

ORIGINAL

In the
Supreme Court of Ohio

CITY OF INDEPENDENCE	:	Case No. 2013-0984
	:	
Plaintiff-Appellee,	:	On Appeal from the Cuyahoga County
	:	Court of Appeals, Eighth District
v.	:	
	:	Case No. 97167
OFFICE OF THE CUYAHOGA	:	
COUNTY EXECUTIVE, et al.	:	
	:	
Defendant-Appellant.	:	

**MERIT BRIEF OF DEFENDANT-APPELLANT
OFFICE OF THE CUYAHOGA COUNTY EXECUTIVE**

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FILED
JAN 06 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JAN 06 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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I. STATEMENT OF THE CASE AND FACTS

This matter arises out of the attempt by the Plaintiff-Appellee, City of Independence (“Independence”) to impose upon Cuyahoga County the cost of replacing a bridge on a dead-end street serving a secluded area within Independence.

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, 52 N.E. 124 (1898). That same body of settled law dictates that the State of Ohio 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, 114 N.E. 258 (1916). While the various counties are required to maintain and repair bridges located upon certain state and county roads, counties have never been burdened with the responsibility or cost of repairing either local roads or the bridges on such roads. This is the settled law of Ohio, and this settled law has been disregarded by both the Common Pleas Court and the Court of Appeals in their respective decisions.

Cities and counties have long relied upon this settled law of Ohio, and have planned and budgeted for the repair of local streets and the bridges that serve them based upon that law. Cities have understood that they must provide the budget, equipment and manpower to maintain local roads and the bridges that serve them. Moreover, cities, counties and regional authorities such as the Northeast Ohio Area-wide Coordinating Agency (NOACA) all proceed upon the aforementioned division of responsibilities. Indeed, the Ohio Department of Public Works has funding programs designed to assist *cities* in performing that well-established duty, including

programs for the awarding of grants to municipalities, like Independence, for the repair of local bridges. The law for determining responsibility for the repair of local bridges has never turned on the question of whether or not a bridge on municipal streets straddles two municipalities, and the lower courts' creation of such a hitherto unknown rule of law will, if not reversed by this Court, upset clear and settled law in this State.

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 situated¹ 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. Instead, courts should consider the utility of the road to determine responsibility, deferring to the knowledge and expertise of local authorities who are ultimately responsible for prioritizing needs of the community.

Instead of following this settled precedent, the trial court and the Eighth District Court of Appeals have 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, 52 N.E. 124 (1898), the lower courts announced a new rule of law that any bridge that straddles a municipal boundary line should henceforth be

¹ 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.

deemed a county bridge, and thus a county responsibility. The trial court's reasoning was a simple as it was wrong. Substituting its judgment for that of the Board of County Commissioners (hereinafter "BOCC"), it held explicitly that 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 somehow that single fact was deemed dispositive and meant responsibility fell to the County. For the reasons discussed hereafter, the judgment should be reversed.

A. 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. Throughout the early 20th century, what is now Old Rockside Road was a publically dedicated, East to West road running through 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 in 1967. The various resolutions accomplishing this vacating of Old Rockside Road are attached to Independence's Supplemental Record filed with the trial court. See Independence's Memo Opp. Jur. at pp. 9-10.

B. Old Rockside Road is Vacated after Construction of "New" Rockside Road

Since 1967, a small number of businesses have occupied land west of the Cuyahoga River and have used Old Rockside Road as a means of ingress and egress to Canal Road, a north-to south road leading to "new" Rockside to the south and Granger Road to the north. See Fig. 1, County- Memo in Support of Jur. at p. 5. For many years Independence accepted the maintenance responsibilities for the street and the bridge located on it. In recent years, as the

bridge deteriorated, Independence filed applications seeking bridge replacement funding from the State of Ohio Public Works Commission for funds specifically earmarked for municipalities to fund the cost of reconstructing their bridges. See, <http://www.noaca.org/index.aspx?page=211>. (Last accessed Jan. 3, 2014). (“History/Background: In June, 2011 the City of Independence obtained \$2,500,000 in Municipal Bridge (MBR) Program funding, through [ODOT] for the replacement of the bridge on Old Rockside Road in the City of Independence.”)

