

ORIGINAL

In the  
Supreme Court of Ohio

13-0984

CITY OF INDEPENDENCE,	:	Case No. _____
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
OFFICE OF THE CUYAHOGA	:	
COUNTY EXECUTIVE,	:	Court of Appeals
	:	Case No. 97167
Defendant-Appellant.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
DEFENDANT-APPELLANT OFFICE OF THE CUYAHOGA COUNTY EXECUTIVE**

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## INTRODUCTION

This matter arises out of the attempt by the City of Independence to impose upon the county the cost of replacing a bridge serving a private road within that city.

For over 100 years Ohio law has been settled that municipalities are responsible for the repair of local city streets. *Piqua v. Geist*, 59 Ohio St. 163 (1898). That same body of settled law dictates that the State is responsible for the repair and maintenance of state routes and interstate highways, while the various counties of Ohio are responsible for township roads within their respective counties. It has been equally settled that the duty to maintain and repair bridges located upon such local city streets is to be borne by the same governmental entity whose duty it is to repair the street of which it forms a part. *Interurban Ry. & Terminal Co. v. City of Cincinnati*, 94 Ohio St. 269 (1916). While the various counties are required to maintain and repair bridges located upon *state routes*, counties have never been burdened with the responsibility or cost of repairing either local roads or the bridges serving such roads. This case involves a previously vacated road that is not even a public street, and the Court of Appeals decision to declare that any bridge that lies partially in one city and partially in another somehow transforms the street or private drive upon which it is located into a “road of general and public utility” which is the responsibility of the county to maintain ignores longstanding law on this subject that cries out for correction by this Court.

### **THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

#### ***The Unprecedented Nature of the Court of Appeals' Decision***

This appeal seeks review of a recent decision of the Eighth District Court of Appeals that ignores, and indeed, reverses settled law in this area and holds *for the first time in Ohio's history* that counties, not cities, must bear the responsibility and costs for bridge maintenance and repair

of bridges located on private roads within municipalities if such bridges happen to straddle the boundaries of two adjacent municipalities. This unprecedented decision is both erroneous and far-reaching in its implications. Should the Eighth District's drastic and unwarranted change in Ohio law be permitted to stand, it will create profound uncertainty and upset the settled expectations of counties and cities throughout the State of Ohio.

### ***The Settled Expectations of Counties and Cities***

Cities and counties have long relied upon the settled law of Ohio and have planned and budgeted for the repair of local streets and the bridges that serve them. Cities have understood that they must provide the budget, equipment and manpower to maintain local roads and the bridges that serve them. Indeed, the Ohio Department of Public Works has funding programs designed to assist *cities* in performing that well-established duty, including programs for local bridge.

Counties have never been required to maintain and repair local municipal streets or the bridges that serve them, regardless of whether the bridge is wholly within one city or village. Instead, adjoining cities whose local streets are connected by bridges that traverse their boundaries share the cost of repairing such bridges by cost-sharing agreements between themselves and the contractors with whom they deal. In Cuyahoga County alone, there are at least ten such structures directly situated<sup>1</sup> on municipal boundaries. A conclusive answer from this Court soundly rejecting the theory that bridges not *entirely* within one municipality or another are to automatically default to County structures would benefit all parties, as well as other political subdivisions, and the State of Ohio.

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<sup>1</sup> Cuyahoga County has both an abundance of waterways and local municipalities/political subdivisions. There are presently 38 cities, 19 villages, and 2 townships within the County for a grand total of 59 political subdivisions.

In its decision, the Eighth District has created a new litmus test for determining whether a bridge is the responsibility of municipal or county government. Discarding over a century of law dating back to this Court's decision in *Piqua v. Geist*, 59 Ohio St. 163 (1898), the Court of Appeals has created a new rule of law that *any bridge that straddles a municipal boundary line is a county bridge*. The trial court's reasoning was as simple as it was wrong: it held explicitly that since the bridge in question was not *wholly within* the Village of Valley View, nor was it *wholly within* the City of Independence, then the responsibility for the bridge must necessarily fall to the County. That legal conclusion, supported by neither law nor simple logic, was affirmed by the Court of Appeals under a deferential "abuse of discretion" standard. Employing that standard on a question of law is also reversible error. This unprecedented and wrongheaded expansion of county liability for bridge structures located on municipal boundaries should be promptly reviewed and corrected by this Court.

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

### ***Old Rockside Road and its Replacement***

The relevant facts of this case must begin with a description and a brief history of Old Rockside Road. What is now Old Rockside Road was a publically dedicated, East to West road through the City of Independence for many years before the construction of the interstate highway system and the construction of modern roads in the 1960s. Sometime in the early 1960s, the State of Ohio constructed a four lane highway to replace the then-existing two lane Rockside Road. With the construction of the "new" Rockside Road, which ran parallel to the old road, the short portion of Old Rockside Road located in the City of Independence running along the new highway was converted into a cul-de-sac, and the street was formally vacated by the

County. The various resolutions accomplishing this vacating of Old Rockside Road are attached to Independence's Supplemental Record filed with the trial court.

