IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

CASE NO. CA-12-098728
(Consolidated with Case Nos. CA-12-098729 and CA-12-098739)

ON APPEAL FROM THE
CUYAHOGA COUNTY COURT OF COMMON PLEAS
CASE NO. CV-10-714945

NORTHEAST OHIO REGIONAL SEWER DISTRICT,
Plaintiff/Appellee/Cross-Appellant,

v.

BATH TOWNSHIP, OHIO, *et al.*,
Defendants/Appellants/Cross-Appellees.

ANSWER BRIEF AND CROSS-APPEAL OPENING BRIEF OF PLAINTIFF/APPELLEE/CROSS-APPELLANT NORTHEAST OHIO REGIONAL SEWER DISTRICT

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ASSIGNMENTS AND CROSS-ASSIGNMENTS OF ERROR

I. ASSIGNMENTS OF ERROR (AS STATED BY APPELLANTS).

1. The trial court erred in denying the Cities' and Property Owners' Counterclaims, to the extent that they sought permanently to enjoin the Sewer District from imposing and collecting its unlawful "Stormwater Fee."

2. The trial court erred in denying the Cities' and Property Owners' Counterclaims, to the extent that they sought permanently to enjoin the Sewer District from undertaking a comprehensive Stormwater Management Program (*i.e.*, its Title V) for which it has no authority under R.C. Chapter 6119.

3. The trial court erred in denying the Cities' and Property Owners' Counterclaims to the extent that they sought permanently to enjoin the Sewer District from undertaking an SMP not authorized by its Charter.

4. The trial court erred in denying the Cities' and Property Owners' counterclaims, to the extent that they sought permanently to enjoin the Sewer District from undertaking its SMP, because that SMP, as applied, violates numerous Ohio and Federal Constitutional provisions.

5. The trial court erred in denying the Cities' and Property Owners' motions to dismiss because the trial court lacked subject matter jurisdiction due to Plaintiff's failure to join all necessary parties in this action.

6. The trial court erred when it oversaw amendments to Title V after holding a trial and its February 2012 Opinion declaring the rights of the parties.

II. CROSS-ASSIGNMENTS OF ERROR.

1. The trial court erred in finding that there is no rational basis for disparate treatment of residential and non-residential property owners with respect to the stormwater fee (the "Stormwater Fee") set forth in Title V of the Northeast Ohio Regional Sewer District's (the "District") Code of Regulations ("Title V").

2. The trial court erred in requiring the District to provide the school systems with appropriate curriculum for grades 1-12 to further the stated purpose of the Stormwater Education Credit set forth in Title V.

3. The trial court erred in requiring the District to accredit costs of licensed engineers in completing non-residential property owners' applications for Stormwater Fee Credits set forth in Title V.

4 The trial court erred in requiring the District to revise, or to increase the amount of, the Community Cost-Share set forth in Title V.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District has the authority to manage stormwater as outlined in Title V under Chapter 6119 of the Ohio Revised Code (Assignment of Error ("AOE") No. 2).

2. Whether the District has authority to manage stormwater as outlined in Title V under its Petition and Plan for Operation (AOE No. 3).

3. Whether the Stormwater Fee is authorized by, and complies with, Chapter 6119 of the Ohio Revised Code (AOE No. 1).

4 Whether the Stormwater Fee is authorized by, and complies with, the District's Petition and Plan for Operation (AOE No. 3).

5. Whether the Stormwater Fee constitutes a "fee," and not a "tax" (AOE No. 1).

6. Whether Title V conflicts with any provisions of the District's Petition and Plan for Operation (AOE No. 3).

7. Whether the Stormwater Fee complies with equal protection under the United States and Ohio Constitutions (AOE No. 4).

8. Whether the Stormwater Fee complies with substantive due process under the United States and Ohio Constitutions (AOE No. 4).

9. Whether Title V is contrary to any constitutional right of the District's Member Communities to operate a utility or unconstitutionally conflicts with any of those Member Communities' "home rule" powers (AOE No. 4).

10. Whether the District joined all interested parties to the declaratory judgment action (AOE No. 5).

11. Whether the trial court properly oversaw amendments to Title V after holding a trial and issuing its preliminary opinion on February 15, 2012 (AOE No. 6).

12. Whether there is a rational basis for the disparate treatment of residential and non-residential property owners with respect to the Stormwater Fee (Cross-Assignment of Error ("CAOE") No. 1).

13. Whether the trial court had any legal basis for requiring the District to provide school systems with appropriate curriculum for grades 1-12 to further the stated purpose of the Stormwater Education Credit set forth in Title V (CAOE No. 2).

14. Whether the trial court had any legal basis for requiring the District to accredit costs of licensed engineers in completing non-residential property owners' applications for credits available under Title V (CAOE No. 3).

15. Whether the trial court had any legal basis for requiring the District to revise, or to increase the amount of, the Community Cost-Share set forth in Title V.

COUNTERSTATEMENT OF THE CASE AND FACTS

I. INTRODUCTION.

After more than two-and-a-half years of litigation, voluminous motions, multiple hearings, and a more than three-week trial on the merits of this case, the Honorable Thomas J. Pokorny confirmed in his various judgments, journal entries and opinions now on appeal the legality of the District's Regional Stormwater Management Program (the "Program") outlined in Title V of the District's Code of Regulations ("Title V"), which is a comprehensive plan to address the flooding, erosion, and other stormwater-related problems that have been plaguing this region for decades.

At the trial, hundreds of exhibits were introduced into evidence and over two dozen witnesses were called to testify, including six experts. The following witnesses testified on behalf of the District, which testimony is referenced throughout this Brief:

- Hector Cyre (expert), President of Water Resource Associates, Inc., who in his *decades* of experience has helped to establish at least 150 stormwater utilities;
- Erwin Odeal, former Executive Director of the District;
- Julius Ciaccia, current Executive Director of the District;
- Andrew J. Reese, P.E. (expert and fact), Vice President, AMEC Earth & Environmental, Inc., one of the country's leading experts on stormwater utilities and the District's lead consultant on the development of its Program;
- Frank Greenland, Director of Watershed Programs of the District;
- Earl Leiken, Mayor of the City of Shaker Heights;
- Jay Dorsey, Water Resources Engineer--Streams, Watersheds, and Stormwater, Ohio Department of Natural Resources, who spends approximately 95% of his time on stormwater issues;
- Larry Roesner, Ph.D., P.E. (expert), arguably the country's leading authority on urban hydrology;
- Bruce Rinker, Mayor of Mayfield Village and Member of the Cleveland Metroparks Board of Commissioners;

- David Beach (expert), Director of the GreenCityBlueLake Institute, who has been involved in nearly every major water quality and watershed planning initiative in this region for the past twenty-five years; and

- Kyle Dreyfuss-Wells, Manager of Watershed Programs of the District.