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

During this time, Independence witnessed the steady deterioration of the bridge serving its isolated business district. The practical economic reality is that, although the bridge crosses the boundary lines of both the Village of Valley View and Independence, Independence alone benefits from this bridge since the bridge supports only the few businesses west of the river, all of whom pay income and property taxes to the benefit of Independence. Fig. 1, County- Memo in Support of Jur. at p. 5.

Frustrated by its inability to obtain state funding to repair the bridge, sometime in 2010 the Law Director of Independence began pursuit of a campaign to have the County pay for the repair of the bridge, 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”) acceded 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. The County Engineer testified before the Commissioners to the effect that his office had conducted a traffic study of the bridge (which study was introduced into the record) and that the meager travel on the bridge and the fact that it lead to nowhere (i.e. was

dead-end street) justified his conclusion that the street in question was not a road of general and public utility. Independence appeared at the hearing through its Director of Law, who spoke to the issue, raised no objections to the proceedings, and provided letters from the businesses located on the dead-end road to the effect that if the bridge were closed, they would not have means of ingress and egress.² At the conclusion of the hearing, “[t]he Board determined that Old Rockside Road is not a road of general and public utility. This item was considered and adopted by majority vote...”³ This determination of the BOCC meant that Cuyahoga County was *not* required to pay for the Bridge’s repair or maintenance.⁴

D. 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. On appeal, the County maintained that the BOCC held an open hearing at Independence’s request, and that the BOCC decision was supported by reliable, probative and substantial evidence and was not arbitrary, capricious or unreasonable.

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

² Understandably, the letter writers did not express any concern over who (the City or the County) should pay for the bridge repair.

³ <http://bocc.cuyahogacounty.us/ViewFile.aspx?file=URncWkBhWOW%3d> (Last accessed Jan. 3, 2014); also found at Appx. 020-021.

⁴ 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.

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." *Independence v. Office of the Cuyahoga Cty. Executive*, 8th Dist. No. 97167, 2013-Ohio-1336, ¶30 (hereinafter "Ap. Op.").

This Court accepted discretionary jurisdiction over Appellant, Cuyahoga County's Second Proposition of Law.

E. Independence Tells the BOCC one Thing, and NOACA Another

Independence pursued a multipronged strategy to seek reconstruction of the bridge, and, in September 2013, finally struck pay dirt.⁵ Independence's application to the Northeast Ohio Area Wide Coordinating Agency (NOACA) was approved on September 13 2013, with construction slated to be completed by November, 2015. See, *Amicus Curiae Appx.* at 026. In its application, Independence serves as the project's "sponsor" and its mayor and city council specifically approved of that application. *Id.* at 058-59. "The City has received a \$2.5 [million

⁵ See <http://www.noaca.org/index.aspx?page=211> at p. 2. (Last accessed Jan. 3, 2014). ("The difference between the estimated construction cost and the identified funding is \$1,075,000. [Independence] requests eighty percent (\$860,000) of the difference be funded with NOACA-administered Surface Transportation Program (STP) funds. [Independence] will provide the twenty percent match (\$215,000).")

dollar] grant commitment from the Ohio Department of Transportation to assist with the replacement of the Old Rockside Road Bridge[.]” Id.

II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

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 private interests.

A. Standard of Review: Issues of Law Determined by the BOCC are Reviewed de Novo.

1. The Reversal by the Common Pleas Court.

It is beyond dispute that the common pleas court issued a decision based upon a legal conclusion. The common pleas court did not purport to resolve any factual dispute, as there were no factual issues presented to the court. For example, the parties agreed to all relevant facts, such as the age, condition, and the location of the Road and the Bridge, the volume of traffic, the dead-end nature of the street, as well as the history of the replacement of Old Rockside Road with “New” Rockside Road. The sole issue presented to the common pleas court was, based upon the undisputed facts, as developed before the BOCC, was whether the road in question was one of general and public utility, and consequently, whether the maintenance of the bridge was the responsibility of the City of Independence or of the County. That determination, based as it was upon undisputed facts, was strictly legal determination.

