

ORIGINAL

IN THE SUPREME COURT OF OHIO

Robert Coleman, et al.	:	
	:	
Plaintiffs-Appellees,	:	Case No. 2011-0199
	:	
vs.	:	
	:	On Appeal from the Portage County
Portage County Engineer,	:	Court of Appeals
	:	Eleventh Appellate District
Defendant-Appellant.	:	Court of Appeals Case No. 2010-P-00016

**BRIEF IN SUPPORT OF APPELLANT  
 OF AMICI CURIAE  
 THE COUNTY COMMISSIONERS' ASSOCIATION OF OHIO  
 AND THE COUNTY ENGINEERS ASSOCIATION OF OHIO  
 AND THE COUNTY SANITARY ENGINEERS ASSOCIATION  
 AND THE COUNTY RISK SHARING AUTHORITY  
 AND METROPOLITAN SEWER DISTRICT OF GREATER CINCINNATI  
 AND THE OHIO MUNICIPAL LEAGUE  
 AND THE OHIO TOWNSHIP ASSOCIATION  
 AND THE COALITION OF LARGE URBAN TOWNSHIPS  
 AND THE ASSOCIATION OF OHIO METROPOLITAN WASTEWATER AGENCIES**

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**I. INTRODUCTION AND STATEMENTS OF INTEREST OF AMICI CURIAE**

The question of immunity for the absence of sewer upgrades is critical to the Amici Curiae. The Amici exist to support local governments and their engineers. The question has far-reaching implications, not just for storm water control, but also for sanitary sewers and wastewater treatment. The better legal position is that immunity should apply. If the Court decides that there is no immunity, or that immunity is narrowly circumscribed, every bit of arguably outmoded infrastructure could become the subject of litigation, and the public coffers, such as they are, will be opened to potentially catastrophic damages during periods of inclement weather. This would be bad for the jurisprudence of immunity, bad for small government, and bad for the citizens of Ohio.

The following is a brief description of each Amicus, along with a summary of the Amici's arguments. The County Commissioners' Association of Ohio ("CCAO") works to promote best practices and policies in the administration of county government. CCAO accomplishes these goals by providing legislative representation, technical assistance, and educational opportunities for county commissioners and their staffs.

The County Risk Sharing Authority ("CORSA") is a political subdivision joint self-insurance pool authorized by R.C. 2744.081. It provides broad property and liability coverages to its member counties, as well as comprehensive risk management services. As of this filing, CORSA counts among its members 63 Ohio counties and 18 multi-county facilities. CORSA members include boards of county commissioners, county water and wastewater departments, county engineers, and county sanitary engineers, all of whom will be directly affected by the outcome of this appeal.

The Coalition of Large Urban Townships (“CLOUT”) is a group of large, urban townships in Ohio that has formed a committee for the purpose of providing its members with a forum for the exchange of ideas and solutions for problems and issues related specifically to the governance of large, urban townships. CLOUT works jointly with the Ohio Township Association. Membership in CLOUT is limited to those townships having either a population of 15,000 or more residents in the unincorporated area, or a budget of over \$3,000,000.00.

The Ohio Township Association (“OTA”) is a statewide professional organization dedicated to the promotion and preservation of township government in Ohio. Established in 1928 and organized in 87 counties across the state, the OTA has more than 5,230 active members and over 4,000 associate members. OTA’s many functions include working at the General Assembly relative to legislation that affects local governments in general and the 1,308 township governments in particular, and providing members with educational material and opportunities to assist township officials.

The Ohio Municipal League is a non-profit corporation and statewide association that protects the interests of Ohio municipal government. Collectively, the Ohio Municipal League represents the interests of approximately 730 cities and villages of Ohio before the Ohio General Assembly and state agencies. Its mission is the improvement of municipal government and promotion of the general welfare of the cities and villages of Ohio.

The County Engineers Association of Ohio (“CEAO”) is a statewide association of county engineers who hold office in each of Ohio’s 88 counties. CEAO provides support to the county engineers in developing, promoting and maintaining practical, efficient and financially sound administration of county government including by filing Amicus Curie briefs in support of proper judicial interpretation of legislation that would affect the duties of county engineers.

County engineers are, by statute, required to be both a Professional Engineer (P.E.) and Registered Surveyor (R.S.) and are by statute required in most instances to be the P.E. and R.S. for the county. As such, the county engineers are engaged in, as required by various statutes, the design and construction of facilities to prevent flooding.