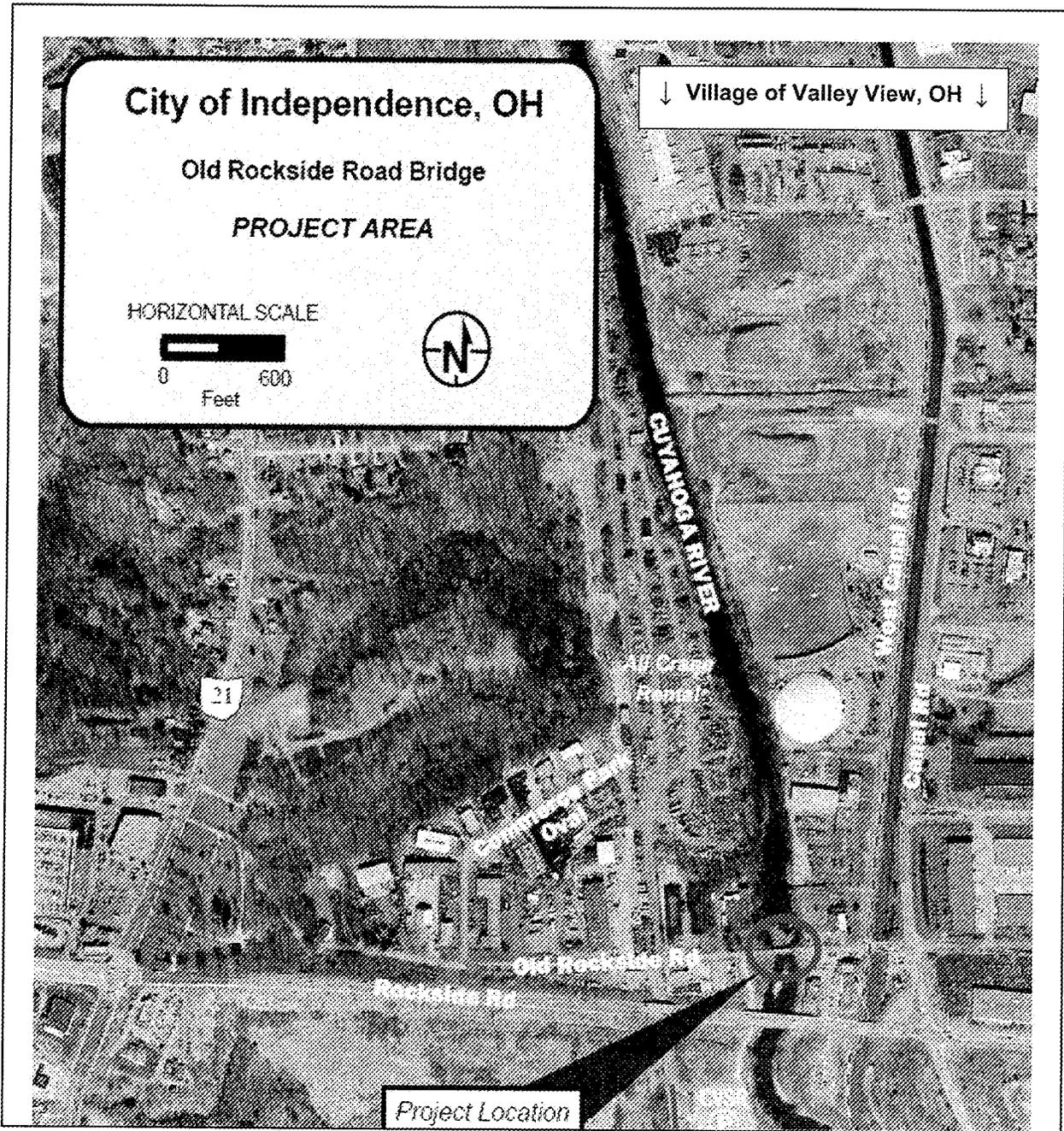
***Old Rockside Road Ceases to be a Public Road***

When Old Rockside Road was vacated in 1967, it ceased to be a public road or street of any kind. As is explained in greater detail in this memorandum, Ohio law, specifically R.C. 5553.10, clearly dictates that when a road is vacated, "***it shall cease to be a public road.***" (Emphasis added). For reasons best known to city officials themselves, the City of Independence does not appear to have taken steps to dedicate the vacated dead-end drive as a municipal road. Nevertheless, throughout the last fifty years, a small number of businesses have occupied land adjacent to the drive and have used it as a means of ingress and egress to Granger Road, a north-to south road leading to new Rockside. For many years the City of Independence, has apparently accepted the maintenance responsibility for the drive and the bridge that abutted the drive. In recent years, as the bridge has deteriorated, Independence has filed applications to seek funding from the State of Ohio Public Works Commission from funds specifically earmarked for municipalities to fund the cost of reconstructing their bridges.

***As Deterioration of Bridge Continues, Independence Applies to the State for Funds to Rebuild Bridge***

During this time, the City of Independence witnessed the steady deterioration of the bridge serving the private drive. This bridge over the Cuyahoga River therefore straddles the boundaries of the two localities, so that approximately one half of the bridge lies in each city. See Figure 1, *infra.* at p. 5. The practical reality is that it is only Independence alone that benefits from the bridge, since the bridge benefits only the few businesses on the drive, all of whom pay income and property taxes to the benefit of Independence. *Id.*

Figure 1.



Frustrated by its inability to obtain state funding to repair the bridge, sometime in 2010 the Law Director of the City of Independence began sending letters to the three Cuyahoga County Commissioners urging them to find that Old Rockside Road was a street of general and public utility.

