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COURT OF APPEALS

STATE OF NEW YORK

TOWN OF AURORA,

Respondent,

-against-

NO. 116

VILLAGE OF EAST AURORA,

Appellant.

20 Eagle Street
Albany, New York
October 10, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 116, Town of Aurora
2 v. Village of East Aurora.

3 MR. WEISS: May it please the court, I'm Paul
4 Weiss and I represent the Village of East Aurora. I'd like
5 to reserve two minutes for rebuttal, please.

6 CHIEF JUDGE DIFIORE: You may, sir.

7 MR. WEISS: Thank you.

8 Since the mid-nineteenth century, this state has
9 consistently presumed that the responsibility for
10 maintaining bridges lies with towns. For generations,
11 bridges - - - bridge repair - - -

12 JUDGE GARCIA: Counsel, let me just ask you, on -
13 - - on Section 606, right, which is, "When a village may
14 construct or repair bridge", a village certainly could, by
15 doing what's laid out in this statute, take control of that
16 bridge in constructing it, right?

17 MR. WEISS: Correct, Your Honor. What - - -

18 JUDGE GARCIA: Your position is your village did
19 not do that. They didn't comply with this statute?

20 MR. WEISS: Correct, Your Honor.

21 JUDGE GARCIA: So isn't, really, the issue here
22 what's the effect of noncompliance with this statute? It
23 isn't who controls a bridge under ordinary circumstances,
24 is the Village here constructed the bridge, which
25 ordinarily, I think, in a common-sense way, you would think



1 you build it, you own it, but they didn't comply with the
2 specific provisions of 606.

3 MR. WEISS: Correct, Your Honor.

4 JUDGE GARCIA: So why - - - their argument is,
5 well, why should we be stuck with the bill because you
6 violated the law?

7 MR. WEISS: Okay. So that is an estoppel
8 argument, which doesn't hold against - - -

9 JUDGE FAHEY: It's - - - it's - - - don't you
10 have to read it, Mr. Weiss, too, at 604, which starts off
11 by saying, "If the board of trustees of a village has
12 supervision and control of the bridge therein, it shall
13 continue to exercise such control under this chapter"?

14 MR. WEISS: Yes, Judge Fahey - - -

15 JUDGE FAHEY: Yeah.

16 MR. WEISS: - - - they have to be read together.

17 JUDGE FAHEY: Yeah.

18 MR. WEISS: And in this case, what you have is,
19 Judge, is indicating that the default position is that it
20 is the town, and actually - - - and that's what I was
21 indicating is that, both statutorily, if you take a look at
22 the statutory scheme, both with the Highway Law, as well
23 with the Village Law, that there has to be - - - they
24 clearly indicate that it is the town. The town - - -

25 JUDGE FAHEY: You see, that's, Mr. - - - Mr.



1 Weiss, that's not the way - - - and Judge Garcia can
2 correct me, if I'm wrong, but the way I'm hearing his
3 question is, is he saying that the - - - the default
4 position is you've got to do something. If you own this
5 bridge, which you built in 1973, had for forty years, or is
6 told for almost - - - almost ten years, but a number of
7 years in a row, that it needed to be repaired - - - DOT
8 kept on telling you it's a flagged bridge. So you - - -
9 you were - - - you were on record for it. And then in
10 2010, you said no, it - - - it's not our bridge; really,
11 the Town is responsible. That's the way I understand the
12 sequence.

13 If that is a sequence, then the question we have
14 to ask is, does Section 142 apply of the old Village Law or
15 does a new Village Law apply?

16 MR. WEISS: Well - - -

17 JUDGE GARCIA: And under 142, the bridge did not
18 exist at the time that chapter took effect, so it wouldn't
19 apply and you wouldn't own it, right?

20 MR. WEISS: Correct.

21 JUDGE FAHEY: We all agree on that.

22 MR. WEISS: Yes, Your Honor.

23 JUDGE FAHEY: However, that went out in September
24 of 1973, and you finalized payment on this bridge in
25 October 31st of '73, and that seems to say to me that Judge



1 Garcia's question then is - - - is right on point, if you
2 read 604 and 606 toge - - - together.

3 MR. WEISS: Correct, and in fact, there was a
4 nonexistent bridge in 1973 when it went into - - - when
5 that law went into effect. So it wasn't possible for - - -
6 it was impossible for the Village to actually supervise and
7 control it.

8 JUDGE GARCIA: You see the problem with just
9 allowing a village to do this, do what Judge Fahey was
10 describing, for thirty or forty years, and then when they
11 don't want to pay anymore, say, you know what, we actually
12 violated this provision when we built this bridge, so now
13 the Town, you have to take over the payments?

14 JUDGE STEIN: But doesn't the Town have other
15 things that they can do? They can impose a tax, right? Or
16 couldn't they - - - couldn't they seek to enjoin them from
17 building this bridge?

18 MR. WEISS: There are - - - correct, Judge Stein.
19 And so there were - - - are a number of things. And
20 actually, there are a number of things that the - - - it's
21 kind of, as Judge - - -

22 JUDGE RIVERA: But did you give them notice you
23 were building the bridge?

24 MR. WEISS: It - - - that was published in the -
25 - - in - - - in the paper. The - - - there were village



1 minutes. There was - - - there were village minutes.
2 There was a resolution, so what effect that had more than
3 general - - -

4 JUDGE RIVERA: There was no - - - there was not a
5 notice directed to the Town specifically. You mean,
6 there's a general public notice?

7 MR. WEISS: No, no.

8 JUDGE RIVERA: Is that what you mean?

9 MR. WEISS: No, there was a - - - no. There wa -
10 - - that was a general notice, and it was a public meeting
11 that it was at.