The Sanitary Engineers Association of Ohio is an affiliate of the County Commissioners Association of Ohio with membership representing approximately 40 Ohio counties. The mission of the Sanitary Engineers Association is to improve public sewer and water service by providing educational opportunities to and the sharing of knowledge, experience and ideas among its membership.

The Metropolitan Sewer District of Greater Cincinnati, which is owned by the Hamilton County Board of Commissioners, collects and treats wastewater from 850,000 residential and business customers in the City of Cincinnati, Hamilton County, and portions of adjoining counties. It treats 157 million gallons of wastewater annually at seven primary wastewater treatment plants. In 2010, the federal court approved the first amendment to consent decrees between Hamilton County, Cincinnati, the United States, the State of Ohio and ORSANCO (Ohio River Sanitation Commission). The Wet Weather Implementation Plan approved as a part of the Consent Decree mandates specific work to be done in order to address combined and sanitary sewer overflows in Hamilton County. Between 2010 and 2018, Phase 1 of the Plan calls for the completion of specific projects and project bundles estimated at approximately \$1.2 billion. The remaining projects are in Phase 2 of the Plan. Phase 2 is estimated to cost approximately \$2 billion. These wet weather compliance issues, in addition to problems relating to old and deteriorating infrastructure, will cause the Metropolitan Sewer District, and most sewer systems throughout the nation, to spend large sums over the next several decades on

capital improvements. It is the position of the Metropolitan Sewer District that the design, selection, and sequencing of these projects are governmental functions that should not be subject to tort claims.

The Association of Ohio Metropolitan Wastewater Agencies (“AOMWA”) is a statewide organization that represents the interests of Ohio’s public wastewater agencies. AOMWA’s members construct, operate, maintain and manage public sewer collection and treatment systems throughout Ohio. Collectively, AOMWA’s members treat more than 300 billion gallons of wastewater each year for more than 4 million Ohioans. They provide this invaluable public service, which protects public health and the environment, on budgets that are, in many cases, funded solely by the citizens and businesses in their communities. As such, their operating/improvement budgets are constrained by the number of citizens and businesses that utilize their services, what those citizens and businesses can afford, and what rate increases elected public officials are willing to approve. Given such limited funding, AOMWA members must allocate their funds to the vital and necessary tasks that provide the most significant benefits for all ratepayers within their communities — a discretionary decision they must make for the good of the whole. Therefore, the issue in this case is critical to AOMWA’s members. If immunity does not apply, AOMWA members could face significant liability from those who would second-guess how the members use limited financial resources in connection with their systems.

Not only do the Amici offer guidance to political subdivisions and engineers, they also work to articulate and protect the interests of those persons and entities. These interests include the advancement of a sound construction of statutory immunity for tort claims under R.C. Chapter 2744 as it pertains to sewer systems.

The Amici submit that political subdivisions should be immune for sewer overflows and backflows during periods of heavy rain that do not result from improper operation, maintenance or upkeep of a sewer system, but that instead could be cured only by “upgrading” the system. This immunity is grounded in R.C. 2744.01(C)(2)(l), which defines governmental function to include “[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system.” It is also grounded in R.C. 2744.03(A)(5), which extends immunity if injury “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.” It is also grounded in R.C. 2744.03(A)(3), which extends immunity for liability arising from an employee’s exercise of discretion “with respect to policy-making, planning, or enforcement powers.”

## **II. STATEMENT OF THE CASE AND FACTS**

The Amici incorporate the Statement of the Case set forth by Appellant Portage County Engineer. The Amici emphasize that this appeal was held for the determination of *Essman v. City of Portsmouth*, Case Nos. 2010-1970 & 2010-2253, in which there was a certified conflict question. When *Essman* settled, the Court dismissed it. Although there is no certified conflict question in the appeal sub judice, there remains a conflict between the appellate districts concerning whether the absence of a sewer upgrade is “proprietary” or “governmental” for purposes of R.C. Chapter 2744.

In addition to the facts provided by Appellant Portage County Engineer, the Amici offer the following statement regarding the circumstances and concerns more generally faced by the cities, counties, townships, engineers and sewer districts for whom the Amici advocate.