In December, 2010, Appellant, Cuyahoga County Board of Commissioners (hereinafter “the BOCC” or “Cuyahoga County”) agreed to Independence’s request to hold a hearing to determine if Old Rockside Road was a road of general and public utility. A hearing was held and testimony was taken. At the conclusion of the hearing the BOCC determined by majority vote that Old Rockside Road Bridge was *not* a road of general and public utility. This determination of the BOCC meant that Cuyahoga County was *not* required to pay for the Bridge’s repair or maintenance.<sup>2</sup>

***Independence Appeals to the Court of Common Pleas,  
Which Reverses the BOCC’s Decision***

Independence then filed an administrative appeal of the County’s decision to the Cuyahoga County Court of Common Pleas. The County maintained that the BOCC held an open hearing<sup>3</sup> at Independence’s request, and the BOCC decision was supported by reliable, probative and substantial evidence and was not arbitrary, capricious or unreasonable.

Nevertheless, the trial court overturned the BOCC’s determination in July, 2011 by issuing a three (3) sentence entry, without fully explaining a legal rationale, without holding a hearing in contravention of R.C. 2506.03, and thereby finding that the Bridge was of “general and public utility.” The trial court issued the following order in July, 2011:

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<sup>2</sup> On January 1, 2011, Cuyahoga County converted to a charter form of government pursuant to Art. X, Sec. 3 of the Ohio Constitution. The Charter of Cuyahoga County created the position of County Executive and a County Council which replaced the three-member BOCC. *See* County Charter Sec. 2.03.

<sup>3</sup> There mere fact that testimony at the BOCC’s hearing was unsworn and not subject to cross examination is completely irrelevant because Independence’s law director, who fully participated in the proceeding, failed to object or request oaths be administered to those who testified at the BOCC hearing. Indeed, Counsel for Independence introduced several hearsay affidavits from business owners whose businesses are located on the dead end drive. They too, were not subject to cross-examination. *Shields v. Englewood*, 172 Ohio App.3d 620, 2007-Ohio-3165, 876 N.E.2d 972, ¶ 16; *Zurow v. Cleveland* (1978), 61 Ohio App.2d 14, 24, 399 N.E.2d 92.

The court reviewed the briefs and the record and finds that the decision of the Cuyahoga County Board of Commissioners was unreasonable and arbitrary therefore reverses the Board's decision. **The Old Rockside Road Bridge is found to be a bridge of "general and public utility" as it lies between two municipalities and is therefore not within the municipal corporation** as required by O.R.C. 723.01 and O.R.C. 5591. The court finds that Cuyahoga County is responsible for the repair and maintenance of the Old Rockside Road Bridge. Final.

(Emphasis added.)

The County appealed to the Eighth District Court of Appeals. The Panel affirmed the Court of Common Pleas, but in doing so, the Panel based its decision on the determination that "the trial court's determination that the bridge is one of general and public utility was supported by a preponderance of reliable, probative and substantial evidence." (Ap. Op. at ¶30, attached hereto as Ex. B). Such a finding is appropriate for determinations of fact made by a fact-finder; it does not and cannot dispose of questions of law, and the trial court's decision was based on a legal, not a factual determination.

The County moved for reconsideration of the Eighth District's judgment arguing that the Panel improperly deferred to the trial court's "determination" that the bridge is one of general and public utility, as if that determination were a question of fact when it was one of law, and thus fully reviewable. The County cited to holdings of this Court that questions of law, including the interpretation of statutes and ordinances, are subject to *de novo* review. *Riedel v. Consol. Rail Corp.*, 125 Ohio St.3d 358, 2010-Ohio-1926, ¶ 6 ("Because this case 'requires the interpretation of statutory authority, which is a question of law, our review is de novo.'"). The County further pointed out that even within the Eighth District, other panels have followed this Court and noted that judges decide questions of law relating to the meaning of statutes or ordinances. Compare the Panel's Opinion at ¶14 with *Moulagiannis v. City of Cleveland Bd. of Zoning Appeals*, 8th Dist. No. 84922, 2005-Ohio-2180, ¶ 10 ("Though courts of appeals have a

limited scope of review on R.C. 2506 appeals, interpretation of a city's ordinance presents a question of law that must be reviewed de novo." Notwithstanding these arguments, the Eighth District denied the County's motion for reconsideration on May 3, 2013. This appeal followed.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### Appellant's Proposition of Law No. I:

**Before a county may be held responsible for the repair and maintenance of a bridge located on the boundary line between two cities, it must be determined whether the bridge is part of a road of general and public utility. Since a private drive is not a public road, it cannot be a road of general and public utility. Because the bridge located upon that road is not part of a public road, the county has no responsibility to maintain or repair such a bridge.**

### *In Order for a Road to be "a Road of General and Public Utility," it Must First be a Public Road*

The year after Old Rockside Road was vacated, this Court held that where a county vacates a road under R.C. 5553.10, it could not thereafter assert any interest therein. *Fish v. Board of Comm'rs of Lake County* 13 Ohio St.2d 99, 234 N.E.2d 590, (1968). R.C. 5553.10 states in pertinent part:

When, on the final hearing on the proposed improvement, the board of county commissioners finds in favor of such improvement, and determines to proceed therewith, it shall cause a record of the proceedings, including the survey, plat, and accurate and detailed description of such improvement, to be entered forthwith in the proper road records of the county by the county engineer. \*\*\* If the proceeding is for the vacation of a road, **the board shall order the road vacated and it shall cease to be a public road.** (Emphasis added).