12 JUDGE GARCIA: So next week, if you decide to
13 build another bridge and you don't get it approved, and the
14 construction starts going on, what would the Town - - -
15 they have to watch and see you're building a bridge right
16 there or read the legal notices or your minutes. And then
17 they're like, okay, you're building an illegal bridge, so
18 you don't have approval for this, so you're not going to
19 own it, we're going to own it. What do they do?

20 MR. WEISS: I'm sorry; what do they - - -

21 JUDGE GARCIA: What would they do? What does the
22 Town do?

23 JUDGE FEINMAN: The Town do.

24 MR. WEISS: The - - - the Town has the
25 responsibility for the - - - for the supervision and



1 control by default, so - - -

2 JUDGE GARCIA: So then they're going to be stuck
3 with another bridge.

4 MR. WEISS: And - - - and Your Honor, to look at
5 it this way - - -

6 JUDGE FAHEY: Fine.

7 JUDGE STEIN: For which they can - - -

8 JUDGE FAHEY: And it doesn't - - -

9 JUDGE STEIN: - - - tax the Village residents,
10 right - - -

11 MR. WEISS: Exactly, Your Honor.

12 JUDGE STEIN: - - - to pay for those repairs and
13 maintenance.

14 MR. WEISS: Judge - - - yes - - -

15 JUDGE GARCIA: But could they tax only the
16 Village residents for that or could they tax all the
17 residents of the Town for that? I - - - I - - - I don't
18 know the answer to that.

19 MR. WEISS: It would be both the Town and - - -
20 and the Village, but the - - - the Village is a special - -
21 -

22 JUDGE GARCIA: So the other Town residents - - -

23 MR. WEISS: The Village is a special - - -

24 JUDGE GARCIA: - - - would be paying for that
25 Village's bridge, rather than just the Village tax base?



1 MR. WEISS: Yes.

2 JUDGE GARCIA: Right.

3 JUDGE WILSON: So your interpretation of the
4 state law as it exists is that villages can build bridges
5 whenever they want, they can foot - - - foot the
6 construction costs for it, and then turn over the
7 maintenance costs - - - not turn over - - - it is by law an
8 obligation of the town?

9 MR. WEISS: Judge Wilson, yes, and what we have
10 is - - -

11 JUDGE FAHEY: The problem with that is it - - -
12 it doesn't take into account the first line of Section 604.
13 "If the board of trustees of a village has the supervision
14 and control of a bridge therein, it shall continue to
15 exercise such control under this chapter." In every other
16 case, the town's got it.

17 JUDGE STEIN: But the only way - - -

18 MR. WEISS: In every - - -

19 JUDGE STEIN: - - - you can get supervision and
20 control is if you had it in 1897 or you followed 606.
21 Isn't that right?

22 MR. WEISS: Exactly - - -

23 JUDGE STEIN: Okay.

24 MR. WEISS: - - - Judge Stein. That's - - -

25 JUDGE RIVERA: No, where - - - where does it say



1 1897?

2 JUDGE FAHEY: I - - - I didn't see that in the
3 statute.

4 JUDGE RIVERA: No, of course not.

5 MR. WEISS: Okay, what it doesn't say in the
6 statute, and this is why you take a look at the - - - the
7 legislative history. 142 did say - - -

8 JUDGE RIVERA: Well, the language is clear. Why
9 should we look to legislative history? There's - - -
10 there's no date in the statute.

11 MR. WEISS: Because what happened is - - - you
12 have to do that because - - - I - - - I would respectfully
13 submit - - -

14 JUDGE FAHEY: The problem with legislative
15 history is East Aurora has built a lot of bridges up and
16 down since the mid-1800s. And so I - - - I think that
17 we're kind of stuck with the plain language first, and then
18 if there's an ambiguity, then of course, Mr. Weiss, we'd go
19 to - - - but there doesn't seem to be any ambiguity about
20 this language.

21 MR. WEISS: Well, the ambiguo - - - if there is
22 some ambiguity, it is at - - - at where the reason for why
23 the legislature had taken out that specific language, "if
24 at the time this chapter takes effect." So what you have
25 is, you did have it up until 1972, in that - - - or 1973.



1 In 97 - - - 1973, you don't have it. But if you take a
2 look at the bill jacket, the bill jacket says this law has
3 remained largely intact.

4 JUDGE FAHEY: So is it - - - is it - - - is it
5 fair to - - -

6 MR. WEISS: So you take a look at the bi - - -
7 the bill jacket, and that takes you to - - - that takes you
8 back to - - - there was nothing in this - - - the
9 legislature, what is the meaning of taking that language
10 out? What did that mean? That meant you'd look at the
11 bill jacket. The bill jacket says largely intent (sic).

12 JUDGE RIVERA: So we took - - - we took it out
13 because we meant to keep it in? I mean, I'm - - - that's
14 what I'm not understanding.

15 JUDGE STEIN: Unless it necc - - - no, no - - -

16 JUDGE RIVERA: Let me ask you a different
17 question.

18 JUDGE FAHEY: You see the problem with that
19 argument.

20 JUDGE RIVERA: Counsel, let me just ask you this
21 question, because it's - - - it's back to something else
22 you said and I'm just not clear about this. Is it the
23 Village's position that it can unilater - - - unilaterally
24 decide to build a bridge - - - the Town has no say in it
25 whatsoever; so the Town can't prevent you from building the



1 bridge. Is that correct?

