine on public policy. In this case, however, involving a contract between a private party and a political subdivision, there is a compelling reason to support the application of the doctrine. We therefore hold that the inclusion of a deed restriction preventing the use of property for school purposes in the contract for sale of an unused school building is unenforceable as against public policy."

Conners, 132 Ohio St. 3d at 472-75, 974 N.E.2d at 82-85 (emphasis added).

We agree with the reasoning employed in Conners, and we find that its reasoning straightforwardly applies to the similar facts in this case. As it is in Ohio, in Alabama

> "[t]he power to declare a contract void based on a violation of public policy ' "is a very delicate and undefined power and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." ' Milton Constr. Co. v. State Highway Dep't, 568 So. 2d 784, 788 (Ala. 1990) (quoting 17 Am Jur. 2d Contracts § 178 (1964)). ' "The courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain. ... [T]he courts will not declare an agreement void on the ground of public policy unless it clearly appears to be in violation of the public policy of the state." ' Id. (emphasis omitted)."

Poole v. Prince, 61 So. 3d 258, 281 (Ala. 2010). However, also in this state, as in Ohio,

> " '[i]t is ... well settled that restrictions on the use of land are not favored in the law, and such restrictions are strictly construed in favor of the free use of such property.' Hill v. Rice, 505 So. 2d 382, 384 (Ala. 1987). Indeed, the construction this Court gives a restrictive covenant 'will not be extended by implication or include anything not plainly prohibited and all doubts and ambiguities must be resolved against the party seeking enforcement.' Bear v. Bernstein, 251 Ala. 230, 231, 36 So. 2d 483, 484 (1948)."

Bon Aventure, L.L.C. v. Craig Dyas L.L.C., 3 So. 3d 859, 864 (Ala. 2008).

As we detailed at the outset of this analysis -- and as the SCBE concedes -- the Act clearly evinces a purpose of encouraging the establishment and proliferation of charter schools to compete with traditional public schools. The Act does this in part by providing two different types of "authorizers" -- the APCSC and local school boards -- that have the responsibility to solicit and evaluate applications for charter schools from qualified nonprofit organizations and by setting the basic standards for charter schools. More specifically as it relates to this case, and similar to the law at issue in Conners, the Act also contains a provision encouraging the sale of old school buildings to charter-school

organizations. See § 16-6F-11(b), Ala. Code 1975. The Act does all of this because the legislature has expressed the belief that charter schools will, among other things, "[e]ncourage innovative educational ideas that improve student learning" and "[f]oster tools and strategies to close achievement gaps between high-performing and low-performing groups of public school students." § 16-6F-3(8)b. & f., Ala. Code 1975.

The restrictive covenant at issue specifically prohibits UWA from permitting the LHS property "to be utilized for any private, charter, or other school entity serving students in kindergarten through twelfth grade or in pre-kindergarten educational programs, unless said school or programs are under the control or supervision of the Sumter County Board of Education ...." The restrictive covenant thus "frustrates the state's intention to make classroom space available to [charter] schools" in Sumter County. Conners, 132 Ohio St. 3d at 474, 974 N.E.2d at 84.

The SCBE counters:

> "The covenant is not adverse to the Legislature's intent in its enactment of the [Act] to encourage creation and growth of public charter schools. The covenant in the Sales Contract does not place an absolute restriction on use of the old Livingston High School property as a public charter school, but

> merely limits use of the property as a charter school, unless it is under SCBOE's control or supervision."

The SCBE's brief, p. 15.

However, the covenant at issue in Conners contained a very similar restriction, and, as the Ohio Supreme Court observed, such a provision actually "seeks to thwart competition by providing that the restriction applies to all buyers except [the school system] itself." Conners, 132 Ohio St. 3d at 474, 974 N.E.2d at 84. Such singular control by the SCBE is contrary to the Act's scheme that provides for charter-school authorization from the APCSC, in addition to local schools boards that become authorizers, and that allows a charter-school-organization applicant who is rejected by a local-school-board authorizer to appeal that decision to the APCSC. See § 16-6F-6(a)(1) & (4), Ala. Code 1975. Moreover, the provision of the restrictive covenant that the SCBE insists keeps the restriction from being absolute is not even capable of fulfillment because, as we noted earlier in this analysis, UCS had to obtain its authorization to establish a charter school directly from the APCSC because the SCBE has not applied to be an authorizer within the boundaries of the school

system it oversees. See § 16-6F-6(e), Ala. Code 1975. Thus, there is no way for a charter school located at the LHS property to be "under the control or supervision of the Sumter County Board of Education." Therefore, the restrictive covenant effectively constitutes a complete prohibition on housing a charter school at the LHS property.[7]

In short, by preventing the LHS property from being used by UCS, the restrictive covenant contradicts the Act's stated policy of making a "closed or unused public school facility or property located in a school system from which [a public charter school] draws its students" available to a qualified charter-school organization in Sumter County. § 16-6F-11(b), Ala. Code 1975. More broadly, the restrictive covenant thwarts the overall purpose evinced by the Act, which is to foster competition in public education by encouraging the establishment and proliferation of charter schools, thereby improving the quality of education services provided to students throughout Alabama -- including in Sumter

[7]The memo Dr. Primm composed during the negotiations for the sale of the LHS property and that discussed the "Terms for Sale Transaction of Livingston High School" confirms that the purpose of the restrictive covenant was to protect the SCBE from "K-12 Competition."

