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**STATEMENT OF INTEREST OF
AMICUS CURIAE OHIO MUNICIPAL LEAGUE**

The Ohio Municipal League is an Ohio non-profit corporation incorporated in 1952 by city and village officials. They recognized the need for a statewide association to serve the interests of Ohio municipal governments. During the last 50 years, its membership has grown to approximately 750 cities and villages in this State, who work collectively to improve municipal government and administration and to promote the general welfare of their residents.

The Ohio Municipal League is particularly interested in this case because it represents another unfortunate chapter in the conflict between municipal and county governmental entities over the increasingly scarce resources available to local governments to solve increasingly expensive and complex issues. This case involves a county board of commissioners that (1) entered into a contract with a city for the use of the city's solid waste management facility; (2) raised no complaints about the course of performance of the parties for more than a decade; (3) spent the money obtained from waste disposal fees that was intended for long-term environmental monitoring costs; and then (4) refused to carry out its contractual duty to perform the monitoring on the ground, *inter alia*, that it had not had the contract certified by its County Auditor.

Appellant asks this Court to make fundamental changes in Ohio law so that it can avoid its contractual commitments to the City of St. Marys and avoid paying the landfill monitoring costs that it promised to pay. Those legal changes would undermine existing contracts and destabilize relations between local government entities. In addition, if the Court accepts Appellant's propositions of law in this case, it will encourage cash-strapped local governments to forsake rules of law and rules of fair-

play in their relations with others. The decision of the Court of Appeals should be affirmed.

ARGUMENT

This case is about money, or, more specifically, about the increasingly disparate scramble for decreasing resources by local government entities. This case is not about what the law of Ohio is, or even what it should be. Appellant Auglaize County asks the Court to change Ohio law in at least three significant ways, with no better reason than that Appellant can win that way and avoid significant costs that it promised to pay, in writing, in its contract with Appellee City of St. Marys nearly twenty years ago.

The Ohio Municipal League is particularly interested in this appeal because it is the most visible tip of a significant problem that will become even more serious unless the Court reaffirms in this case that county governments, like everyone else, must play by the rules. All local government entities face the same budgetary crises and are forced to make the same difficult choices about how to allocate insufficient revenues. If financial desperation overrides contractual commitments, common law principles of justice, and statutory rules, THE relations between local government entities become lawless.

The Court should affirm the decision of the Court of Appeals for the reasons that follow.

I. Appellant is bound by the plain and unambiguous terms of the Agreement.

In Appellant's Proposition of Law No. 1, it attempts to escape the consequences of its express and specific contractual promise to pay for landfill monitoring costs. In order to accomplish that, it asks the Court to ignore the plain and unambiguous language of its waste disposal contract with Appellee. In Paragraph 5(a) of that 1988 Agreement, Appellant expressly agreed:

[T]he County shall:

a. ***undertake complete responsibility for all environmental monitoring required for the City Site by applicable statutes and regulations, including the operation of such environmental monitoring and any capital expenditures necessary to accomplish the monitoring, both prior to and subsequent to closure of the site

Appellant's promise could not be clearer, and not surprisingly both of the courts that examined the question below concluded that Appellant is responsible for all monitoring at the landfill for as long as it is required by environmental laws and regulations. But after Appellant realized, more than a decade later, that it would be financially burdensome to keep its promise to Appellee, it suddenly stopped paying the monitoring costs and announced that the contract is "ambiguous."

The language of Paragraph 5(a), as quoted above, is not ambiguous, and the Court should enforce the words the parties used to express their intended obligations. If the Court finds that this provision is ambiguous, simply because the waste disposal contract otherwise had a twelve year term, then many of the contracts of members of the Ohio Municipal League -- and others -- are at risk of repudiation and the threat of protracted and expensive litigation over terms and provisions that have been accepted at face value for decades.

The law of Ohio has always required courts to effectuate the intentions of contracting parties, as expressed in the language they used in their contract. In re All Kelly & Ferraro Asbestos Cases (2004), 104 Ohio St.3d 605, 2004-Ohio-104. The application of that traditional rule prevents Appellant from attempting to dodge its contractual responsibility for the landfill monitoring, now that it has exhausted the use of Appellee's landfill and can no longer dispose of its solid waste at that site.

Appellant recognizes that it is unlikely to convince the Court that the Agreement is ambiguous, so its proposition of law asks the Court to change Ohio law. Appellant argues that Ohio courts should no longer ascertain and enforce the intentions of contracting parties as to the length of their responsive contractual duties, based upon the ordinary meaning of the words in the contract. Instead, it seeks a new blanket rule that all duties and obligations related to a contract must expire simultaneously, at the end of the term that is provided generally for the contracts, unless the parties use some special language that meets some special standard of explicitness.

Appellant never even attempts to define its proposed new legal standard or to describe what language is necessary to satisfy it. The language in the Appellant's contract with Appellee is at least as "explicit" in describing the length of the monitoring obligations as most contracts are in describing terms and conditions; if, as Appellant claims, it is not explicit enough, then once again a great many existing contracts will become open to challenge if Appellant's proposition of law is accepted, even though the parties have performed under them without questioning their validity for years.