This Court’s precedents and the applicable statutes establish that courts review questions of statutory interpretation in administrative appeals de novo. R.C. Chapter 2506 governs appeals from final decisions issued by an agency of a political subdivision, such as a Board of County

Commissioners. See generally, R.C. 2506.01; *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000).

R.C. 2506.04 specifies the applicable standards of review:

If an appeal is taken in relation to a * * * decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the * * * decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. * * * The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code.

As this language suggests, the common pleas court applies a different standard of review than the court of appeals. *Henley*, 90 Ohio St.3d at 147-48. While the common pleas court reviews "both factual and legal determinations," *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979), the court of appeals' review is limited to "questions of law." *Henley*, 90 Ohio St.3d at 147.

2. As to Questions of Law, Appellate Review is Always Plenary

At both levels, however, an administrative statutory interpretation is reviewed de novo. *Henley* explains that "the application of [a statute] to the facts is a 'question of law' -'[a]n issue to be decided by the judge, concerning the application or interpretation of the law.'" 90 Ohio St.3d at 148. In administrative appeals as in other appeals, a judge decides this pure question of law de novo. See *Lang v. Dir., Ohio Dept. of Job & Family Serv.*, 134 Ohio St.3d 296, 2012-Ohio-5366, ¶ 12 ("A question of statutory construction presents an issue of law that we determine de novo on appeal."); *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 82 (1998) ("With respect to purely legal questions, however, the court is to exercise independent judgment."); *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶ 38 ("An agency adjudication is like a trial, and while the reviewing court must defer to the lower tribunal's

findings of fact, it must construe the law on its own.") (plurality opinion), quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993). "An appellate court exercises plenary review on issues of law in an administrative appeal from a common pleas court's decision." *Pinkney v. Ohio Dept of Job & Fam. Svcs.*, 8th Dist. No. 94696, 2010-Ohio-5252, ¶7 citing *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096, ¶ 43

3. *Such De Novo or Plenary Review Requires a Court to Determine the Law*

De novo statutory interpretation in the administrative context, as elsewhere, requires an independent judicial determination of which statutes apply. This Court's precedents make clear that a court's "first duty" when interpreting statutes is "to determine whether it is clear and unambiguous." *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, ¶ 15. That is because a "court, as well as the agency, must give effect to the unambiguously expressed intent of [the legislature]." *Lang*, supra. 2012-Ohio-5366, ¶ 12, quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

B. Undisputed Facts Clearly Establish that Old Rockside Road is NOT a Road of General and Public Utility.

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.

(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 question of fact to be determined in the first instance by the board of county commissioners.” 1990 Op. Att’y Gen. No. 2-334 (syllabus, paragraph 3), 1990 WL 546995, approving and following 1981 Op. Att’y Gen. No. 81-007 syllabus, ¶2, and 1957 Op. Att’y Gen. No. 811, p. 316, syllabus, ¶2.

In this case, the BOCC held a hearing, described above, at which Robert Klaiber, the County Engineer, was made available. County representatives introduced relevant testimony as to the history and nature of the road and bridge, its short, dead-end configurations, as well as the traffic study performed by his office showing very slight traffic on the road and bridge. Independence, on the other hand, presented only a handful of letters from property owners on the street in which they voiced their concern should the bridge be closed. Independence’s constituents obviously have a great desire to keep the bridge open. However, what’s on Independence’s side of the bridge is not the issue. The proper focus of the BOCC (along with reviewing courts and attorneys’ general previously interpreting these statutes) is the volume of

motor vehicles and the type of traffic crossing the bridge. 1990 Ohio Op. Atty. Gen. 2-334, 1990 WL 546995 at *2. The record below strongly demonstrated this mostly commercial traffic into Independence's business district is more suited to its own interests, not those "of general or public utility."

