

**IN THE
SUPREME COURT OF OHIO**

DANIELLE MOORE, *et al.*,

CASE NOS. 2007-2106 & 2008-0030

Plaintiffs-Appellees,

-vs-

On Appeal from the Lorain
County Court of Appeals,
Ninth Judicial District

LORAIN METROPOLITAN HOUSING
AUTHORITY, *et al.*,

Court of Appeals
Case No. 06CA008995

Defendant-Appellant.

**REPLY BRIEF OF AMICUS CURIAE
CUYAHOGA METROPOLITAN HOUSING AUTHORITY**

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. Governmental Function vs. Proprietary Function	2
II. Regarding Appellees' R.C. §2744.02(B)(5) Contention	3
III. Regarding Appellees' "Special Relationship" Contention	4
IV. Regarding Appellees' R.C. §2744.02(B)(4) Contention	4
CONCLUSION	5
CERTIFICATE OF SERVICE	6
APPENDIX	7

Appx. Page No.

A. CONSTITUTIONS and STATUTES

CONSTITUTIONS

United States Constitution, Amendment 5	1
Ohio Constitution, Section 19, Article I	2

STATUTES

Ohio Revised Code

R.C. 2744.01 3
R.C. 2744.02 8
R.C. 3735.27 10
R.C. 3735.31 14
R.C. 3735.40 16

B. UNREPORTED CASES

Mattox v. Village of Bradner (March 21, 1997)
Wood App. No. WD-96-038, 1997 WL 133330 18
Perry v. City of East Cleveland (February 16, 1996)
Lake App. No. 95-L-111, 1996 WL 200558 22

C. OTHER AUTHORITIES

"Final Analysis - Am. Sub. Sen. Bill 7"
(Legislative Service Commission, 2007) 28

TABLE OF AUTHORITIES

Page(s)

A. CASES

Blakemore v. Cincinnati Metropolitan Housing Authority (1943)
74 Ohio App. 5, 29 O.O. 206 3

Butler v. Jordan (2001)
92 Ohio St. 3d 354 3

Cater v. City of Cleveland (1998)
83 Ohio St. 3d 24 4

City of Cleveland v. United States (1945),
323 U.S. 329, 65 St.Ct. 280 2

Federal Public Housing Authority v. Guckenberger (1944)
143 Ohio St. 251 2

Hackathorn v. Springfield Local School Dist. Bd. of Edn. (Summit 1994)
94 Ohio App. 3d 319 5

Howard v. Miami Township Fire Division,
__ Ohio St. 3d __, 2008-Ohio-2792 3

In Re Exemption from Taxation, Chase v. Board of Tax Appeals (Cuya. 1967)
10 Ohio App.2d 75 2, 3

Keller v. Foster Wheel Energy Corp.
163 Ohio App. 3d 325, 2005-Ohio-4821 5

Kraynak v. Youngstown City School District Board of Education
__ Ohio St. 3d __, 2008-Ohio-2618 4

McCloud v. Nimer (Cuya. 1991)
72 Ohio App. 3d 533 5

Opatken v. City of Youngstown
Mahon. App. No. 02-CA-59, 2003-Ohio-1072 5

O'Toole v. Denihan,
__ Ohio St. 3d __, 2008-Ohio-2574 3

Rankin v. Cuyahoga County Department of Children & Family Services,
__ Ohio St. 3d __, 2008-Ohio-2567 4

United States v. Boyle (N.D. Ohio 1943)
52 F.Supp. 906 2

B. CONSTITUTIONS and STATUTES

CONSTITUTIONS

United States Constitution, Amendment 5 3
Ohio Constitution, Section 19, Article I 3

STATUTES

Ohio Revised Code

R.C. 2744.01 2
R.C. 2744.02 3, 4, 5
R.C. 3735.27 2
R.C. 3735.31 2, 3
R.C. 3735.40 2

C. UNREPORTED CASES

Mattox v. Village of Bradner (March 21, 1997)
Wood App. No. WD-96-038, 1997 WL 133330 5
Perry v. City of East Cleveland (February 16, 1996)
Lake App. No. 95-L-111, 1996 WL 200558 5

D. OTHER AUTHORITIES

"Final Analysis - Am. Sub. Sen. Bill 7"
(Legislative Service Commission, 2007) 2

REPLY BRIEF

In their merit brief appellees have presented four arguments to support the appellate court's aberrant judgment:

(1) that the "Ownership and operation of a public housing facility is a proprietary function" because it is not an obligation of sovereignty, but, rather, merely "involves activities that are engaged in or customarily engaged in by nongovernmental persons,' i.e., private landlords";¹

(2) that R.C. §2744.02(B)(5)'s exception is applicable because (i) several intermediate courts of appeals "have implicitly found the requirements under [Ohio's Landlords and Tenants Act] to be applicable to metropolitan housing authorities² and (ii) because "it cannot be said that a section of the Revised Code which expressly imposes civil liability upon the political subdivision must do so in the same express terms as either R.C. 2743.02 or R.C. 5591.37 in order for [that] exception *** to apply";³

(3) that appellant Lorain Metropolitan Housing Authority's ("LMHA's") "voluntary entry *** into a landlord-tenant relationship *** [with] Ms. Moore further constitutes a 'special relationship' under R.C. 2743.02(A)(3)(b), which relationship waives its statutory immunity for nonperformance of its duties or obligations as a landlord";⁴ and

(4) that R.C. §2744.02(B)(4)'s exception is applicable because that exception "unambiguously and expressly applies *** to all 'buildings that are used in connection with the performance of a governmental function' with specified exception of "jails, places of juvenile detention, workhouses, or any other detention facility ***."⁵

¹ Appellees' Merit Brief at pp. 14-16.

² Id. at p. 23.

³ Id. at p. 25.

⁴ Id. at pp. 25-26.

⁵ Id. at pp. 28-29.

Amicus CMHA respectfully submits that none of appellees' arguments has merit and, thus, that same do not support appellees' request that the appellate court's judgment be affirmed. The reasons which compel that conclusion are as follows.

I. Governmental Function vs. Proprietary Function

Appellees' primary submission – that the “Ownership and operation of a public housing facility is a proprietary function” – is patently erroneous because it ignores the fact that a metropolitan housing authority's (“MHA's”) owning and operating rental properties is not an end unto itself, as is the case with private landlords. Rather, for MHAs, owning and operating rental properties is merely one of several statutorily designated *means* of accomplishing a far greater governmental purpose – i.e., benefitting the physical health and social well-being of the public at large *through the elimination of slum conditions*. See, R.C. §§3735.27(A); 3735.31(B); and 3735.40(B),(C). Compare, R.C. §2744.01(C)(2)(q). As CMHA previously briefed to this Court, the fundamental concept that *the elimination of slum conditions benefits the public at large* has been both the “law” and the “public policy” throughout this Nation since 1933. [See, CMHA's May 19, 2008, Amicus Brief at pp. 2 through 7. Cf., Judge Slaby's dissent in the case at bar. 2007-Ohio-5111 at ¶36; “Final Analysis - Am. Sub. Sen. Bill 7” (Legislative Service Commission, 2007), “Blight,” at pp. 7-8 (summarizing prior statutory law).]