2 MR. WEISS: The Town can't - - - only if you file
3 6-606, and that is a resolution which is passed by a per -
4 - - which then is followed by a permissive referendum. So
5 you have to file, one, 604, which says that all the bridges
6 are the Town's. But if you go to 606, what you have to do,
7 is you have a pass a resolution, which is subject to a
8 permissive referendum. Other than that, that's an illegal
9 act. It's ultra vires, and therefore, you cannot bind the
10 Village residents.

11 And the purpose for that, and the purpose of all
12 these - - - the statutory scheme that we're dealing with is
13 that the Village doesn't by happenstance somehow become - -
14 - have supervision and control of the bridge.

15 JUDGE RIVERA: But I guess I'm having even a
16 little difficulty even with this. Let - - - let me assume
17 for one moment, I - - - I agree with your argument about
18 acting ultra vires. I'm not clear why the remedy for that
19 is the Village doesn't have to pay the cost.

20 MR. WEISS: It's not that the Village doesn't - -
21 - you mean the - - -

22 JUDGE RIVERA: Beyond - - -

23 MR. WEISS: - - - the repair and maintenance - -
24 -

25 JUDGE RIVERA: Yes, that's what we're talking



1 about.

2 MR. WEISS: The Town doesn't either.

3 JUDGE RIVERA: You already paid to have it built.

4 MR. WEISS: The Town can abandon the bridge. The
5 co - - - the Town can - - - can block it off and let it
6 deteriorate. It's not like you're holding the Town into
7 perpetuity. That becomes a Town decision whether or not
8 the Town is going to let it continue - - -

9 JUDGE GARCIA: Is that really only a Town
10 decision or would be the state be involved in that?

11 MR. WEISS: No, the - - - these are Village
12 roads, and it deals with that the Village is a highway
13 district. The Village is a separate highway district - - -

14 JUDGE GARCIA: Oh, so - - -

15 MR. WEISS: - - - so it's not - - - there are
16 three other bridges in the Village that are statewide. And
17 - - - or there are two that are state - - - or two that are
18 county and one that is state. So what you're dealing with
19 is these are specifically - - - and this actually goes back
20 to English law. English law, which this state, in 1784,
21 had decided - - - this state decided that that becomes not
22 the county, which is what English law was, but rather that
23 it becomes the town's responsibility.

24 And so when you have the town responsibility - -
25 - and that fits into the legislative history, as well as



1 the statutory scheme that we have here. The statutory
2 scheme is the default is that it's the town. The village
3 has to act very specifically and it has to take specific
4 actions. Absent that, the default is that the town - - -
5 the town can't stand here and say, oh, by the way, we
6 didn't do anything. That is not their responsibility. The
7 - - - it is the town's responsibility. They don't have to
8 do something.

9 JUDGE GARCIA: But the - - - the catch - - -

10 MR. WEISS: The village actually does have to do
11 something.

12 JUDGE GARCIA: The catch here is you construct a
13 bridge, and in order to construct it, you have to do these
14 things under 604. You don't do them, so you're technically
15 then not responsible for the maintenance of the bridge, and
16 then you turn to the Town and said, we built this bridge,
17 we didn't comply with the statute, we're acting ultra
18 vires. Tough. The Town residents now are going to pay the
19 bill for this Village bridge that we decided to build
20 without following the law.

21 It seems like not a very good incentive built
22 into that answer.

23 MR. WEISS: The Village residents are also Town
24 residents.

25 JUDGE GARCIA: I understand, but those Town



1 residents who didn't have anything to do with this
2 construction of the bridge now are going to be paying the
3 bill for that, because the Village board didn't follow the
4 law.

5 MR. WEISS: And because - - - but that's not be -
6 - - what the Village is trying to do; that's what the state
7 legislature has said in - - - in 6-606 by using the term
8 "may" - - -

9 JUDGE FAHEY: The problem is we go back to the
10 same - - - it - - - it doesn't apply if you had supervision
11 and control of the bridge therein. The Village of East
12 Aurora had supervision and control of the bridge therein.
13 And so it simply doesn't apply. You have to read that
14 sentence out for you to be correct.

15 MR. WEISS: Your Honor, what you would have to
16 take a look at is what is - - - when you say look at
17 supervision and control - - - supervision and control can
18 only happen through 6-606. So when you're saying 142 of
19 the previous law clearly pointed to 1909 - - -

20 JUDGE FAHEY: How - - -

21 MR. WEISS: - - - 140 - - - what you're dealing
22 with is, there's a - - - there is actually - - -

23 JUDGE FAHEY: Oddly enough - - -

24 MR. WEISS: Please take a look at the record.
25 The record - - -



1 JUDGE FAHEY: I - - - I will, Mr. Weiss, but
2 oddly enough, it's funny, because when you look at 142, it
3 has almost the exact same sentence in the beginning. It
4 has "if" - - - then the sentence is taken out - - - "at the
5 time this chapter takes effect, the board of trustees has
6 supervision and control." It - - - I don't see how that
7 helps you. I - - - I'm - - - you're mis - - - you're
8 confusing me.

9 MR. WEISS: Okay, if you take a look at - - -
10 that language sets it at 1909. The Attorney General
11 opinion in 1974 - - -

12 JUDGE FAHEY: That means you had supervision and
13 control in 1909, right.

14 MR. WEISS: Says it should be 1909.

15 JUDGE FAHEY: You - - - you didn't have it. That
16 - - - it's a - - - it's - - - it's a vesting provision,
17 which was taken out. It was taken out and it - - - so at
18 the time that this law went into effect, the board had
19 supervision and control and there was no 1909 vesting
20 provision.

21 JUDGE STEIN: Well, don't - - - can't - - -

22 JUDGE FAHEY: That had been removed.

23 JUDGE STEIN: Can't it mean that it - - - when
24 the - - - when the - - - the original law was passed in 18
25 - - - in 19 - - - in 1897, right?



