In the
Supreme Court of Ohio

ORIGINAL

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.	:	

REPLY BRIEF OF DEFENDANT-APPELLANT OFFICE OF THE CUYAHOGA COUNTY EXECUTIVE

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO APPELLEE'S STATEMENT OF FACTS AND STATEMENT OF THE CASE.... 1

I. Under R.C. 5591.02 and R.C. 5591.21, Counties are Not Responsible for Bridges on Municipal Streets Leading to Dead-End Enclaves. 3

II. If Undisputed Dead-End Streets Qualify as "Roads that are of General and Public Utility" that Legal Term of Art Has Been Rendered Utterly Meaningless. 5

III. On Appeal, both the Trial Court and the Court of Appeals Failed to Determine the Law. 6

IV. Judicial Estoppel Bars Independence's Arguments to this Court. 8

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Page

Cases

Advanced Analytics Laboratories v. Kegler, Brown, Hill & Ritter, 148 Ohio App.3d 440, 773 N.E.2d 1081 (10th Dist., 2002) 9-10

Brenneman v. Allen Cty. Bd. of Commrs. 196 Ohio App.3d 60, 962 N.E.2d 342, 2011-Ohio-4032 4

City of Piqua v. Geist, 59 Ohio St. 163, 52 N.E. 124 (1898) 4-5

City of Washington Court House v. Dumford, Fayette C.P. (Apr. 7, 1969) 7

D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536 5

Greer-Burger v. Temesi, 116 Ohio St.3d 324, 879 N.E.2d 174, 2007-Ohio-6442 8

In re Application of Columbus S. Power Co., -- N.E.3d --, 2014 WL 553174, Slip Opinion No. 2014-Ohio-462 (Feb. 14, 2014) 3

Kaine v. Marion Prison Warden, 88 Ohio St.3d 454, 727 N.E.2d 907 (2000) 7

Lamie v. U.S. Trustee, 540 U.S. 526, 124 S.Ct. 1023 (2004). 6

Pinkney v. Ohio Dept of Job & Fam. Svcs., 8th Dist. No. 94696, 2010-Ohio-5252 7

Shields v. Englewood, 172 Ohio App.3d 620, 876 N.E.2d 972, 2007-Ohio-3165 1

Smith v. Granville Twp. Bd. of Trustees, 81 Ohio St. 3d 608, 612 (1998). 7

State v. Washington, 137 Ohio St.3d 427, 999 N.E.2d 661, 2013-Ohio-4982, ... 8

State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn., 131 Ohio St.3d 478, 967 N.E.2d 193, 2012-Ohio-1484. 5

Teledyne Industries, Inc. v. Natl. Labor Relations Bd., 911 F.2d 1214 (6th Cir. 1990). 8