The decision of whether and when to upgrade is driven, in part, by the effects of development. Authorities work earnestly to ascertain what is best for their communities, but there can be unpredicted consequences upon storm water runoff associated with building and development, particularly when development occurs outside the entity's jurisdiction but within a shared watershed. As responsible authorities plan and provide storm and sanitary sewer services, assessing the actual remaining capacity of existing systems, and development, and fluctuating land use and (sometimes unknown) hydrological conditions, present real challenges in policy-making, discretion and judgment. It is essential and appropriate that governmental immunity extend to such activities.

Very much less hypothetical is the fact that many cash-strapped local governments simply do not have sufficient funds to "upgrade" their systems, or to separate sanitary and storm sewer systems, or to expand sanitary treatment capacity. Many local governments find themselves in difficult financial straits, especially since the economic recession, and there is no fault in not having millions of dollars for sewer upgrades. Each year, local governments identify infrastructure needs and wants, compare the cost of these with budgetary constraints, and then set priorities, both practical and political. Setting priorities for the expenditure of limited funds for wants is clearly discretionary and a governmental function. Again, immunity for such functions is essential and appropriate.

### **III. LAW AND ARGUMENT**

#### **Re-Stated Proposition of Law – Part A**

**The absence of an upgrade to sewers is an omission in connection with a governmental function, namely, the "provision or non-provision, planning, construction or re-construction" of a sewer within the meaning of R.C. 2744.01(C)(2)(I).**

**A. The question falls under the second tier of R.C Chapter 2744 immunity analysis.**

R.C. Chapter 2744 establishes a three-step analysis to determine whether a political subdivision is immune from liability. See, e.g., *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946 at ¶14. First, R.C. 2744.02(A)(1) sets forth the general rule that a political subdivision is immune from tort liability for any act or omission in connection with a governmental or proprietary function. Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). Finally, if liability exists under R.C. 2744.02(B), a court should consider R.C. 2744.03(A), which sets forth several defenses that re-instate a political subdivision's immunity.<sup>1</sup>

Under the second tier of analysis, R.C. 2744.02(B)(2) removes immunity for "proprietary functions." The central legal question here falls under the second tier. One might ask whether the absence of a sewer upgrade falls under R.C. 2744.01(G)(2)(d), which defines "proprietary function" to include "the maintenance, destruction, operation, and upkeep of a sewer system." However, for the analysis to be complete, one must also ask whether the presence or absence of a sewer upgrade falls under R.C. 2744.01(C)(2)(l), which defines "governmental function" to include "[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system."

**B. "Upgrade" means "enhancement" or "improvement" of the sewer. It does not mean "maintenance," "operation," or "upkeep."**

Legislative intent supports the conclusion that a sewer upgrade, or lack thereof, is a governmental function, not a proprietary function. In order to determine legislative intent, a court must "read words and phrases in context and construe them in accordance with rules of

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<sup>1</sup> Even if the decision not to upgrade or the lack of upgrades were a proprietary function, which is denied, there remains the question of third tier discretionary immunity, discussed elsewhere herein.

grammar and common usage.” Furthermore, “[i]n construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings.” If the terms of a statute are unambiguous, there is no need to resort to the rules of statutory construction. *Essman v. City of Portsmouth*, 4<sup>th</sup> Dist. No. 09CA3325, 2010-Ohio-4837 at ¶40, internal citations omitted.

The court in *Essman* went on to consider the plain meaning of the words in R.C. 2744.01(G)(2)(d) and made the following observations. As used in the statute, “maintenance” means “the act of keeping the sewer in its existing state of repair and to preserve it from failure or decline.” “Operation” means “the act of putting [the sewer] into action.” “Upkeep” means “the act of maintaining [the sewer] in good condition.” In contrast, “upgrade” is but another word for “improvement.” *Essman*, at ¶41. It is axiomatic that, where injury does not result from a state of disrepair, it cannot be said that the injury involves “maintenance” of a sewer system. *Murray v. City of Chillicothe*, 164 Ohio App.3d 294 (4<sup>th</sup> Dist.) 2005-Ohio-5864 at ¶17.<sup>2</sup>

The words are plain, and there is no reason to resort to statutory construction. The presence or absence of a sewer “upgrade” is not described by the plain language of R.C. 2744.01(G)(2)(d). Thus, it is not a proprietary function.