1 MR. WEISS: Yeah, yes.

2 JUDGE STEIN: There were no rules for how to
3 obtain control of a bridge for a village, right?

4 MR. WEISS: No, there weren't.

5 JUDGE STEIN: Is that right?

6 MR. WEISS: No, Your Honor.

7 JUDGE STEIN: Okay. So - - - so you could do it
8 by just doing it, which is what they did here. But in
9 1897, the law changed and said, now the only way you can do
10 it is by these mechanisms, right?

11 MR. WEISS: Correct, Your Honor.

12 JUDGE STEIN: Okay. So then they did this - - -
13 and so it was one of two things at that point in time.
14 Either you actually built it and took control of it and did
15 whatever you wanted to do before 1897 - - - 1897, or you
16 followed the rules. You had - - -

17 MR. WEISS: Correct.

18 JUDGE STEIN: You had a referendum and all that
19 stuff. Okay. So then we come to 1973, and they redo the
20 laws, right?

21 MR. WEISS: Yes.

22 JUDGE STEIN: So doesn't that all still carry
23 forward? Or wouldn't we otherwise be saying that - - -
24 that from 1897 to 1973, there's only one way you can assume
25 control, but after 1973, we're going back to the wild, wild



1 West, where you can do it by any act?

2 MR. WEISS: And - - - and Your Honor, that 1973
3 provision - - - I agree with you, because what you're say -
4 - - what you're saying is the - - - the 1973, what the - -
5 - the bill jacket clearly indicates that it was largely
6 passed intact. What's important to indicate here also is
7 that the Town, in the reply brief to the amicus, actually
8 say on page 1 that the bridge was completed after 1970 - -
9 - after 1973.

10 JUDGE RIVERA: So just - - - just to be clear,
11 where is the prior version of this statute or the prior law
12 that uses the word "only", "solely", any of those words?

13 MR. WEISS: There isn't one.

14 JUDGE RIVERA: Oh, okay.

15 MR. WEISS: And that's - - - and Your Honor, when
16 you're dealing with that as the Fourth Department did, they
17 added the word "only" to the statute. "May" actually is a
18 discretionary tact - - -

19 JUDGE RIVERA: No, I think they're saying it
20 doesn't say only.

21 MR. WEISS: It - - - but "may" - - - but you have
22 to look at "may" and "may only".

23 JUDGE RIVERA: No, but you're - - - my question
24 to you was is there any prior law, pre-1973, that uses the
25 word "only"?



1 MR. WEISS: No, there isn't, Your Honor. And the
2 word "may", though, is for discretionary act, not one of
3 several options.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MR. WEISS: Thank you.

6 CHIEF JUDGE DIFIORE: Counsel?

7 MR. MARKARIAN: Good afternoon, Your Honors. May
8 it please the court, Ed Markarian, for the Town of Aurora.

9 Your Honors, there are two issues. One has been
10 addressed thoroughly and that is how to interpret these
11 statutes. I do think maybe a moment should also be
12 addressed to whether the Chestnut Ridge language should be
13 addressed under what the true issue was in Chestnut Ridge.

14 JUDGE FAHEY: Well, unfortunately, we were
15 pounding on him so bad, he wasn't able to get to Chestnut
16 Ridge, but - - - so maybe you can mention it in response.
17 But the way I understand Chestnut Ridge, and - - - and - -
18 - and the reason I think it wasn't followed is it was a
19 question of control. It seem - - - it really wasn't a
20 question of control, it was really whether the structure
21 was a bridge or a culvert, and the court noted that the
22 Village had never assumed responsibility, but the Town
23 didn't dispute that, so I don't know if it's exactly on
24 point, Chestnut Ridge.

25 MR. MARKARIAN: It is not on point.



1 JUDGE FAHEY: But I - - - in fairness, I think
2 maybe the Chief will let counsel respond when he comes back
3 up to that.

4 MR. MARKARIAN: Yes, Your Honor. And I - - - I
5 would like to note that if you pull the briefs from
6 Chestnut Ridge, you'll see that the Town in Chestnut Ridge
7 never argued control, never argued - - -

8 JUDGE FAHEY: It - - - it seems to be a different
9 - - - a different factual dispute than what we have here.

10 MR. MARKARIAN: Just whether it was a bridge or a
11 culvert. I agree, Your Honor.

12 JUDGE GARCIA: Counsel, if a village want - - -
13 forget the issues in this case, but now, today, a village
14 wants to build a bridge. Do they have to comply with 606
15 in order to do that?

16 MR. MARKARIAN: No, Judge.

17 JUDGE GARCIA: Why?

18 MR. MARKARIAN: Because 604 - - - you've got to
19 read the first sentence, and you must also read the "in any
20 other case" language in 604. So 604 starts out, "Care of
21 bridges." If a village controls a bridge, it continues to
22 control it, and remember, it's "Care of bridges" - - -
23 that's the caption. "Care of bridges" is repair of
24 bridges. Now, "in any other case" - - - so that's in any
25 other case, where a village does not control a bridge, then

1 the town constructs and repairs it.

2 JUDGE GARCIA: So if the village is building a
3 bridge - - - so right now no one controls it. The village
4 wants to build a bridge - - -

5 MR. MARKARIAN: Right.

6 JUDGE GARCIA: - - - so what happens?

7 MR. MARKARIAN: Well, that's why I'm looking at
8 this language, "constructing and repairing" in 604.

9 JUDGE GARCIA: Right.

10 MR. MARKARIAN: This is in the "any other case"
11 language. So it's saying a town constructs and repairs in
12 any other case, meaning a village constructs and repairs in
13 the cases where it exercises control. So 604 gives the
14 Village the right to construct a bridge.