Simply put, the law as well as the evidence was overwhelmingly in the District's favor, which is why the Opening Brief of Appellants—eleven of the District's fifty-six Member Communities (the "Community Appellants")[1] and a group of intervening commercial property owners (the "Property Owner Appellants")[2] that do not want to pay anything for stormwater management—misstates facts, misinterprets, ignores, and/or distorts the plain language and meaning of statutes, and selectively cites only portions of statutes. It is also why Appellants' Opening Brief is very short on citations to the voluminous record and very long on unsupported rhetoric. Appellants' assignments of error have no merit, and should be overruled in their entirety.

Further, the trial court's holding that there is no rational basis for disparate treatment of residential and non-residential property owners with respect to the Stormwater Fee is incorrect as a matter of law and directly contrary to the evidence introduced at trial. Similarly, the trial court had no legal basis for requiring the District to modify Title V and the Stormwater Fee Credit Manual to: (a) provide school systems with appropriate curriculum for grades 1-12 to further the stated purpose of the Stormwater Education Credit; (b) accredit costs of licensed engineers in completing

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[1] The Community Appellants consist of: City of Beachwood; City of Bedford Heights; City of Brecksville; City of Cleveland Heights; Village of Glenwillow; City of Independence; City of Lyndhurst; City of North Royalton; Village of Oakwood; City of Olmsted Falls; and City of Strongsville.

[2] The Property Owner Appellants consist of: The Greater Cleveland Association of Building Owners and Managers; Cleveland Automobile Dealers Association; The Northern Ohio Chapter of NAIOP, The Association for Commercial Real Estate; CADA Properties, LLC; The Ohio Council of Retail Merchants; Snowville Service Associates LLC; Boardwalk Partners, LLC; Creekview Commons, LLC; Fargo Warehouse LLC; Greens of Lyndhurst, Ltd.; Highlands Business Park, LLC; JES Development Ltd.; Lakepoint Office Park, LLC; Landerbrook Point, LLC; Newport Square, Ltd.; Park East Office Park LLC; Shaker Plaza, Ltd.; Pavilion Properties, LLC; and WGG Development, Ltd.

non-residential property owners' applications for available Stormwater Fee Credits; and (c) revise, or increase the amount of, the Community Cost-Share. The District's assignments of error should be sustained by this Court, and these four holdings in the trial court's February 15, 2012 Opinion should be reversed.

II. ESTABLISHMENT, PURPOSE, AND PRIOR STORMWATER MANAGEMENT ACTIVITIES OF THE DISTRICT.

A. Establishment of The District and Plan For Operation.

The Northeast Ohio Regional Sewer District (the "District"), originally named the "Cleveland Regional Sewer District," was officially organized and declared a political subdivision of the State of Ohio on June 15, 1972, by judgment entry of the Cuyahoga County Common Pleas Court and pursuant to Chapter 6119 of the Ohio Revised Code. Defendant's Trial Exhibit ("Def's Tr. Ex.") 3.[3] The District's petition and initial plan for operation were attached as Exhibit A to the judgment entry (the "Petition and Plan for Operation").[4] Id. The stated purpose of the District, set forth in the Petition and Plan for Operation, has always been to provide a "*total wastewater*[5] *control system* for the collection, treatment and disposal of *wastewater* within and without the District." Id. at Petition and Plan for Operation, § 4 (emphasis added). Among other things, the

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[3] An Appendix of all record documents cited has been filed herewith for the Court's convenience.

[4] The Petition and the Plan for Operation are two separate documents that the District combined into one "Exhibit A" approved by Judge McMonagle. The Petition is sections 1-4 and 6-8 of Exhibit A. The Plan for Operation is section 5 of Exhibit A. The board of trustees that forms a new regional district must submit both documents to the Court for approval. R.C. 6119.04. The Petition defines the scope of the new district's authority and, most importantly, describes its purpose and territory. See R.C. 6119.02(A). The Plan for Operation simply describes how the new board intends to operate in carrying out its purpose. Although the jurisdictional court *initially* must approve both documents, once approval is given the board of trustees may "amend, modify, change, or alter the plan for its operation as [it] from time to time may determine necessary." R.C. 6119.04(D). In contrast, because the Petition defines a district's authority, any changes to it must be obtained by subsequent petition to the jurisdictional court. R.C. 6119.51.

[5] As discussed later in the Brief, the term "wastewater" is defined in R.C. 6119.011(K) as "*any storm water* and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water." R.C. 6119.011(K) (emphasis added).

District has always been charged with planning, financing, constructing, operating and controlling "*waste water* treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, *storm water handling facilities*, and all other water pollution control facilities of the District." Id. at § 5(c)(1) (emphasis added).

In 1975, the District's Petition was amended (with court approval) to affirm that the District has "regulatory authority over all *wastewater* collection facilities and systems in the District." Def's Tr. Ex. 8, at Petition and Plan for Operation, § 4(e) (emphasis added). Similarly, the Court approved an amendment to the Plan for Operation to make clear that the District has the authority to regulate local stormwater collection facilities and systems and has an *affirmative obligation* to develop a plan for regional stormwater management:

> (m) Local Sewerage Collection Facilities and Systems
>
> The District shall have authority pursuant to Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate local sewerage collection facilities and systems within the District, *including both storm and sanitary sewer systems*. . . .
>
> (1) Regulation
>
> The District shall have regulatory authority over all local sewerage collection facilities and systems in the District, *including both storm and sanitary sewer systems*. This authority shall be exercised by the District through rules and regulations adopted by the Board of Trustees pursuant to Chapter 6119 of the Ohio Revised Code. . . .
>
> . . .
>
> (3) Planning
>
> The District shall have authority to plan local sewerage collection facilities and systems pursuant to Chapter 6119 of the Ohio Revised Code. The District *shall develop* a detailed integrated capital improvement plan for regional management of wastewater collection and *storm drainage* designed to identify a capital improvement program for the solution of all *intercommunity* drainage problems (*both storm and sanitary*) in the District.