**C. The question of whether to “upgrade” a sewer is best understood as being in the nature of “planning or design, construction, or reconstruction” of the sewer.**

In the appeal sub judice, the Plaintiffs-Appellees allege that a piping system is unable to accommodate all the drainage water that is present from time to time, and they seek modifications to the system necessary to protect their property from being inundated with storm water. “Modification” is not maintenance, operation or upkeep. It is improvement.

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<sup>2</sup> Note also that courts have found no duty to upgrade highways as median technology develops. See, e.g., *Thomas v. Bd. of County Commrs.* (Sep. 30, 1993), 8<sup>th</sup> Dist. No. 62949, 1993 Ohio App. LEXIS 4651.

“Upgrading” is best understood as a governmental function because the desire or need for upgrades is, in essence, linked to past design choices, not a present lack of routine maintenance.

R.C. 2744.01(C)(2)(l) defines governmental function to include “[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system.” As the Ninth District Court of Appeals has explained, an alleged failure to upgrade constitutes an omission in connection with a governmental function described in R.C. 2744.01(C)(2)(l). For example, in *Zimmerman v. County of Summit, Ohio* (Jan. 15, 1997), 9<sup>th</sup> Dist. No. 17610, 1997 Ohio App. LEXIS 52, it was found that R.C. 2744.01(C)(2)(l) applied where the crux of the problem was that a sewer system was outdated and inadequate to handle current flows. During severe rainstorms, the county pumped sewage from a sewer system into a stream that flowed across the Zimmermans’ property. This was done in order to prevent sewage backups into basements of property owners serviced by the system. Periodic pumping was necessary because the sewer system, as it was designed and constructed more than twenty years before, could not handle all the rain water and sewage that currently passes through it. The court held as follows:

“Plaintiffs’ claimed injuries and losses, however, were not caused by defendant’s maintenance and operation of its sewer system. \*\*\* Plaintiffs’ claimed injuries and losses did not arise from defendant’s failure to repair damage to the system, to inspect it, to remove obstructions, or to remedy general deterioration. \*\*\* Instead, they resulted from defendant’s original design and construction of the sewer system. As evidenced by [the county sanitary engineer’s] affidavit, defendant’s decision to pump sewage and rain water into the stream was a response to the sewer system’s inability as designed and constructed to handle the volume of materials that currently pass through it. This was not a problem that defendant could remedy through routine maintenance. It would require extensive redesigning and reconstructing of the system to meet current demands.”

In *Zimmerman*, the sewage overflow resulted from lack of capacity that developed over time. It did not result from a lack of maintenance, and only upgrades could fix the problem. The overflows were tied to design choices, not a lack of maintenance.

Another Ninth District case further illustrates the point. In *Alden v. County of Summit, Ohio*, 112 Ohio App.3d 460 (9<sup>th</sup> Dist., 1996), the Aldens' land was regularly inundated with sewage when a "bar screen" on a wastewater treatment plant was positioned so as to release sewage into a stream that flowed across the Aldens' property. This was done during periods of heavy rain in order to handle heavy flows. The original design of the system contained a flaw in the calculations as to how much water could pass through per day. Under the flawed calculations, a flow rate of 21 to 27 million gallons per day was anticipated. In actuality, only 14 to 15 million gallons per day could pass through. The Aldens contended that the county's decades-long failure to upgrade the system was, in essence, a failure of maintenance, operation or upkeep.

In rejecting the Aldens' argument and holding that R.C. 2744.01(C)(2)(l) applied, the court stated that,

"The fact that the county designed the sewer system with the bar screen and bypass as part of the system, with the intent to allow water and sewage to escape onto land, supports the determination that this decision was exercised as part of the county's governmental function. It is apparent that the sewer system needs this type of mechanism to accommodate the overflow. The decision to have the bar screen and bypass and place it near the Mud Brook was committed to the governmental, and thus discretionary, function of the county."

Like *Zimmerman*, the court in *Alden* understood the desire or need for upgrades to be inextricably linked with design and planning, rather than as being part and parcel of maintenance, operation or upkeep.

