

ORIGINAL

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
)	
Appellant.)	

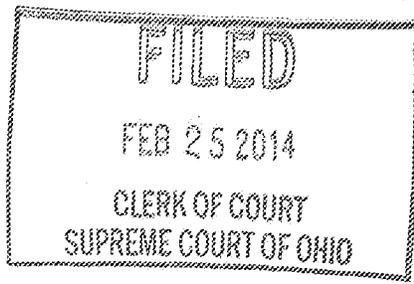
MERIT BRIEF OF
APPELLEE, CITY OF INDEPENDENCE

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INTRODUCTION

Contrary to the assertions of the Appellant, Office of the Cuyahoga County Executive, and its Amicus, County Engineers Association of Ohio, this is not a case where the courts below ignored settled law to rule in favor of Appellee, the City of Independence. The fact is, the obligation to maintain and repair Old Rockside Road Bridge is governed by the plain language of R.C. 5591.02 and 5591.21, which place the maintenance obligation solely upon Cuyahoga County because the Bridge supports an “improved road which is of general and public utility.”

The trial court, after accepting additional evidence not permitted by the Cuyahoga County Board of Commissioners, concluded that the evidence demonstrated that Old Rockside Road was, in fact, “a road of general and public utility” under the plain language of R.C. 5591.02 and 5591.21. The Eighth District Court of Appeals unanimously upheld this factual determination. C.A. Opp. at ¶ 30. Thus, the primary contention by Cuyahoga County – that the lower courts adopted a “new rule of law” that “any bridge that straddles a municipal boundary line” is a county’s responsibility, Cuyahoga County’s Brief at 2-3, is devoid of merit.

Cuyahoga County seeks to muddy the issue in this Court in multiple ways, by citing to claimed “facts” not in the record¹, by espousing arguments not offered in the lower courts, and by mischaracterizing this dispute as an issue of law when it is not. In reality, this appeal is nothing more than Cuyahoga County’s attempt to have a third bite at the judicial apple, and to

¹ In an improper attempt to have this Court accept review, in its Memorandum in Support of Jurisdiction, Cuyahoga County contended that the road at issue was a “private” road, which is a separate legal concept that has never been an issue in this case. See Cuyahoga County’s Memorandum in Support of Jurisdiction at 1, 4, 8, 9, 12. Moreover, the supposed “evidence” that Cuyahoga County claimed supported such a finding was not only not in the record, it was patently false and would have been demonstrated utterly false had Cuyahoga County attempted to make the argument below. See Independence’s Memorandum Opposing Jurisdiction at 9-11. The County never raised this issue below because it would have been meritless. And not surprisingly, it has dropped that argument in its merits brief in this Court.

have this Court disregard the factual determinations of the lower courts and their application of those facts to the plain language of the statute. Despite Cuyahoga County's contentions, the issue in this case is simple – whether or not the two courts below properly applied the undisputed facts to the applicable statutory law in determining that the Bridge is a bridge of “general and public utility” and that its maintenance is therefore the responsibility of Cuyahoga County. It is clear that the lower courts properly applied the relevant legal standard, and as such, the determination below should be affirmed.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

On September 29, 2010, Independence submitted a request to the Cuyahoga County Board of Commissioners (the “Commissioners”), asking the Commissioners to recognize the Bridge as a bridge supporting a road of 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. *See* Sept. 29, 2010 Letter to Commissioners, Independence’s Supplemental Record, filed June 1, 2011 (“Supplemental Record”), Exhibit K.

The initial “hearing” on Independence’s request took place on December 2, 2010, which marked the final meeting of the former Cuyahoga County Board of Commissioners (Dimora, Hagan, Jones) prior to the new County Executive/County Council form of government taking effect. At that “hearing,” which can best be described as cursory both because of its brevity and the fact that no testimony was allowed, the Commissioners ruled that the Bridge is not a bridge of “general and public utility.” *See* Audio Recording of Hearing before the Commissioners, Record filed February 2, 2011.

Independence filed a timely administrative appeal of the Commissioners' decision to the Cuyahoga County Court of Common Pleas under Revised Code Chapter 2506. On March 4, 2011, the Common Pleas Court granted Independence's unopposed motion to submit additional evidence under R.C. 2506.03, which authorizes a trial court to accept additional evidence not heard by the administrative body when the administrative body has failed to meet certain required statutory conditions. Independence submitted substantial additional evidence and each party fully briefed all issues. On April 19, 2011, the parties filed a Joint Motion to Schedule an Evidentiary Hearing or, in the Alternative, to Schedule Discovery. On April 22, 2011, the court granted the motion in part, by granting the alternative request permitting 30 days for discovery and enlarging the briefing schedule.