1. R.C. 5591.02 and R.C. 5591.21 Limit a County's Responsibility.

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.*, 2nd 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 (2nd Dist. 1969); *City of Hamilton v. Van Gordon*, 12 Ohio Op.2d 37, 39, 164 N.E.2d 463 (Butler C.P. 1959, *aff'd* 109 Ohio App. 513, 159 N.E.2d 778 (1st Dist. 1959). See also, 1990 Ohio Atty.Gen.Ops. No. 2-334; 1981 Ohio Atty.Gen.Ops. No. 81-007; 1957 Ohio Atty.Gen.Ops. No. 811; 1955 Ohio Atty.Gen.Ops. No. 6030.

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 County in 1967. See Independence's Supp. R. at Ex. A, pp. 5-8; Independence's Memo Opp. Jur. at pp. 9-10.

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. Indeed, after vacation it became a municipal street, and thus cannot qualify as a “road of general or public utility” since by its plain language, such designation is limited to “road[s]”. Despite its historic namesake, Old Rockside Road, is clearly not a road as that term is used in R.C. 5591.02.

2. Local Roads and Municipal Streets are Not the County's Responsibility.

Thus, in *City of Washington Court House v. Dumford*, 22 Ohio App.2d 75, 77, 258 N.E.2d 261 (2nd 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. The trial court in *Dumford* identified five bridges as “secondary roads” which the appeals court agreed were the municipality’s responsibility. *Amicus Appx.* 063. A “secondary road” is defined as either “a road not of primary importance” or “a feeder road.” *Merriam-Webster Dictionary*.⁶ More recently, in *State ex rel. Moraine v. Bd. of Cty. Commrs. of Montgomery Cty.*, 2nd 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). There is little doubt that dead end roads such as the one in question are “meant to facilitate local traffic.”

⁶ See, <http://www.merriam-webster.com/dictionary/secondary%20road> (Last accessed Jan. 3, 2014)

3. *Dead-End Streets May Rarely, if Ever, Quality as “Roads that are of 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 numbers must be halved, as every vehicle entering Independence via the Bridge has to exit over it at the same point, thereby triggering two counts per trip.) In comparison, the bridge on the road that replaced Old Rockside Road (the “new” Rockside Road Bridge – on a dedicated County road) has an average daily traffic count of 24,300 vehicles. See, Fig. 1, Memo in Support of Jur. at p. 5; Amicus Appx. at 049. These maps accent the particularly private utility of Old Rockside Road, and any conclusion to the contrary ignores settled law.

4. *Bridges to Isolated Business Enclaves are Not “Necessary Bridges” as that Term is Used in Both R.C. 5591.02 and R.C. 5591.21*

It is undisputed the Old Rockside Road Bridge is on a dead-end road. All traffic that crosses it must come back over it to leave. Bridges on such roads are not “necessary bridges.” At best, Old Rockside is a non-thruway, qualifies as a “secondary road,” and is the City’s responsibility. Thus, a county is 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 local use and convenience of the municipality that are not part of a state or county road. *City of Piqua v. Geist*,

59 Ohio St. 163, 52 N.E. 124 at syllabus. 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 *criticality* of the bridge to the few businesses it served in Independence. This focus, on the *level* of importance to the *few* businesses on the dead-end street, 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.

C. Judicial Estoppel Bars Independence's Arguments that “it’s a County Bridge.”

This case is about preventing what the United States Supreme Court found was a “perversion of the judicial process.” *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808; 149 L.Ed.2d 968 (2001), quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). Specifically, at trial, Independence won the argument that “it’s a County Bridge” but later represented to NOACA in its grant application that it’s apparently a “City Bridge” since Independence serves as “sponsor” for the approved project. Worse, Independence “has received a 2.5 [million dollar] grant commitment from [O.D.O.T.] based on the representations contained in its application to NOACA signed by Independence Engineer, Donald J. Ramm. Independence should not be rewarded by making conflicting representations in its successful efforts to use “other people’s money” to pay for its responsibilities.