Id. at § 5(m)(1), (3) (emphasis added).

Mr. Odeal, the District's former Executive Director and an employee of the District from 1974 through 2007, testified that, during his several decades at the District, he understood the

District's role to be to "prepare a plan and manage all wastewater issues in the Greater Cleveland area in our Sewer District area," which "included wastewater treatment, sewage treatment, and *storm drainage issues*." Trial Transcript ("Tr."), at 269-70 (Odeal). Mr. Odeal always understood the District to be responsible for regional stormwater management. Id. at 270 (Odeal).

On May 25, 1979, the Common Pleas Court granted another petition by the District to amend its Petition in order to, among other things, change its name from the "Cleveland Regional Sewer District" to its current name, the "Northeast Ohio Regional Sewer District." Def's Tr. Ex. 12. No further amendments have ever been made to the District's Petition and Plan for Operation.

B. History of Stormwater Management by the District.

Early in the District's history, due to U.S. Environmental Protection Agency ("EPA") mandates under the Clean Water Act and community need, the District focused primarily on remedying sanitary sewage issues, including construction of significant upgrades to District wastewater treatment plants and construction of interceptors and intercommunity relief sewers to eliminate certain local wastewater treatment plants and septic systems, and to alleviate local community sewer flooding problems. Plaintiff's Motion for Partial Summary Judgment ("Pl's MPSJ"), Affidavit of Erwin Odeal ("Odeal MPSJ Aff."), ¶ 4;[6] Tr. at 271-72 (Odeal).

Additionally, as a condition for EPA funding of interceptor sewers under the Clean Water Act, the District was mandated to implement a program to require local community improvements to alleviate infiltration and inflow problems and to alleviate local sanitary sewer overflows. Odeal MPSJ Aff., at ¶ 5. Thus, the District focused primarily on these issues. Id.; Tr. at 271-72 (Odeal).

Despite its primary focus on sanitary sewage, the District participated in the funding and construction of at least twenty-five stormwater-related projects beginning in the 1970s. Odeal

[6] The Affidavit of Erwin Odeal is attached to Plaintiff's MPSJ as Exhibit 2.

MPSJ Aff., at ¶ 6; Tr. at 272 (Odeal), 1016-17 (Greenland). Moreover, pursuant to its Petition and Plan for Operation, the District has invested more than $12.9 million over the last thirty years in a series of stormwater-related studies and construction efforts. Odeal MPSJ Aff., at ¶ 8; Tr. at 272-93 (Odeal), 865-74 (Greenland); Plaintiff's Trial Exhibits ("Pl's Tr. Ex.") 6-9, 18.[7] The detailed studies revealed that the number of stormwater problem areas in the region had *more than doubled* since 1978, and that intercommunity stormwater problems were pervasive and throughout the District's service area. Tr. at 285-86, 291 (Odeal); Pl's Tr. Ex. 9, at 1, 9-10. As explained by Mr. Odeal, "there is a major regional problem that nobody is addressing" and "people look at storm drainage as only the poor guy that gets the flow downstream." Tr. at 294 (Odeal).

Beginning in December 2007, and to prepare for its implementation of a regional stormwater management program, the District had extensive discussions with its Member Communities and a wide variety of local, state and county officials, watershed groups and other

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[7] These stormwater-related studies include:

(a) the *Regional Plan for Sewerage and Drainage Study* (1976-1978) to identify intercommunity stormwater flooding areas and community concerns across the District;

(b) the *Regional Plan for Sewerage and Drainage–Phase I Study* (1997-1999) to identify stormwater problem areas and to begin the detailed development of a regional stormwater management program;

(c) the *Regional Intercommunity Drainage Evaluation Study* (2000-2004) to provide a more detailed assessment of the region's stormwater problems, including planning-level stream-system computer modeling of the major watersheds within the District;

(d) the *Stormwater Roadmap Development Study* (2006-2007) to assess existing District resource capabilities and to develop a preliminary stormwater management program outline with potential costs, ramp-up activities, and resource needs, including the collection of satellite-based impervious area data needed to evaluate revenue issues and billing requirements; and

(e) the *Stormwater Management Program Implementation Project* (December 2007-2009) to retain AMEC Earth & Environment, Inc. ("AMEC"), an engineering consultant internationally recognized for its expertise in developing successful stormwater management programs, to assist in the final development of the District's Program.

See Tr. at 272-93 (Odeal), 865-73 (Greenland); Pl's Tr. Ex. 6-9, 18.

interested parties regarding stormwater problems, construction improvement needs, and operation and maintenance issues related to regional stormwater management. Pl's MPSJ, Affidavit of Frank Greenland ("Greenland MPSJ Aff."), ¶ 10;[8] Tr. at 867-73 (Greenland); Pl's Tr. Ex. 19-27. This consisted of "hundreds of meetings." Tr. at 867 (Greenland).

III. THE DISTRICT'S REGIONAL STORMWATER MANAGEMENT PROGRAM.

A. The Activities That Will Be Undertaken Pursuant to the Program.

On January 7, 2010, after having studied the impact of stormwater in this region for many years, the District's Board of Trustees unanimously approved Title V of the District's Code of Regulations ("Title V") to authorize the establishment of a regional stormwater management program (the "Program"), which will take steps to manage the impact of stormwater on the Regional Stormwater System (defined in Title V, § 5.0221)[9] and will protect the long-term viability of Northeast Ohio's water resources, including Lake Erie. See generally Pl's Tr. Ex. 2.

The District, working collaboratively with its Member Communities, will undertake two primary activities under the Program, both of which it is planning to commence on January 1, 2013. These include (1) construction activities and (2) inspection, operation, maintenance, and monitoring activities, in addition to the various support activities that they entail. Pl's Tr. Ex. 2, §§ 5.0302, 5.0506, 5.0507.