The Eighth District holds that the mere fact that a sewer is “grossly inadequate” does not necessarily mean that the city who owns the sewer was negligent in its upkeep. *Spitzer v. Mid Continent Constr. Co.*, 8<sup>th</sup> Dist. No. 89177, 2007-Ohio-6067 at ¶20-¶21. This is true whether the sewer is inadequate from the outset or is inadequate by virtue of changing conditions over time. In *Spitzer*, new development and construction resulted in silting and blockage of the city’s storm sewers, which resulted in flooding. Although the city in *Spitzer* was in a position to upgrade (enlarge) the sewers and thereby eliminate the flooding, had there been no upgrade, the city still would have been immune under R.C. 2744.01(C)(2)(I).<sup>3</sup>

**D. The cases which hold that a failure to upgrade constitutes negligence in sewer “upkeep” are predicated on *Doud*, a case which is factually inapposite and legally overcome by the enactment of R.C. Chapter 2744 immunity.**

The cases that hold that a failure to upgrade constitutes negligence in the performance of a proprietary function rely upon *Doud v. City of Cincinnati*, 152 Ohio St. 132 (1949). The reliance is unfounded. *Doud* did not involve sewer functionality, let alone the prospect of upgrades. Furthermore, the enactment and evolution of R.C. Chapter 2744 has outmoded *Doud* to a significant degree.

The most frequently quoted passage from *Doud v. City of Cincinnati*, 152 Ohio St. 132 (1949) is syllabus paragraph 2:

“2. Where a municipal corporation uses and assumes the management and control of a sewer within the municipality, it is required to exercise reasonable diligence and care to keep the same in repair and free from conditions which will cause damage to private property; and the municipality’s failure in this respect makes it liable for damages caused by its negligence, in the same manner and to the same extent as a private person under the same circumstances.”

Less often quoted, but informative for the context it provides, is syllabus paragraph 3:

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<sup>3</sup> As an aside, it is noted that, although a sewer system may discharge effluent upon private property from time to time, if the system is working as intended, the city is immune from liability under R.C. 2744.01(C)(2)(I). *Gabel v. Miami East High School*, 169 Ohio App.3d 609 (2<sup>nd</sup> Dist.), 2006-Ohio-5963 at ¶36-¶40.

“3. Although a municipal corporation is not liable for damages growing out of a dangerous condition which suddenly arises in connection with the use or operation of its sewers until it has actual or constructive notice of such dangerous condition, yet, since the municipal corporation has a duty of inspection of its sewer as an instrumentality under its supervision and control, it becomes chargeable with notice of what reasonable inspection would disclose, including defects which may arise through the slow process of deterioration.”

In 1922, Ms. Doud built her house on top of and then tapped into an existing city sanitary sewer. As a result of gradual deterioration of the sewer’s structure, the house settled in 1943. The city could have determined the fact and extent of deterioration through inspection, but failed to do so. Ms. Doud sought to recover for damage to her home. Sewage backflow, sewer functionality, and sewer capacity were not issues. Whether to upgrade the sewer was not an issue. The issue was degraded structural integrity due to physical deterioration. The certified conflict question concerning the legal status of upgrades stands divorced from any suggestion of physical deterioration, indeed, from any question of maintenance or upkeep as those terms are commonly understood. Thus, *Doud* is factually and legally inapposite to the question of upgrades.

Furthermore, there is the matter of immunity under R.C. Chapter 2744. It has now been sixty-two years since *Doud* was decided and twenty-six years since R.C. Chapter 2744 was enacted. It has been suggested the rationale of *Doud* was codified in that act. *Inland Products v. City of Columbus*, 10<sup>th</sup> Dist. No. 10AP-592, 2011-Ohio-2046 at ¶23. However, in the jurisprudential debate over whether a failure to “upgrade” is in the nature of maintenance or upkeep, or a discretionary decision in the nature of “planning or design, construction, or reconstruction,” *Doud* has been ridden too far. *Doud*’s admonition to keep sewers “free from conditions which will cause damage to private property” has been roundly supplanted by statute. There are many occasions on which a sewer might cause damage to private property in which the

responsible political subdivision is immune.<sup>4</sup> The Amici urge the Court to regard R.C. Chapter 2744 on its own terms and to consider the legislative intent expressed in the language of the statute, rather than to rely on an outmoded case which is factually and legally inapposite and which is in direct conflict with dimensions of R.C. Chapter 2744.