The United States Supreme Court has unanimously ruled that “[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” *New Hampshire*, 532 U.S. at 749, quoting *Davis v. Wakelee*, 156 U.S. 680, 689, 39 L.Ed. 578, 15

S.Ct. 555 (1895). The rule is needed “to protect the integrity of the judicial process,” *Id.*, quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982), “to prevent the perversion of the judicial process[.]” *Id.*, quoting *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990), to prevent “parties from ‘playing fast and loose with the courts[.]’” *Id.*, quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3rd Cir. 1953), and to prevent the “improper use of judicial machinery,” *Id.*, quoting *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (D.C. Cir. 1980).

While there is no fixed rule as to when judicial estoppel applies, “several factors typically inform the decision whether to apply the doctrine in a particular case[.]” *New Hampshire*, 532 U.S. at 750. “First, a party’s later position must be ‘clearly inconsistent’ with its earlier position.” *Id.*, quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999). “Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled[.]’” *Id.*, quoting *Edwards*, *supra*. 690 F.2d at 599. “A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *New Hampshire*, 532 U.S. at 751 (Citations omitted.)

Here, all three factors apply such that the doctrine should be applied in Cuyahoga County’s favor. First, Independence’s positions are “clearly inconsistent.” The Bridge cannot be both a county bridge, and a city bridge. It’s either on a “road of general and public utility” or it’s not. And if it’s not on such a road, the city should not be gratuitously asking for grant money for a bridge which it was successful in foisting responsibility for upon Cuyahoga County. Second, if the City’s 2013 grant application to NOACA is true, then Independence “misled” the

common pleas court in 2011. On appeal to the Common Pleas Court, Independence stated, “[t]he Bridge is a road of general and public utility because the only means of ingress and egress to those businesses is the Bridge. These businesses effect intrastate, interstate and world-wide commerce[.]”⁷ *Independence’s Brief of Appellant* at p. 11. Then, two years later, the city stated in its grant application to NOACA that it was responsible for the bridge by serving as the bridge project’s sponsor. Finally, in obtaining ODOT’s grant money by its representations, the City has derived an unfair advantage. Indeed, the City’s efforts to shirk from its responsibility for its street and bridge may put the entire project at risk. Grant money from the *municipal* bridge fund would likely be unavailable to Cuyahoga County and the County is certainly not in a position to complete the project within NOACA’s announced time frame. Likewise, municipalities should not be able to jump to the front of the line to get streets fixed by making conflicting representations. Judicial estoppel should be applied to bar Independence’s arguments.

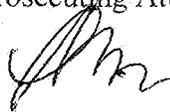
III. CONCLUSION

It is not duty of the courts to save the 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. For all of the above reasons, the Office of the Cuyahoga County Executive respectfully requests that this Court reverse the judgment of the court of appeals and reinstate the 2010 determination of the Board of County Commissioners.

⁷ The city’s “commerce clause” line particularly highlights its Herculean task to argue a dead end street is really a major thoroughfare.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11(B)(1), I certify that a copy of the foregoing Merit Brief of Defendant-Appellant, Office of Cuyahoga County Exec. was served by Electronic Mail at the addresses so indicated this 3rd day of January, 2014, upon the following counsel:

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BRIAN R. GUTKOSKI
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APPENDIX

ORIGINAL

In the
Supreme Court of Ohio

CITY OF INDEPENDENCE,	:	Case No. <u>13-0984</u>
	:	
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.	:	

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
OFFICE OF THE CUYAHOGA COUNTY EXECUTIVE**

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FILED
JUN 17 2013
CLERK OF COURT
SUPREME COURT OF OHIO

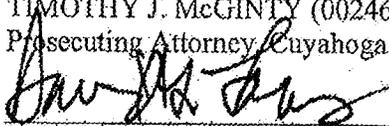
NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Now comes Defendant-Appellant State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate Judicial District entered in Independence v. Office of the Cuyahoga County Executive, Cuyahoga App. No. 97167, 2013-Ohio-1336 on April 4, 2013.

For reasons set forth in Cuyahoga County's Memorandum in Support of Jurisdiction, this case raises questions of great public concern and general interest.