On July 19, 2011, after reviewing the parties' briefs and the now-complete record, including the newly submitted evidence, the Common Pleas Court reversed the decision of the Board of Commissioners and found that based on the evidence the Bridge is, in fact, one of "general and public utility" as used in R.C. 5591.02 and 5591.21. On August 15, 2011, Cuyahoga County appealed to the Eighth District Court of Appeals. In reviewing the trial court's decision and the record evidence, the court of appeals held that the record evidence supported the trial court's conclusion that the Bridge is on a road of general and public utility, and therefore unanimously affirmed. C.A. Op. at ¶ 30. Following denial of Cuyahoga County's Motion to Reconsider that decision, Cuyahoga County filed a request that this Court accept jurisdiction, which it did on Cuyahoga County's Second Proposition of Law only.

2. STATEMENT OF FACTS

Old Rockside Road was previously a county road, but was vacated by Cuyahoga County on or about June 22, 1967 following the completion of the current "new" Rockside Road. The

documents, however, that effected the road vacation made clear that “after vacation as a county highway the road will remain as a municipal street.” See Vacation Documentation, Supplemental Record, Exhibit A. The road that was vacated included the portion of Old Rockside Road that traverses the Bridge. It is undisputed that vacation of the road surface and its status as a municipal street does not impact the separate obligation for maintenance and repair of a bridge under R.C. Chapter 5591. See R.C. 5591.02; R.C. 5591.21.

The portion of Old Rockside Road that is in Independence runs west from the Bridge to where it now ends. This road serves as a connection to two other Independence streets, Commerce Park Oval and Walker Oval. The road provides public access to the Cuyahoga Valley National Park and is the only motor vehicle access to a railroad station for the Cuyahoga Valley Scenic Railroad (“CVSR”). In addition, the Bridge provides access to an enclave of businesses located on the west bank of the Cuyahoga River. See Aerial Map, Supplemental Record, Exhibit B; Affidavit of Steven W. Wait of CVSR, Supplemental Record, Exhibit H. There is no access to these roads, public facilities, or businesses other than via the Bridge. *Id.* It is undisputed that the Bridge and these roads serve thousands of individuals and industrial users with county, state, and national customer bases. See Supplemental Record: Affidavit of Michael L. Liptik of All Crane, Exhibit C; Affidavit of Brian Carson of Franck & Fric, Inc., Exhibit D; Affidavit of Joseph Schuerger of American Fleet, Exhibit E; Affidavit of Robert W. Talion of Adcraft Decal, Exhibit F; Wait Affidavit, *supra*.

The CVSR has a railway station on Old Rockside Road and the only motor vehicle access to the station is over the Bridge. See Wait Affidavit, *supra*. Individuals from all over the nation travel to the CVSR’s station to ride the railroad. *Id.* During 2010 alone, approximately 75,000 passengers boarded the CVSR at the station located on the Independence side of the Bridge. *Id.*

If the Bridge were to become unusable, the CVSR would no longer be able to operate this thriving historic station. *Id.*

The businesses include several prominent northeast Ohio entities. For example, 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 hundreds of heavy construction cranes and equipment over the Bridge for use in the construction, maintenance, and repair of structures throughout Ohio. *See* Liptik Affidavit, *supra*. The only access that any of these entities have to their land is over the Bridge. If the Bridge fails, individuals will not be able to access the Cuyahoga Valley National Park at this location, there will be no access to the CVSR's station, and these significant business entities will not be able to continue to operate or honor their existing contractual obligations or serve the public. *See* Exhibits, *id.*

As documented by the November 17, 2010 Inspection Report (the "2010 Engineering Report") by the Cuyahoga County Engineer (the "Engineer"), the Bridge is in need of significant repairs. *See* 2010 Engineering Report, Supplemental Record, Exhibit G. The report cited eleven specific maintenance needs, nine of which bore a designation indicating that "[r]epairs to the structure are to be performed immediately." *Id.* p. 4.