15 606, if you see, picks up from the last phrase in
16 604, "Unless the Village assumes the whole or part of such
17 expense." So 606 - - - only the heading in 606 talks about
18 construct and repair. But the actual text of 606 is only
19 talking about assumption of control.

20 JUDGE STEIN: So is this a case-by-case
21 determination now, looking at all of the acts that the
22 Village did and all of the - - - let's say they didn't
23 construct it. It's only a question of whether they
24 controlled and maintained it. Is - - - is - - - so in
25 every case, is it going to be an in-depth determination of



1 whether they reached some threshold of enough action and
2 enough activity to have assumed maintenance control?

3 MR. MARKARIAN: Well, there are - - -

4 JUDGE STEIN: Rather than a - - - a bright-line
5 rule as - - - as 606 would be?

6 MR. MARKARIAN: So - - - so there is a bright
7 line in this case, because this is a construction case.

8 JUDGE STEIN: I understand, but I'm - - -

9 MR. MARKARIAN: You're talking about - - -

10 JUDGE STEIN: - - - I'm not asking about that.

11 MR. MARKARIAN: Right. You're talking about an
12 assumption case.

13 JUDGE STEIN: I am.

14 MR. MARKARIAN: So can they assume it just by
15 having control?

16 JUDGE STEIN: No, at - - - no, I'm not talking
17 about assuming; I'm talking about exercising.

18 MR. MARKARIAN: Well, the way I look at it, this
19 is a construction case. They constructed it.

20 JUDGE STEIN: Let's say a private landowner
21 bridge a bridge? No - - - no government entity is
22 involved, okay. And - - - and then the bridge is in need
23 of repair. The private landowner doesn't want to pay or
24 the private landowner is gone, and now the town and the
25 village are fighting over who has controlled and maintained

1 this bridge for forty, fifty, sixty years, whatever, okay -
2 - -

3 MR. MARKARIAN: Not in the case, Judge, only
4 because it's not on a highway. That would be a private
5 bridge. So that won't - - - that scenario won't apply
6 here.

7 But in the scenario that I think that you are
8 raising, which is not this case, is village builds a bridge
9 in 1950. We can talk about whether it's ultra vires or
10 not; I don't think it is. But they build a bridge in 1950.
11 They don't do anything with it. Then in 1980 and going
12 forward, they start a - - - you know, they actually go in.
13 They don't like the way the town's doing it. The village
14 goes in and takes over control de facto. In reality, they
15 have control. They've assumed control.

16 JUDGE STEIN: How do they do that?

17 MR. MARKARIAN: Well, they just go and do it.

18 JUDGE STEIN: What do you mean they go - - - they
19 go and do what?

20 MR. MARKARIAN: They repair the bridge.

21 JUDGE STEIN: That's my question.

22 MR. MARKARIAN: They repair the bridge.

23 JUDGE STEIN: Oh, they repair it?

24 MR. MARKARIAN: Yes.

25 JUDGE STEIN: Okay, so they make one repair,



1 let's say. In fifty years, they go in and they make one
2 repair, okay, and it's a, I don't know, a hundred-dollar
3 repair, okay. So then are we arguing whether that's enough
4 to assume control?

5 MR. MARKARIAN: I think that will be the next
6 case, Judge. And a town in that case, I - - -

7 JUDGE STEIN: That's - - - that's my point, so in
8 - - -

9 MR. MARKARIAN: - - - if I'm representing the
10 town - - -

11 JUDGE STEIN: So in every case going forward, if
12 we agree with your interpretation, then we're going to have
13 to look at the discrete acts and how much and - - - and - -
14 - and make a sui generis - - -

15 MR. MARKARIAN: And the - - -

16 JUDGE STEIN: - - - determination.

17 MR. MARKARIAN: The test will be supervision and
18 control. They will have to have - - - a hundred-dollar
19 repair isn't going to do it.

20 JUDGE WILSON: Is there a way to read 604 to say
21 that only towns can build bridges?

22 MR. MARKARIAN: No, I don't think - - -

23 JUDGE WILSON: Why - - - why not?

24 MR. MARKARIAN: - - - that's a correct
25 interpretation, Judge. Because it says "in any other case"

1 - - -

2 JUDGE WILSON: Right, and so - - - so - - -

3 MR. MARKARIAN: - - - a town constructs and
4 repairs.

5 JUDGE WILSON: - - - first one concerns bridges
6 that exist. Any other case would cover bridges that don't
7 exist - - -

8 MR. MARKARIAN: In any other case where a village
9 doesn't have control, the town will construct and repair.
10 I believe that means that the village - - -

11 JUDGE WILSON: Well, the town - - - the town - -
12 - the superintendent of highways in the town will have
13 control. And control might mean control of the
14 construction.

15 MR. MARKARIAN: In any other case where a village
16 does not have supervision and control, the town constructs
17 and repairs, which means that in any case where the village
18 does have supervision and control, the village constructs
19 and repairs. And I believe that's the correct
20 interpretation of 604. And 606 is just if a village hasn't
21 done any of this - - - these - - - those things, this is
22 how it can assume it, by resolution and referendum.

23 JUDGE GARCIA: It seems to me that Judge Wilson -
24 - - that reading that Judge Wilson has proposed is
25 consistent 604 with 606, on the theory of whoever pays for



1 it, owns it and is responsible for it. So under 604, if
2 the town constructs it, the town owns it.