Here, it is undisputed that Cuyahoga County vacated Old Rockside Road in 1967. By operation of law, it therefore ceased to be a public road. Accordingly, the Eighth District erred in affirming the trial court's declaration that Old Rockside Road is a road of general and public utility. If it ceased to be a public road in 1967, that necessarily means it cannot be a road of general and public utility. In order to justify affirming the trial

court's novel classification of structures linking municipalities, the Eighth District wrongly found that although the road was vacated, the bridge was not. Panel Op. at ¶7. As far as undersigned counsel knows, there is no procedure under Ohio law whereby a county may vacate a road, but not the bridges serving that road. Thus, when the County vacated Old Rockside Road, it also vacated the two lane bridge located thereon<sup>4</sup>. Accordingly, the Eighth District's flawed reasoning and misapplication of law in disregarding the County's vacation is contrary to precedent and should be reversed.

**Appellant's Proposition of Law No. II:**

**A county has no duty to repair or replace a bridge on dead-end private drive serving a limited number of businesses. The county's duty to repair or replace such a bridge depends upon whether the road served by the bridge is a road of general and public utility, and such a road primarily serves a small number of special and privates interests. *Interurban Ry. & Terminal Co. v. City of Cincinnati*, 94 Ohio St. 269 (1916); 1990 Ohio Op. Atty. Gen. 2-334, followed.**

Settled Ohio law generally requires a municipality to maintain and repair streets and bridges that are within the municipal corporation unless that responsibility is imposed upon the county pursuant to R.C. 5591.02 and R.C. 5591.21. Section 5591.02, Revised Code, provides as follows:

The board of county commissioners shall construct and keep in repair all *necessary bridges* in municipal corporations on all county roads and improved roads *that are of general and public utility*, running into or through the municipal corporations, and that are not on state highways.  
(Emphasis added).

Section 5592.21, Revised Code, reads, in pertinent part, as follows:

Except as provided in section 5501.49 of the Revised Code, the board of county commissioners shall construct and keep in repair *necessary* bridges over streams and public canals on or connecting state, county, and improved roads.

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<sup>4</sup> Independence acknowledged its responsibility for maintenance of the Bridge in letters from the Mayor and the City Engineer.

(Emphasis added).

As discussed hereafter, Ohio courts have created a body of law interpreting these statutes which holds that counties are only responsible for repairing necessary bridges on improved roads that are “of “general and public utility[,]” that is, bridges on roads that provide for general as opposed to local traffic use. Reviewing Ohio law on the subject, the Ohio Attorney General has opined “The determination as to whether a particular road is an improved road of general and public utility is a that whether a particular road is an improved road of general and public utility is a question of fact to be determined in the first instance by the board of county commissioners.” 1990 Op. Att’y Gen. No. 90-079 (syllabus, paragraph 3).

Ohio law is abundantly clear that the term “improved roads” in R.C. 5591.21 must be read *in pari materia* with the use of that term in R.C. 5591.02 and thus is qualified and limited to those roads that “are of general and public utility, running into or through” the municipal corporation. *See State ex rel. Moraine v. Bd. of Cty. Commrs. of Montgomery Cty.*, 2<sup>nd</sup> Dist. No. 10033, 1987 WL 6638 at \*4 (1987); *Accord, City of Washington Court House v. Dumford*, 22 Ohio App.2d 75, 77, 258 N.E.2d 261 (2<sup>nd</sup> Dist. 1969); *City of Hamilton v. Van Gordon*, 12 Ohio Op.2d 37, 39, 164 N.E.2d 463 (C.P. 1959, *aff’d* 109 Ohio App. 513, 159 N.E.2d 778 (1<sup>st</sup> Dist. 1959). *See also*, 1990 Ohio Atty.Gen.Ops. No. 90-079; 1981 Ohio Atty.Gen.Ops. No. 81-007; 1957 Ohio Atty.Gen.Ops. No. 811.

Limiting a county’s responsibility to such roads and bridges that provide for general as opposed to local traffic use is consistent with long-standing Ohio law. In *City of Piqua v. Geist*, 59 Ohio St. 163, 52 N.E. 124 (1898), this Court declared that county commissioners were not required to construct and keep in repair bridges over natural streams and public canals, on streets established by a city or village for the use and convenience of the municipality, and not a part of

a state or county road, holding that it was the duty of the city or village to keep such bridges in repair. *Id.* at syllabus. *See also, Interurban Railway & Terminal Co. v. Cincinnati*, 94 Ohio St. 269, 114 N.E. 258 (1916). Here, Old Rockside Road was vacated by the BOCC in 1967.

Therefore, Old Rockside Road is no longer part of a state or county road and the duty to repair the bridge in question is that of the City of Independence or the Village of Valley View.