The frail condition of the Bridge is especially problematic to all of the individuals and entities on the Independence side of the Bridge, since their only access to that area—and the only access their customers have to those entities—is over the Bridge. *See* Affidavits, Supplemental Record, *supra*. Thus, the health of the Bridge directly impacts thousands of individuals and a significant number of businesses, and thereby has a direct impact upon intrastate, interstate, and international commerce. *Id.*

On November 18, 2009, Independence requested that the Engineer take the necessary steps to repair the Bridge. *See* Nov. 18, 2009 Letter to Stanley D. Kosilesky, Supplemental Record, Exhibit I. Almost one year later, the Cuyahoga County Prosecutor's Office (the "Prosecutor"), responding on behalf of the Engineer, denied Independence's request. *See* Sept. 8, 2010 Letter from Sara E. Decaro, Supplemental Record, Exhibit J. In doing so, the Prosecutor unilaterally determined that the Bridge is not one of "general and public utility."

On September 29, 2010, Independence submitted a request with multiple attached exhibits ("September Submission") to County Commissioner Peter Lawson Jones, requesting that the Commissioners determine the status of the Bridge. *See* September Submission, Supplemental Record, Exhibit K. Specifically, Independence sought a determination pursuant to R.C. 5591.02 and R.C. 5591.21 that the Bridge is of "general and public utility" and that the maintenance responsibility for the Bridge's structure therefore lies with Cuyahoga County. *Id.*

Months later, the Commissioners placed Independence's request on the agenda for the Commissioners' December 2, 2010 meeting. This meeting served as the last regular meeting for the now-disbanded Cuyahoga County Board of Commissioners.² Accompanying Independence's request were approximately 86 unrelated agenda matters for consideration by the Commissioners that day, as well as dozens of other administrative issues. *See* Agenda of Meeting before the Commissioners, Record filed February 2, 2011.

Nevertheless, the Commissioners purported to conduct a "hearing" on Independence's request. That hearing consisted of unsworn, conclusory statements made by a representative from the Prosecutor's office and two representatives of the County Engineer. That presentation lasted a total of two and one-half minutes. Affidavit of Gregory J. O'Brien, Supplemental

² The Commissioners were replaced by a County Executive and County Council as a result of a well-publicized corruption scandal.

Record, Exhibit M, ¶ 4. No documents or other evidence were offered by the Engineer or the Prosecutor during the hearing. *Id.* at ¶ 5. No witnesses were sworn prior to giving testimony, and Independence was not afforded the opportunity to question the representatives speaking for the Engineer. *Id.* at ¶¶ 5, 6. Instead, before moving on to other agenda items, the Commissioners simply deferred to the opinion of the Engineer and ruled that the Bridge was not of “general and public utility.” *See* Audio Recording of Hearing before the Commissioners, Record filed February 2, 2011.

On December 23, 2010, pursuant to R.C. Chapter 2506, Independence filed an administrative appeal of the Commissioners’ decision to the Cuyahoga County Court of Common Pleas. *See* Docket, 10 CV 744246. On February 24, 2011, Independence filed a motion to submit additional evidence. Subsequently, the trial court, pursuant to R.C. 2506.03, granted Independence’s motion to submit additional evidence, and both parties submitted evidence to supplement the record made before the Commissioners. *Id.*

After both parties submitted their briefs, on July 19, 2011, the trial court issued its ruling reversing the Commissioners’ decision. *Id.* The trial court specifically stated that it had reviewed the record and the briefs and, based upon all the evidence, including the newly-submitted evidence, found that the Commissioners’ decision was unreasonable and arbitrary. It found that the Bridge is one of “general and public utility.” The trial court therefore concluded that, under the plain language of R.C. 5592.02 and 5592.21, Cuyahoga County is responsible for repair and maintenance of the Bridge.

On August 15, 2011, Cuyahoga County filed an appeal with the Eighth District Court of Appeals. According to the court of appeals the issue on appeal was “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.” C.A. Opp. at ¶ 14. After thoroughly reviewing the record evidence, the court of appeals unanimously concluded 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” and therefore overruled Cuyahoga County’s assignment of error challenging the trial court’s ruling. *Id.* at ¶ 30.

After the appellate court denied its motion for reconsideration, Cuyahoga County filed a notice of appeal and a memorandum requesting this Court to accept jurisdiction. On October 23, 2013, this Court accepted jurisdiction on Cuyahoga County’s Proposition of Law No. II only.

LAW AND ARGUMENT

Cuyahoga County’s Second Proposition of Law states:

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 on 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.

As noted previously, Cuyahoga County claimed, in its Memorandum in Support of Jurisdiction, that Old Rockside Road is a “private” non-public road. Mem. Supp. at 1, 4, 8, 9, 12. *See also* Amicus Mem. Supp. at 1-7. This representation was the first time that any party had ever claimed that Old Rockside Road was a “private” road and it is an assertion that is patently false.³ Cuyahoga County’s Supplemental Record, Exhibit A, at 1-5, 7-9. *See also* Independence’s Memorandum Opposing Jurisdiction at 9-10.