Although appellees' myopia in this regard is perfectly congruent with that of the court of appeals' two-judge majority, the fact of the matter remains that their view was rejected by the United States Supreme Court when it decided *City of Cleveland v. United States* (1945), 323 U.S. 329, 65 S.Ct. 280 – thereby affirming *United States v. Boyle* (N.D. Ohio 1943), 52 F.Supp. 906, and reversing *Federal Public Housing Authority v. Guckenberger* (1944), 143 Ohio St. 251. Cf., *In re*

Exemption from Taxation, Chase v. Board of Tax Appeals (Cuya. 1967), 10 Ohio App.2d 75, 81-82; *Blakemore v. Cincinnati Metropolitan Housing Authority* (1943), 74 Ohio App. 5, 29 O.O. 206.

Moreover, appellees' "proprietary function" submission is at odds with the fact that R.C. §3735.31(B) affords MHAs authority to precipitate *eminent domain* proceedings; a power which can only exist when the property is being taken for a *public* use. See, United States Const., Amend. 5; Section 19, Art. I, Ohio Const.

As CMHA sees it, appellees' – and the appellate majority's – purposeful ignoring of the well settled *judicial* history which underlies all public housing legislative initiatives in this Nation, both state and Federal, is analytically identical to ignoring the *legislative* history of the statutes in issue. This Court should, therefore, recognize it as such and afford it the same degree of corrective analysis which reliance upon that form of argumentation deserves. See, *Howard v. Miami Township Fire Division*, ___ Ohio St.3d ___, 2008-Ohio-2792 at {¶¶23-30}.

II. Regarding Appellees' R.C. §2744.02(B)(5) Contention

Appellees' attempt to rely upon R.C. §2744.02(B)(5) is foreclosed by this Court's decisions in *O'Toole v. Denihan*, ___ Ohio St.3d ___, 2008-Ohio-2574 at {¶¶67-69}, and *Butler v. Jordan* (2001), 92 Ohio St.3d 354, 357; both of which upheld the obvious point that R.C. §2744.02(B)(5)'s requirement that the imposition of civil liability be "express" means exactly what the General Assembly wrote: "'Expressly' means 'in direct or unmistakable terms: in an express manner: *explicitly, definitely, directly.*'" [*Butler*, supra. (Italics sic.)] However, as review of appellees' brief confirms,⁶ Ohio's Landlords and Tenants Act not only fails to impose *any duty* upon political

⁶ It is to be noted that nowhere in appellees' merit brief is there any quotation of, or citation to, language within Ohio's Landlords and Tenants Act which expressly imposes any *duty* of
(continued...)

subdivisions in general or MHAs in particular but also fails to impose any type of *civil liability* upon political subdivisions in general or MHAs in particular for a failure to perform any duty mandated therein. Rather, Ohio's Landlords and Tenants Act only imposes *duties* and *civil liability* upon landlords – viz., without ever mentioning MHAs or political subdivisions. As such, that Act is incapable of supporting a claimed R.C. §2744.02(B)(5) exception.

III. Regarding Appellees' "Special Relationship" Contention

Appellees' "special relationship" argument is foreclosed by this Court's decisions in *Rankin v. Cuyahoga County Department of Children & Family Services*, ___ Ohio St.3d ___, 2008-Ohio-2567 at ¶¶30-32, and *Kraynak v. Youngstown City School District Board of Education*, ___ Ohio St.3d ___, 2008-Ohio-2618 at ¶23; nothing in R.C. §2744.02(B) authorizing such a "special relationship" exception to R.C. §2744.02(A)(1)'s grant of immunity.

IV. Regarding Appellees' R.C. §2744.02(B)(4) Contention

Finally, appellees' attempted reliance upon R.C. §2744.02(B)(4) is precluded by the facts that (i) "the business of government" is *not* "**conducted**" within MHAs' dwelling units, such as Ms. Moore's residence in LMHA's "Pagodas," and (ii) such dwelling units are *not* "**open to the public.**" According to the overwhelming weight of Ohio decisional law, structures in which the business of government is *not* conducted and which are *not* open to the public *cannot* be classified as "buildings that are used in connection with the performance of a governmental function." See, *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, at 31 ("Unlike a courthouse or office building *where*

⁶(...continued)

compliance *upon MHAs*; nor does any quotation of, or citation to, language within Ohio's Landlords and Tenants Act which expressly imposes *civil liability upon MHAs* appear in appellees' said brief.

government business is conducted, a city recreation center houses recreational activities”); *McCloud v. Nimmer* (Cuya. 1991), 72 Ohio App.3d 533, 538-539 (“Office buildings and courthouses are *buildings in which the business of government is conducted and which are open to the public*. They are not similar in kind to a private residence subsidized by the government.”) [Emphasis added.] Accord, *Keller v. Foster Wheel Energy Corp.*, 163 Ohio App.3d 325, 2005 -Ohio- 4821, at {¶17} (“Merelle’s injury occurred in her home, not on public grounds. Accordingly, former R.C. 2744.02(B)(4) does not apply”); *Opatken v. City of Youngstown*, Mahon. App. No. 02-CA-59, 2003-Ohio-1072, at {¶¶13-14} (“In addition to ownership, a plaintiff must establish negligence on the part of one or more of the governmental entity’s employees and that the premises are used *in connection with the performance of a governmental function*”) [italics sic.]; *Hackathorn v. Springfield Local School Dist. Bd. of Edn.* (Summit 1994), 94 Ohio App.3d 319, 325 (“decendent’s private home was not open to the public generally and is not similar in kind to an office building or a courthouse”), discretionary appeal not allowed, (1994), 70 Ohio St.3d 1440; *Mattox v. Village of Bradner* (March 21, 1997), Wood App. No. WD-96-038, 1997 WL 133330, at *3; *Perry v. City of East Cleveland* (February 16, 1996), Lake App. No. 95-L-111, 1996 WL 200558, at *5. (“[A]ppellant claims that if the housing of the dog was a governmental act, then the house would constitute a building used for a governmental or public function. *** [W]e concur with the trial court’s assessment that appellant’s residence does not qualify as a building used for such a purpose.”)

Conclusion

For all of the foregoing reasons, and for those originally stated, CMHA joins in appellant Lorain Metropolitan Housing Authority’s submission that the judgement of the court of appeals must be reversed, and that of the trial court reinstated.

Respectfully Submitted,

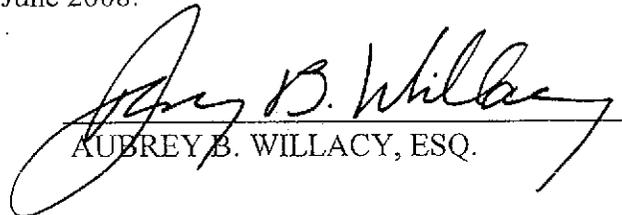


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CERTIFICATE OF SERVICE

Copies of amicus curiae Cuyahoga Metropolitan Housing Authority's foregoing Brief have been served, by ordinary mail, upon counsel for appellant, Daniel D. Mason, Esq., Stumphauzer, O'Toole, McLaughlin, McGlamery & Loughman Co., LPA, 5455 Detroit Road, Sheffield Village, Ohio 44054, and Terrance P. Gravens, Esq., Rawlin Gravens Co., LPA, 55 Public Square, Suite 850, Cleveland, Ohio 44113; and upon counsel for appellee, Joseph F. Salzberger, Esq., P.O. Box 799, Brunswick, Ohio 44212-00799, this 25th day of June 2008.