United States ex el. Mistick PBT v. Hous. Auth., 186 F.3d 376 (3d Cir. 1999) 6

Zurow v. Cleveland, 61 Ohio App.2d 14, 24, 399 N.E.2d 92 (1978) 1

Statutes, Rules and Consitutional Provisions

R.C. 5591.02 3-7

R.C. 5591.21 3-7

Other Authorities

1990 Ohio Op. Atty. Gen. 2-334; 1990 WL 546995 4

Webster's Third New International Dictionary 1510-1511 (1986) 3

REPLY TO APPELLEE'S STATEMENT OF FACTS AND STATEMENT OF THE CASE

Initially, Appellee's seven-page Statement of the Case and Facts contained in its Merit Brief contains several misstatements that demand a brief reply. First, Independence continues its groundless complaints about the Board of County Commissioners' initial determination hearing. Independence's own law director attended that December 2, 2010 hearing -- at which he now claims was "cursory" because "no testimony was allowed[.]" *Independence Merit Brief* at p. 2. Not once did he object, request witnesses be sworn, or otherwise vocalize any perceived procedural issues with that hearing. Accordingly, he may not do so now. *Shields v. Englewood*, 172 Ohio App.3d 620, 2007-Ohio-3165, 876 N.E.2d 972, ¶ 16; *Zurow v. Cleveland*, 61 Ohio App.2d 14, 24, 399 N.E.2d 92 (1978). In the same vein, Independence blatantly mischaracterizes the record stating "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." *Independence Merit Brief* at p. 6. In actuality, there were *two* Assistant Prosecutors, Sara DeCaro, and the Civil Division Chief, David Lambert, who presented to the BOCC. Likewise, two representatives Engineer's Office presented, including then-Engineer, Robert Klaiber who said, "**the bridge is on a dead-end**..."[1] Further, the entirety of the Board of County Commissioners' ("the BOCC") hearing lasted over fifteen minutes, not two and a half minutes as Independence seems to imply.

Independence states in its Merit Brief, "[i]t is undisputed that vacation of the road surface and its status as a municipal street does not impact the separate obligation for maintenance and

[1] 12/2/2010 BOCC Hearing, at Time Marker 14:24. (Emphasis added); See also, Ap. Op. at ¶21.

repair of a bridge under R.C. Chapter 5591." To the contrary, that is very much in dispute. In fact, then-County Commissioner Tim Hagan specifically questioned Independence Law Director, Gregory O'Brien on this very issue as follows:

Tim Hagan: Counsel, I think we understand the point of who [the bridge] serves. How do you address the issue of the road being vacated in 1960?

Greg O'Brien: Yes?

Tim Hagan: ***And obviously the bridge is on the road.*** So the question for the [BOCC] is the inconsistency of having the road vacated and having the bridge still being used. We obviously, in 1960, there was an expression of the BOCC (really the County Engineer) -- I'm probably the only one that remembers [Engineer] Porter, Mr. Porter made a suggestion that, they vacate the road because it was no longer a public use. Now the counter-argument that you would have to put before us is, since this property was now being used in a different way, we would have to consider.... Am I right counsel?

12/2/2010 BOCC Hearing, at Time Marker 5:00 - 6:12 (Emphasis added).

In response, Law Director O'Brien claimed, "that is exactly not the case" and instead argued, as he does now, that the bridge structure was never vacated. See *Independence Merit Brief* at p. 9. ("The issue in this case, however, is not maintenance of Old Rockside Road, it is the maintenance of the Bridge over the Cuyahoga River, which supports that roadway surface.") As demonstrated by Commissioner Hagan's adept questioning, the BOCC approached these complex issues of law in a thoughtful manner. Despite Independence's assurances to this Court

that this issue is "undisputed,"[2] the vacation of Old Rockside Road is an important, and potentially dispositive, issue. Local roads and municipal streets by definition are not located on "roads of general or public utility." See *County's Trial Court Brief* at 4-6; *County's Appellate Court Brief* at pp. 7-14. Independence's attempts to claim the contrary, or argue waiver to this Court, are misguided.

I. Under R.C. 5591.02 and R.C. 5591.21, Counties are Not Responsible for Bridges on Municipal Streets Leading to Dead-End Enclaves.

At every stage of this case, the County has argued that the above statutes clearly and unambiguously relieve counties of maintenance and repair obligations for bridge structures on local streets. Independence does not dispute that Old Rockside is a local street. "[R]esponsibility for maintenance of [Old Rockside Road] was turned over to [Independence] by Cuyahoga County in 1967." *Independence Merit Brief* at p. 9.

R.C. 5591.02 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).

"***[T]he word 'necessary' denotes something that is essential, indispensable, or absolutely required." *In re Application of Columbus S. Power Co.*, --N.E.3d--, 2014 WL 553174, Slip Opinion No. 2014-Ohio-462, ¶ 28 citing Webster's Third New International Dictionary 1510-1511 (1986). In reviewing the statutory structure of both R.C. 5591.02 and R.C. 5591.21, it is clear that the term "*necessary bridges*" used in both statutes, describes those bridges situated on roads which are essential to getting Ohioans from one end of town to the other, i.e., those

[2] See *Independence Merit Brief* at p. 4, ¶1. Even a non-lawyer, former County Commissioner Tim Hagan, understood the basic concept that a responsibility for a bridge follows the road.

bridges situated on "roads of general and public utility." In *City of Piqua v. Geist*, 59 Ohio St. 163, 52 N.E. 124 (1898), this Court declared:

> [C]ounty commissioners are 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 ***. It is the duty of the city or village to construct and keep in repair such bridges ***.