³ In fact, the record evidence demonstrates that when Cuyahoga County adopted the resolution vacating the road, it specifically vacated it “*as a county road.*” Supplemental Record, Exhibit A at 9-10 (emphasis added), and that the intention of vacating Old Rockside Road was expressed clearly as vacation “of the road as a county road *leaving it as a municipal street only.*” Cuyahoga County’s Supplemental Record, Exhibit A at 1 (emphasis added.) Further had Cuyahoga County raised the issue below, Independence would have demonstrated that Cuyahoga County’s own records show that Old Rockside Road continues today to be platted as a dedicated

Now, in arguing its Second Proposition of Law to this Court, Cuyahoga County has dropped its false and unsupported claim that Old Rockside Road is a “private” drive – even though that language appears in its Proposition of Law – because Old Rockside Road is a public road and has been maintained as such by Independence since the responsibility for maintenance of that road was turned over to it by Cuyahoga County in 1967. The issue in this case, however, is not the maintenance of Old Rockside Road, it is the maintenance of the Bridge over the Cuyahoga River, which supports that roadway surface.

Under R.C. 5591.02 and 5591.21, if Old Rockside Road is a road “of general and public utility,” then Cuyahoga County bears responsibility to maintain the Bridge over the Cuyahoga River, which supports Old Rockside Road. After reviewing all of the evidence, the trial court concluded that Old Rockside Road is a road “of general and public utility” and therefore ruled that Cuyahoga County bears maintenance responsibility for the Bridge. The court of appeals unanimously affirmed this finding. In the present appeal, Cuyahoga County seeks to have this Court declare, as a matter of law and notwithstanding the factual findings below, that Old Rockside Road is *not* a road of “general and public utility.” This argument is simply an attempt to attack the factual findings by two courts below and should therefore be rejected.

1. Governing Statutes

R.C. 5591.02 provides:

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.

road and that, for the last 47 years, Independence has maintained, repaired and plowed snow from Old Rockside Road. Of course, the road’s status as a municipal street has no bearing on whether it is also a road of “general and public utility” for purposes of determining which entity is responsible for maintaining the bridge that support it.

R.C. 5592.21 states in pertinent part:

Except as further 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.

Ohio courts have held that R.C. 5592.02 and 5592.21 should be read together and both should be interpreted as meaning an improved road of general and public utility. *Washington Court House v. Dumford*, 22 Ohio App.2d 75, 78, 258 N.E.2d 261 (12th Dist. 1969).

2. Standard of Review

Cuyahoga County asserts that the issue before this Court – whether Old Rockside Road is of general and public utility -- is an issue of law. (Cuyahoga County Merit Br. at 7). But the County’s contention is contradicted by its own authority. Specifically, the very same Ohio Attorney General opinion that Cuyahoga County relies upon so heavily later in its brief,⁴ states unequivocally that “[t]he determination of whether a particular road is an improved road of general and public utility is a *question of fact*” 1990 Op. Atty. Gen. No. 2-334, 1990 WL 546995 (syllabus, paragraph 3) (emphasis added). Here, the trial court determined, as a factual matter, “. . . that the Bridge is one of general and public utility.” C.A. Opp. at ¶ 14. In reviewing this finding, the Court of Appeals, applying the standard set forth in *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 148, 2000-Ohio-493, 735 N.E. 2d 433 and *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E. 2d 848 (1984), concluded

“[T]he 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.

And perhaps more importantly, although Cuyahoga County contends here that the issue is a question of law, it has never postulated a legal standard by which a bridge that is factually

⁴ See Cuyahoga County Merit Br. at 10-11, 13.

determined to support a “road of general and public utility” is nevertheless exempt from the maintenance mandate of R.C. 5591.02 and 5591.21. In fact, such a rule of law has never been argued or proffered in any other case because courts have had no difficulty applying the relevant facts to the statutory standard. The plain fact is, the determination of whether or not a road is of “general and public utility” is a simple application of factual evidence to the clear and unambiguous language of the statute -- there is no need for a “special rule of law” to exclude a road which otherwise qualifies under that language. Moreover, even if such a “special rule” were to apply, Cuyahoga County has never proposed any such rule and has therefore waived the right to do so here. Consequently, because the courts below properly concluded, based upon the record evidence, that the Bridge supports a road of “general and public utility,” R.C. 5591.02 and 5591.21 obligate Cuyahoga County to repair and maintain the Bridge.