AUBREY B. WILLACY, ESQ.

APPENDIX

RIGHTS OF PERSONS

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 19

CONSTITUTION OF THE STATE OF OHIO

Article I - Bill of Rights

§ 19 Inviolability of private property

§ 19 Inviolability of private property

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

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2744.01**Statutes and Session Law****TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES****CHAPTER 2744: POLITICAL SUBDIVISION TORT LIABILITY****2744.01 Political subdivision tort liability definitions.**

2744.01 Political subdivision tort liability definitions.

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

- (d) The provision of a free public library system;
- (e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;
- (f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;
- (g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;
- (h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;
- (i) The enforcement or nonperformance of any law;
- (j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;
- (k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.
- (l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;
- (m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;
- (n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;
- (o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;
- (p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;
- (q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;

(ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this

definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

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2744.02**Statutes and Session Law****TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES****CHAPTER 2744: POLITICAL SUBDIVISION TORT LIABILITY****2744.02 Governmental functions and proprietary functions of political subdivisions.**

2744.02 Governmental functions and proprietary functions of political subdivisions.

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent

performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

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3735.27**Statutes and Session Law****TITLE [37] XXXVII HEALTH -- SAFETY -- MORALS****CHAPTER 3735: METROPOLITAN HOUSING AUTHORITY****3735.27 Creating metropolitan housing authority.****3735.27 Creating metropolitan housing authority.**

(A) Whenever the director of development has determined that there is need for a housing authority in any portion of any county that comprises two or more political subdivisions or portions of two or more political subdivisions but is less than all the territory within the county, a metropolitan housing authority shall be declared to exist, and the territorial limits of the authority shall be defined, by a letter from the director. The director shall issue a determination from the department of development declaring that there is need for a housing authority within those territorial limits after finding either of the following:

(1) Unsanitary or unsafe inhabited housing accommodations exist in that area;

(2) There is a shortage of safe and sanitary housing accommodations in that area available to persons who lack the amount of income that is necessary, as determined by the director, to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings without congestion.

In determining whether dwelling accommodations are unsafe or unsanitary, the director may take into consideration the degree of congestion, the percentage of land coverage, the light, air, space, and access available to the inhabitants of the dwelling accommodations, the size and arrangement of rooms, the sanitary facilities, and the extent to which conditions exist in the dwelling accommodations that endanger life or property by fire or other causes.

The territorial limits of a metropolitan housing authority as defined by the director under this division shall be fixed for the authority upon proof of a letter from the director declaring the need for the authority to function in those territorial limits. Any such letter from the director, any certificate of determination issued by the director, and any certificate of appointment of members of the authority shall be admissible in evidence in any suit, action, or proceeding.

A certified copy of the letter from the director declaring the existence of a metropolitan housing authority and the territorial limits of its district shall be immediately forwarded to each appointing authority. A metropolitan housing authority shall consist of members who are residents of the territory in which they serve.

(B)(1) Except as otherwise provided in division (C), (D), or (E) of this section, the members of a metropolitan housing authority shall be appointed as follows:

(a)(i) In a district in a county in which a charter has been adopted under Article X, Section 3 of the Ohio Constitution, and in which the most populous city is not the city with the largest ratio of housing units owned or managed by the authority to population, one member shall be appointed by the probate court, one member shall be appointed by the court of common pleas, one member shall be appointed by the board of county commissioners, one member shall be appointed by the chief executive officer of the city that has the largest ratio of housing units owned or managed by the authority to population, and two members shall be appointed by the chief executive officer of the most populous city in the district.

(ii) If, in a district that appoints members pursuant to division (B)(1)(a) of this section, the most populous city becomes the city with the largest ratio of housing units owned or managed by the authority to population, when the term of office of the member who was appointed by the chief executive officer of the city with the largest ratio expires, that member shall not be reappointed, and the membership of the authority shall be as described in division (B)(1)(b) of this section.

(b) In any district other than one described in division (B)(1)(a) of this section, one member shall be appointed by the probate court, one member shall be appointed by the court of common pleas, one member shall be appointed by the board of county commissioners, and two members shall be appointed by the chief executive officer of the most populous city in the district.

(2) At the time of the initial appointment of the authority, the member appointed by the probate court shall be appointed for a period of four years, the member appointed by the court of common pleas shall be appointed for three years, the member appointed by the board of county commissioners shall be appointed for two years, one member appointed by the chief executive officer of the most populous city in the district shall be appointed for one year, and the other member appointed by the chief executive officer of the most populous city in the district shall be appointed for five years.

If appointments are made under division (B)(1)(a) of this section, the member appointed by the chief executive officer of the city in the district that is not the most populous city, but that has the largest ratio of housing units owned or managed by the authority to population, shall be appointed for five years.

After the initial appointments, all members of the authority shall be appointed for five-year terms, and any vacancy occurring upon the expiration of a term shall be filled by the appointing authority that made the initial appointment.

(3) For purposes of this division, population shall be determined according to the last preceding federal census.

(C) For any metropolitan housing authority district that contained, as of the 1990 federal census, a population of at least one million, two members of the authority shall be appointed by the legislative authority of the most populous city in the district, two members shall be appointed by the chief executive officer of the most populous city in the district, and one member shall be appointed by the chief executive officer, with the approval of the legislative authority, of the city in the district that has the second highest number of housing units owned or managed by the authority.

At the time of the initial appointment of the authority, one member appointed by the legislative authority of the most populous city in the district shall be appointed for three years, and one such member shall be appointed for one year; the member appointed by the chief executive officer of the city with the second highest number of housing units owned or managed by the authority shall be appointed, with the approval of the legislative authority, for three years; and one member appointed by the chief executive officer of the most populous city in the district shall be appointed for three years, and one such member shall be appointed for one year. Thereafter, all members of the authority shall be appointed for three-year terms, and any vacancy shall be filled by the same appointing power that made the initial appointment. At the expiration of the term of any member appointed by the chief executive officer of the most populous city in the district before March 15, 1983, the chief executive officer of the most populous city in the district shall fill the vacancy by appointment for a three-year term. At the expiration of the term of any member appointed by the board of county commissioners before March 15, 1983, the chief executive officer of the city in the district with the second highest number of housing units owned or managed by the authority shall, with the approval of the municipal legislative authority, fill the

vacancy by appointment for a three-year term. At the expiration of the term of any member appointed before March 15, 1983, by the court of common pleas or the probate court, the legislative authority of the most populous city in the district shall fill the vacancy by appointment for a three-year term.

After March 15, 1983, at least one of the members appointed by the chief executive officer of the most populous city shall be a resident of a dwelling unit owned or managed by the authority. At least one of the initial appointments by the chief executive officer of the most populous city, after March 15, 1983, shall be a resident of a dwelling unit owned or managed by the authority. Thereafter, any member appointed by the chief executive officer of the most populous city for the term established by this initial appointment, or for any succeeding term, shall be a person who resides in a dwelling unit owned or managed by the authority. If there is an elected, representative body of all residents of the authority, the chief executive officer of the most populous city shall, whenever there is a vacancy in this resident term, provide written notice of the vacancy to the representative body. If the representative body submits to the chief executive officer of the most populous city, in writing and within sixty days after the date on which it was notified of the vacancy, the names of at least five residents of the authority who are willing and qualified to serve as a member, the chief executive officer of the most populous city shall appoint to the resident term one of the residents recommended by the representative body. At no time shall residents constitute a majority of the members of the authority.