Cases which rely on *Doud* to find a duty to upgrade not contained in the statute include: *H. Hafner & Sons, Inc. v. Cincinnati Metropolitan Sewer District*, 118 Ohio App.3d 792 (1<sup>st</sup> Dist., 1997) (the conflict case); *Moore v. City of Streetsboro*, 11<sup>th</sup> Dist. No. 2008-P-0017, 2009-Ohio-6511, citing *Hafner*; *Coleman v. Portage County Engineer*, 11<sup>th</sup> Dist. No. 2010-P-0016, 2010-Ohio-6255, citing *Hafner*, accepted for review at 2011-Ohio-1829, and stayed pending outcome of the instant appeal; and, *Ezerski v. Mendenhall*, 188 Ohio App.3d 126 (2<sup>nd</sup> Dist.), 2010-Ohio-1904.

Cases in which the limited applicability of *Doud* was grasped include *Zimmerman v. County of Summit, Ohio* (Jan. 15, 1997), 9<sup>th</sup> Dist. No. 17610, 1997 Ohio App. LEXIS 52; discussed above, and *Malone v. City of Chillicothe*, 4<sup>th</sup> Dist. No. 05CA2869, 2006-Ohio-3268. The court in *Malone* stated that, although the statute as informed by *Doud* imposes liability for negligent failure to repair deterioration, the decision to upgrade is a discretionary function subject to governmental immunity. *Malone*, at ¶22-¶24.

**E. Conclusion – The failure to upgrade a sewer, whether pursuant to a deliberate decision or not, implicates and is a governmental function.**

In summary, a political subdivision's failure to upgrade an inadequate sewer system does not constitute a proprietary function within the meaning of R.C. 2744.01(G)(2)(d). This

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<sup>4</sup> E.g., for “planning or design, construction, or reconstruction of... a sewer system” under R.C. 2744.01(C)(2)(l); for the “exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources” under R.C. 2744.03(A)(5); for employee action or inaction “within the discretion of the employee with respect to policy-making, planning, or enforcement powers...” under R.C. 2744.03(A)(3).

subsection speaks of “the maintenance, destruction, operation, and upkeep of a sewer system.” Instead, a complaint over lack of upgrades is best understood as a complaint about “planning or design, construction, or reconstruction” which is a governmental function under R.C. 2744.01(C)(2)(l). The reliance by some courts upon *Doud v. City of Cincinnati*, 152 Ohio St. 132 (1949) to find a duty to upgrade, as opposed to simply keep a sewer in good repair, is misguided because *Doud* is factually and legally distinguishable, and because R.C. Chapter 2744 differs substantively from the principles expressed in *Doud*.

### Re-Statement of Law – Part B

**Deciding whether to upgrade a sewer constitutes the “exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities and other resources” for which there is immunity under R.C. 2744.03(A)(5).**

Even if the absence of sewer upgrades fell under the rubric of “proprietary function” resulting in the potential for liability under R.C. 2744.02(B)(2), immunity is reinstated by R.C. 2744.03(A)(5), which provides, in pertinent part,

“The political subdivision is immune from liability 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 wanton or reckless manner.”

A number of courts of appeals have recognized that deciding whether to upgrade is a discretionary function for which there is immunity under R.C. 2744.03(A)(5). An example is found in *Duvall v. City of Akron*, 9<sup>th</sup> Dist. No. 15110 (Nov. 6, 1991), 1991 Ohio App. LEXIS 5381. For years, Duvall experienced sewage backflows during periods of heavy rain. This is because the Akron city sewer lines were simply insufficient to handle the flow. Sewer maintenance could not prevent the backups. The sewer line was inspected regularly, was free of

obstructions, and was not defective. Duvall wanted Akron to update the sewer system. In holding that the city was immune for its failure to upgrade, the court stated as follows:

“Duvall may be correct in asserting that the system altered fifty-one years ago is inadequate to meet the current residential demands and that pumps or a general update of the system are indicated. Nevertheless, these remedies lie within the discretionary governmental functions of Akron. Akron was immune from liability when it exercised its judgment fifty-one years ago and planned sewer construction calling for the sewer tie-in to be altered. Akron remains immune from liability when it exercises its judgment in determining whether to acquire equipment, such as pumps, and in determining how to allocate its limited financial resources, with regard to updating the sewer system.”

*Duvall*, 1991 Ohio App. LEXIS 5381 at \*8. In other words, the decision whether to upgrade is discretionary as to acquisition and use of equipment, facilities and other resources, and it is inextricably linked with initial design.