3. The Lower Courts Applied The Correct Legal Standard.

As the Attorney General, relying on Ohio caselaw, concluded nearly a quarter century ago, “whether a particular bridge located on an improved road located entirely within a municipality is of general and public use is a question of fact” 1990 Ohio Op. Atty. Gen. 2-334, 338 citing *City of Hamilton v. Van Gordon*, 12 Ohio Op.2d 37, 39, 164 N.E. 2d 463, 466.⁵ Both the trial court and the court of appeals concluded, as a matter of fact, that the record evidence, showing use of the Bridge by 75,000 annual patrons of the Cuyahoga Valley National Park and the CVSR and by significant businesses on the western side of the Bridge that service customers throughout the state and nation, demonstrated that the Bridge supported a road of “general and public utility” within the meaning of these statutes. There was no misapplication of law; the trial court simply applied the record evidence to the unambiguous statutory standard and

⁵ See also, Cuyahoga County Merit Br. at 10-11, 13.

concluded the standard was met.⁶ The court of appeals applied the correct legal standard in reviewing that factual determination. The fact that Cuyahoga County disagrees with that determination is simply not enough to warrant reversal by this Court.

A. Volume of Traffic is Not Dispositive as to Whether a Road is of General and Public Utility.

Cuyahoga County contends that it should be absolved from the maintenance responsibility of the Bridge, because in its opinion, the Old Rockside Road exists solely for “local use” (*i.e.*, a road and connecting bridge which runs into a city but not out of the city) (Cuyahoga County Merit Br. at 9-10). But that contention runs contrary to decades of established law.

For more than 100 years, it has been established that such “local use” (absolving a county of its 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, and as determined by the two lower courts, Old Rockside Road is not a street that is purely “local,” nor is its use exclusive to Independence. To the contrary, it is a street which provides the lifeline to the Cuyahoga Valley National Park, the CVSR and multiple businesses with statewide and national customer bases that use Old Rockside Road and the Bridge in order to engage in this commerce. C.A. Op. at ¶ 19. Indeed, the fact that 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

⁶ The statutory standard for a trial court’s review of an administrative decision is that the trial court must find, based upon the *entire* record (here, including the substantial additional evidence which the trial court accepted under R.C. 2506.03) that the administrative decision “is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the *whole* record.” R.C. 2506.04. *See, e.g., Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207, 389 N.E. 2d 1113, 1116-1117 (1979); *Sottile v. Amberly Village Tax Bd. of Review*, 146 Ohio App. 3d, 680, 2001-Ohio-4277, 146 Ohio App.3d 680 (1st Dist. 2001).

Rockside Road to ride that train, by itself, firmly supports the factual conclusions reached by the courts below. Thus, the conclusion by the lower courts that Old Rockside Road is not a road that serves purely local interests is well supported by the record evidence.

Cuyahoga County's contention ignores the plain language of R.C. 5591.02 and 5591.21. In those statutes, there is no reference to volume of traffic, and there is no bright-line test as to where the dividing line between "local" and "general" utility lies. Indeed, where the dividing line lies is a factual determination which, for decades, has been made on a case-by-case basis. See 1990 Ohio Op. Atty. Gen. 2-334, 338 (If the road it supports is a road of general and public utility, the county has a duty to repair the bridge thereon).

Cuyahoga County does not propose a legal test that would "trump" the factual determination below that Old Rockside Road is a road of "general and public utility." Even if Cuyahoga County did propose such a test, it would, in effect, be asking this Court to rewrite R.C. 5591.02 and 5591.21, a job that is best left to the Ohio General Assembly. The fact that other bridges in the County may have higher traffic flow does not, in itself, mean that the Bridge serves only a "local" purpose. Indeed, the trial court, when reviewing all the facts in the record, determined that the Bridge *did* serve a general and public utility. C.A. Op. at ¶ 14. The court of appeals properly reviewed that decision and found that the trial court's determination was supported by the preponderance of reliable, probative, and substantial evidence, and that the "evidence demonstrates that the bridge is not primarily for the use and benefit of the city." *Id.* at ¶ 30. Consequently, Cuyahoga County's actual dispute with the findings below is that it disagrees with them – and the resultant obligation that Cuyahoga County now bears to repair and maintain the Bridge. Consequently, there is no legal issue for this Court to review.

B. Cuyahoga County's Failure To Argue Below That, As A Matter Of Law, A Dead-End Road Cannot Be A Road Of General And Public Utility Precludes Cuyahoga County From Making That Argument, For The First Time, In This Court.