(D)(1) For any metropolitan housing authority district located in a county that had, as of the 2000 federal census, a population of at least four hundred thousand and no city with a population greater than thirty per cent of the total population of the county, one member of the authority shall be appointed by the probate court, one member shall be appointed by the court of common pleas, one member shall be appointed by the chief executive officer of the most populous city in the district, and two members shall be appointed by the board of county commissioners.

(2) At the time of the initial appointment of a metropolitan housing authority pursuant to this division, the member appointed by the probate court shall be appointed for a period of four years, the member appointed by the court of common pleas shall be appointed for three years, the member appointed by the chief executive officer of the most populous city shall be appointed for two years, one member appointed by the board of county commissioners shall be appointed for one year, and the other member appointed by the board of county commissioners shall be appointed for five years. Thereafter, all members of the authority shall be appointed for five-year terms, with each term ending on the same day of the same month as the term that it succeeds. Vacancies shall be filled in the manner provided in the original appointments. Any member appointed to fill a vacancy occurring prior to the expiration of the term shall hold office as a member for the remainder of that term.

(E)(1) One resident member shall be appointed to a metropolitan housing authority when required by federal law. The chief executive officer of the most populous city in the district shall appoint that resident member for a term of five years. Subsequent terms of that resident member also shall be for five years, and any vacancy in the position of the resident member shall be filled by the chief executive officer of the most populous city in the district. Any member appointed to fill such a vacancy shall hold office as a resident member for the remainder of that term. If, at any time, a resident member no longer qualifies as a resident, another resident member shall be appointed by the appointing authority who originally appointed the resident member to serve for the unexpired portion of that term.

(2) On and after the effective date of this amendment, any metropolitan housing authority to which two additional members were appointed pursuant to former division (E)(1) of this section as enacted by Amended Substitute House Bill No. 95 of the 125th general assembly shall continue to have those additional members. Their terms shall be for five years, and vacancies in their positions shall be filled in the manner provided for their original appointment under former division (E)(1) of this section as so

enacted.

(F) Public officials, other than the officers having the appointing power under this section, shall be eligible to serve as members, officers, or employees of a metropolitan housing authority notwithstanding any statute, charter, or law to the contrary. Not more than two such public officials shall be members of the authority at any one time.

All members of an authority shall serve without compensation but shall be entitled to be reimbursed for all necessary expenses incurred.

After a metropolitan housing authority district is formed, the director may enlarge the territory within the district to include other political subdivisions, or portions of other political subdivisions, but the territorial limits of the district shall be less than that of the county.

(G)(1) Any vote taken by a metropolitan housing authority shall require a majority affirmative vote to pass. A tie vote shall constitute a defeat of any measure receiving equal numbers of votes for and against it.

(2) The members of a metropolitan housing authority shall act in the best interest of the district and shall not act solely as representatives of their respective appointing authorities.

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3735.31**Statutes and Session Law****TITLE [37] XXXVII HEALTH -- SAFETY -- MORALS****CHAPTER 3735: METROPOLITAN HOUSING AUTHORITY****3735.31 Metropolitan housing authority - powers and duties.**

3735.31 Metropolitan housing authority - powers and duties.

A metropolitan housing authority created under sections 3735.27 to 3735.50 of the Revised Code, constitutes a body corporate and politic. To clear, plan, and rebuild slum areas within the district in which the authority is created, to provide safe and sanitary housing accommodations to families of low income within that district, or to accomplish any combination of the foregoing purposes, the authority may do any of the following:

(A) Sue and be sued; have a seal; have corporate succession; receive grants from state, federal, or other governments, or from private sources; conduct investigations into housing and living conditions; enter any buildings or property in order to conduct its investigations; conduct examinations, subpoena, and require the attendance of witnesses and the production of books and papers; issue commissions for the examination of witnesses who are out of the state or unable to attend before the authority or excused from attendance; and in connection with these powers, any member of the authority may administer oaths, take affidavits, and issue subpoenas;

(B) Determine what areas constitute slum areas, and prepare plans for housing projects in those areas; purchase, lease, sell, exchange, transfer, assign, or mortgage any property, real or personal, or any interest in that property, or acquire the same by gift, bequest, or eminent domain; own, hold, clear, and improve property; provide and set aside housing projects, or dwelling units comprising portions of housing projects, designed especially for the use of families, the head of which or the spouse of which is sixty-five years of age or older; engage in, or contract for, the construction, reconstruction, alteration, or repair, or both, of any housing project or part of any housing project; include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions that the federal government has attached to its financial aid of the project; lease or operate, or both, any project, and establish or revise schedules of rents for any projects or part of any project; arrange with the county or municipal corporations, or both, for the planning and replanning of streets, alleys, and other public places or facilities in connection with any area or project; borrow money upon its notes, debentures, or other evidences of indebtedness, and secure the same by mortgages upon property held or to be held by it, or by pledge of its revenues, or in any other manner; invest any funds held in reserves or sinking funds or not required for immediate disbursements; execute contracts and all other instruments necessary or convenient to the exercise of the powers granted in this section; make, amend, and repeal bylaws and rules to carry into effect its powers and purposes;

(C) Borrow money or accept grants or other financial assistance from the federal government for or in aid of any housing project within its territorial limits; take over or lease or manage any housing project or undertaking constructed or owned by the federal government; comply with any conditions and enter into any mortgages, trust indentures, leases, or agreements that are necessary, convenient, or desirable;

(D) Subject to section 3735.311 of the Revised Code, employ a police force to protect the lives and property of the residents of housing projects within the district, to preserve the peace in the housing projects, and to enforce the laws, ordinances, and regulations of this state and its political subdivisions in

the housing projects and, when authorized by law, outside the limits of the housing projects.

(E) Enter into an agreement with a county, municipal corporation, or township in whose jurisdiction the metropolitan housing authority is located that permits metropolitan housing authority police officers employed under division (D) of this section to exercise full arrest powers as provided in section 2935.03 of the Revised Code, perform any police function, exercise any police power, or render any police service within specified areas of the county, municipal corporation, or township for the purpose of preserving the peace and enforcing all laws of the state, ordinances of the municipal corporation, or regulations of the township.

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3735.40**Statutes and Session Law****TITLE [37] XXXVII HEALTH -- SAFETY -- MORALS****CHAPTER 3735: METROPOLITAN HOUSING AUTHORITY****3735.40 Housing project definitions.**

3735.40 Housing project definitions.

As used in sections 3735.27, 3735.31, and 3735.40 to 3735.50 of the Revised Code:

(A) "Federal government" includes the United States, the federal works administrator, or any other agency or instrumentality, corporate or otherwise, of the United States.

(B) "Slum " has the meaning defined in section 1.08 of the Revised Code.