Respectfully submitted,

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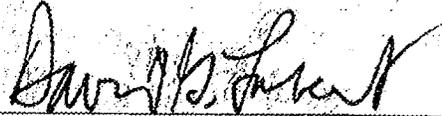
Office of the Cuyahoga County Executive

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal 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

COMMON PLEAS COURT

-vs-

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.

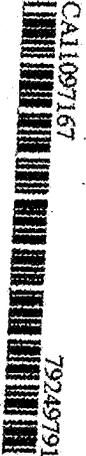
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MAY 08 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS

By [Signature] Deputy



Presiding Judge MARY J. BOYLE, Concur

Judge KENNETH A. ROCCO, Concur

[Signature]
LARRY A. JONES, SR.
Judge

APR 04 2013

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97167



CITY OF INDEPENDENCE

PLAINTIFF-APPELLEE

vs.

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

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

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



VOL 0769 PG 0875

Appx. 005

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FILED AND JOURNALIZED
PER APP.R. 22(C)

APR 04 2013

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OF THE COURT OF APPEALS
By [Signature] Deputy

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CLERK OF COURTS
By [Signature] Deputy

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LARRY A. JONES, SR., J.:

{¶1} In this administrative appeal, defendants-appellants, the Office of the Cuyahoga County Executive¹ 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

¹Pursuant 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.

utility.

{¶4} The city appealed to the common pleas court under R.C. Chapter 2506. On 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.² 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.

²The witnesses were not under oath or subject to cross-examination.

{¶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, 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.³

{¶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

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

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,⁴ 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.

{¶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).

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

{¶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.

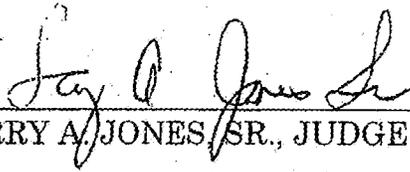
{¶37} Judgment affirmed.

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.


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

CUYAHOGA COUNTY BD. OF COUNTY COMM.
ETAL
Defendant

Case No: CV-10-744246

Judge: NANCY MARGARET RUSSO

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

- 96
07/19/2011

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COMMISSIONERS
Jimmy Dimora
Timothy F. Hagan
Peter Lawson Jones

AGENDA ACTIONS

December 2, 2010

The regular meeting of the Cuyahoga Board of County Commissioners was called to order at 10:07 a.m. Commissioners Jimmy Dimora, Timothy F. Hagan and Peter Lawson Jones were in attendance.

The December 2nd meeting resulted in the following actions:

1. Clerk of the Board, certifying and submitting the electronic record of proceedings from the 11/18/2010 meeting, in accordance with Ohio Revised Code Section 305.11.

Considered and adopted by unanimous vote.

INFRASTRUCTURE & DEVELOPMENT

2. County Engineer, submitting an agreement of cooperation with City of Beachwood for resurfacing of Green Road from Chagrin Boulevard to Fairmount Boulevard.

This item was considered and adopted by majority vote, with Commissioner Dimora recusing himself from the vote.

3. County Engineer, requesting authority to negotiate with Parsons Brinckerhoff Ohio, Inc. for consultant design engineering services for Highland Road Bridges Nos. 156, 157, 158 and 226 over Euclid Creek in the City of Euclid. (Resolution No. 103108 - authority to seek proposals.)

This item was considered and adopted by majority vote, with Commissioner Dimora recusing himself from the vote.

4. County Engineer/Sanitary Engineering Division, submitting Sewer Builder's Licenses for the Year 2010; requesting authority for the County Administrator to execute said licenses.

This item was considered and adopted by majority vote, with Commissioner Dimora recusing himself from the vote.

57. County Prosecutor, recommending to employ Michael P. Maloney, Esq. in the amount not-to-exceed \$5,000.00 for legal services in connection with Cuyahoga County Court of Common Pleas Case No. CA95599, State of Ohio vs. Honorable David T. Matia, in accordance with Ohio Revised Code Section 305.14.

This item was considered and adopted by majority vote, with Commissioner Dimora recusing himself from the vote.

