

CERIAL

IN THE SUPREME COURT OF OHIO

CITY OF INDEPENDENCE,)	CASE NO. 2013-0984
)	
Appellee,)	
)	
v.)	On Appeal from the Cuyahoga County Court of
)	Appeals, Eighth Appellate District
OFFICE OF THE CUYAHOGA)	
COUNTY EXECUTIVE, et al.,)	Court of Appeals Case No. 97167
)	
Appellants.)	

MEMORANDUM OPPOSING JURISDICTION OF
APPELLEE, CITY OF INDEPENDENCE

Gregory J. O'Brien (0063441)
gobrien@taftlaw.com
 Thomas J. Lee (0009529)
 Counsel of Record
tlee@taftlaw.com
 Taft Stettinius & Hollister LLP
 200 Public Square, Suite 3500
 Cleveland, Ohio 44114
 (216) 241-2838
 (216) 241-3707 fax

Counsel for Appellee, City of Independence

Timothy J. McGinty (0024626)
 Prosecuting Attorney of Cuyahoga County
 David G. Lambert (0030273)
 Counsel of Record
 Brian R. Gutkoski (0076411)
bgutkoski@prosecutor.cuyahogacounty.us
 Assistant Prosecuting Attorney
 1200 Ontario Street, Eight Floor
 Cleveland, Ohio 44113
 (216) 443-7860
 (216) 443-7602 fax

*Counsel for Appellant, Office of the Cuyahoga
 County Executive*

FILED
 JUL 17 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

Frederick A. Vierow (0005185)
Counsel of Record
fvierow@columbus.rr.com
6870 Haymore Ave. West
Worthington, Ohio 43085
(614) 888-0666
(614) 888-0666 Fax

*Counsel for Amicus Curiae, County Engineers
Association of Ohio*

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST1

There Is No Novel Issue Of Law In This Case.....1

This Case Does Not Involve A “Private” Road.....3

STATEMENT OF THE CASE AND FACTS6

1. Statement of the Case.....6

2. Statement of Facts.....7

ARGUMENT.....9

Response to Proposition of Law No. I.....9

Response to Proposition of Law No. II.....11

Response to Proposition of Law No. III.....12

CONCLUSION.....13

CERTIFICATE OF SERVICE15

TABLE OF AUTHORITIES

CASES

Cincinnati & M.V.R. Co. v. Village of Roseville, 76 Ohio State 108, 81 N.E. 178 (1907).....10

Mastera v. City of Alliance, 43 Ohio App.3d 120, 539 N.E. 2d 1130 (5th Dist. 1987).....11

Piqua v. Geist, 59 Ohio State 163, 52 N.E. 124 (1898).....1, 2, 12

State ex rel. Fitzhum v. Turinsky, 172 Ohio State 148, 174 N.E. 2d 240 (1961).....11

Washington Courthouse v. Dumford, 22 Ohio App.2nd 75, 258 N.E. 2d 261
(12th Dist. 1969).....1

STATUTES AND RULES

R.C. 723.012, 4, 5, 13

R.C. 25067, 9

R.C. 2506.037, 9

R.C. 55914, 7

R.C. 5591.021, 2, 6, 7

R.C. 5591.211, 2, 6, 7

WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This case is not of public or great general interest. This issue in this case is whether Appellant, the Office of the Cuyahoga County Executive (“Cuyahoga County”), is obligated to maintain and repair Old Rockside Road bridge (the “Bridge”), or whether that responsibility falls to Appellee, the City of Independence (“Independence”) and non-party, the Village of Valley View (“Valley View”)¹, the two municipal corporations in which the Bridge is located. The simple answer to this issue is determined by applying the facts of the case to the unambiguous language of the statute, a test that has survived for more than a century. The two courts below properly applied this test and reached the correct result, and this case therefore has no issue of public or great general interest.

There Is No Novel Issue Of Law In This Case.