(C) "Housing project" or "project" means any of the following works or undertakings:

(1) Demolish, clear, or remove buildings from any slum area. Such work or undertaking may embrace the adaptation of such area to public purposes, including parks or other recreational or community purposes.

(2) Provide decent, safe, and sanitary urban or rural dwellings, apartments, or other living accommodations for persons of low income. Such work or undertaking may include buildings, land, equipment, facilities, and other real or personal property for necessary, convenient, or desirable appurtenances, streets, sewers, water service, parks, site preparation, gardening, administrative, community, health, recreational, educational, welfare, or other purposes.

(3) Accomplish a combination of the foregoing. "Housing project" also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration, and repair of the improvements, and all other work in connection therewith.

(D) "Families of low income" means persons or families who lack the amount of income which is necessary, as determined by the metropolitan housing authority undertaking the housing project, to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings, without overcrowding.

(E) "Families" means families consisting of two or more persons, a single person who has attained the age at which an individual may elect to receive an old age benefit under Title II of the "Social Security Act" or is under disability as defined in section 223 of that act, 49 Stat. 622 (1935), 42 U. S. C. A. 401, as amended, or the remaining member of a tenant family.

(F) "Families" also means a single person discharged by the head of a hospital pursuant to section 5122.21 of the Revised Code after March 10, 1964.

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Wood
County.
Majorie MATTOX, et al., Appellants,
v.
VILLAGE OF BRADNER, et al., Appellees.
No. WD-96-038.

March 21, 1997.

Gregory R. Elder and Marshall W. Guerin, Toledo, for
appellants.

Joan Szuberla, Toledo, for appellees.

DECISION AND JUDGMENT ENTRY

*1 This is an appeal from a judgment of the Wood County Court of Common Pleas which granted summary judgment in this case arising from an accident at a municipal swimming pool. Appellants, Marjorie Mattox, Jack Mattox, wife and husband, and Courtney Mattox, ("Courtney") a minor by and through her mother and father, natural parents and next of friends, Jack Mattox and Marjorie Mattox, set forth the following two assignments of error:

- "1. The Trial Court erred to the prejudice of the Appellants when it granted Summary Judgment to all of the Appellees and held that the Appellees were immune from suit pursuant to Ohio Revised Code Chapter 2744.
- "2. The Trial Court erred to the prejudice of the Appellants when it granted Summary Judgment to

Appellee, Steven Fairbanks, and held that he was immune from suit because there is a genuine issue of material fact regarding whether or not he was engaged in wanton and reckless misconduct."

The following facts are relevant to this appeal. On July 25, 1995, appellants filed their complaint against appellees, the village of Bradner, the Bradner Park Board, the "Bradner Pool Park", Virgil Shull, Jr., the chair of the Bradner Park Board, and Steven Fairbanks, the manager of the Bradner Municipal Pool ("the pool") in the summer of 1993. In their complaint, appellants alleged that appellees were negligent; that appellees' conduct was wanton and reckless; that appellees were liable under an exception to the general rule of immunity; and that the village of Bradner was liable under the doctrine of *respondent superior*. The complaint arose from Courtney's accident at the pool on July 26, 1993. On that day, Courtney, then twelve years old, went to the pool with her sister and cousin. Courtney's cousin challenged her to race. Her cousin was to jump off the low diving board, Courtney was to jump off the high diving board and then they were to swim to a dividing rope in the pool. After Courtney walked to the end of the high diving board, she turned to talk to her cousin. Courtney then lost her footing on the high diving board, slipped and fell with her upper body hitting the concrete below and her lower body hitting the water. She has had medical treatment for the injuries she received in the accident.

On March 27, 1996, appellees filed a motion for summary judgment. Appellants filed a memorandum in opposition to appellees' motion and appellees filed a reply memorandum. On June 12, 1996, the trial court granted summary judgment to appellees. This appeal was timely filed.

Both assignments of error allege that the trial court erred

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in granting summary judgment to appellees. In reviewing the grant of summary judgment, this court must apply the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

*2 The trial court based its grant of summary judgment on R.C. 2744. R.C. 2744.01 includes as a governmental function the maintenance and operation of a swimming pool. R.C. 2744.01(C)(1) states:

"(C)(1) 'Governmental function' means a function of a political subdivision that is specified in division (C)(2) of this section ***."

R.C. 2744.01 (C)(2) provides:

"(2) A 'governmental function' includes, but is not limited to, the following:

"(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any park, playground, playfield, indoor recreational facility, zoo, zoological park, bath, or swimming pool or pond, and the operation and control of any golf course ***."

R.C. 2744.02(A)(1) provides, in pertinent part:

"(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

In their first assignment of error, appellants argue that the trial court erred in granting summary judgment to appellees because an exception in R.C. 2744.02(B)(4)

applies to this case. That section states:

"(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

"(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and *that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function*, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code." (Emphasis added.)

The emphasized portion of the preceding statutory section is the crux of appellants' argument. Appellants argue that because a pool building on the park grounds was used in connection with the pool, there is liability for the negligence of an employee on those premises. This court finds no merit in this argument.

Appellants base their argument that the exception enumerated in R.C. 2744.02(B)(4) applies to their case on *Mills v. Cleveland* (June 15, 1995), Cuyahoga App. No. 67665, unreported. However, that case does not provide support for appellants' argument. In that case, the appellate court stated:

*3 "Mills claims that the City is not immune from liability because the operation of a swimming pool is a governmental function within or on the grounds of a building that was used in connection with the performance of a governmental function. This appears to be a logical conclusion.

"However, the Supreme Court of Ohio has recently held that the operation of swimming pools is subject to sovereign immunity. *Garrett v. Sandusky* (1994), 68

Ohio St.3d 139, 140, 624 N.E.2d 704. We note that the court did not fully set forth precedent nor did it discuss the statute with its exceptions. We are nonetheless bound by its ruling."

In *McCloud v. Nimmer* (1991), 72 Ohio App.3d 533, 539, the court stated:

"The rule of *ejusdem generis* provides that where a statute includes both a specific enumeration of things to be included, as well as a more general classification, the general classification is not to be construed broadly, but rather is restricted in scope to include only things similar in kind to these specifically named. *State v. Barker* (1983), 8 Ohio St.3d 39, 41. Therefore, we must interpret "buildings used in connection with the performance of a governmental function" as limited to the class similar to office buildings and courthouses. Office buildings and courthouses are buildings in which the business of government is conducted and are open to the public."

The court in *Hackathorn v. Springfield Local School Dist.* (1994), 94 Ohio App.3d 319, 325, analyzing the specific inclusion of office buildings and courthouses in R.C. 2744.02(B)(4), stated:

"The specific inclusion must be contrasted with the statute's specific exclusion of 'jails, places of juvenile detention, workhouses, or any other detention facility.' Construing the inclusion and exclusion together, we find that the statute's general classification is limited to the class which is similar to office buildings and courthouses."

Applying the above law to the facts of this case, this court finds that the trial court did not err in granting summary judgment to appellees. This court finds that the exception provided in R.C. 2744.02(B)(4) does not apply to this case.

Accordingly, appellants' first assignment of error is found not well-taken.

In their second assignment of error, appellants argue that the trial court erred in granting summary judgment to

appellee Steven Fairbanks ("Fairbanks"). Appellants argue that, as a municipal employee, Fairbanks is liable because he acted in a wanton and reckless manner. This court finds no merit in this argument.