Next, Cuyahoga County incorrectly argues that a dead-end road cannot be a road of general and public utility. (Cuyahoga County Merit Br. at 13). However, it is axiomatic that a party cannot raise new issues or legal theories for the first time on appeal. *See, e.g., Stores Realty v. Cleveland*, 41 Ohio St.2d 41, 43 (1975). Despite this axiom, Cuyahoga County now asserts that because the Bridge lies on a dead-end street, it cannot be Cuyahoga County's responsibility because (it contends) such streets, *as a matter of law*, cannot be roads of general and public utility. (Cuyahoga County Merit Br. at 13). Never before in the nearly three-year course of this litigation has the County made this argument.⁷

The County's failure to raise this argument until now in this forum deprived Independence of any opportunity to marshal evidence in response. Indeed, had the argument been proffered below, Independence would simply have responded by pointing to a number of prominent dead-end streets which serve such important facilities as large factories, airports, water ports, public stadiums and the like. Had it been given the opportunity to offer that evidence, Independence would have been able to show that a rule of law that would exclude from the application of R.C. 5591.02 and 5591.21 any street that was a "dead-end" would be a rule of law contrary to the intent of the legislature in adopting R.C. 5591.02 and 5591.21, and contrary to the actual practice throughout the state.

⁷ Cuyahoga County *did* argue that, as a factual matter, the dead-end nature of Old Rockside Road was a factor which should cause the finder of fact to conclude that the road was not one of "general and public utility." However, Cuyahoga County has not, until reaching this Court, argued that *even if* Old Rockside Road is a road of general and public utility, that status does not trigger County responsibility under R.C. 5591.02 and 5591.21 *as a matter of law* because of the dead-end status.

This Court should not entertain such an argument, especially because it was not considered below and is offered now, at the eleventh hour, in a desperate attempt by Cuyahoga County to avoid the responsibility imposed upon it by Ohio law as determined by the trial court nearly three years ago.⁸ Independence respectfully suggest that this Court should not permit Cuyahoga County now to inject new legal theories, untested by the courts below, into this Court's review and should conclude that because Cuyahoga County failed to raise this assertion in the lower courts, it has waived any right to make this argument here.

Even if this Court were to consider Cuyahoga County's "dead-end street" argument, that argument necessarily fails. First, the argument ignores the plain language of the statutes at issue. Indeed, had the Ohio legislature intended a "bright line" exclusion, it would have so specified. Since the statutes do not make such a specification, the issue to be determined, on a case-by-case basis, is whether or not a road is "of general and public utility." Some dead-end streets will meet that standard. Others will not. It is a question of fact.

Further, the only case cited by Cuyahoga County to support its new position that a dead-end street can never been a road of general and public utility is *State ex rel. City of Moraine, Ohio v. Bd. of Co. Commr's of Montgomery Co., Ohio*, 2d Dist. Montgomery No. 10033, 1987 WL 6638 (Feb. 12, 1987). Although the court of appeals in that case did find, as a factual matter, that the dead-end road at issue in that case was not of general and public utility (*id.* at *4), the court made no sweeping pronouncement that all such roads, as a matter of law, were excluded from coverage under the statute. Here, the undisputed record evidence demonstrates

⁸ Cuyahoga County also boldly asserts that an "abundance" of similarly situated structures on municipal boundaries exist, and implies – without stating – that Cuyahoga County maintains none of those structures. Cuyahoga County Merit Br. at 2. The County never made this new assertion below and has never offered any evidence in support of it. Consequently, Independence should not be required in response to speculate as to what "facts" Cuyahoga County is now vaguely attempting to allude.

that the Bridge serves tens of thousands of park and railroad visitors annually and that it promotes regional and even national interests in serving significant businesses with statewide and even national customer bases. Not surprisingly, the courts here reached a different decision.

Simply put, the “issue of law” that Cuyahoga County posits herein is that a dead-end street can *never* qualify under R.C. 5591.02 and 5591.21 *even where* it has been factually determined that the dead-end street *is* one of “general and public utility.” In addition to this issue never having been raised or considered in the courts below, there is simply no justifiable basis for putting such a judicial gloss on these statutes.

Consequently, as a legal argument, the attempt to universally exclude “dead-end streets” from coverage under R.C. 5591.02 and 5591.21 should be rejected.

C. Cuyahoga County Waived Its Right To Argue That The Bridge Does Not Qualify Under The Statutes Because Of Traffic Counts.