Revised Code Sections 5591.02 and 5591.21 obligate Cuyahoga County to “keep in repair all necessary bridges in municipal corporations” that lie on “improved roads that are of general and public utility.” Throughout the administrative proceedings and the subsequent appeals to the Common Pleas Court and to the Court of Appeals, the parties did not dispute the long-settled law of Ohio that if Old Rockside Road is a road of “general and public utility”, and if it is not located *entirely* within Independence, the responsibility for maintenance of the Bridge falls upon Cuyahoga County. R.C. 5591.02; R.C. 5591.21; *Piqua v. Geist*, 59 Ohio State 163, 52 N.E. 124 (1898); *Washington Courthouse v. Dumford*, 22 Ohio App.2nd 75, 78, 258 N.E. 2d 261 (12th Dist. 1969). Prior to filing its Memorandum in Support of Jurisdiction (“Mem. Supp.”), Cuyahoga County consistently conceded this standard. For example:

¹ Valley View (population 2,000), in which the eastern half of the Bridge and Old Rockside Road is located, elected not to join in this litigation because, unlike Independence, none of Valley View’s residents or businesses would be stranded with absolutely no road access should the Bridge ultimately fail.

- “Pursuant to R.C. 5591.02 and R.C. 5591.21, a county’s duty to repair a bridge on an improved road in a municipality when the road is neither a state nor county road depends upon whether the improved road is one of general or public utility.” Cuyahoga County’s Common Pleas Brief at 4.
- “Under [R.C. 5591.02 and R.C. 5591.21] the county is responsible for repairing necessary bridges over streams and canals or on connecting state, county and improved roads that are of ‘general and public utility’...” Cuyahoga County’s Court of Appeals Brief at 2.
- “Under Ohio law, a county is responsible for repairing necessary bridges over streams and canals on or connecting state, county, and improved roads that are of ‘general and public utility’”... *Id.* at 5.
- “Ohio law provides that a county’s duty to repair a bridge on an improved road in a municipality and [sic] not a state or county road depends upon whether the improved road is one of ‘general and public utility.’” *Id.* at 6.

Indeed, this was the issue upon which the Court of Appeals ruled. C.A. Op. at ¶ 30. The issue of the location of the Bridge – straddling a municipal boundary line – is relevant only because a bridge serving a road of general and public utility that lies *entirely within* a municipality is the responsibility of the municipality, not the county. R.C. 723.01. *Piqua v. Geist, supra*. Here, the Bridge straddles the municipal boundary between Independence and Valley View, and Old Rockside Road is therefore is not a road that lies entirely within one municipality. Consequently, R.C. 723.01 does not foreclose Independence from claiming that Cuyahoga County bears maintenance responsibility for the Bridge pursuant to R.C. 5591.02 and R.C. 5591.21.

As recognized by the court below, the issue is therefore whether the trial court’s ruling that the Bridge is one of general and public utility is supported by a preponderance of reliable, probative and substantial evidence. C.A. Op. at ¶ 14. This case involves no tricky “statutory interpretation” issue. If the Bridge supports a road of “general and public utility” – using the ordinary interpretation of those terms – then Cuyahoga County is obligated to repair and maintain the Bridge.

The undisputed facts in the record demonstrate that many significant businesses rely upon the Bridge as their sole means of ingress and egress, that those businesses serve customer bases that are both state-wide and national in scope, and that the Bridge also provides the only road access to the Cuyahoga Valley Scenic Railroad (“CVSR”), in the Cuyahoga Valley National Park, with approximately 75,000 passengers boarding the train at the Independence location annually. *Id.* at ¶¶ 19-20. Applying this evidence to the statutory standard, the Court of Common Pleas determined that the Bridge is on a road of general and public utility and, on review, the Court of Appeals determined that said finding was supported by a preponderance of reliable, probative and substantial evidence. *Id.* at ¶ 30.

This Case Does Not Involve A “Private” Road.

In a surprising effort to obtain further review of these decisions, Cuyahoga County now claims that Old Rockside Road is a “private” road. Mem. Supp. at 1, 4 8, 9, 12. *See also* Amicus Mem. At 1-7. This representation is the first time in the 30-month history of this litigation that any party has *ever* claimed that Old Rockside Road is a “private” road. This assertion is patently false.