Appellant never explains why it is necessary to replace the traditional rule of enforcing the intentions of the parties with a new rule that frustrates those intentions if they are expressed in ordinary language. The disadvantage of adopting this new technical requirement for contracts -- which will trick the unwary and thwart the parties' intentions -- vastly outweighs any advantages, if any, it would provide.

More importantly, the rule of law Appellant proposes would apply to contracts, like the one in the present case, that were written when no one imagined that their provisions would be judged by this special rule of "explicitness." Once again, many

contracts that have served perfectly well for years to describe the parties' mutual obligations would suddenly be vulnerable to legal attack by any party that decided it was too burdensome or too expensive to keep its long-term contractual commitments.

Significantly, Appellant is forced to seek a further change in Ohio law in this regard because the course of its own performance for the twelve years after the Agreement was signed proves that it has always believed that its monitoring obligation extended for longer than twelve years. If, as Appellant claims, the general twelve-year term provision in Paragraph 2 of the Agreement renders the express language in Paragraph 5(a) ambiguous, then extrinsic evidence that it repeatedly and consistently recognized the longer term of the monitoring provision is admissible to resolve the ambiguity. State ex rel. Petro v. R. J. Reynolds Tobacco Co. (2004), 104 Ohio St.3d 559, 2004-Ohio-7102.

Accordingly, Appellant asks the Court to create another new legal rule for Ohio that would bar extrinsic evidence of contracting parties' intent that is admissible under current law. Appellant argues that if its contract is ambiguous, and "there is any need to go outside the four corners of the Agreement to determine the parties' intent as to whether the monitoring obligations were to extend beyond the expiration date, then the Agreement lacks the required explicit survival language" as a matter of law. Brief of Appellant, 21. However, Appellant offers no explanation whatsoever as to why Ohio law needs this exception to the traditional rule that extrinsic evidence is admissible to show the intent of contracting parties when the language of the contract is ambiguous.

In short, Appellant's Proposition of Law No. 1 should be rejected because it attempts to circumvent both the plainly expressed intentions of the contracting parties

and the Ohio law of contracts. Amicus curiae the Ohio Municipal League joins Appellee in urging the Court to enforce the Agreement as it is written and to decline Appellant's invitation to "fix" traditional legal principles that are not broken. It is in everyone's interest to enforce the clearly expressed intentions of contracting parties and the ordinary rules of law that govern daily affairs. It is particularly important when financial considerations encourage parties to seek some way out of their long-standing contractual promises. The decision of the Court of Appeals should be affirmed on this issue.

II. Appellant is bound by its course of performance.

The Court should also reject Appellant's Proposition of Law No. 2. Instead of denying that it has any contractual responsibility for landfill monitoring, as it did in its first proposition of law, Appellant argues here that its own performance is excused because Appellee allegedly breached the Agreement. Appellant contends that the Court of Appeals erred when it held that Appellee fulfilled its contractual duties with respect to the Fund created under the Agreement and, thereby, held Appellant to its own contractual promises.

There are two major problems with Appellant's argument. First, the Agreement simply does not impose the duties on Appellee that Appellant claims were breached. The Agreement does not require Appellee to establish the Fund. It does not say that the disposal "rate" (used, in part, to provide money to the Fund) refers only to gate fees imposed by Appellee rather than the disposal surcharge imposed by Appellant. And it most certainly does not say that payments to the Fund must be sufficient to pay for all monitoring costs. Paragraph 9(a) of the Agreement specifically states:

[T]o the extent that the costs of environmental monitoring subsequent to the closure of the City Site exceed the amounts set aside pursuant to this subparagraph, the County shall bear those costs . . .

It appears that there is now little money remaining in the Fund, which has been administered by the Board of the Auglaize County SWMD -- made up of Appellant Auglaize County Board of Commissioners. Agreement, Paragraph 9(d). Faced with the need to find some other source to pay for the landfill monitoring, Appellant suddenly announced -- after both parties had performed their duties for more than a decade -- that the method Appellee had always used to make payments to the Fund was a breach of the Agreement. Although it was fully aware of Appellee's methodology from the outset, Appellant waited twelve years, until after the landfill was closed to any additional solid waste, to object to Appellee's procedure.

That leads to the second problem with Appellant's Proposition of Law No. 2. For over twelve years, Appellant followed a consistent course of conduct that demonstrated the practical construction it placed on the contract. Appellant allowed Appellee to make payments from the surcharge it collected for waste disposal at the landfill, without objection, and never complained about the source or amount of those payments. Accordingly, it cannot prevail on this issue unless it convinces the Court to change the law of Ohio in a way that will help it prevail in this case. Thus, according to Appellant, government entities who act through public officials should not be bound by the construction they place on the contract even though ordinary contracting parties would be bound in identical circumstances.