3 MR. MARKARIAN: Yes.

4 JUDGE GARCIA: But under 606, the only way that
5 doesn't happen is if the village pays and constructs it,
6 and then the village owns it. And the problem here is
7 we've got a hybrid.

8 MR. MARKARIAN: We - - -

9 JUDGE WILSON: So - - -

10 MR. MARKARIAN: I think this is a clear - - - a
11 bright-line case, because it's a construction case.

12 JUDGE GARCIA: We don't have a town paying for it
13 under 604, in which case the town constructed it - - -

14 MR. MARKARIAN: Right.

15 JUDGE GARCIA: - - - and the town owns it. And
16 we don't have compliance with 606, which says if the
17 village pays for it, they own it, and they're responsible
18 for it, because they didn't comply with the terms of 606.

19 So on that reading, which is whoever builds it -
20 - - it seems a pretty reasonable reading - - - whoever pays
21 for building it, owns it and repairs it, where do - - -
22 what do we do with this? Because, let's assume Judge
23 Wilson's reading is correct, the Town didn't pay for it, so
24 they don't own it under 604, but the Village didn't comply
25 with 606, so they don't own it under 606. So what do we



1 do?

2 MR. MARKARIAN: The Village constructed it and
3 repaired it; they have care of it, because the Village has
4 a supervision of control of the bridge, so they have to - -
5 - they have control. Nobody else ever had control of it.

6 JUDGE GARCIA: But it seems to me that 606 is the
7 only mechanism for when a village, on its own, can
8 construct a bridge.

9 MR. MARKARIAN: I disagree with that, Your Honor.
10 So the Village has the power in the Constitution and
11 numerous statutes. Judge Breitel said that a village can
12 construct a bridge, passing a resolution. And this statute
13 says a village can construct and repair a bridge where the
14 town is not controlling it. This very statute says - - -

15 JUDGE GARCIA: Right, but they have to comply
16 with that.

17 MR. MARKARIAN: No, no, no. Comply - - - that's
18 606.

19 JUDGE WILSON: But where does - - - where does -
20 - - where does it say they can? Where does it say a
21 village can?

22 MR. MARKARIAN: Can?

23 JUDGE WILSON: Yeah.

24 MR. MARKARIAN: It says it because in any other
25 case, a town can do it. Implicit in that is that in those



1 other cases, a village can do it.

2 JUDGE WILSON: But no, the other cases are where
3 it already has the supervision of control over a bridge.
4 If a bridge doesn't exist, I think there's at least an
5 interpretation of this statute that says the purpose of the
6 enactment of the change in 1973 was to make it clear that
7 only towns - - - the superintendent of - - - of highways in
8 the town is, going forward, responsible for all the
9 construction of bridges, except as allowed by 606, where
10 there was a resolution and approval by the voters. Then
11 and only then, the village could build it.

12 MR. MARKARIAN: I read it which says, in any
13 other case, a town can construct, implicitly means that a
14 village construct - - - can construct in the other cases.
15 There's no reason why a village cannot build a bridge. A
16 village has the broad powers, constitutionally and by
17 statute, to build a bridge. There's nothing that says they
18 can't - - -

19 JUDGE WILSON: These statutes, the legislature -
20 - -

21 MR. MARKARIAN: They do not say - - -

22 JUDGE WILSON: Can the legislature
23 constitutionally restrict that to cases where the village
24 is willing to pay for the whole bridge and its maintenance?

25 MR. MARKARIAN: They haven't done that, though.



1 The arg - - -

2 JUDGE WILSON: Well, I didn't ask whether they
3 had, whether they could.

4 MR. MARKARIAN: Sure, yes, Your Honor.

5 JUDGE WILSON: Okay, thanks.

6 MR. MARKARIAN: I do think a point that was made
7 early on was a basic fairness point, and I don't think the
8 statute should be interpreted - - - interpreted the way the
9 Village suggests, because to do that, you have to strike
10 not only the entire first sentence of 604, you also have to
11 strike the next four words of the second sentence of 604,
12 so you're striking all that language out of the statute, or
13 you're reading in the 1909 language, which was removed from
14 the statute, to produce an unfair result.

15 JUDGE RIVERA: Well, let me - - - let me just be
16 clear where - - - where the Town is on this. It - - - it's
17 your position that they could unilaterally choose to build
18 this bridge. They didn't have to give you notice of - - -
19 or they didn't have to give some kind of notice directed
20 specifically to the Town to do so, correct?

21 MR. MARKARIAN: Yes.

22 JUDGE RIVERA: Okay. And once they did so, they
23 now not only are the - - - the ones who are paying - - -
24 because obviously they are not physically building it.
25 None of their employees are doing that. They are



1 supervising and controlling the bridge, and the only way
2 they can avoid that consequence, once they build it, is to
3 either before they build it, have entered an agreement with
4 the town, or after they build it - - -

5 MR. MARKARIAN: Yes.

6 JUDGE RIVERA: - - - per - - - go pursuant to
7 statute - - -

8 MR. MARKARIAN: And the statute - - -

9 JUDGE RIVERA: - - - 606 - - - 60, whatever it
10 is.

11 MR. MARKARIAN: 606 encourages that, Your Honor.

12 JUDGE GARCIA: But what if they just build a
13 bridge and they never do anything else? They never access
14 - - - do any repairs. They never supervise it; they never
15 control it. They just turn to you and they say, okay,
16 here's your bridge; is that okay?

17 MR. MARKARIAN: I want to answer that. I just
18 want to say that's not this case, too. The record at pages
19 - - -

20 JUDGE GARCIA: No, I understand. But I - - - I -
21 - -

22 MR. MARKARIAN: - - - 58 - - - they've been
23 controlling it all along.

24 JUDGE GARCIA: - - - I understood your reading to
25 be that the Village can build boards (sic) without



1 complying with 606. They can just go and build them, so
2 then they can build them and then turn to you and say,
3 here's your bridge.