The reasoning of *Duvall* was expressly adopted in *Smith v. Stormwater Mgt. Div.*, 111 Ohio App.3d 502 (1<sup>st</sup> Dist., 1996), and was applied to a situation in which a city did not follow a consultant’s recommendations. In *Smith*, a creek ran through a nine-by-six foot culvert under a road near the plaintiff’s property. During a fifty-year storm, the culvert overflowed, causing flooding of the plaintiff’s property. The plaintiff’s expert opined that “[a]s a result of overdevelopment and failure to properly regulate development, excessive use of these culverts and stream has placed demands upon them in excess of their capacity.” The plaintiff observed that the city had commissioned a study of storm water management but had not implemented the study’s recommendations. The plaintiff alleged, among other things, that the city was negligent in not updating (enlarging) the culvert.

In rejecting the plaintiff’s contentions, the court in *Smith* emphasized that the city was immune from liability when it first constructed the culvert, and the city remains immune under

R.C. 2744.03(A)(5) when it decides whether to update the culvert, even where an engineer's report is not followed. Specifically, the court held as follows:

“When certain allegations of negligence with respect to the failure of two political subdivisions to upgrade, operate, and maintain a sewer were based on the failure to implement recommendations in an engineer's report, the pivotal issue turned on the exercise of discretion in the use of public resources, and the political subdivisions were accordingly immune from civil liability under R.C. 2744.03(A)(5), in the absence of any evidence of malicious purpose, bad faith, or willful or wanton misconduct.”

*Smith*, at syllabus.

From the point of view of the Amici, if the Court is not willing to hold that the absence of a sewer upgrade is “governmental” for purposes of the statute, it is critical that the Court recognize the discretionary nature of the decision whether to make infrastructure improvements. From a financial perspective, cities, counties, townships and sewer districts must make difficult decisions concerning how and where to spend limited revenue. From a technical perspective, cities, counties, townships and sewer districts legitimately might not follow every recommendation of every consulting engineer, even if some of those recommendations are actually technically and financially feasible. Furthermore, there can be instances in which an engineer's recommendations are not feasible, or are not sufficiently circumspect, or are even just plain ill-advised. By extending discretionary immunity, the Court would wisely avoid rendering actionable every sentence in every consultant's report.

### **Re-Stated Proposition of Law – Part C**

**Deciding whether to upgrade a sewer constitutes “planning” and “policy-making” for which there is immunity under R.C. 2744.03(A)(3).**

Deciding whether to upgrade is also a “planning” and “policy-making” function to which third-tier immunity extends pursuant to R.C. 2744.03(A)(3). This subsection provides:

“The political subdivision is immune from liability 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 by virtue of the duties and responsibilities of the office or position of the employee.”

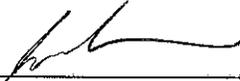
The subsection codifies the ministerial/discretionary test formulated by the Ohio Supreme Court after common law sovereign immunity was abrogated in the 1980s. *Hedrick v. County of Franklin*, 10<sup>th</sup> Dist. No. H-10-008 (Mar. 30, 1993), 1993 Ohio App. LEXIS 1874 at \*18, citing *Howe v. Jackson Twp. Bd. of Trustees*, 67 Ohio App.3d 159, 162 (1990). To constitute a basic policy-making decision, an exercise of judgment should involve the weighing of fiscal priorities, safety, and engineering considerations. *Id.*, citing *Williamson v. Pavlovich*, 45 Ohio St.3d 179, 185 (1989).

As is discussed at some length above, the decision whether to upgrade involves both fiscal priorities and engineering considerations. The Amici ask the Court to recognize and acknowledge the reality that, in deciding whether, when and how to upgrade sewers, cities, counties, townships and sewer districts face difficult planning and policy decisions to which statutory immunity extends. The Amici urge the Court to provide guidance to parties and lower courts regarding the same.

#### IV. CONCLUSION

For the foregoing reasons, Amici Curiae County Commissioners Association of Ohio, the County Engineers Association of Ohio, County Risk Sharing Authority, the Ohio Municipal League, the Coalition of Large Urban Townships, the Ohio Township Association, the County Sanitary Engineers Association, the Metropolitan Sewer District of Greater Cincinnati, and the Association of Ohio Metropolitan Wastewater Agencies respectfully ask this Court to hold that alleged negligence in failure to upgrade a sewer relates to a “governmental function” as that term is used in R.C. 2744.02(A)(1), and to adopt the re-stated propositions of law set forth herein.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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