Just as with its “dead-end street” argument, Cuyahoga County also proffers another improper and new theory – that Old Rockside Road is not a road of general and public utility because a two day traffic study showed that fewer than 2,000 vehicles use the Bridge daily. This is not a legal argument, it is a factual argument. Specifically, the fact that, by comparison, “new Rockside Road Bridge” – one of the busiest streets in the County – is used by more vehicles, was considered by both the trial court and the court of appeals but rightly found to be unpersuasive in determining the real issue in this case. Moreover, Cuyahoga County has never argued a “bright line” rule – such as a road with a traffic count of less than 1,800 vehicles per day cannot be a “road of general and public utility” – because positing such an argument would be ludicrous, especially given the fact that there is absolutely no record evidence upon which a court could make such an evaluation. Further, Cuyahoga County’s contention that Old Rockside Road has a “particularly private utility,” (Cuyahoga County Merit Br. at 13), is nothing more than an attempt

to reassert a factual argument that both lower courts found unpersuasive. Both of the lower courts determined, as a factual matter, that Old Rockside Road was a road of “general and public utility” based upon the record evidence and nowhere in the decisions below was any rule of law based on traffic count either proffered or decided.

D. The Lower Courts Did Not Create A New Test, Based Upon Location.

Cuyahoga County also misleadingly argues that the lower courts created a “new litmus test” for determining who bears the responsibility for a bridge’s repair, based upon “the location of the bridge.” (Cuyahoga County Merit Br. at 2). Cuyahoga County claims that the lower courts “announced a new rule of law that any bridge that straddles a municipal boundary line should henceforth be deemed a county bridge, and thus a county responsibility.” (Id. at 2-3). This contention is patently false, and seeks to distract this Court from the real issue – whether or not the lower courts properly applied the facts to the law.

The parties have never disputed that a bridge 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. But here, Old Rockside Road extends outside of Independence, as demonstrated by the undisputed fact that the Bridge straddles the Independence/Valley View border. C.A. Op. at ¶ 8.

In this Court, Cuyahoga County now claims the following:

[The trial court] held explicitly that since the bridge in question was not *wholly within* the Village of Valley View, nor was it *wholly within* the City of Independence, then somehow that single fact was deemed dispositive and meant responsibility fell to the County.

County Merit Brief at 3. The trial court did not make any such ruling. 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 Cuyahoga Valley National Park, the CVSR, and to many businesses serving state and national interests. The trial court's reference to the Bridge straddling the municipal line was merely intended to make clear that Independence was not obligated to maintain the Bridge under R.C. 723.01 – which it would have been had it been entirely within the City's boundaries. The fact that Old Rockside Road extended beyond the municipal boundaries was therefore *not* the ultimate reason that the lower courts concluded that Old Rockside Road was a road of general and public utility.

Nor is there support for Cuyahoga County's claim that the court of appeals adopted a "litmus test" based upon a bridge's location to impose maintenance responsibility. (County's Merit Br. at 2). The court of appeals did *not* hold that the Bridge's *location* shifted maintenance responsibility and nothing in its opinion suggests that it did. Instead, the court of appeals clearly and unambiguously rejected Cuyahoga County's challenge to the trial court's determination that Cuyahoga County was responsible for maintenance of the Bridge because "...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." C.A. Opp. at ¶ 30.

Consequently, Cuyahoga County's assertion here that the courts below applied a new "litmus test" is nothing more than a transparent attempt to create an issue of law for review by this Court where no such issue exists. The determination below applied the clear and unambiguous language of the statute to the facts in evidence and that determination is not reviewable here because no legal error occurred.

4. **The Lower Courts Properly Applied The Undisputed Facts To The Law.**

Because Cuyahoga County cannot demonstrate that the lower courts applied the incorrect legal standard, the only analysis left is whether or not those courts correctly applied the undisputed facts to the law. It is clear that they did. 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 court 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," 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). Cuyahoga County consistently conceded this standard. For example:

- "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 Eighth District 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 not a state or county road depends upon whether the improved road is one of ‘general and public utility.’” *Id.* at 6.
- “[C]ounties are . . . responsible for repairing necessary bridges on improved roads that are ‘of general and public utility . . .’” Cuyahoga County Merit Br. at 10.

Indeed, this was the issue that the court of appeals resolved. C.A. Op. at ¶ 30. And as that court observed, this is a factual issue. It is therefore not reviewable in an appeal to this Court.