Thus, in *City of Washington Court House v. Dumford*, 22 Ohio App.2d 75, 77, 258 N.E.2d 261 (2<sup>nd</sup> Dist. 1969), the court noted that in construing R.C. 5591.02 and R.C. 5591.21, “it is reasonable to believe that the county’s obligation to provide for bridges on roads running into and through a municipal corporation is related to the general, as distinguished from local, use of such bridges.” *Id.* at 77, 258 N.E.2d 261. More recently, in *State ex rel. Moraine v. Bd. of Cty. Commrs. of Montgomery Cty.*, 2<sup>nd</sup> Dist. No. 10033, 1987 WL 6638 (1987), the court observed that “[t]he purpose of R.C. 5591.21 and 5591.02 is to place responsibility for bridge construction and maintenance upon a city where the bridge is situated on a city street and is meant to facilitate local traffic primarily.” *Id.* at \* 4, (Emphasis added).

The Court of Appeals steadfastly ignored this law and confused private benefit with public utility. “General” and “public” utility is to be distinguished from “special” and “private” utility. In its questioning at oral argument, the Court of Appeals seemed to focus inordinately upon the *importance* or *criticality* of the bridge to the few businesses it served. This focus, on the *level* of importance to the *few* businesses on the dead-end drive, is a focus on an acute *special* utility. No matter how acute that special, private utility is, it does not transform that utility into *general* and *public* utility.

Under Ohio law, any County responsibility necessarily depends on whether the Bridge serves general public traffic needs, not local – if not private – vehicular desires. “The phrase ‘of

general and public utility, running into or through the municipal corporations' has long been construed as creating a distinction based on the type of traffic using the street on which the bridge is located." 1990 Ohio Op. Atty. Gen. 2-334, 1990 WL 546995 at \*2. Prior to the initial hearing before the Board of Commissioners, the County conducted a traffic study; the results confirmed the obvious. The count revealed that on the first day 1,666 vehicles used the Bridge and on the second day 1,780 vehicles used the Bridge. (These number must be halved, as every vehicle entering the drive has to exit it at the same point, thereby triggering two counts per trip.) In comparison, the bridge on the road that replaced Old Rockside Road (the Rockside Road Bridge – which is on a dedicated County road) has an average daily traffic count of 24,300 vehicles. *See, Map supra.* at p. 5. These figures accent the particularly private utility of the drive in question, and the Court of Appeals' conclusion to the contrary ignores settled law.

**Appellant's Proposition of Law No. III:**

**Under R.C. 5535.10, the responsibility for the maintenance of a bridge structure located on a vacated road does not shift to a county merely because that structure straddles a municipal boundary line.**

The trial court determined that because the bridge in question was not *wholly within* the Village Valley View, nor was it *wholly within* the City of Independence, the responsibility for the bridge necessarily fell to the County. This conclusion had no basis in law or logic. In fact, it is quite common for bridges to straddle rivers, creeks and other bodies of water that form the boundaries of municipalities. The mere fact that a structure is not entirely within a municipal corporation's boundary lines does not transform it from a local bridge into a county bridge. Nevertheless, the trial court concluded that *because* the Old Rockside Road Bridge "lies between two municipalities[,] it must be a "bridge of general and public utility[,] declaring as follows:

The Old Rockside Road Bridge is found to be a bridge of “general and public utility” **as it lies between two municipalities** and is therefore not within the municipal corporation as required by O.R.C. 723.01 and O.R.C. 5591. (Emphasis added).

There are several critical flaws in this analysis. First, as a logical matter, a bridge cannot “lie between” two municipalities; it is partially in one and partially in another, just as many streets which form the boundary line between cities lie partially in one city and partially in another.<sup>5</sup> More fundamentally, this analysis simply cannot be reconciled with the plain language of the statutes. There is no statutory basis for distinguishing between municipal bridges based up whether they are wholly within a city or not. In fact, the trial court and the Court of Appeals have in effect, re-written R.C. 5591.02 by adding the words “unless a bridge straddles two municipalities, in which case it is automatically a county bridge” to the end of the statute. This Court has admonished against judicial re-writing of statutes.

The appellate court improperly included words in the statute that were not there and ignored words that were there. \*\*\* We previously have cautioned against ‘judicial legislation’ by adding words to [the Revised Code], and we reiterate that caution again.

*State ex rel. Carna v. Teays Valley Loc. School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484 , at ¶ 24. (internal citations omitted).

The mere fact that the Bridge is not entirely within the municipal boundaries of either the Independence or Valley View does not change the fact that the status of the bridge is to be decided by reference to whether or not it is on a road of general and public utility. It most certainly does not mean that both of those municipalities can absolve themselves of their statutory maintenance duties by shifting them onto Cuyahoga County and its taxpayers.

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<sup>5</sup> By the Court’s logic, such boundary streets would be the maintenance responsibility of the county, since they too would no lie entirely within either city.

## CONCLUSION

For all of the reasons set forth above, this case involves issues of public and great general interest. It is not duty of the trial court or the court of appeals to save the City of Independence from its own lack of prudence or foresight in failing to budget for or plan for paying the cost of replacing the bridge in question. The decision below disturbs the delicate balance of municipal versus county responsibility for roads and streets that has existed for over a century. If the decision of the Court of Appeal is not reversed, it is quite conceivable that other municipalities will not hesitate to bring actions seeking to absolve their residents of the costs of maintaining bridges on their streets and foist such costs upon the County. Appellant therefore requests that this Court accept jurisdiction so that these important issues can be reviewed on their merits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant, Office of the Cuyahoga County Executive was served by U.S. mail this 17th day of June, 2013, and by e-mail upon the following counsel:

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# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Andrea Rocco, Clerk of Courts

CITY OF INDEPENDENCE

Appellee

COA NO.  
97167

LOWER COURT NO.  
CP CV-744246

-vs-

COMMON PLEAS COURT

OFFICE OF THE CUY. CTY. EXEC., ET AL

Appellant

MOTION NO. 464125

Date 05/03/13

Journal Entry

Motion by Appellant for reconsideration is denied.