4 MR. MARKARIAN: Right. They can't - - - that's
5 what they want and they can't - - - should not be allowed
6 to do that, because once they have they control - - -

7 JUDGE GARCIA: But by what rule?

8 MR. MARKARIAN: - - - the control doesn't
9 evaporate. They can't build it and control it when they
10 build it, and control it when they assess their taxpayers
11 to pay for it, and in this case, control it because they do
12 maintain it all along. They can't do that or just build it
13 and walk away, which I think is your example. If they
14 build it and walk away, that doesn't give up control.
15 Control doesn't evaporate. They had the control. They
16 created it. They can't say now we're not touching it
17 anymore, we don't have control anymore.

18 JUDGE RIVERA: So - - - so to avoid that
19 consequence, what could they have done - - - they want this
20 bridge - - -

21 MR. MARKARIAN: Right.

22 JUDGE RIVERA: - - - but they don't want to - - -
23 maybe they're willing to pay for it to be built, but they -
24 - - they don't want to carry the costs - - -

25 MR. MARKARIAN: Right.



1 JUDGE RIVERA: - - - of maintenance.

2 MR. MARKARIAN: 60 - - -

3 JUDGE RIVERA: What could they have done?

4 MR. MARKARIAN: 606 answers it. It says they can
5 enter into a cooperation agreement - - -

6 JUDGE RIVERA: With the town.

7 MR. MARKARIAN: - - - with the town. In fact, it
8 refers not only to that statement, it refers to Article 5-G
9 of the General Municipal Law, which is the municipal
10 cooperation statute.

11 JUDGE RIVERA: So if they come to the town, and
12 the town says, we don't want to pay for this, we don't want
13 to enter an agreement, then what is left for the village is
14 to decide to build it, and as Judge Garcia said, now you
15 own it, you have to deal with it from now on, or not build
16 it, correct?

17 MR. MARKARIAN: That's correct. And that's a
18 fair result.

19 JUDGE RIVERA: That's what, then, their options
20 are?

21 MR. MARKARIAN: If you build it unilaterally, and
22 the town - - - you - - - the town -

23 JUDGE RIVERA: Which you have the right to do,
24 you argue, under the law.

25 MR. MARKARIAN: You have a right to do, correct.



1 If you build it unilaterally, then you pay for it.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. MARKARIAN: Thank you, Your Honors.

4 CHIEF JUDGE DIFIORE: Counsel?

5 MR. WEISS: Thank you.

6 Before I address the applicability of Chestnut
7 Ridge, let me address several things. One, the record is
8 devoid. It is bereft of any evidence that the Village took
9 supervision and control - - - that it did anything, that it
10 repaired it, that it did anything. Take a look at the
11 record at page 480 to 485. That's the superintendent for
12 DPW for the Village. And he clearly indicates that he has
13 been there for twenty-five years, and the Village has done
14 nothing.

15 Now, what - - - what counsel was trying to point
16 to was a self-serving resolution by the Town, which said,
17 well, we never did anything. The Village owns its bridges.
18 The Village maintains its bridges. And in fact, it talks
19 to - - - refers to a letter from the - - - the Town's
20 supervisor who says, the Village has always maintained all
21 its bridges, which goes into one of the points that - - -

22 JUDGE GARCIA: Well, if you want to build a
23 bridge tomorrow, if you want to build a bridge - - -
24 different bridge - - - you go to the well again - - - you
25 want to build a bridge tomorrow. Would you have to, in



1 order to be able to build that bridge, comply with 606?

2 MR. WEISS: Absolutely, Your Honor. Absolutely,
3 you would have to because - - - and here's why - - - and
4 that addresses one of the - - - counsel for the Town veers
5 into, well, the Village has this inherent authority.
6 That's not the statutory scheme that the - - - that the
7 state legislature has imposed upon municipalities. The
8 statutory scheme is that the town, they own them even if
9 they don't do anything. But let me just finish this, Your
10 Honor.

11 JUDGE GARCIA: But it seems to me, though,
12 looking at - - - to go to that statutory scheme, the
13 purpose of it was to say, if you're going to do that, and
14 you're going to assume responsibility for this bridge that
15 you built, you better go out and get this referendum,
16 because this is a pretty big undertaking. Whereas in 604,
17 you know, otherwise, the town can build it and the town can
18 make that financial decision, and - - - so everyone's
19 making their own financial decisions.

20 So I come back to my point again where, your
21 Village has now made the financial decision to build the
22 bridge, but you don't want to pay for the repairs, which
23 kind of seems to fall between these two provisions,
24 assuming Judge Wilson's reading is accurate.

25 MR. WEISS: But we're not into new ground on



1 this. If we talk about Chestnut Ridge - - - let me - - - I
2 do want to get back to my point, which is that counsel
3 refers to general provisions in the law, rather than, and
4 as this court knows, specific provisions that control, 6-
5 604 and 6-606 - - - control over what a general provision
6 such as Village Law 1-102. So there is a specific controls
7 over the general.

8 But getting back - - - getting back to that.
9 When you are dealing with Chestnut Ridge, there was no - -
10 - there wasn't a question of who built it. And what this
11 court did in Chestnut Ridge is they took a look at what was
12 the function of the structure. And then they said the
13 Highway Law - - - although it's for purposes of inspection,
14 Highway Law really talks about, if it's a bridge, it's the
15 town. And if I can - - - Your Honor, if I could please get
16 to that.