Based upon its detailed studies and input from its fifty-six Member Communities, the District has identified a backlog of regional stormwater projects totaling approximately $228 million that need to be completed, and believes that other projects exist that have yet to be identified and that new projects will continue to arise in the future. Tr. at 948-54 (Greenland); Pl's

[8] The Affidavit of Frank Greenland is attached to Plaintiff's MPSJ as Exhibit 1.

[9] The definition of Regional Stormwater System, and exactly what it encompasses, is discussed below on pages 42-44 of this Brief.

Tr. Ex. 43, 44, 46 (pg. 15), 59. The District has also identified and evaluated what it believes to be the most urgent regional stormwater problems throughout its service area, and has compiled a list of construction projects (included within the backlog), referred to as the "First Out Projects," that will help alleviate those problems. Tr. at 894-904 (Greenland); Pl's Tr. Ex. 29, 44. The First Out Projects include, among other things, the construction, replacement, repair, restoration, rehabilitation and/or stabilization of floodwalls, flood berms, culverts, detention basins and facilities, concrete encasements, channels, stream banks, lakes, dams, storm sewers, and erosion control measures, as well as raising roadways to address chronic flooding. Id.

With respect to inspection, operation, maintenance, and monitoring activities, the District will, among other things, inspect the regional streams within its service area for existing and developing problems, clear debris from and unblock these watercourses, and monitor and repair streambank erosion. Tr. at 904-11 (Greenland); Pl's Tr. Ex. 2 (§ 5.0507), 30-32. Inspecting the streams on a regular basis will enable the District "to be more proactive instead of reactive" with respect to regional stormwater problems. Tr. at 904-05 (Greenland).

The District will also develop Stormwater Master Plans with the input from Watershed Advisory Committees comprised of representatives from its Member Communities to identify future stormwater projects and activities under the Program. Tr. at 888-94 (Greenland); Pl's Ex. 2, at §§ 5.0504, 5.0505.

B. The Stormwater Fee and Its Related Exemptions and Credits.

1. The Stormwater Fee and Exemptions.

To fund its Program and the activities described above, the District will charge each property owner within its service area a Stormwater Fee based upon the amount of impervious surface on his or her property. Pl's Tr. Ex. 2, § 5.0704. Generally, impervious surface includes

rooftops, traveled gravel areas, asphalt or concrete paved areas, private access roads, driveways, parking lots, and patio areas. Id. at § 5.0210.

Prior to deciding to use impervious surface as the basis for assessing the Stormwater Fee, the District, under the close guidance of its engineering consultant AMEC Earth & Environment, Inc. ("AMEC"), conducted a rigorous analysis and evaluation of a range of stormwater funding mechanisms. Tr. at 650 (Reese), 912-16, 971-72 (Greenland); Pl's Tr. Ex. 36, at 2-3. District employees also reviewed and/or visited other stormwater utilities throughout the country to assess the bases upon which they charge fees, measure the effectiveness of their programs, and solicit their guidance and advice. Tr. at 913-14 (Greenland); Pl's Tr. Ex. 36, at 3. Like the vast majority of stormwater utilities in Ohio and throughout the country, and based upon the advice of AMEC, the District ultimately determined that the use of impervious surface is the best and most equitable parameter for apportioning the costs of the Program. Tr. at 651-53 (Reese), 914-17 (Greenland), 1580-81 (Dreyfuss-Wells); Pl's Tr. Ex. 36, at 3.

Natural land surfaces have an ability to absorb stormwater. When property owners pave over those surfaces, they have "essentially cut off the ability to percolate [stormwater] into the soil [and] into the groundwater system," and have instead caused the stormwater to run off of the properties faster and in greater quantities, which then gets routed directly to the streams. Tr. at 912 (Greenland). The Stormwater Fee is thus based upon the *incremental increase in the demand on the Regional Stormwater System caused by development on parcels of land* because when "you increase the amount of impervious [surface], you increase the runoff by the same amount, no matter what the soil type is." Id. at 1333 (Roesner).

In determining the unit of measurement for the Stormwater Fee, the District, with the assistance of AMEC, conducted a statistical analysis of 870 residential properties within its service area to obtain the average amount of impervious surface thereon. Pl's Tr. Ex. 36, at 3-7. Based

upon that analysis, the District concluded that three thousand (3,000) square feet of impervious surface should be designated as one Equivalent Residential Unit ("ERU"). Id. at 4.

The District also determined that measuring the exact impervious surface on each of the hundreds of thousands of residential properties within its service area would be unduly burdensome and an inefficient use of time, resources, and funds. Id. at 5. Based upon its statistical analysis, the District found the following three-tier system for charging the Stormwater Fee to residential properties to be equitable, cost-effective, and accurate:

- Small Residential Parcels: Residential parcels with less than two thousand (2,000) square feet of impervious surface will be classified as equal to 0.6 of an ERU, and will be charged $3.03 per month in 2013 (annual total of $36.36);
- Medium Residential Parcels: Residential parcels with two thousand (2,000) to three thousand nine hundred and ninety-nine (3,999) square feet of impervious surface will be classified as equal to 1.0 ERU, and will be charged $5.05 per month in 2013 (annual total of $60.60); and
- Large Residential Parcels: Residential parcels with four thousand (4,000) or more square feet of impervious surface will be classified as equal to 1.8 ERUs, and will be charged $9.09 per month in 2013 (annual total of $109.08).[10]

Id. at 7; Pl's Tr. Ex. 2, § 5.0707; Tr. at 928-31 (Greenland).