As discussed more fully *infra* at 9-11, when the Cuyahoga County Commissioners vacated Old Rockside Road, they specifically vacated it “as a county road,” stipulating “the road will remain a municipal street.” Appellant's Supplemental Record, Exhibit A, at 1-5, 7-9. Further, had Cuyahoga County ever raised this purported issue during the litigation, Independence would have demonstrated with overwhelming evidence that the road is, in fact, a public road in both Independence and Valley View. Consequently, Cuyahoga County's attempt to argue here, for the first time, that Old Rockside Road is a private, non-dedicated road, and that, as a result, Cuyahoga County does not bear responsibility for maintenance of the Bridge, is

an argument that is demonstrably premised upon a false “fact” that, although never previously at issue, is nevertheless rebutted by evidence already in the record.

Nor is there any merit to Cuyahoga County’s claim that the decision of the Court of Appeals is unprecedented or creates “a new rule of law that *any* bridge that straddles a municipal boundary line is a county bridge.” Mem. Supp. at 3. This argument is simply a red herring.

Throughout, it has been undisputed that a bridge which sits on a non-county road that is located *entirely within* a municipality does not create an obligation for county maintenance. Independence’s Appellate Brief at 11; Cuyahoga County’s Appellate Brief at 3. *See* R.C. 723.01. Here, Old Rockside Road extends outside of Independence, as demonstrated by the fact that the Bridge is located both within Independence and Valley View. C.A. Op. at ¶ 8.

In this Court, Cuyahoga County now claims the following:

The trial court determined that because the bridge in question was not *wholly within* the Village Valley View [*sic*], nor was it *wholly within* the City of Independence, the responsibility for the bridge necessarily fell to the County.

Memorandum in Support at ¶ 12. This is a misstatement of what the trial court held. In fact, the trial court held the following:

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. Final.

July 19, 2011 Order of the trial court (emphasis added).

It is apparent that the trial court, while perhaps stating its decision inelegantly, did not base its decision regarding “general and public utility” on the location of the Bridge, but rather

upon the record evidence demonstrating that the Bridge is a lifeline – the only means of access – to the many businesses serving state and national interests which lie on the western side of the Bridge. Thus, the trial court’s reference to the Bridge straddling the municipal line was intended to make clear that Independence was not obligated to maintain the Bridge pursuant to R.C. 723.01, not as the ultimate reason Cuyahoga County bore responsibility for its maintenance.

Nor is there support for Cuyahoga’s County claim that the Court of Appeals adopted the trial court’s holding. Mem. Supp. at 12, emphasis in original. The Court of Appeals did *not* hold that the Bridge’s *location* shifted maintenance responsibility and nothing in the opinion of the Court of Appeals even suggests that it did. Cuyahoga County’s argument is, instead, premised entirely upon its fragmented and incorrect reading of the ruling of the trial court, quoted above. The Court of Appeals, by contrast, made no mention of the situs of the Bridge insofar as the location relates to Cuyahoga County’s responsibility for maintenance or to that part of the trial court’s ruling. C.A. Opp. at ¶ 30. Consequently, the claim of Cuyahoga County that the decision below creates an entirely new standard for determining maintenance responsibility is simply an attempt to generate interest from this Court by creating a “straw man” argument that was plainly not the basis of the holding of the Court of Appeals.

Independence respectfully suggests that this Court should similarly not give credence to the issues raised by *amicus curiae*, Cuyahoga County Engineers Association of Ohio. All three of the propositions of law asserted by the *amicus* are premised upon Cuyahoga County’s assertion that Old Rockside Road is a “private drive” and not a public road. These assertions – never raised in any of the courts below – are false and therefore cannot be the basis for granting jurisdiction.

In this case, both of the lower courts applied the proven facts to the pertinent legal standard to reach their ultimate conclusion. Throughout this litigation, the parties have conceded that if Old Rockside Road is one of "general and public utility," then R.C. 5591.02 and 5591.21 obligate Cuyahoga County to repair and maintain the Bridge. The record in this case strongly supports the conclusion of both courts below that the Bridge supports a road of general and public utility. C.A. Opp. at ¶ 30. This case is therefore simply an application of the admitted facts to unambiguous statutory language, and therefore presents no question of public or great general interest.