City of Piqua v. Geist, 59 Ohio St. 163, 52 N.E. 124 (1898) at syllabus.

Every time Independence has cited to *Piqua* -- at every stage of the proceedings below -- it has improperly included the word "*exclusive*" in the sentence preceding the citation.[3] That word appears nowhere in this Court's decision. Besides *adding* words to cited authority that were not in the original, Independence additionally *deletes* words from cited authority that were in the original. In particular, Independence purports to quote from 1990 Op. Att'y Gen. No. 2-334, 1990 WL 546995, syllabus at paragraph three, in declaring that it "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***..." See *Independence Merit Brief* at p. 10 (Emphasis sic; omission in original). In fact, paragraph three of the syllabus reads *in full* as follows:

> R.C. 5591.02 and 5591.21 place a duty on the county commissioners to repair a bridge located on an improved road of general and public utility running into or through a municipal corporation within the county, which road is not a state or county road. The determination of 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 county commissioners.*** (1981 Op.Att'y. Gen. No. 81-007 syllaubs, paragraph two, and 1957 Op.Att'y Gen. No. 811, p. 316, syllabus, paragraph two, approved and followed. (Emphasis added.)

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[3] E.g. "What little direction exists holds only that the term excludes streets established by a city for the exclusive use and convenience of the municipality." *Independence Common Pleas Brief* at p. 10; see also, *Independence Eighth District Brief* at p. 12 and p. 15 (on page 12 the word "exclusive" is bolded); *Independence Brief Opp. to Jur.* at p. 12; and finally, *Independence Merit Brief* at p. 12 (most recently, in its Merit Brief, Independence emphasized a word that appears nowhere in this Court's decision by italicizing and bolding that phantom term.)

Independence's selective deletion of the language italicized above was surely no accident. The inconvenient truth is that the BOCC, the government body that was ultimately responsible for determining and prioritizing county road construction and repair projects, received evidence and presentations on this particular bridge and determined in the first instance that this bridge was not located on an improved road of general and public utility. Notwithstanding Independence's deliberate omission of this critical syllabus language, Ohio legal authority confirms that such factual determinations are appropriately the domain of three (3) informed county commissioners in consultation with the county engineer rather by one common pleas court judge.

Clearly, Independence understands that its acceptance of Old Rockside Road as a municipal street in 1967 means that street was "established by [Independence] for the use and convenience of the municipality..." *City of Piqua v. Geist*, 59 Ohio St. 163 (1898) at Syllabus. Over a century ago, this Court held that Counties have no duty to construct or keep in repair these structures. Independence's efforts to distance itself from this Court's binding precedent by grafting the word "exclusive" onto this Court's syllabus *in every brief it has ever filed in this case* should not be ignored, much less tolerated or sanctioned.

II. If Undisputed Dead-End Streets Qualify as "*Roads that are of General and Public Utility*" that Legal Term of Art Has Been Rendered Utterly Meaningless.

It is a cardinal rule of statutory interpretation that a court may not interpret a statute in a manner that effectively deletes words from the statute. "No part [of the statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, ¶ 19. see also, *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26

(noting that "words in statutes should not be construed to be redundant, nor should any words be ignored.") The General Assembly drafted R.C. 5591.02 and R.C. 5591.21 so that counties are only responsible for roads and structures found upon county roads, or otherwise major throughways. An alternate reading renders the "general and public utility" phrase at issue in R.C. 5591.02 meaningless. Likewise, the word "necessary" found in both R.C. 5591.02 and R.C. 5591.21 was also rendered superfluous by the Eighth District's decision. See, *County's Reply Brief, supra.*, at p. 3. Sometimes courts adopt a technical, specialized, or otherwise unusual reading of a statute to avoid surplusage. *E.g., United States ex el. Mistick PBT v. Hous. Auth.*, 186 F.3d 376, 386-88 (3d Cir. 1999) (Alito, J.). And sometimes courts insist on the ordinary reading of a statute even though that reading creates surplusage. *e.g., Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). What courts never do is adopt an unusual reading of a statute that also creates surplusage. Independence would have this Court do so, and the Court should decline.