58. County Prosecutor, recommending to employ Richard Blake, Esq. and the law firm of Bricker & Eckler, LLP, in the amount not-to-exceed \$60,000.00 for legal services in connection with a Federal government investigation, in accordance with Ohio Revised Code Section 305.14.

This item was considered and adopted by majority vote, with Commissioner Dimora recusing himself from the vote.

59. County Prosecutor, submitting a settlement agreement in the amount of \$10,000.00 in connection with U.S. District Court Case No. 1:06CV1061, Dorothy A. Benison, Administrator of the Estate of Frankie Lee Benison v. The Cuyahoga County Corrections Center, et al.

Considered and adopted by unanimous vote.

60. County Prosecutor, submitting a settlement agreement in the amount of \$125,000.00 in connection with Cuyahoga County Common Pleas Court Case No. 10 CV722861, Rita Walters v. Cuyahoga County Sheriff's Department, et al.

Considered and adopted by unanimous vote.

61. County Prosecutor, submitting a settlement agreement in the amount of \$5,000.00 in connection with Cuyahoga County Court of Common Pleas Case No. CV-09-701747, Sonya Fullen, et al. vs. Cuyahoga County Board of Commissioners, et al.

Considered and adopted by unanimous vote.

62. County Prosecutor, submitting a settlement agreement in the amount of \$75,000.00 in connection with Cuyahoga County Common Pleas Court Case No. 09-CV703012, Steven Key and Tracy Miller Key v. Cuyahoga County Sheriff's Department and Gerald T. McFaul.

This item was considered and adopted by majority vote, with Commissioner Dimora recusing himself from the vote.

63. County Prosecutor, requesting a determination of whether or not Old Rockside Road, located in the City of Independence and Village of Valley View, is a road of general and public utility, as that term is used in Ohio Revised Code Sections 5591.02 and 5591.21.

The Board determined that Old Rockside Road is not a road of general and public utility. This item was considered and adopted by majority vote, with Commissioner Dimora recusing himself from the vote.

723.01 Legislative authority to have care, supervision, and control of public roads, grounds and bridges.

Municipal corporations shall have special power to regulate the use of the streets. Except as provided in section 5501.49 of the Revised Code, the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation. The liability or immunity from liability of a municipal corporation for injury, death, or loss to person or property allegedly caused by a failure to perform the responsibilities imposed by this section shall be determined pursuant to divisions (A) and (B)(3) of section 2744.02 of the Revised Code.

Effective Date: 04-09-2003

2506.01 Appeal from decisions of agency of political subdivisions.

(A) Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.

(B) The appeal provided in this section is in addition to any other remedy of appeal provided by law.

(C) As used in this chapter, "final order, adjudication, or decision" means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

Effective Date: 03-17-1987; 08-17-2006

2506.03 Hearing.

(A) The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action; but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:

- (1) The transcript does not contain a report of all evidence admitted or proffered by the appellant.
- (2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final order, adjudication, or decision, and to do any of the following:
 - (a) Present the appellant's position, arguments, and contentions;
 - (b) Offer and examine witnesses and present evidence in support;
 - (c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;
 - (d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions;
 - (e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.
- (3) The testimony adduced was not given under oath.
- (4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.
- (5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.

(B) If any circumstance described in divisions (A)(1) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party.

Effective Date: 03-17-1987; 08-17-2006

2506.04 Order, adjudication, or decision of court.

If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

Effective Date: 03-17-1987; 08-17-2006

5591.02 Commissioners must build certain bridges.

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.

Effective Date: 07-01-1989; 2007 HB67 07-03-2007

5591.21 Bridges - bonds - land acquisition.

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.

The board may submit to the electors the question of issuing county bonds for the construction of bridges on proposed state or county roads or connecting state or county roads, one or more of which may be proposed, but such bonds shall not be issued or sold until the proposed roads are actually established.

When the board determines it unnecessary in the construction of any bridge and the approaches thereto to acquire the entire land upon and over which the same shall be located, it may acquire such part of the land and easements and rights in the remainder thereof as are necessary and sufficient for such construction.

Effective Date: 07-01-1989