STATEMENT OF THE CASE AND FACTS

1. Statement of the Case.

On June 22, 1967, the Cuyahoga County Board of Commissioners adopted a resolution which vacated Old Rockside Road *as a county road*. The accompanying documents made clear that "after vacation as a county highway the road will remain as a municipal street," and that "after vacation, Old Rockside Road would be left "as a municipal street only." Supplemental Record, Exhibit A. However, contrary to Cuyahoga County's claim, Mem. Supp. at 4, the vacation did not transfer the road property to the adjacent private property owners and make Old Rockside Road "private." Even today, Old Rockside Road remains a platted, dedicated street in Independence and Valley View.

On September 29, 2010, Independence submitted a request to Cuyahoga County asking the County Commissioners to recognize the Bridge as located on a road of "general and public utility" within the meaning of R.C. 5591.02 and 5591.21 and thereby accept responsibility for maintenance of the Bridge's structure. On December 2, 2010, after a brief hearing, the

Commissioners ruled that the Bridge was not of “general and public utility,” and therefore declined to accept maintenance responsibility.

On December 23, 2010, Independence filed an administrative appeal of the Commissioners’ decision pursuant to Revised Code Chapter 2506. On July 19, 2011, after reviewing the parties’ briefs, the substantial additional evidence submitted by Independence pursuant to R.C. 2506.03 and the complete record, the Common Pleas Court reversed the Commissioners’ decision, ruling that the Bridge was one of general and public utility, and that, as a result “Cuyahoga County is responsible for the repair and maintenance of the Old Rockside Road Bridge.”

In reviewing this decision, and after reviewing the evidence in the record, the Court of Appeals determined that the record supported the trial court’s conclusion that the Bridge is on a road of general and public utility, and therefore affirmed. C.A. Op. at ¶ 30. Following denial of Cuyahoga County’s Motion to Reconsider that decision, Cuyahoga County filed its present request that this Court accept jurisdiction.

2. Statement of Facts.

Old Rockside Road was previously a county road, and became a municipal street when Cuyahoga County vacated it as a county road following the completion of the current “new” Rockside Road. The road that was vacated included the portion of Old Rockside Road that traverses the Bridge. Vacation of the road surface does not impact the obligation for maintenance and repair of a bridge under R.C. Chapter 5591. *See* R.C. 5591.02; R.C. 5591.21. *See also* C.A. Op. at ¶ 7.

Old Rockside Road traverses Valley View and Independence. The portion of the road that is located within Independence runs west from the center of the Bridge to where it now dead

ends, and this road serves as a connection to Commerce Park Oval, Walker Oval and an enclave of businesses located on the west bank of the Cuyahoga River. There is no access to these roads or businesses other than via the Bridge. The Bridge and these roads serve businesses with county, state, and national customer bases. C.A. Op. at ¶ 19. *See also* Supplemental Record, Exhibits B-F. The Bridge also provides the only access to the train depot for the CVSR, located within the Cuyahoga Valley National Park. That facility alone receives approximately 75,000 passengers annually at the Independence location. *See* C.A. Op. at ¶ 20.

The Bridge is in need of significant repairs. The frail condition of the Bridge is especially problematic to all of the businesses on the Independence side of the Bridge, since their only access is over the Bridge. Indeed, one of the businesses located on the isolated side of the Bridge is ALL Erection & Crane, whose primary use of the Bridge is to transport its hundreds of heavy construction cranes and equipment for use in the construction, maintenance, and repair of structures throughout Ohio and beyond. Supplemental Record, Exhibit C. Because the Bridge serves as the only means of ingress and egress for these businesses, the health of the Bridge directly impacts these businesses, and thereby has a direct impact upon intrastate, interstate, and international commerce, as well as the many customers these facilities serve daily. C.A. Op. at ¶ 19.