Unlike residential properties, non-residential properties in the District's service area vary widely in their amounts of impervious area. Pl's Tr. Ex. 36, at 7. Thus, the District determined, and AMEC recommended, that it is both more equitable and efficient to individually determine the

[10] The District also created a Stormwater Homestead Fee that will be charged to certain elderly, low-income, and/or disabled property owners in place of the regular Stormwater Fee. These property owners will be charged $2.03 per month in 2013 (annual total of $24.36). Pl's Tr. Ex. 2, §§ 5.0708, 5.0712, Tr. at 931-32 (Greenland).

charges for these properties by measuring their impervious surface, and then computing their Stormwater Fee by multiplying (1) the total number of ERUs for a given parcel, *i.e.*, total square feet of impervious surface divided by 3,000, by (2) the fee established per ERU, which is $5.05 per month in 2013. Id. at 7-8; P's Tr. Ex. 2, § 5.0707; Tr. at 921-22 (Greenland).[11]

The Stormwater Fee collected from all property owners will be segregated and placed in a separate Stormwater Account and used only for stormwater-related projects. Pl's Tr. Ex. 2, § 5.0701; Tr. at 946-48 (Greenland). It will never exceed the total cost or expense of the Program and will never be diverted for general District expenses. Tr. at 946-48, 955-56 (Greenland).

Also, under the Community Cost-Share Program set forth in Chapter 9 of the prior version of Title V introduced at trial,[12] the District would place a minimum of 7.5% of all funds collected through the Stormwater Fee from property owners in a Member Community in a separate account to be allocated to that Member Community for its use towards local stormwater-related projects. Pl's Tr. Ex. 2, Chapter 9; Tr. at 942-46 (Greenland). The District decided upon the 7.5% by conducting an exercise with a stormwater advisory group and by considering other factors such as the amount of revenue needed to address regional stormwater problems. Tr. at 944-45 (Greenland).

Finally, the District, with the advice of AMEC, reasonably determined that the following should be exempt from the Stormwater Fee: (a) public road rights-of-way, airport runways, and airport taxiways; (b) railroad rights-of-way; (c) aggregated parcels with less than four hundred (400) square feet of impervious surface; and (d) parcels whose use has been designated as a Non-

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[11] As set forth in the Cross-Appeal, Title V has been revised by the District in accordance with the trial court's February 15, 2012 Order. See June 7, 2012 Report to the Court (outlining revisions). One of these revisions included incorporating what is known as a "declining block" fee structure for non-residential parcels, which, as explained in more detail below, means that the amount of the Stormwater Fee decreases somewhat as the amount of impervious surface reaches certain levels.

[12] Title V has also been modified by the District in accordance with the trial court's February 15, 2012 Order to increase the amount of the Community Cost Share to 25%. Id.

Self Supporting Municipal Function (defined in Title V, § 5.0214) owned by Member Communities. Pl's Tr. Ex. 2 (§ 5.0705), 36 (Billing Data Policy #s 1, 2, 9, 15); Tr. at 250-52 (Cyre), 415-16 (Ciaccia), 932-38, 1065-66, 1200 (Greenland).

2. The Stormwater Fee Credits.

As set forth in Chapter 8 of Title V and the District's Stormwater Fee Credit Manual, all property owners may obtain credits to reduce the amount of their Stormwater Fee by taking measures to decrease the peak rate or volume of stormwater flowing from their properties to the Regional Stormwater System or improving the water quality of their stormwater runoff (the "Stormwater Fee Credits"). Pl's Tr. Ex. 2 (Chapter 8), 3. These credits include: (a) an Individual Residential Property Credit of 25% for approved stormwater control measures implemented on residential properties (*e.g.*, rain gardens, rain barrels, a reduction in impervious surface, the installation of pervious pavement or vegetated filter strips, etc.); (b) a Stormwater Quantity Credit (further separated into a Peak Flow Credit and Runoff Volume Credit) of up to 75% for approved stormwater control measures implemented on residential and non-residential properties to control stormwater peak flows and volumes (*e.g.*, dry detention basins, retention ponds, green roofs, bioretention areas, and the installation of pervious pavement); (c) a Stormwater Quality Credit of up to 25% for approved stormwater control measures implemented on residential and non-residential properties to improve water quality (*e.g.*, bioretention areas, detention basins, constructed wetlands, infiltration trenches, vegetative swales, and the installation of pervious pavement); and (d) an Education Credit of 25% for public and private primary, elementary, and secondary schools providing students an education program concentrating on preservation of water resources and minimization of demand on the Regional Stormwater System. Id.

Every property owner within the District may achieve credits of *up to a maximum of 100%*, meaning that no Stormwater Fee would be owed. Pl's Tr. Ex. 3, at 3; Tr. at 1542, 1572-73

(Dreyfuss-Wells). Giving credits for actions that reduce the burden on the Regional Stormwater System is analogous to the discount that property owners who consume less water receive on their water bills. Tr. at 650 (Reese). These same types of credits are offered by other stormwater utilities. Id. at 1538 (Dreyfuss-Wells).

IV. RELEVANT PROCEDURAL HISTORY OF THE LITIGATION.

On January 7, 2010, the same day that the District's Board of Trustees unanimously approved Title V to authorize the establishment of the Program, the District filed an action in the trial court seeking: (1) a judgment declaring that the District has the authority to fully implement the Program with respect to all Member Communities served by the District (the "Declaratory Judgment Action"); or, in the alternative, (2) an order permitting an amendment to the District's Petition and Plan for Operation providing the District with such authority. See generally Complaint. All of the District's Member Communities were named as defendants, including the Community Appellants.[13] Id. Several parties were also subsequently permitted to intervene, including the Property Owner Appellants, who filed a Counterclaim against the District on July 6, 2010, seeking, among other things, to permanently enjoin the District from implementing its Program. See generally Property Owner Appellants' Answer and Counterclaim.

On June 25, 2010, the Community Appellants moved to dismiss the Declaratory Judgment Action, arguing, among other things, that the District could not obtain a declaratory judgment unless all of the hundreds of thousands of property owners within the District's service area were joined as defendants. June 25, 2010 Motion to Dismiss. The trial court issued a Judgment Entry denying the Motion to Dismiss on November 8, 2010, and holding, among other things, that there is no necessity to name all property owners within the District's service area as defendants, as

[13] Out of these fifty-six Member Communities, only the *eleven* Community Appellants are currently opposing the District's Program.

these property owners are properly represented by the elected public officials of their respective Member Communities. November 8, 2010 Judgment Entry ("Nov. 2010 JE"), at 2.