PROCESSED

MAY 08 2013

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OF THE COURT OF APPEALS  
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ALL PARTIES - COURTS TAKED

Presiding Judge MARY J. BOYLE, Concur

Judge KENNETH A. ROCCO, Concur

[Signature]  
LARRY A. JONES, SR.  
Judge

EXHIBIT

A

[Cite as *Independence v. Office of the Cuyahoga Cty. Executive*, 2013-Ohio-1336.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 97167

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**CITY OF INDEPENDENCE**

PLAINTIFF-APPELLEE

vs.

**OFFICE OF THE  
CUYAHOGA COUNTY EXECUTIVE, ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-744246

**BEFORE:** Jones, J., Boyle, P.J., and Rocco, J.

**RELEASED AND JOURNALIZED:** April 4, 2013

**EXHIBIT**

B

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LARRY A. JONES, SR., J.:

{¶1} In this administrative appeal, defendants-appellants, the Office of the Cuyahoga County Executive<sup>1</sup> and Cuyahoga County (collectively the “board”), appeal the trial court’s judgment reversing the board’s finding that the Old Rockside Road Bridge (the “bridge”) was not a bridge of general and public utility. We affirm.

### I. Procedural History

{¶2} In September 2010, plaintiff-appellee, the city of Independence, submitted a request to the board that it recognize the bridge as one of “general and public utility” under R.C. 5591.02 and 5591.21. Such a finding would mean that the county would be responsible for the maintenance of and repairs to the bridge.

{¶3} The board addressed the matter at its December 2, 2010 meeting. Representatives from the county prosecutor’s and engineer’s offices, as well as the city’s law director were present. The representatives from the prosecutor’s and engineer’s offices contended that the bridge was not one of general and public utility, while the city’s law director claimed that it was. At the conclusion of the presentation, the board stated that it would follow the prosecutor’s and engineer’s recommendation, and voted that the bridge was not one of general and public utility.

{¶4} The city appealed to the common pleas court under R.C. Chapter 2506. On

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<sup>1</sup>Pursuant to App.R. 29, this court has substituted the Office of the Cuyahoga County Executive for the originally named defendant, the Cuyahoga County Board of County Commissioners, which no longer exists.

the city's motion, the trial court permitted the city to submit additional evidence. The city and the board filed a joint motion to schedule an evidentiary hearing or, in the alternative, to schedule discovery. The court granted the alternative request of the motion, and allowed 30 days for discovery and enlarged the time for briefing.

{¶5} Upon the briefs and record, the trial court found that the bridge is one of general and public utility and, therefore, reversed the board's decision. The trial court's judgment reads as follows:

The court reviewed the briefs and the record and finds that the decision of the Cuyahoga County Board of Commissioners was unreasonable and arbitrary [and] therefore reverses the board's decision. The Old Rockside Road Bridge is found to be a bridge of "general and public utility" as it lies between two municipalities and is therefore not within the municipal corporation as required by O.R.C. 723.01 and O.R.C. 5591. The court finds that Cuyahoga County is responsible for the repair and maintenance of the Old Rockside Road Bridge.

{¶6} The board assigns the following as error:

- I. The court of common pleas erred in reversing the Board's decision and declaring Old Rockside Road a road of general and public utility by substituting its judgment for that of the Board.
- II. The court of common pleas erred, abused its discretion, and denied defendant[s]-appellants due process of law when the trial court failed to conduct a hearing pursuant to R.C. 2506.03 on the administrative appeal.

## II. Facts

{¶7} The record demonstrates the following facts. Old Rockside Road had been a county road until 1967, when it was vacated as such by the county upon the completion of the new Rockside Road. A portion of the road that was vacated includes the bridge; the bridge was not vacated.

{¶8} Part of Old Rockside Road is in Independence and part is in Valley View. The portion of the road that is in Independence runs west from the bridge to a dead end where numerous businesses and a station for the Cuyahoga Valley Scenic Railroad are located.

{¶9} An inspection report prepared by the engineer's office stated that the bridge was in need of significant repairs. The city requested that the county engineer repair the bridge. The prosecutor's office, responding on behalf of the engineer, stated that the bridge is not one of general and public utility, and denied the city's request.

{¶10} The matter was reviewed by the board, which upheld the prosecutor's and engineer's offices' position. The trial court reversed the board's decision.

### III. Law and Analysis

{¶11} In its first assignment of error, the board contends that the trial court erred in reversing its decision.

{¶12} In *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 2000-Ohio-493, 735 N.E.2d 433, the Ohio Supreme Court distinguished the standard of review to be applied by common pleas courts and appellate courts in R.C. Chapter 2506 administrative appeals. Specifically, the *Henley* court stated:

The common pleas court considers the “whole record,” including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.

The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is “more limited in scope.” “This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on ‘questions of law,’ which does not include the same extensive power to weigh ‘the preponderance of substantial, reliable and probative evidence,’ as is granted to the common pleas court.” “It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. \* \* \* The fact that the court of appeals, or this court, might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.”