5. Cuyahoga County’s Judicial Estoppel Argument Is Spurious.

Apparently realizing that its appeal is futile because the lower courts properly applied the facts to the law, Cuyahoga County now improperly seeks to rely upon facts that are not in the record in order to raise a purported “judicial estoppel” argument that was never previously asserted and for which Independence has never been given the opportunity to respond. *See* County’s Merit Br. at 14-15. This Court should ignore this new argument because it is axiomatic that, “[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter.” *Chupka v. Saunders*, 28 Ohio St.3d 325, 328, 504 N.E.2d 9 (1986).

Cuyahoga County impermissibly points to a 2013 grant application by Independence⁹, requesting funds for Bridge repair, contending that, by requesting such funds from the Northeast Ohio Area Coordinating Agency, Independence is somehow “judicially estopped” from claiming here that maintenance and repair of the Bridge is Cuyahoga County’s obligation, as the lower courts both held. (Cuyahoga County’s Merit Br. at 14). Not only was this argument never raised

⁹ That Grant Application is not in the appellate record. Instead, in blatant violation of this Court’s rules, it was attached to the brief of Cuyahoga County’s *amicus*. *See* Amicus Brief, App. 1-59. Then, in further violation of this Court’s rules, Cuyahoga County relied upon that non-evidence in its argument to this Court. *See* Cuyahoga County’s Merits Brief at 14-16.

previously, the “evidence” upon which it is purportedly based is not in the record of this case. In truth, the fact that Cuyahoga County would even suggest that a 2013 application for funds – made long after Cuyahoga County had already been adjudicated to be responsible for the repair of the Bridge – somehow shifts the obligation to Independence simply underscores Cuyahoga County’s desperate position in this appeal.

The purpose of judicial estoppel is to prevent inconsistent court determinations in different proceedings. *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S.Ct. 1808 (2001) (citations omitted). Here, there is no such risk. The alleged “inconsistent position” that Cuyahoga County complains of occurred not in a different court in a different litigation but, instead, in a grant application, made with Cuyahoga County’s knowledge and cooperation at a time during which the parties were attempting to resolve this matter – and long after Cuyahoga County had already been adjudicated to be responsible for maintenance of the Bridge. The fact is, despite the lower courts’ ruling years ago that Cuyahoga County is obligated to maintain the Bridge, Cuyahoga County has refused to do so, even though Cuyahoga County neither sought nor obtained a stay of either of the lower courts’ rulings. Consequently, Independence’s attempt to obtain outside funding to correct this problem – and to attempt to protect all of the affected property owners, business owners, visitors, and inter- and intrastate commerce from Cuyahoga County’s dereliction of its judicially-determined duty -- cannot, in any way, be taken as an “admission” by Independence that is contrary to the consistent position Independence has taken since it commenced this litigation.

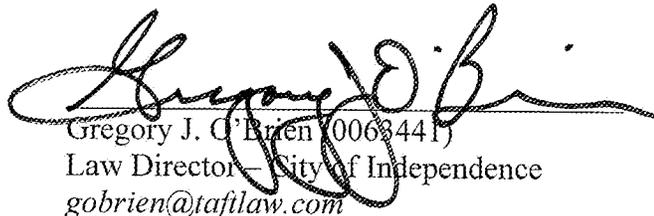
The issue in the case is whether the Bridge supports a road which is “of general and public utility,” an issue that is unrelated to grant applications or attempts by the parties to find

outside funding for this much-needed public works project. The plain fact is, Cuyahoga County's judicial estoppel argument is reprehensible and should be rejected by this Court.

CONCLUSION

Contrary to Cuyahoga County's assertion, the lower courts' application of the "general and public utility" test simply employed a well-settled unambiguous statutory standard to the facts in evidence below. Both the trial court and the Court of Appeals determined that the evidence established that the Bridge supports a road of general and public utility, and therefore ruled that the responsibility for the maintenance of that Bridge is – and always has been – that of Cuyahoga County. This is – and always has been – a factual issue and there is therefore no legal issue for this Court to adjudicate. Accordingly, the decision below should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served by United States mail this 25th day of February 2014,

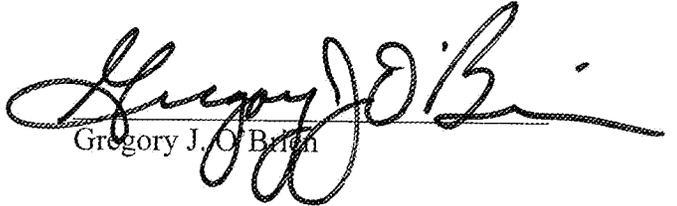
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