On August 5, 2010, after denial of their Motion to Dismiss, the Community Appellants (minus Bedford Heights) filed a Counterclaim against the District seeking permanent and preliminary injunctions enjoining the District from implementing its Program, including enjoining the District from imposing the Stormwater Fee and from expending any further funds to develop, implement, or promote its Program. See Community Appellants' Answer and Counterclaim.

On January 31, 2011, the District moved for partial summary judgment seeking a determination that it has the authority pursuant to Chapter 6119 of the Ohio Revised Code, its Petition and Plan for Operation, and prior orders of the Cuyahoga County Common Pleas Court to manage stormwater as outlined in Chapters 1 through 6, 9, and 10 of Title V. Pl's MPSJ. Appellants opposed the District's motion, and also filed cross-motions for summary judgment on that issue. The parties did not move for summary judgment on the issue of the District's authority to fund a regional stormwater management program through the Stormwater Fee.

On April 21, 2011, the trial court issued a Journal Entry and Opinion finding in favor of the District (Apr. 2011 JE & O), holding, among other things, that:

(a) Chapter 6119 authorizes the District to address intercommunity flooding, erosion and stormwater-related water quality issues, and the District may legally implement a regional stormwater management program (See Apr. 2011 JE & O, at 4);

(b) further consent of the District's Member Communities is not required for the District to implement such a program (Id. at 5); and

(c) Title V does not unlawfully interfere with the Member Communities' home rule powers or rights to operate a public utility (Id.).[14]

[14] The trial court did hold that sections 5.0602, 5.1005, and 5.1006 of Title V were beyond the District's authority and invalid. Id. at 6. The District has since removed these provisions from Title V, and they are not at issue in this appeal. See Pl's Tr. Ex. 2.

Issues relating to the imposition of the Stormwater Fee and the availability of Stormwater Fee Credits were left to be decided at trial.

The trial court held a three-week-long trial in late 2011. Hundreds of exhibits were introduced into evidence and over two dozen witnesses were called to testify, including four experts on behalf of the District and two experts on behalf of the Community Appellants.

On February 15, 2012, based upon all of the evidence presented at trial, the Court issued an Opinion ("Feb. 2012 Opinion") holding, among other things, that:

(a) Chapter 6119 authorizes the District to address intercommunity flooding, erosion, and stormwater-related water quality issues, and authorizes the District to implement a program to address regional stormwater problems (See Feb. 2012 Opinion, at 1-2);

(b) the Stormwater Fee is authorized by R.C. 6119.06(W) and 6119.09 (Id. at 7);

(c) the Stormwater Fee is authorized and not restricted by the District's Petition and Plan for Operation, referred to the by trial court as the District's "charter" (Id. at 8-9);

(d) the Stormwater Fee is not an unlawful tax (Id. at 11);

(e) the Program does not unlawfully interfere with the Community Appellants' home rule powers, and the definition of the Regional Stormwater System in Title V, which includes only watercourses receiving drainage of three hundred (300) acres or more, is lawful and constitutional (Id. at 11-13);

(f) the Stormwater Fee, and the use of impervious surface as the measure for calculating it, is lawful and constitutional except for the non-residential fee schedule without a cap, which the District must rework; (Id. at 16);

(g) the Stormwater Fee Credits are constitutional, but the District must submit a plan or formula providing for the accrediting of costs of licensed engineers in completing non-residential property owners' applications for the same (not to exceed 10% of the Stormwater Fee) (Id. at 17);

(h) the Community Cost-Share (set forth in Chapter 9 of Title V) allocating 7.5% of all Stormwater Fees collected from property owners in a Member Community back to that Member Community for it to use towards local stormwater-related projects should be no less than 25%, or what constitutes a "regional" versus a "local" project must be redefined by the parties (Id. at 18); and

(i) The exemptions to the Stormwater Fee (set forth in section 5.0705 of Title V) are lawful and constitutional (Id. at 19).

The trial court also denied Appellants' Counterclaims, including their request for injunctive relief.

On March 16, 2012, prior to the trial court's scheduled hearing on the proposed revisions to Title V that the District was ordered to submit in the February 15, 2012 Opinion regarding the non-residential fee schedule, the crediting of costs of licensed engineers in completing applications for Stormwater Fee Credits, and the Community Cost-Share, Appellants filed Notices of Appeal of that Opinion, the November 10, 2010 Judgment Entry denying their motion to dismiss, and the April 21, 2011 Journal Entry and Opinion on the motions for summary judgment. The appeals were dismissed by this Court for lack of a final appealable order on March 28, 2012.

On May 30, 2012, the trial court held a post-trial hearing on the District's proposed revisions to Title V. See June 7, 2012 Report to the Court (outlining revisions). The trial court entered a Supplemental Journal Entry on June 28, 2012, adopting such revisions and affirming its prior findings set forth in the February 15, 2012 Opinion in favor of the District and against Appellants. June 28, 2012 Supplemental Journal Entry. All of the above-referenced trial court opinions and entries are collectively referred to herein as the "Orders."

Appellants timely filed Notices of Appeal from the Orders, and the District timely filed a very limited cross-appeal regarding whether the District should have been required to submit the proposed revisions to Title V ordered in the trial court's February 15, 2012 Opinion. The Community Appellants also filed a Motion for Stay of Execution of Judgment Pending Appeal in the trial court, which was denied, and then a Motion for Temporary Injunction and Stay Pending Appeal in this Court, which was likewise denied.

LEGAL ARGUMENT RELATING TO APPEAL

I. STANDARD OF REVIEW.

The appellate standard of review with respect to rulings on motions to dismiss for lack of subject matter jurisdiction and motions for summary judgment under Rules 12(B)(1) and 56 of the Ohio Rules of Civil Procedure is *de novo*. Mahoning-Youngstown Community Action Partnership v. Ohio State Dept. of Edn., 10th Dist. Nos. 11AP-582 & 11AP-583, 2011-Ohio-6394, ¶ 6; Perez v. Univ. Hosp. Health Sys., 8th Dist. No. 98427, 2012-Ohio-5896, ¶ 9.