Additionally, the CVSR has a station on Old Rockside Road, and the only access to the station is over the Bridge. C.A. Op. at ¶ 20. Annually, approximately 75,000 individuals from all over Ohio and the nation travel over the Bridge to the CVSR's station to ride the railroad. *Id.* If the Bridge were to become unusable, the CVSR would no longer be able to operate this thriving station. *Id.*

Throughout this case, the dispute centered upon whether the Bridge is one of “general and public utility.” The County Commissioners concluded that the Bridge was not of general and public utility. On appeal, pursuant to Chapter 2506, after accepting and reviewing additional evidence pursuant to R.C. 2506.03, the trial court concluded that the Bridge was a road of general and public utility. On appeal, the Court of Appeals affirmed this decision, thereby confirming that Cuyahoga County bore responsibility for maintaining the Bridge.

ARGUMENT

Response to Proposition of Law No. 1

Cuyahoga County’s First Proposition of Law relies solely upon its false statement that Old Rockside Road is a “private drive.” Because Cuyahoga County never asserted this claim in the courts below and because it is belied by the record evidence before the County Commissioners, the Common Pleas Court and the Court of Appeals, Cuyahoga County’s First Proposition of Law presents a hypothetical question only based upon a “fact” which is not present in this case.

From the date this matter began until Cuyahoga County filed its Memorandum in Support with this Court, Cuyahoga County has never asserted or argued the central premise of Cuyahoga County’s three propositions of law: the claim that old Rockside Road is a “*private* road.”

This claim is contrary to the record evidence. (Note that neither the trial court nor the Court of Appeals even mentioned the assertion that Old Rockside Road is a “private” road.) Even though Cuyahoga County never made this assertion until reaching this Court, the record still demonstrates that Old Rockside Road is, in fact, a public road which Independence and Valley View have maintained and repaired since 1967. For example:

- When Cuyahoga County adopted the resolution vacating the road it specifically vacated it “*as a county road.*” Supplemental Record, Exhibit A at 9-10.

- A pre-vacation May 11, 1967 letter from the County Engineer to the County Commissioners references that the action be taken is vacation “of the road as a County Road *leaving it as a municipal street only.*” Appellant's Supplemental Record, Exhibit A at 1 (emphasis added)
- A June 21, 1967 letter from the County Engineer to the County Commissioners states, “*After vacation as a County Highway the road will remain as a municipal street.*” Appellant's Supplemental Record, Exhibit A at 2 (emphasis added).
- The legal description vacating Old Rockside Road specifies that it is being vacated “*as a County Road.*” Appellant’s Supplemental Record, Exhibit A, p. 5.
- The Commissioners’ resolution at Journal 147, p. 979, specifies that the vacation was “as a *county road,*” Appellant’s Supplemental Record, Exhibit A, p. 6.
- The Commissioners’ resolution at Journal 148, p. 139, references the vacation “as a *county road,*” Appellant’s Supplemental Record, Exhibit A, p. 8.
- In its Court of Appeals brief, Cuyahoga County noted “after vacation as a County Highway the road will remain as a municipal street.” *Id.* At 3, fn. 4, quoting 6/21/1967 letter from County Engineer.

In addition, had Cuyahoga County raised the issue below, Independence would have produced additional evidence showing the following:

- Cuyahoga County’s own records show that Old Rockside Road continues today to be platted as a dedicated road in Independence and Valley View. *See* <http://gis.cuyahogacounty.us/> (search for “Old Rockside Road”)².
- As part of the road vacation process, Independence entered into an agreement with Cuyahoga County to accept the portion of the road in Independence as a city street and to restore and repave Independence’s portion of Old Rockside Road at city expense.
- In 1987, Independence expended substantial funds to resurface Old Rockside Road. *See* Independence Ordinance No. 1987-41.
- For the last 46 years, Independence has maintained, repaired and plowed snow from Old Rockside Road in Independence.
- Commerce Park Oval and Walker Oval are two city streets that run north off of Old Rockside Road in Independence. If Old Rockside Road were not dedicated, Independence would have no public access to either of these streets, which Independence also maintains.