R.C. 2744.03(A)(6) provides:

"(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or section 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

"(a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;

*4 "(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

"(c) Liability is expressly imposed upon the employee by a section of the Revised Code."

In *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 454, the court stated:

"Finally, an individual acts in a 'reckless' manner: '*** if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.'" (Citations omitted.)

"The Supreme Court also noted that since the term 'reckless' is often used interchangeably with 'willful' and 'wanton,' its comments regarding recklessness equally apply to conduct characterized as willful or wanton. (Citation omitted.) Furthermore, we recently held that the term 'reckless' as used in R.C. 2744.03(A)(6)(b) means a perverse disregard of a known risk. (Citation omitted.) We also concluded that 'in R.C. 2744.03(A)(6)(b), the word "reckless" is associated with the words "malicious purpose," "bad faith," and "wanton," all of which suggest conduct more egregious than simple carelessness.'" (Citation omitted.)

Applying these standards to the case at bar, this court must determine whether Fairbanks' conduct was more

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(Cite as: 1997 WL 133330 (Ohio App. 6 Dist.))

Page 4

egregious than simple carelessness, or reflects the perverse disregard of a known risk. This court has thoroughly reviewed the record in this case including the conduct asserted by appellants [FN1] to support their claim that Fairbanks' conduct was wanton and reckless. This court concludes that Fairbanks' conduct does not come within R.C. 2744.03(A)(6).

FN1. Appellants argue that the following conduct was wanton and reckless: Fairbanks was not present at the pool at the time of the accident and the lifeguard present was fifteen years old and poorly positioned to guard the pool.

Accordingly, appellants' second assignment of error is found not well-taken.

On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Wood County Court of Common Pleas is affirmed. Appellants are ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 7/1/92.

HANDWORK, Sherck and Knepper, JJ., concur.

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Lake
County.

Kimberly F. PERRY, Plaintiff-Appellant,

v.

The CITY of East Cleveland, et al.,
Defendant-Appellee.

CASE NO. 95-L-111,

Feb. 16, 1996.

Civil Appeal from Court of Common Pleas Case No. 93
CV 000646

Atty. Walter J. McNamara, III 8440 Station Mentor, OH
44060 (For Plaintiff-Appellant).

James H. Hewitt, III, Director of Law, Rhonda G. Curtis
Assistant Director of Law 14340 Euclid Avenue, East
Cleveland, OH 44112 (For Defendant-Appellee).

FORD, P.J.

*1 Appellant, Kimberly F. Perry, appeals the decision of
the Lake County Court of Common Pleas granting
summary judgment for appellee, The City of East
Cleveland, on her claim for personal injuries.

At the time of her injury, appellant was married to
Michael Perry, appellee's police canine ("K-9") unit
officer. In his capacity as the K-9 officer, Michael and
appellant kept "J.R.," the police dog, at their residence,
which was located in Mentor, Ohio. J.R. had been selected
from the local animal shelter in September of 1990.
Appellee determined that it was best for the dog to be
housed with the K-9 unit officer to facilitate bonding
between the animal and Officer Perry, and because
appellee did not have the appropriate space to properly
house the dog. Appellant and her husband approved of
this arrangement, and appellant was pleased to have the
dog at her home.

Appellee owned the dog, but it reimbursed Officer Perry
for any expenses associated with housing J.R. in the Perry
household including food, equipment and veterinary bills.
J.R. was allowed to roam freely about the house when
Officer Perry was at home, but he was kept in a cage at
night and when Officer Perry was not at the residence.
Appellant, on occasion, would allow J.R. to go outside
into the backyard.

On April 29, 1991, appellant was home alone in Mentor.
Appellant's husband was on duty, but J.R. was not with
him since the specially equipped vehicle which was used
by Officer Perry to transport the dog was out of service.
Appellant let the dog out of its cage to go outside to
relieve itself. When appellant let J.R. in, she assumed the
dog had returned to his cage to wait for Officer Perry to
come home. However, J.R. did not return to his cage but
went under the dining room table. When appellant bent
over to give food and water to Daisy, another dog, J.R.
emerged from under the table and bit appellant on the face
causing injuries.

Appellant instituted suit against appellee seeking damages based upon its "negligent * * * maintenance, use and care of such dog * * *." After suit was filed, appellee filed a motion for summary judgment alleging that appellant was the "keeper or harbinger" of the dog and, therefore, was not entitled to compensation. However, the court denied the motion concluding that there were factual issues regarding whether or not the dog was vicious and whether appellee knew of this fact.

On June 3, 1994, appellee filed another motion for summary judgment alleging that it was immune from liability as a result of governmental immunity. Appellee then filed a supplemental memorandum. Appellant responded, and she claimed that appellee was not immune because keeping the dog at the house constituted a "proprietary function." Appellant also claimed that appellee was negligent by permitting the dog, which it knew was aggressive, to be kept at their home. After receiving appellee's reply to the opposition filed by appellant, the trial court entered summary judgment for appellee.

*2 Appellant timely appealed the trial court's summary judgment ruling raising the following assignments of error:

- "1. The court erred in granting summary judgment in favor of appellee based upon sovereign immunity provided by R.C. 2744.01 *et seq.*
- "2. The court below erred in determining that appellant [*sic*] was not liable under R.C. 955.28."

In the first assignment, appellant is alleging that the court should not have granted appellee summary judgment as appellee is not protected from liability by the doctrine of sovereign immunity contained in R.C. 2744 *et seq.*

In relevant part, R.C. 2744.02(A)(1) provides that subject to the exceptions contained in paragraph (B) of the same section "a political subdivision is not liable in damages in

a civil action for injury * * * to persons * * * allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

R.C. 2744.01 defines the relevant terms.

"(C)(1) 'Governmental function' means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:
* * *"

"(b) A function that is for the common good of all citizens of the state;

"(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

"(2) A 'governmental function' includes, but is not limited to, the following:

"(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

"(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; * * * and to protect persons and property;
* * *"

"(G)(1) A 'proprietary function' means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

"(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

"(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons."

R.C. 2744.02(B) further provides that a political subdivision may be liable for: (1) injuries arising from the negligent operation of motor vehicles, subject to certain defenses; (2) the negligent performance of acts by

employees with respect to proprietary functions; (3) failing to keep public ways open, in repair and free from nuisance; (4) loss caused by the negligence of employees on the grounds of buildings that are used in connection with public functions; and (5) acts where liability is expressly imposed by statutory enactment in the Revised Code.

*3 In *Adams v. City of Willoughby* (Dec. 16, 1994), Lake App. No. 94-L-055, unreported, this court referenced *Wilson v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450, noting:

"R.C. 2744.02(A)(1) granting a broad immunity to political subdivisions of the state. * * * Division (B) of the statute designates five exceptions to this grant of immunity. * * * 'There is, however, no such general exception for governmental functions. Consequently, except as specifically provided in R.C. 2744.02(B)(1), (3), (4) and (5), with respect to governmental functions, political subdivisions retain their cloak of immunity from lawsuits stemming from employees' negligent or reckless acts. * * *' *Wilson* at 452." (Citations omitted.) *Id.* at 4.