When reviewing civil appeals from bench trials, the appellate court must apply a "manifest-weight standard of review" with respect to rulings on factual issues. Domaradzki v. Sliwinski, 8th Dist. No. 94975, 2011-Ohio-2259, ¶ 6. Appellate courts are "guided by the presumption that the trial court's findings were correct, and . . . will not reverse its decision as against the manifest weight of the evidence if it is supported by some competent, credible evidence going to all the essential elements of the case." Id. However, appellate courts should apply a *de novo* standard of review in regard to the trial court's determination of "legal issues" in the case. Arnott v. Arnott, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 13.

II. THIS COURT SHOULD AFFIRM THE DENIAL OF APPELLANTS' COUNTERCLAIMS BECAUSE THE DISTRICT HAS AUTHORITY TO MANAGE STORMWATER UNDER CHAPTER 6119 OF THE OHIO REVISED CODE AND ITS PETITION AND PLAN FOR OPERATION (AOE Nos. 2, 3).

A. The District Has Authority to Manage Stormwater As Outlined in Title V Under Chapter 6119 of the Ohio Revised Code (AOE No. 2).

In arguing in their Opening Brief that the District lacks statutory authority to manage stormwater, Appellants invite this Court to disregard the unambiguous words of Chapter 6119, look beyond the face of the statute, and adopt a statutory interpretation that would produce unreasonable and absurd results. It is a well-established rule of statutory construction that, if words in a statute are unambiguous, a court must look no further than the face of the statute and

simply apply its terms. State ex rel. Jones v. Conrad, 92 Ohio St.3d 389, 392, 750 N.E.2d 583 (2001). Also, when interpreting statutes, courts must avoid constructions that create absurdities. Medcorp, Inc. v. Ohio Dept. of Job & Family Servs., 121 Ohio St.3d 622, 2009-Ohio-2058, 906 N.E.2d 1125, ¶ 13. The Court should reject Appellants' invitation, and affirm the trial court's finding that the District has the statutory authority to manage stormwater.

A regional water and sewer district created under Chapter 6119 can have either or both of the following purposes: (A) to supply water to users within and without the district; or (B) to provide for the collection, treatment, and disposal of *waste water* within and without the district. R.C. 6119.01 (emphasis added). The term "waste water" is defined as "*any storm water* and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water." R.C. 6119.011(K) (emphasis added). Thus, Ohio law expressly authorizes the District to provide for the collection, treatment, and disposal of stormwater.

In addition to R.C. 6119.011(K), there are several other provisions of Chapter 6119 addressing the rights, powers, and duties of a regional district with respect to undertaking and financing stormwater-related projects, as well as promulgating and enforcing rules and regulations and charging and collecting fees in relation to those projects. These provisions further make clear that the District has statutory authority to manage stormwater as outlined in Title V.

For example, R.C. 6119.06 provides that the District shall exercise all the rights, powers, and duties vested in it by Chapter 6119, including the right to "acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent to or from, or contract for operation by or for, a political subdivision or person, *water resource projects* within or without the district." R.C. 6119.06(G) (emphasis added). And, R.C. 6119.08 confers statutory authority on the District to make and enforce rules and regulations to, among other things, prescribe the manner of use of any of its *projects* by a political subdivision.

As used in Chapter 6119, the term "project" or "water resource project" means:

> . . .any *waste water facility* or water management facility acquired, constructed, or operated by or leased to a regional water and sewer district or to be acquired, constructed, or operated by or leased to a regional water and sewer district under this chapter, . . ., including all buildings and facilities that the district considers necessary for the operation of the project, together with all property, rights, easements, and interest that may be required for the operation of the project.

R.C. 6119.011(G) (emphasis added).

The term "waste water facilities" is defined as:

> . . . facilities for the purpose of treating, neutralizing, disposing of, stabilizing, cooling, segregating, or holding waste water, including, without limiting the generality of the foregoing, facilities for the treatment and disposal of sewage or industrial waste and the residue thereof, facilities for the temporary or permanent impoundment of waste water, both surface and underground, and *storm and sanitary sewers and other systems, whether on the surface or underground, designed to transport waste water*, together with the equipment and furnishings thereof and their appurtenances and systems, whether on the surface or underground, including force mains and pumping facilities thereof when necessary.

R.C. 6119.011(L) (emphasis added). Thus, pursuant to R.C. 6119.011(G) and (L), a stormwater system facility is a "project" or "water resource project" under Chapter 6119, and, as a matter of law, the District has the authority and power to manage stormwater as set forth in Title V.

Appellants contend "that 'waste water' is something that is 'collected' *and* 'treated' *and* 'disposed of,' conjunctively." Opening Brief, at 27. Essentially, Appellants urge this Court to find that the District is acting outside the scope of its authority any time the three actions (*i.e.*, collection, treatment, and disposal) are not all performed *at the same time.*

To interpret R.C. 6119.01 to mean that the District is acting outside the scope of its authority any time all three authorized actions are not performed together would produce unreasonable and absurd results. Under Appellants' interpretation, any time the District collects and treats waste water, but does not dispose of it, the District is acting outside the scope of its authority. Likewise, under this interpretation, any time the District collects and disposes of waste

water, but does not treat it, the District is acting outside the scope of its authority. This interpretation defies plausibility.

A grant of authority of a list of powers joined by the word "and" means that the grantee is authorized to exercise one or more of those powers in the manner and at the times the grantee deems appropriate. For example, under R.C. 6119.011(P), "revenues" means:

> . . . all rentals and other charges received by a district for the use or services of any project, all special assessments levied by the district pursuant to this chapter, any gift or grant received with respect thereto, *and* moneys received in repayment of and for interest on any loan made by the district to a political subdivision, whether from the United States or a department, administration, or agency thereof, or otherwise.