(Citations omitted.) *Id.* at 147.

{¶13} Thus, our more limited review requires us to “affirm the common pleas court, unless [we find], as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence.” *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). Within the ambit of “questions of law” includes whether the common pleas court abused its discretion. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 148, 2000-Ohio-493, 735 N.E.2d 433. Abuse of discretion connotes more than an error of law or of judgment; rather, it implies the court’s attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶14} The issue in this case, therefore, is whether the trial court’s decision that the bridge is one of general and public utility is supported by a preponderance of reliable, probative, and substantial evidence.

A. The Board’s Position and Evidence

{¶15} The board, citing *State ex rel. Emerson v. Commrs. of Hamilton Cty.*, 49 Ohio St. 301, 30 N.E. 785 (1892), contends that it was in the “superior position to determine \* \* \* the particular traffic needs within [the] county.” According to the board, because Old Rockside Road is a dead-end road, it is a “non-thruway” or “secondary road” that primarily benefits the city and, thus, should be the city’s responsibility.

{¶16} The board cites the following in support of its position: (1) upon completion of the new Rockside Road in 1967, the county vacated Old Rockside Road; (2) the city previously acknowledged, in 1997 and 2003, responsibility for maintaining the bridge and sought and paid for inspections of it; and (3) a two-day traffic study conducted by the engineer’s office in 2010 showed that less than 2,000 vehicles traveled on the bridge, while approximately 24,300 vehicles traveled on the new Rockside Road.

{¶17} According to the board, the trial court merely substituted its judgment for that of the board because its judgment entry is “devoid of any significant legal analysis and fails to cite any case law.”

B. The City’s Position and Evidence

{¶18} The city contends that the portion of Old Rockside Road that is in its municipality is the only connection to numerous businesses that serve “industrial users

with county, state, and national customer bases.” The city further cites the Cuyahoga Valley Scenic Railroad, which has a station on Old Rockside Road and is only accessible via the bridge. Thus, the city’s position is that the bridge is one of general and public utility.

{¶19} The city submitted various documentation in support of its position. The following are examples from some of the businesses, who all stated or averred that the sole means of ingress and egress to their businesses is via the bridge: (1) a letter from the general counsel for All Erection & Crane Rental Corp., which stated that it is “among the largest crane and equipment companies in North America” and that its facility on Old Rockside Road plays a “central and vital role” in the company’s operations in Cuyahoga County, the state of Ohio, the United States, and Canada; (2) an affidavit of the general manager of Franck & Fric, Inc., who averred that its “largest share of business comes from the Cleveland Clinic, University Hospitals, Case Western Reserve University, as well as other various projects all over the Northeast Ohio market”; (3) an affidavit of the president of American Fleet Services, who averred that its customers are “located all over Cuyahoga County and are not exclusively from Independence”; and (4) an affidavit of the president of Adcraft Decals, Inc., who averred that its customers are “located all over the United States, Canada, Mexico and parts of Europe and are not exclusively from Independence.”

{¶20} The city also submitted an affidavit from the president and CEO of the Cuyahoga Valley Scenic Railroad. The president averred that the station is accessible only via the bridge, and that “passengers come from all over Cuyahoga County, the state of

Ohio, and the nation” to ride the train. He further averred that in 2010 approximately 75,000 passengers boarded the train at the Independence location.

C. Hearing before the Board

{¶21} The hearing before the board lasted approximately 15 minutes. Representatives from the prosecutor’s and engineer’s offices as well as the law director for the city were present.<sup>2</sup> Counsel for the engineer’s office stated that, in conjunction with the prosecutor’s office, the county engineer was recommending that the board find that the bridge was not one of general and public utility. A representative from the engineer’s office addressed the board and contended that, because the old road was a dead-end street and based on the two-day traffic study, there was not enough traffic to support finding the bridge be one of general and public utility.

{¶22} The law director contended that the traffic generated from the Cuyahoga Valley Scenic Railroad was sufficient in and of itself to qualify the bridge as one of general and public utility. He contended that that traffic, coupled with the traffic generated by the businesses, was more than adequate to qualify the bridge as one of general and public utility. The law director also advised the board that in 2008 the county assumed responsibility for some maintenance of the bridge. A representative from the engineer’s office stated that although that was true, the county did so because it was trying to help the city, not because it was obligated to do so.

{¶23} After hearing the parties’ positions, one of the commissioners stated that,

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<sup>2</sup>The witnesses were not under oath or subject to cross-examination.

although the city made “compelling arguments,” it was with “rare exception” that he did not follow the recommendation of the engineer’s office. The commissioner encouraged the city to pursue the issue with the new county government, which he surmised would probably have a “changed relationship” with the engineer’s office.<sup>3</sup>

{¶24} Another commissioner stated that because a legal determination had been made by the engineer’s and prosecutor’s offices it was “certainly [his] inclination to support the recommendation of our county engineer’s office.”

{¶25} The majority vote of the board determined that the bridge was not one of general and public utility.

#### D. Governing Statutes and their Application

{¶26} R.C. 5591.02 governs the county’s responsibilities for certain bridges and provides as follows:

The board of county commissioners shall construct and keep in repair all necessary bridges in municipal corporations on all county roads and improved roads that are of general and public utility, running into or through the municipal corporations, and that are not on state highways.