Furthermore, R.C. 2744.03(A) provides that a political subdivision may present defenses for the acts or nonacts arising from both governmental or proprietary functions. R.C. 2744.03(A) states, in part, that:

"[D]efenses or immunities may be asserted to establish nonliability:

" * * *

"(2) * * * if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or * * * was necessary or essential to the exercise of powers of the political subdivision or employee.

"(3) * * * if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers * * *
" * * *

"(5) * * * [if the] loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

Thus, to determine whether a subdivision is immune, one must first ascertain whether the action was either governmental or proprietary. If governmental, and not subject to one of the exceptions enumerated in R.C. 2744.02(B), the political subdivision may only be liable for an act or omission of an employee involved in a resource allocation judgment decision which was malicious, in bad faith, wanton or reckless. If proprietary, the governmental body may be liable for a negligent act or nonact unless the act (1) involved the necessary or essential exercise of its powers; (2) was within the discretionary policy-making powers of the employee; or (3) was within the resource allocation powers of the employee unless the decision was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner. It is with the foregoing predicate that the instant appeal shall be addressed.

Initially, it should be noted that appellant's primary argument to overturn the lower court's disposition is based solely upon an allegation of simple negligence. In particular, appellant is asserting that appellee was negligent in boarding the dog at appellant's house. Therefore, appellant may only proceed on her claim if that function is "proprietary" and not "governmental," and not immune under one of the defenses contained in R.C. 2744.03. Appellant presents four sub-arguments to support her position.

*4 First, appellant is claiming that since the injury occurred outside the borders of appellee's jurisdiction, it cannot be protected by R.C. 2744 *et seq.* Specifically,

appellant alleges that the action in this case is focused on "the exercise of police power." Appellant asserts that since a political subdivision may only exercise its police power within its jurisdictional limits, any police action taken outside of the territorial boundaries is not protected under the immunity provision. Therefore, appellant's supposition continues, the housing of the police dog outside appellee's jurisdictional limits is not protected by the immunity provisions of R.C. 2744 *et seq.*

As appellee correctly notes, appellant is raising this argument for the first time on appeal. As such, appellant is precluded from raising it here. Accord *State v. Williams* (1977), 51 Ohio St.2d 112.

Alternatively, addressing the merits of appellant's contention, we conclude that appellant's proposition is unsupported. Nothing within the statute limits those governmental or proprietary functions to actions which occur within the jurisdictional boundaries of the political subdivision. Furthermore, this court is unable to locate any statutory provision limiting a political subdivision from acting outside its geographic boundaries or requiring them to forego immunity for acts which would be shielded from tort liability if undertaken within its boundaries. To the contrary, R.C. 715.01 empowers municipalities to purchase and use lands outside its geographic limits. Additionally, R.C. 715.50 permits the municipality to provide necessary police and sanitary services to such property. Indeed, in *McDonald v. Columbus* (1967), 12 Ohio App.2d 150, the court acknowledged that a city may establish a campground under its power of local self-government. Furthermore, pursuant to R.C. 737.04, political subdivisions may enter into agreements whereby police officers from one jurisdiction may enter into another jurisdiction to provide police services. Similarly, the officers may cross jurisdictional boundaries when engaged in "hot pursuit." R.C. 2935.03. Applying the foregoing, we conclude that acts or decisions relating to or occurring in part on extra-territorial property, would be entitled to the same immunity provisions as lands within

the borders of the municipality subject to the exceptions enumerated in R.C. 2744 *et seq.*, so long as such function is otherwise within the fulcrum of proper police activity. The first sub-argument is without merit.

In the second sub-argument, appellant claims that maintaining a police dog in a private home is not a governmental function, and, therefore, not subject to immunity. We disagree.

Both "governmental" and "proprietary" functions are defined in 2744.01. However, the classification of the decision to board the dog at appellant's house as either "governmental" or "proprietary" is immaterial to our resolution of this matter. As noted previously, as long as the act is one involving the "exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources," the political subdivision is immune "unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

*5 Appellant concedes in his fourth sub-argument that this was, indeed, a judgmental decision. Appellant has failed to meet her burden in order to avoid summary judgment because she failed to set forth facts showing that appellee's actions constituted reckless or wanton conduct, or were malicious or made in bad faith, so that sovereign immunity would not apply. Therefore, the trial court's judgment granting appellee's summary judgment motion was proper. The second sub-argument is overruled.

Then in the third sub-argument, appellant claims that if the housing of the dog was a governmental act, then the house would constitute a building used for a governmental or public function. Therefore, appellee would be liable under R.C. 2744.02(B)(4). However, we concur with the trial court's assessment that appellant's residence does not

qualify as a building used for such a purpose.

"[T]he evidence shows that the boarding of the dog at [appellant's] household was purely incidental to the provision of police dog services. First, there is no evidence that any other dogs not owned by [appellant and her husband] were boarded at a house or that [appellee] was interested in maintaining a kennel *per se*.

Alternate locations for boarding the animal were considered but turned down as impractical. The dog was boarded with its handler to maintain its bond with the handler, continue its training and reinforce what it had learned earlier, and to keep it under control of its handler as much as possible. The evidence showed that boarding the dog with its handler is especially important during its critical first year of police work.

"Options such as putting a kennel in the police garage were rejected since the dog would receive much less exercise, training and care. In addition, the hydrocarbon fumes in the garage would degrade the dog's sense of smell and noise would agitate the dog. In addition, since the dog was bonded only to one handler, it was not readily approachable by other policemen nor was it considered suitable to train the dog to allow others to approach it. Because the boarding of the dog at [appellant's] household was incidental to its police work, [appellee] was not operating a kennel and was not carrying out a proprietary function."

We cannot say the court erred in reaching this conclusion.

Furthermore, as noted in *Hackathorn v. Springfield Local School Dist. Bd. of Edn.* (1994), 94 Ohio App.3d 319, a private residence does not qualify as a "governmental building."

"With this assignment of error, Hackathorn argues that the decedent's home was a building used in connection with the performance of a governmental function; therefore, R.C. 2744.02(B)(4) provides an exception to Springfield's immunity. 'R.C. 2744.02(B)(4) includes a general description, "buildings that are used in connection with the performance of a governmental

function," as well as two specific examples, office buildings and courthouses.' *McCloud v. Nimmer* (1991), 72 Ohio App.3d 533, 539 * * *. The specific inclusion must be contrasted with the statute's specific exclusion of 'jails, places of juvenile detention, workhouses, or any other detention facility.' Construing the inclusion and exclusion together, we find that the statute's general classification is limited to the class which is similar to office buildings and courthouses. Unlike the excluded class of buildings, office buildings and courthouses are buildings that are open to the public. The decedent's private home was not open to the public generally and is not similar in kind to an office building or a courthouse." (Parallel citation omitted.) *Id.* at 325.

*6 The third sub-argument is without merit.

In the fourth sub-argument, appellant argues that appellee should not be shielded from liability as any immunity attached to the exercise of discretionary decision making does not apply to decisions affecting areas outside its territorial limits, or in Mentor. As we have addressed and rejected this challenge in the first sub-argument, we need not again discuss and dismiss the same supposition here. The fourth sub-argument is, likewise, overruled.