17 What you have is, in Chestnut Ridge, in People v.
18 Dutchess County, in Hill v. Livingston, in Washburn, in
19 Markey, in Taylor, in Wilson, in Pelham, in Huntington, in
20 all the Attorney General's opinions, all the cases that we
21 cite - - -

22 JUDGE RIVERA: Counsel, let - - - let - - -

23 MR. WEISS: - - - there was no discuss - - -

24 JUDGE RIVERA: Counsel, let me ask you.

25 MR. WEISS: Yeah.



1 JUDGE RIVERA: Let's say we agreed with you, and
2 the Town decides, well, I don't want to take care of that
3 bridge. Can they just tear it down?

4 MR. WEISS: Yes, they can.

5 JUDGE RIVERA: And - - - and if you still want a
6 bridge, what are your options?

7 MR. WEISS: 6-606.

8 JUDGE RIVERA: Which is to do what? Just walk
9 through it for me one more time.

10 MR. WEISS: Okay, 6-606. That the - - - "upon
11 adoption of a resolution of the board of trustees therefor;
12 such action, however, shall be subject to a permissive
13 referendum." We have to have that available for permissive
14 referendum. But there has to be a resolution, and here's
15 what's interesting. If you take the - - -

16 JUDGE RIVERA: Then why - - - why isn't your
17 adversary's reading and suggestion much more logical and
18 efficient? Don't wait for them to tear down the bridge and
19 now you're going to enter a - - - a discussion with them
20 about sharing costs for the bridge. Do that upfront.

21 MR. WEISS: That's what the legislature has
22 determined in the statutory scheme.

23 And if I could go back to what Judge Fahey had
24 talked about, and we talked - - - if a village - - - going
25 back to 604, but answering 6-606, and - - - and that is, it

1 is the state legislature that has determined this is the
2 appropriate way, and this is the only way that you can do
3 it. But go - - -

4 JUDGE FAHEY: But the problem is, Mr. - - -

5 JUDGE GARCIA: Can they sue the board members?

6 JUDGE FAHEY: The problem is, Mr. Weiss, the
7 legislature passed 604, too. It didn't just pass 606. If
8 606 had said that this is the only way that the Village can
9 do it, then I think you'd have an argument, but they left
10 in 604, which has a history that goes back about 160 years
11 right now, the language there. And it said, if a village
12 assumes control and responsibility, they have control and
13 responsibility. And that's what happened here.

14 MR. WEISS: 606 is the assumed control and
15 responsibility and there's a specific provision. 604,
16 however, says, "If the board of trustees of a village" - -
17 -

18 JUDGE FAHEY: Has supervision and - - -

19 MR. WEISS: - - - "has supervision and control."
20 First, "supervision and control" is not defined within the
21 statute. That's number one. And number two - - -

22 JUDGE FAHEY: All right, whoa, whoa, slow down,
23 slow down.

24 MR. WEISS: I'm sorry.

25 JUDGE FAHEY: It's not defined in the statute,



1 but we all read English here, and that means that you're in
2 charge of the bridge, right?

3 MR. WEISS: No, actually, what you would look is
4 some continuing activity. Those are verbs in which - - -

5 JUDGE FAHEY: I see.

6 MR. WEISS: - - - you're dealing with activities,
7 Your Honor.

8 JUDGE FAHEY: Listen, I don't want to read
9 through the record with you and nitpick it to death, but I
10 count eleven different - - - well, ten different flaggings
11 that the - - - the Village received, telling them that they
12 had to take care of this bridge. And it wasn't until 2010
13 that they said, no, it's not our bridge. So it - - -

14 MR. WEISS: The - - - Your Honor, those flaggings
15 in - - -

16 JUDGE FAHEY: On the facts - - - I understand
17 your legal argument and I respect it. But on the facts, in
18 terms of who is responsible for the bridge, it - - - it
19 seems like you never wa - - - you never denied
20 responsibility until the bill came due. That's what it
21 looks like.

22 MR. WEISS: No, there was a two - - -

23 JUDGE RIVERA: Actually, initially, you said
24 we're - - - we're getting money to actually make these
25 repairs.



1 MR. WEISS: What it was is that - - -

2 JUDGE RIVERA: It sounds like you thought you had
3 supervision and control.

4 MR. WEISS: And again, that's ultra vires,
5 because - - - and that's a misunderstanding. And that, we
6 deal with and Russel deals with, you cannot hold against a
7 municipi - - - a subsequent administration the wrongful acts
8 of a prior administration.

9 But let me just say, also in the record, Your
10 Honor, is a re - - - a representation by David Gunner, the
11 Town's super - - - the Town's superintendent of - - -
12 highway superintendent, asking the board of the Town for
13 money in which to look at an engineer.

14 And since 2000, I believe it was, when the to - -
15 - the Village said, so if we look at the flags, we have the
16 flags on the one side, we also have the flags from the DOT
17 coming to the Town every time after that. So if we look at
18 2000 - - - pre-2010, we - - - how do you discount the ones
19 that happen after that, where the DOT says, Town, you have
20 the responsibility?

21 And I want to get to that 604, just very briefly,
22 in that it says - - -

23 CHIEF JUDGE DIFIORE: Very briefly, counsel.

24 MR. WEISS: - - - if - - - if the board of
25 trustees has supervision and control; that was 1973. The



1 operative date was in September. The bridge was not
2 finished until October of 1973. So at the time this went
3 into effect, it is not the 1973 law that applies, it's the
4 9 - - - it's 142, the 1909 - - - 1897 or the 1909, which
5 says "at this time", which is 1909.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. WEISS: Thank you very much. Thank you.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Town of Aurora v. Village of East Aurora, No. 116 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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