III. <u>On Appeal, both the Trial Court and the Court of Appeals Failed to Determine the Law.</u>

If permitted to stand, the Panel's decision below affixed liability upon the County for rebuilding a bridge that may exceed a cost of $6 million dollars based upon a legal rationale consisting entirely of four sentences. See Ap. Op. at ¶30, and Common Pleas Judgment Entry. The trial court's entry neglects to sufficiently explain its rationale in overturning the BOCC decision. This is apparent since both sides are still arguing about exactly what the Common Pleas Court said before the Ohio Supreme Court. In its three sentence opinion, the Common Pleas Court seemed to find the issue that the bridge straddles two municipalities as dispositive by citing to R.C. 723.01. In its Merit Brief at p. 18, Independence concedes that trial court's

decision is "perhaps...inelegant[.]"[4] Clearly, the mere fact that the bridge straddles two cities does not mean the court is absolved from applying the law.

Further, Independence cannot redraft what the common pleas court "meant" in its own Merit Brief. (e.g. "the trial court...did not base its decision regarding 'general and public utility' on the location of the Bridge, but rather...that the Bridge is a lifeline – the only means of access – to CVSR and to many businesses...") *Id.* at p. 18. The "[r]ule under which a judgment ...is effective only when entered on the journal by the Clerk of Court reflects the 'axiom that courts speak only through their journal entries'"). *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 727 N.E.2d 907 (2000). There is nothing in the trial court's three sentence decision about the Bridge being a lifeline. There is, however, language that suggests the trial court based its decision to reverse the BOCC and unilaterally "[found it] to be a bridge of 'general and public utility' as it lies between two municipalities..."

Accordingly, the courts below misapprehended their respective standards of review. "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. This Court has recognized that "the common pleas court must weigh the evidence in the record." *Smith v. Granville Twp. Bd. of Trustees*, 81 Ohio St. 3d 608, 612 (1998). When a trial court hearing an administrative appeal fails to perform its duty, its decision is erroneous as a matter of law. Simply put, a trial court must engage is some cogent legal analysis when it reverses an administrative agency's decision. When a trial court fails to perform this duty such that the parties and reviewing courts are left guessing, reviewing courts must remand for

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[4] The three sentence entry stands in stark contrast to the six-page opinion written by the Common Pleas Court in *Washington Courthouse v. Dumford,* over forty years ago. See Amicus Appx. at 62-67.

clarification, not affirm. *Brenneman v. Allen Cty. Bd. of Commrs.* 196 Ohio App.3d 60, 962 N.E.2d 342, 2011-Ohio-4032, ¶15. ("[W]ithout explaining its decision in the present case, the common pleas court's decision to dismiss the [R.C. 2506 appeal] was both unreasonable and arbitrary.") At each step in the administrative appeals process, varying standards of review are applied. Once there is a break in the chain, the next step cannot proceed. Here, the undisputed and overwhelming evidence established that Old Rockside Road was not a road of general and public utility as a matter of law. Accordingly, further review is not required (especially since further uncertainty may imperil the approved replacement project relying on funding from ODOT's municipal bridge fund). This Court should reverse and remand with instructions to reinstate the BOCC determination from 2010.