{¶27} Further, R.C. 5591.21 provides in part as follows:

Except as provided in section 5501.49 of the Revised Code,<sup>4</sup> the board of county commissioners shall construct and keep in repair necessary bridges

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<sup>3</sup>The record indicates that the meeting was the last one for the former three-commissioner county board.

<sup>4</sup>R.C. 5501.49 governs bridges on a state highway system within a municipal corporation, and is not applicable here.

over streams and public canals on or connecting state, county, and improved roads.

{¶28} The Twelfth Appellate District has addressed the two statutes, stating:

Sections 5591.02 and 5591.21 [of the] Revised Code, as they refer to “improved roads” must be read in pari materia and it was the legislative intent that the language “improved roads” as found in section 5591.21 [of the] Revised Code is qualified and limited by the words “which are of general and public utility running into or through such municipal corporation” contained in Section 5591.02 [of the] Revised Code.

*Washington Court House v. Dumford*, 22 Ohio App.2d 75, 78, 258 N.E.2d 261 (12th Dist. 1969).

{¶29} In *Piqua v. Geist*, 59 Ohio St. 163, 52 N.E. 124 (1898), the Supreme Court of Ohio held that a county was not required to repair a bridge that was established by a city for the use and convenience of the municipality, and that was not part of a state or county road. Thus, the purpose of R.C. 5591.02 and 5591.21 is to “place responsibility for bridge construction and maintenance upon a city where the bridge is situated on a city street and is meant to facilitate local traffic primarily.” *State ex rel. Moraine v. Bd. of Cty. Commrs. of Montgomery Cty.*, 2d Dist. No. 10033, 1987 Ohio App. LEXIS 5849, \*11 (Feb. 12, 1987).

{¶30} Upon review, the trial court’s determination that the bridge is one of general and public utility was supported by a preponderance of reliable, probative, and substantial evidence. In sum, the evidence demonstrates that the bridge is not primarily for the use and benefit of the city.

{¶31} Accordingly, the board’s first assignment of error is overruled.

E. Lack of Hearing at Trial Court Level

{¶32} In its second assignment of error, the board contends that the trial court erred by not holding a hearing in this administrative appeal. We disagree.

{¶33} R.C. 2506.03 governs the “hearing” of an administrative appeal and provides for the submission of additional evidence under certain circumstances.

The city filed a motion to submit additional evidence under the statute, and the trial court granted the motion. This court has held that if any of the circumstances for the submission of additional evidence under the statute apply, the trial court is required to conduct an oral hearing; if not, the trial court may hear the case without an oral hearing. *Dawson v. Richmond Hts. Local School Bd.*, 121 Ohio App.3d 482, 487, 700 N.E.2d 359 (8th Dist.1997); *Scafaria v. Fairview Park*, 8th Dist. No. 61008, 1992 Ohio App. LEXIS 5709 (Nov. 12, 1992).

{¶34} Although the submission of additional evidence would generally trigger the hearing requirement, here, after the trial court granted the city’s motion to submit additional evidence, the parties filed a “joint motion to schedule an evidentiary hearing or in the alternative to schedule discovery, and enlarge briefing schedule.” Within that motion, the parties submitted that, as an alternative to a hearing, the trial court “could satisfy the hearing requirement of R.C. § 2506.03 by affording the parties the opportunity to conduct discovery over a period of ninety (90) days and then submit respective briefs to [the] Court thereafter.” The trial court granted the motion in part, and ordered a briefing schedule after a 30-day period for discovery.

{¶35} We are not persuaded by the board's contention that, in spite of its previous position at the trial court level, the statutory requirement cannot be waived. Further, the board does not contend that it had more evidence or testimony for the trial court to consider.

{¶36} In light of the above, the second assignment of error is overruled.

{¶37} Judgment affirmed.

It is ordered that appellee recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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LARRY A. JONES, SR., JUDGE

MARY J. BOYLE, P.J., and  
KENNETH A. ROCCO, J., CONCUR



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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

CITY OF INDEPENDENCE  
Plaintiff

Case No: CV-10-744246

Judge: NANCY MARGARET RUSSO

CUYAHOGA COUNTY BD. OF COUNTY COMM.  
ETAL  
Defendant

**JOURNAL ENTRY**

96 DISP.OTHER - FINAL

THE COURT REVIEWED THE BRIEFS AND THE RECORD AND FINDS THAT THE DECISION OF THE CUYAHOGA COUNTY BOARD OF COMMISSIONERS WAS UNREASONABLE AND ARBITRARY THEREFORE REVERSES THE BOARD'S DECISION. THE OLD ROCKSIDE ROAD BRIDGE IS FOUND TO BE A BRIDGE OF "GENERAL AND PUBLIC UTILITY" AS IT LIES BETWEEN TWO MUNICIPALITIES AND IS THEREFORE NOT WITHIN THE MUNICIPAL CORPORATION AS REQUIRED BY O.R.C. 723.01 AND O.R.C. 5591. THE COURT FINDS THAT CUYAHOGA COUNTY IS RESPONSIBLE FOR THE REPAIR AND MAINTENANCE OF THE OLD ROCKSIDE ROAD BRIDGE. FINAL. COURT COST ASSESSED TO THE DEFENDANT(S).

Judge Signature

07/19/2011

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07/19/2011

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**EXHIBIT**