It has long been the law of Ohio that a common-law road dedication can occur when the owner of the land intends to donate it for that use, and the municipality subsequently accepts responsibility for maintenance and repair. *See Cincinnati & M.V.R. Co. v. Village of Roseville,*

² Had the road been vacated with the intent that it would thereafter be a private road, the land where the road is would have been transferred to the abutting properties. *See* Cuyahoga County’s Court of Appeals Brief at 10. The County’s plat shows no such transfer occurred.

76 Ohio State 108, 81 N.E. 178 (1907), ¶ 1 of the syllabus; *State ex rel. Fitzhum v. Turinsky*, 172 Ohio State 148, 153, 174 N.E. 2d 240, 243 (1961) (holding that acceptance of dedication can be implied by authorities taking positive action, such as the actual improvement of the road). *See also Mastera v. City of Alliance*, 43 Ohio App.3d 120, 122, 539 N.E. 2d 1130, 1134 (5th Dist. 1987) (dedication "can be manifested by improvements to or maintenance of a street or road.") Indeed, had Cuyahoga County ever raised the illusory "private road" issue prior to arriving in this Court, Independence would easily have been able to demonstrate that it has maintained Old Rockside Road with repair, maintenance and regular snowplowing throughout each of the 47 winters since the Commissioners vacated the road "as a county road." In other words, the claim by Cuyahoga County that the road is a "private road" and Cuyahoga County's arguments that it should not be obligated to repair the Bridge because it connects to a private road should be rejected not only because Cuyahoga County never made those arguments below, but also because those arguments are contrary to the truth.

Cuyahoga County's First Proposition of Law, which bases its entire argument upon the assertion that Old Rockside Road is a private, non-dedicated road, therefore provides no legitimate basis for this Court to accept jurisdiction.

Response to Proposition of Law No. II

As is the case with Cuyahoga County's First Proposition of Law, its Second Proposition of Law also presumes that Old Rockside Road is a "private drive," a claim that is contrary to the truth and the record evidence. Cuyahoga County's Second Proposition of Law also attempts to claim that Cuyahoga County is absolved from the maintenance responsibility of the Bridge assigned by the lower courts because, in its opinion, there is no circumstance where "local" use

i.e., a bridge connecting a road which runs into a city but not out of the city, can ever be deemed to meet the standard of "general and public utility."

For more than 100 years, it has been established that such "local use" (resulting in a non-county bridge maintenance obligation) applies only to streets established by a city for the exclusive use and convenience of the municipality. *See City of Piqua v. Geist*, 59 Ohio St. 163, 52 N.E. 124, ¶ 1 of the syllabus (1898). In the present case, Old Rockside Road is not a street that is purely "local." To the contrary, it is a street which provides the lifeline to multiple businesses with statewide and national business bases that use Old Rockside Road and the Bridge in order to engage in this commerce. C.A. Op. at ¶ 19. Further, Old Rockside Road and the Bridge annually provide the sole means of access to 75,000 visitors to the Cuyahoga Valley National Park who use the CVSR depot on Old Rockside Road to ride that train. These record facts demonstrate that Old Rockside Road is not a road which serves purely local interests. Accordingly, this Court should not accept jurisdiction based upon Cuyahoga County's Second Proposition of Law.

Response to Proposition of Law No. III

In its third Proposition of Law, Cuyahoga County again mis-states the record, arguing that the lower courts held the following: "Because the bridge in question was not *wholly within* the Village Valley View [sic], nor was it *wholly within* the City of Independence, the responsibility for the bridge necessarily fell to the county." Mem. Supp. at 12, emphasis in original. This statement patently misrepresents the holding below.

Nowhere in the opinion of the Court of Appeals is there any suggestion that the fact that the bridge straddles the municipal boundary has any bearing on Cuyahoga County's maintenance responsibility. Indeed, although the Court of Appeals acknowledged that part of Old Rockside

Road was in Independence and part was in Valley View, C.A. Op. at ¶ 8, the court made no other mention of that fact and did not use that fact in any way to reach its ultimate conclusion that Cuyahoga County bore responsibility for maintenance of the Bridge. The truth is, the Court of Appeals based its decision that Cuyahoga County was obligated to maintain the Bridge because “the bridge is one of general and public utility.” *Id.* at ¶ 30.