IV. Judicial Estoppel Bars Independence's Arguments to this Court.

Independence is barred from further contesting its ownership of the repair and maintenance obligations before this Court. For the doctrine of judicial estoppel to prohibit a party from raising an argument, the argument in question must be inconsistent with one successfully and unequivocally asserted by the same party earlier. *State v. Washington*, 137 Ohio St.3d 427, 999 N.E.2d 661, 2013-Ohio-4982, ¶ 22. "Courts apply judicial estoppel in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 879 N.E.2d 174, 2007-Ohio-6442, ¶ 25 quoting *Teledyne Industries, Inc. v. Natl. Labor Relations Bd.*, 911 F.2d 1214, 1218 (6th Cir. 1990).

Independence argues that its 2013 Grant Application is not in the record, so the city's conflicting statements made therein are off limits. How, exactly, was the County supposed to get

a 2013 grant application into the trial court's record in 2011? Next, Independence pulls out the waiver card arguing since judicial estoppel was not argued to the trial court, or appellate court, it cannot be argued here. Again, Independence's Engineer signed this Grant Application on February 28, 2013. See *Amicus Appx.* at 029.[5] Tellingly, the case was argued and submitted to the Court of Appeals on February 25, 2013. Clear gamesmanship was and remains afoot. Cuyahoga County never approved of Independence's application as the city appears to claim. *Independence Merit Brief* at p. 21. Instead, Independence engaged in blatant factual misrepresentations. On February 25, 2013 its lawyers argued to the Court of Appeals that "it's a County bridge" and maintain that argument today. Then, three days after oral argument in the Court of Appeals, the city applied and "obtained $2.5 million dollars in Municipal Bridge (MBR) Program funding, through [ODOT] for the replacement of the bridge on Old Rockside Road in the City of Independence." http://www.noaca.org/index.aspx?page=211. (Last accessed March 14, 2014). In order to get that funding, Independence represented that Old Rockside Road was its responsibility, not the County's concern. A complete 180 degree turn from what it had previously represented in court.

Independence invites this Court to endorse late-in-the-game antics that undermines public confidence in the law. It is no coincidence that this grant application was submitted three days after oral argument in the Eighth District Court of Appeals. Judicial estoppel is an equitable doctrine intended to protect the integrity of the judicial process, which is threatened when a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal. *Advanced Analytics Laboratories v. Kegler, Brown, Hill & Ritter,* 148 Ohio

[5] Independence also takes issue with its grant application being attached to the Ohio Association of County Engineers' Appendix. NOACA, the agency the City applied to, is a public agency. Its orders (and the Independence mayor's order authorizing the grant application found at Amicus Appx 58-59) may be included pursuant to S.Ct.Prac.R. 16.02 (B)(5)(e).

App.3d 440, 773 N.E.2d 1081 (10th Dist., 2002). Independence was successful in obtaining federal and state grant money to finance the vast majority of the bridge's cost. But that's not enough; they want the whole thing. Instead, Independence should be held accountable for its statements made to obtain funding for this approved project. The city achieved success based on its representations that it was their bridge. Now, judicial estoppel should be applied to bar their arguments that it is not their bridge and that the County should pay.

CONCLUSION

This Court should refuse to hear Independence's arguments against reversal because they are barred. Alternatively, this Court should reverse the decision below because it fails to honor the General Assembly's intent by enacting the phrase "roads that are of general and public utility..." R.C. 5591.02. By limiting county responsibility to only bridges on main thoroughfares, or designated county roads, the legislature intended to create a balance and shared sacrifice between counties and municipalities. The court's decisions below vastly expand county liability in this delicate balance, and discard the judgment of the three County Commissioners. Appellant, Cuyahoga County respectfully requests that the judgment of the Court of Appeals be reversed and that the matter be remanded to the Court of Appeals with instructions to reinstate the determination of the Board of County Commissioners.

Respectfully submitted,
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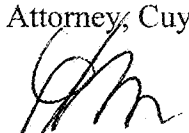
By: 

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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 Reply Brief of Defendant-Appellant, Office of the Cuyahoga County Executive was served this 14th day of March, 2014, by e-mail at the addresses so indicated upon the following counsel:

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