Once again, Appellant offers no logical, legal, or policy basis for such an exception. In this case, Appellant's officials and their successors have always acted in

precisely the same ways with respect to the contract; they have consistently accepted payments by Appellee from disposal surcharge fees, and they have never asked Appellee to establish a new account, to allocate funds differently, or to pay a different amount. There is no reason that Appellant should not be subject to the same rules of contract law in this context as other contracting parties.

Amicus curiae the Ohio Municipal League agrees with Appellee that the Court should overrule Proposition of Law No. 2 and affirm the decision of the Court of Appeals.

III. Appellant waived the alleged deficiencies in Appellee's performance.

In Proposition of Law No. 3, Appellant tries but fails to overcome yet another legal hurdle in its attempt to shed its contractual promise to pay for landfill monitoring: the doctrine of waiver. The problem for Appellant is that it knew the exact nature of Appellee's performance under the Agreement but said absolutely nothing about it until twelve years later, when it could no longer use the landfill but remained obligated to pay monitoring costs.

In an attempt to avoid this fatal defect in its case, Appellant asks this Court to make yet another change in Ohio law and announce that contracting parties can no longer waive any contractual provisions that are material to the contract. Although this would vastly change the waiver doctrine and cause profound changes in the law generally, Appellant offers no legal, logical, or policy reasons in support of the change. Once again, Appellant argues only that the law should be changed so that it can win this case.

As set forth above, all contracting parties -- including local government entities -- should be bound by the plain language they use in their contracts. When there is doubt about the meaning of that language, they should be bound by conduct and statements through which they confirm their understanding of their promises. In addition, they should be bound under traditional legal rules of waiver when they knowingly allow another party to proceed under the contract and make no objection that anything is wrong until years later when the contract becomes inconvenient or expensive.

Amicus curiae the Ohio Municipal League believes that relations between local governmental entities will become even more difficult if traditional waiver principles no longer govern their affairs. This would create another technical loophole that could be exploited to evade unwanted contractual commitments and would invite further legal challenges that further drain municipal resources. Under Appellant's proposed rule, if one contracting party becomes aware of some imperfection in the other party's performance, it can stand by without saying anything for more than a decade, and then assert the breach and walk away from its own duties under the contract whenever it wishes. The Court should not endorse that conduct.

In short, the waiver doctrine exists for very good reasons, and Appellant has offered no reasons why it should not apply to breaches of the contractual provisions at issue in this case. Proposition of Law No. 3 should be rejected by the Court.

IV. Appellant cannot unilaterally void its contracts with other public entities.

Appellant's Proposition of Law No. 4 contends that "[a] county's obligation to pay a municipality pursuant to a contract made pursuant to R.C. 307.15 is void" unless it is certified by the County Auditor and meets other technical requirements. For obvious

reasons, Amicus Curiae the Ohio Municipal League has the strongest objection to this portion of Appellant's argument, in which it attempts to create a legal trapdoor through which counties can escape their contractual obligations by invoking their own failure to comply with statutory requirements.

The purpose of R.C. 5704.41(D) is clear. When a county government contracts with a private entity, it is important to guard against fraud and safeguard the county treasury by requiring that the County Auditor certify the contract. When a county contracts with a municipality, however, the choice is no longer between whether a loss should fall upon a private party or upon the taxpayers; it becomes whether the loss should fall on county taxpayers or on city taxpayers. See, e.g., Bd. of Cty. Commissioners of Jefferson Cty. v. Bd. of Township Trustees (1981), 3 Ohio App.3d 336, 338. There is therefore no reason to apply the statutory certification requirements to contracts between government entities.

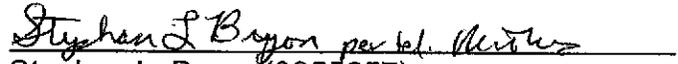
Appellant also attempts to avoid its obligations under another technicality: the requirements of R.C. 307.16 as to specification of contract price. The contract in this case specified that Appellant was responsible for all monitoring required by environmental authorities. There is no way to further specify precisely what these costs will be thirty years later. If counties can use this statute to avoid all contracts in which the extent of the work is defined by an objective external condition, many contracts will be subject to this technical objection and thus vulnerable to a county's financial woes or political whims. Once again, the costs of the County's failure to perform its contractual duties will fall on taxpayers of a different political entity. Once again, such a rule invites gamesmanship and opportunistic interpretations of contractual duties.

Appellant is seeking the right to abandon contracts that become expensive or burdensome based on its own failure to meet a technical requirement. Its proposition of law would encourage counties to breach their contracts and further destabilize their contractual relations with cities. The rulings below properly held Appellant to its promises and should be affirmed.

CONCLUSION

Amicus curiae the Ohio Municipal League supports Appellee City of St. Marys in asking the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Amicus Curiae Ohio Municipal League on Behalf of Appellee City of St. Marys was served this 27th day of December, 2006, by First Class, U.S. Mail, postage prepaid, upon the following:

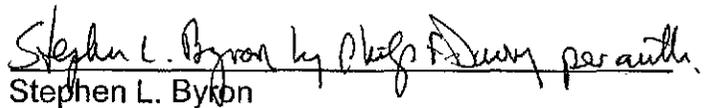
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