As argued previously, although the language of the trial court's decision does observe that the Bridge lies between two municipalities, mention of this fact was necessary to exclude a ruling that Old Rockside Road lies completely within the Independence municipal boundaries and that, as a result, Independence is liable to maintain the Bridge under R.C. 723.01. The trial court did not base its ruling on the situs of the Bridge but rather, on the record evidence demonstrating that the Bridge is one which serves “general and public utility.” Moreover, even if the ruling of the trial court could be construed as basing Cuyahoga County’s maintenance responsibility upon the situs of the Bridge – a construction which Independence suggests would be ludicrous -- that ruling was ignored and supplanted by the conclusion of the Court of Appeals:

“... 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”.

Id. at ¶ 30.

Thus, Cuyahoga County's Third Proposition of Law attempts to assert an argument which challenges a legal holding which the Court of Appeals never made. The Third Proposition of Law therefore does not serve as a basis to accept jurisdiction.

CONCLUSION

This Court should not be persuaded by Cuyahoga County's admonition that the lower courts' application of the “general and public utility” test somehow disturbs a century-old

“balance” of dividing bridge maintenance responsibility between counties and municipalities. The plain fact is, both the trial court and the Court of Appeals applied a century-old test to unrebutted record evidence, determined that the evidence established that the Bridge supports a road of general and public utility, and therefore ruled that the responsibility for its maintenance is – and always has been – that of Cuyahoga County.

The issue here is *not* whether the costs of maintaining bridges can be “foisted” upon Cuyahoga County. To the contrary, the question here is whether Independence, a political subdivision with 7,000 residents, or Cuyahoga County, a political subdivision with 1.2 million residents, should bear the \$5 million cost of repairing this Bridge. The two lower courts, weighing the *actual* evidence, determined that the Bridge supports a road of “general and public utility,” and its maintenance is therefore Cuyahoga County’s responsibility, by applying undisputed facts to well-settled law. This ruling creates no issue of public or great general interest warranting further review by this Court.

Respectfully submitted,



Gregory J. O'Brien, Law Director (0063441)
gobrien@taftlaw.com
Thomas J. Lee (0009529)
tlee@taftlaw.com
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, Ohio 44114
(216) 241-2838 Telephone
(216) 241-3707 Facsimile

**ATTORNEYS FOR APPELLEE, CITY OF
INDEPENDENCE**

CERTIFICATE OF SERVICE

A copy of the foregoing was served by United States mail this 16th day of July 2013,

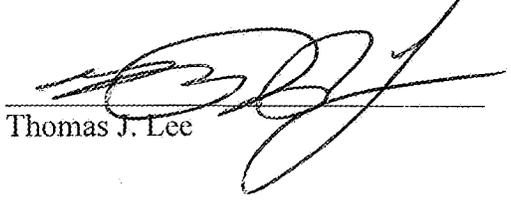
upon the following:

Timothy J. McGinty (0024626)
Prosecuting Attorney of Cuyahoga County
David G. Lambert (0030273)
Counsel of Record
Brian R. Gutkoski (0076411)
bgutkoski@prosecutor.cuyahogacounty.us
Assistant Prosecuting Attorney
1200 Ontario Street, Eight Floor
Cleveland, Ohio 44113
(216) 443-7860
(216) 443-7602 fax

Frederick A. Vierow (0005185)
fvierow@columbus.rr.com
Counsel of Record
6870 Haymore Ave. West
Worthington, Ohio 43085
(614) 888-0666
(614) 888-0666 Fax

**ATTORNEY FOR AMICUS CURIAE,
COUNTY ENGINEERS ASSOCIATION
OF OHIO**

**ATTORNEYS FOR APPELLANT,
OFFICE OF THE CUYAHOGA COUNTY
EXECUTIVE**


Thomas J. Lee

72699067.9