County. We therefore are compelled to conclude that the restrictive covenant is void because it defies both the explicit and implicit public policies of the Act. Accordingly, the circuit did not err in declining to enforce the restrictive covenant and in dismissing all the claims against the University defendants.[8]

IV. Conclusion

Because the restrictive covenant in the sales contract violates clear public policies of the Act, the restrictive covenant is unenforceable. Therefore, the circuit court's judgment dismissing all the claims against the University defendants is affirmed.

AFFIRMED.

Parker, C.J., and Shaw, Sellers, Stewart, and Mitchell, JJ., concur.

Bolin, Wise, and Bryan, JJ., concur in the result.

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[8]Because we conclude that the circuit court correctly entered a dismissal of all the claims based on the University defendants' argument that the restrictive covenant is void for contradicting the clear public policies of the Act, we pretermit examination of the University defendants' other grounds for dismissal of the action, such as the failure to join indispensable parties.

BOLIN, Justice (concurring in the result).

I concur in the result of the main opinion; however, I would resolve the issues presented by this appeal on grounds other than public-policy grounds.

The Sumter County Board of Education ("the SCBE") asserted claims in its third amended complaint -- the operative complaint for this appeal -- of fraud, breach of contract, and reformation of the deed because of a mutual mistake. The SCBE also sought a judgment declaring that there was a mutual mistake in not including the contractual restrictive covenant in the deed conveying the Livingston High School ("LHS") property to the University of West Alabama ("UWA"), as well as a permanent injunction requiring that "the University defendants" -- UWA and Dr. Richard Holland and Dr. Kenneth Tucker, in their individual and official capacities -- cease and desist from operating a private school, a charter school, or any K-12 school on the LHS property without the approval of the SCBE.

The University defendants have argued, for the first time on appeal, that the circuit court lacked subject-matter jurisdiction to adjudicate any

claim for damages asserted by the SCBE based on a breach-of-contract theory. Specifically, they contend that any claim for damages asserted by the SCBE against UWA based on its alleged breach of contract must be brought before the Alabama Board of Adjustment, not the circuit court. " 'Subject-matter jurisdiction cannot be waived, and the lack of subject-matter jurisdiction may be raised at any time by a party or by a court ex mero motu.' " Ex parte Siderius, 144 So. 3d 319, 323 (Ala. 2013) (quoting Ex parte Punturo, 928 So. 2d 1030, 1033 (Ala. 2002)).

> "In Vaughan v. Sibley, 709 So. 2d 482, 486 (Ala. Civ. App. 1997), the Court of Civil Appeals stated:
>
> > " 'Because of the sovereign immunity clause, the courts of this state are without jurisdiction to entertain a suit seeking damages, including back pay, for breach of contract against the state. State Bd. of Adjustment v. Department of Mental Health, 581 So. 2d 481 (Ala. Civ. App. 1991). Vaughan's remedy, if any, is with the Board of Adjustment. Sections 41-9-62(a)(4) and (a)(7), Code of Alabama 1975, provide:
> >
> > > " ' "(a) The Board of Adjustment shall have the power and jurisdiction and it shall be its duty to hear and consider:
> > >
> > > " ' "....

> " ' "(4) All claims against the State of Alabama or any of its agencies, commissions, boards, institutions or departments arising out of any contract, express or implied, to which the State of Alabama or any of its agencies, commissions, boards, institutions or departments are parties, where there is claimed a legal or moral obligation resting on the state;
>
> " ' "....
>
> " ' "(7) All claims for underpayment by the State of Alabama or any of its agencies, commissions, boards, institutions or departments to parties having dealings with the State of Alabama or any of its agencies, commissions, boards, institutions or departments."

" '(Emphasis added.) The Board of Adjustment has jurisdiction over claims against the state that are not justiciable in the courts because of the state's constitutional immunity from being made a

> defendant. Lee v. Cunningham, 234 Ala. 639, 641, 176 So. 477 (1937).'
>
> "Further, § 41-9-62(b), Ala. Code 1975, provides, in pertinent part:
>
> > " '[T]he jurisdiction of the Board of Adjustment is specifically limited to the consideration of the claims enumerated in subsection (a) of this section and no others; ... nothing contained in this subdivision shall be construed to confer jurisdiction upon the Board of Adjustment to settle or adjust any matter or claim of which the courts of this state have or had jurisdiction....'
>
> "In Lee v. Cunningham, 234 Ala. 639, 176 So. 477 (1937), this Court stated the following with regard to the original act creating the Board of Adjustment:
>
> > " 'Our judgment, however, is that the legislative purpose disclosed in the act ... was to confer on said board jurisdiction over claims against the state, colorable legally and morally well grounded, not justiciable in the courts because of the state's constitutional immunity from being made a defendant (Const. 1901, § 14), and to exclude from its jurisdiction claims well grounded in law or equity, cognizable by the courts.'
>
> "234 Ala. at 641, 176 So. at 479 (emphasis added)."