It should also be noted that the cases relied upon by appellant, allegedly in support of her contentions under the first assignment of error, suggest that other jurisdictions view the boarding of police dogs at the officer's house as a police function. Liability was only found when the manner employed to house or keep the animal was grossly negligent, which in Ohio may amount to wanton conduct. In this case, we do not have any evidence which would suggest that that was the case. The first assignment is without merit.

In the second assignment of error, appellant claims that R.C. 955.28, the dog bite statute, creates liability upon

Not Reported in N.E.2d
Not Reported in N.E.2d, 1996 WL 200558 (Ohio App. 11 Dist.)
(Cite as: 1996 WL 200558 (Ohio App. 11 Dist.))

Page 6

appellee. However, as noted, R.C. 2744.02(B) provides that a political subdivision may be liable for acts when liability is *expressly imposed* by statutory enactment in the Revised Code. R.C. 955.28(B) merely provides that "[t]he owner, keeper, or harbinger of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, * * *." It does not contain any language expressly creating liability upon a political subdivision. Finally, in *Zellman v. Kenston Bd. of Edn.* (1991), 71 Ohio App.3d 287, this court rejected a similar contention.

" * * * R.C. 2744.02(B)(5) specifically provides that liability is not to be found to exist simply because a *responsibility* is imposed upon the political subdivision under a separate code section. Instead, *liability*, itself, must be expressly imposed by the statute. This language clearly creates a presumption against interpreting other statutes as stating an exception to the general rule concerning sovereign immunity." (Emphasis *sic.*) *Id.* at 290.

Applying the same rationale to the instant action, appellant's second assignment of error is without merit.

For the foregoing reasons, the judgment of the trial court is affirmed.

CHRISTLEY and MAHONEY, JJ., concur.

Not Reported in N.E.2d, 1996 WL 200558 (Ohio App. 11 Dist.)

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Am. Sub. S.B. 7

127th General Assembly

(As Passed by the General Assembly)

Sens. Grendell, Harris, Faber, Schaffer, Amstutz, Coughlin, Gardner, Padgett, Schuring, Clancy, Mumper, Carey, Niehaus, Austria, Buehrer, Goodman, Jacobson, Schuler, Spada, Stivers, R. Miller, Wilson, Cates

Reps. Blessing, Wagoner, Coley, Bacon, Seitz, Batchelder, Adams, Aslanides, Bubb, Carmichael, Collier, Combs, Core, Daniels, Dolan, Domenick, Evans, Flowers, Gibbs, Goodwin, J. Hagan, Hite, Hottinger, Hughes, Jones, Oelslager, Peterson, Reinhard, Schindel, Setzer, Stebelton, Uecker, Wachtmann, Wagner, White, Zehringer

Effective date: *

ACT SUMMARY

- Defines "blighted area," "slum," and "blighted parcel" and, except with regard to urban renewal projects, applies the new definitions uniformly throughout the Revised Code to replace definitions of "blighted area," "slum," "slum area" and related terms.
- Prohibits any person from considering whether property could be put to a comparatively better use or could generate more tax revenue when determining whether the property is a blighted area or a blighted parcel.
- Exempts agricultural land from being classified as blighted if its condition is consistent with conditions normally incident to generally accepted agricultural practices and the land is used for agricultural purposes or if the land is devoted exclusively to agricultural use.
- Requires that before a public agency appropriates property for a private use based on a finding that the area is a blighted area or a slum, the agency adopt a comprehensive development plan describing and

* The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.

Blight

Definitions

Prior law. Prior law contained multiple definitions of blighted areas and slums that were similar to, but not necessarily consistent with, each other.

The laws authorizing counties to conduct renewal projects (R.C. 303.26 to 303.59) contained nearly identical definitions of blight and slum. "Blighted area" was defined as an area that substantially impaired or arrested sound growth, retarded the provision of housing accommodations, or constituted an economic or social liability and was a menace to the public health, safety, morals, or welfare in its present condition and use because of the presence of a substantial number of slum, deteriorated, or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions to title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors. "Blighted area" also included a disaster area in need of redevelopment or rehabilitation as certified by the county commissioners and the governor. "Slum area" was defined as an area that was conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and was detrimental to the public health, safety, morals, or welfare because it contained a predominance of buildings or improvements, whether residential or nonresidential, that suffered from dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property, by fire and other causes, or any combination of such factors. (R.C. 303.26(D) and (E); 303.36--not in the act.) A county that was conducting a renewal project to address blight or slum conditions was specifically authorized to exercise eminent domain (R.C. 303.37(C), 303.38--not in the act).

The laws authorizing the creation of community urban redevelopment corporations defined "blighted area" as an area containing a majority of structures that have been extensively damaged or destroyed by a major disaster, or that, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, unsafe and unsanitary conditions or the existence of conditions which endanger lives or properties by fire or other hazards and causes, or that, by reason of location in an area with inadequate street layout, incompatible land uses or land use relationships, overcrowding of buildings on the land, excessive dwelling unit density, or other identified hazards to health and safety, are conducive to ill health, transmission of disease, juvenile delinquency and crime and are detrimental to the public health, safety, morals, and

general welfare (R.C. 1728.01(E)). A project undertaken by a community urban redevelopment corporation could include the acquisition of blighted property "by purchase or otherwise" (R.C. 1728.01(F)(2)).

The laws authorizing metropolitan housing authorities to operate housing projects defined "slum area" as any area where dwellings predominate which, by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light, or sanitary facilities, or any combination of these factors, are detrimental to safety, health, or morals (R.C. 3735.40(B)). Metropolitan housing authorities are authorized to use eminent domain to conduct housing projects in slum areas (R.C. 3735.31(B)--not in the act).

Prior law authorized municipal corporations to appropriate and rehabilitate buildings or structures that they found to be a threat to the public health, safety, or welfare, that had been declared to be a public nuisance, and that either had been found to be insecure, unsafe, structurally defective, unhealthful, or unsanitary or violated a building code or ordinance (R.C. 719.012). Continuing law also authorizes "impacted cities" to use eminent domain for purposes of economic development (R.C. 719.011--not in the act). "Impacted cities" are cities that have been extensively damaged by a major disaster and declared to be a major disaster area under federal law, or cities that have attempted to cope with the problems of urbanization, and that provide for economic development by either authorizing the construction of housing by a metropolitan housing authority or adopting a program to combat blight and slums that has been certified as workable by the director of development (R.C. 1728.01(C)).

Operation of the act. The act replaces all of these definitions with a single set of definitions that are applicable throughout the Revised Code except for Chapter 725. (municipal urban renewal).

The act defines "blighted area" or "slum," as used in the Revised Code, as an area in which at least 70% of the parcels are blighted parcels and those blighted parcels substantially impair or arrest the sound growth of the state or a political subdivision of the state, retard the provision of housing accommodations, constitute an economic or social liability, or are a menace to the public health, safety, morals, or welfare in their present condition and use (R.C. 1.08(A)).

Under the act, "blighted parcel," as used throughout the Revised Code except Chapter 725. means either of the following (R.C. 1.08(B)):

- (1) A parcel that has one or more of the following conditions:
 - (a) A structure that is dilapidated, unsanitary, unsafe, or vermin infested, and because of its condition an agency that is responsible