Ex parte Board of Dental Exam'rs of Alabama, 102 So. 3d 368, 387-88 (Ala. 2012). See also Vaughan v. Sibley, 709 So. 2d 482, 486 (Ala. Civ.

App. 1997) ("The Board of Adjustment has exclusive jurisdiction over a contract claim against a state university.").

Because the Board of Adjustment has exclusive power and jurisdiction over contract claims against the "State of Alabama or any of its ... institutions ... arising out of any contract, express or implied," §41-9-62(a)(4), Ala. Code 1975, I conclude that the circuit court was without jurisdiction to consider the SCBE's contract claim to the extent that it seeks damages for the alleged breach of the sales contract because that claim should properly be brought before the State Board of Adjustment. Accordingly, although I would affirm the circuit court's judgment dismissing the SCBE's claim for damages based on UWA's alleged breach of contract, I would do so because the circuit court lacked subject-matter jurisdiction over that claim.

Further, as to all of SCBE's remaining claims, the University defendants argued in the circuit court -- and the circuit court expressly agreed -- that those claims should be dismissed for failing to include an indispensable party, i.e., the University Charter School ("UCS"). As mentioned in the main opinion, the SCBE twice actually did include UCS

as a defendant in the action, but both times it then voluntarily dismissed UCS as a defendant. Concerning whether a party is "necessary" versus "indispensable" to an action, this Court has stated:

> "The provisions of Rule 19[, Ala. R. Civ. P.] provide a two-step process. Note, Rule 19 in Alabama, 33 Ala. L. Rev. 439, 446 (1982). 'First, a court must determine whether the absentee is a person who should be joined if feasible under Rule 19(a).' Note, supra. If the court determines that the absentee is a person who should be joined under Rule 19(a), '[r]ule 19(b) sets forth four factors to consider in determining whether an action should proceed in the absence of such a person.' Mead Corp. v. City of Birmingham, 350 So. 2d 419, 421 (Ala.1977); Note, supra."

Ross v. Luton, 456 So. 2d 249, 256 (Ala. 1984). In other words, Rule 19(a), Ala. R. Civ. P., concerns whether a party is a "necessary" party, while Rule 19(b) concerns whether that party is also an "indispensable" party, without whom the litigation cannot continue. The SCBE conceded that UCS was a necessary party, but it argued that UCS was not an indispensable party whose absence would require dismissal of the action.

> "Many courts have attempted to articulate the distinction between indispensable and merely necessary parties. Champ Lyons in his work, Alabama Practice, Rules of Civil Procedure (1973), collects the following cases under Rule 19, defining them thusly:

> " ' "Indispensable parties" are persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Bennie v. Pastor, C.A.N.M. 1968, 393 F.2d 1.
>
> " '....
>
> " ' "Necessary parties" are those affected by the judgment and against which in fact it will operate. West Coast Exploration Co. v. McKay, 1954, 93 U.S. App. D.C. 307, 213 F.2d 582, certiorari denied, 347 U.S. 989, 74 S.Ct. 850, 98 L.Ed. 1123 [(1954)].'
>
> "1 Lyons, Alabama Practice, at 389."

J.R. McClenney & Son, Inc. v. Reimer, 435 So. 2d 50, 52 (Ala. 1983).

> "There is no prescribed formula to be mechanically applied in every case to determine whether a party is an indispensable party or merely a proper or necessary one. This is a question to be decided in the context of the particular case. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed. 2d 936 (1968). The issue is one to be decided by applying equitable principles ...."

Id.

> "The determination of whether a party is indispensable under Rule 19(b) is based on equitable and pragmatic considerations, Toney v. White, 476 F.2d 203, 207 (5th Cir.

> 1973), and includes the examination of the following factors provided in the rule:
>
> > " 'first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.'
>
> "Mead Corp. [v. City of Birmingham], 350 So. 2d [419,] 421-22 [(Ala. 1977)]."

Ross, 456 So. 2d at 257.

UCS is the entity that currently occupies the LHS property and operates as a charter school on that property. UCS has occupied and operated its school on the LHS property for the three years that this litigation has been pending. Obviously, UCS and its students not only have an interest in the controversy presented, but that interest is of such a nature that a final judgment in favor of the SCBE in this action seeking a permanent injunction prohibiting operation of the charter school on the LHS property could not be made without detrimentally affecting their

interests in the charter school. Accordingly, I would affirm the circuit court's judgment dismissing the remaining claims on the basis that the SCBE failed to join UCS as an indispensable party.