R.C. 6119.011(P). Thus, under Appellants' proposed statutory interpretation, funds received from rentals cannot be considered "revenues" if the District did not also receive special assessments, gifts or grants, *and* moneys in repayment of and for interest on a loan made by the District to a political subdivision. Certainly, when the District receives moneys from charges for the use or services of a project, they are considered "revenues," regardless of whether it also received moneys from other enumerated sources. To hold otherwise would create absurd results.[15]

Similarly, Appellants' statutory interpretation of "waste water" under R.C. 6119.011(K) would produce unreasonable and absurd results. As stated above, the term "waste water" is defined as "any storm water *and* any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water." R.C. 6119.011(K) (emphasis added). Because the words of the statute are unambiguous, the Court need not look any further

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[15] Moreover, Appellants have cited no evidence that the District will not be collecting, treating and disposing of stormwater. As described by Mr. Cyre as the "first flush phenomenon," when pollutants collect on the surface between rain storms they are washed away into the drainage system by the first flush of stormwater. Tr. at 144-46 (Cyre). The District's Program will include construction and maintenance of retention structures that slow the flow of stormwater and allow suspended materials and associated pollutants to settle out of the stormwater before it reaches local rivers and streams or Lake Erie. See, e.g., Tr. 901-03 (Greenland). Through the Program, the District *will be* collecting, treating and disposing of stormwater.

than the face of the statute and simply apply its terms—waste water includes storm water and also includes sanitary water. Yet the Appellants purport to believe the "and" in this definition again limits the District to managing only storm and sanitary water that is mixed together. They maintain that "'stormwater' becomes 'waste water' . . . only when mixed with sewage or other pollutants or contaminants." See Opening Brief, at 28.[16]

If Appellants were correct that the District can only manage stormwater that is mixed with sanitary water, then the reverse necessarily would also be true—the District can manage sanitary flows only when mixed with stormwater. Id. Under this interpretation, the District's ability to collect, treat, and dispose of sanitary flows would be severely limited and impaired. For instance, every time Northeast Ohio experiences dry weather, the District would be required to *stop operations and shut down completely*, because the District cannot collect, treat, and dispose of sanitary water unless it also contains stormwater. Appellants' reading of R.C. 6119.011(K) produces an absurd result and clearly was not what the General Assembly intended when giving regional water and sewer districts authority to manage waste water.

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[16] In support of their strained interpretation of "waste water," Appellants cite only to dicta from one case, Reith v. McGill Smith Punshon, Inc., 163 Ohio App.3d 709, 2005-Ohio-4852, 840 N.E.2d 226 (1st Dist). Reith is irrelevant here, as it was a case involving claims of negligence and trespass in connection with flooding of a landowner's driveway and home, and the statute of limitations relating to same. Id. at ¶¶ 34, 48. Contrary to Appellants' claim, the court in Reith did not "conclude" anything with respect to the definition of waste water in R.C. 6119.011(K) as it had no application to the issues presented.

Appellants' reliance upon the definitional sections of Titles I, III, and IV of the District's Code of Regulations is similarly misguided. Opening Brief, at 28-29. Titles I, III, and IV each contain a section defining the terms as they are to be used *within that title.* It is no surprise then, that Title IV, the Combined Sewer Code, which exists to manage sewers which receive and transport both *sanitary sewage and storm water runoff*, defines "wastewater" as "a combination of water-carried waste . . . together with such ground, surface, or storm water as may be present." Id. at 28. It would be surprising if Title IV contained *any other* definition of wastewater. The question before the Court is what "waste water" means in R.C. 6119.011(K) for purposes of defining the District's overall authority, not what wastewater means in a title of the District's Code of Regulations that is intended to implement only one aspect of the District's overall authority.

Finally, Appellants' argument that a regional water and sewer district formed under Chapter 6119 cannot manage stormwater would come as a great shock to the Deerfield Regional Storm Water District, ABC Water and Storm Water District, and Jefferson Township Storm Sewer District, which were formed under Chapter 6119 *exclusively* to manage stormwater. See April 1, 2011 Amicus Brief of Coalition of Ohio Regional Districts.[17]

B. The District Has Authority to Manage Stormwater As Outlined In Title V Under Its Petition and Plan for Operation (AOE No. 3).

In their Opening Brief, Appellants, mostly through rhetoric, provide their own interpretation of what the late Judge George McMonagle intended in approving the District's Petition and Plan for Operation forty years ago, and conclude that it "contains no stormwater-utility authority." Opening Brief, at 29-31. This interpretation is belied by the plain language of the District's Petition and Plan for Operation and the historical evidence presented by the District, which is why it was rejected by the trial court.

The Cuyahoga County Common Pleas Court's intent to charge the District with the authority to address regional stormwater drainage issues more than forty years ago is evident and obvious. For example, the purpose of the District, as stated in its Petition, is "the establishment of a total wastewater control system for the collection, treatment and disposal of *wastewater* within

[17] Without citing any legal support, Appellants further argue that, because other governmental bodies such as conservancy districts and watershed districts also have powers with regard to stormwater, the District is prohibited from exercising similar powers. Opening Brief, at 27-28. This is incorrect as a matter of law, as political subdivisions may be granted overlapping powers. See Mecca for Fair Govt. v. Mecca Twp. Bd. of Trustees, 123 Ohio App.3d 610, 615, 704 N.E.2d 1270 (11th Dist. 1997) (holding that R.C. 505.26 and 511.18 do not conflict as much as they overlap, as R.C. 505.26 is unambiguous in giving township trustees authority to build a township park, and the board of park commissioners would likewise have the ability to establish a park or parks within the township if a petition to create a park district was filed under R.C. 511.18).

and without the District," which includes stormwater under R.C. 6119.011(K).[18] Def's Tr. Ex. 8, at Petition and Plan for Operation, § 4 (emphasis added). In furtherance of that purpose, the District was given "regulatory authority over all *wastewater* collection facilities and systems within the District." Id. at ¶ 4(e) (emphasis added).

Further, in the Plan for Operation, the District is charged with planning, financing, constructing, operating and controlling "*waste water* treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, *storm water handling facilities*, and all other water pollution control facilities of the District." Id. at ¶ 5(c)(1) (emphasis added). The District was expressly given an affirmative obligation to develop a plan for regional stormwater management as follows:

> The District *shall* develop a detailed integrated capital improvement plan for regional management of wastewater collection and storm drainage designed to identify a capital improvement program for the solution of all intercommunity drainage problems (*both storm and sanitary*) in the District.

Id. at ¶ 5(m)(3) (emphasis added).

The historical evidence also demonstrates that the District and its Member Communities understood from the District's inception that it was to create a regional stormwater management program like its current Program. Pursuant to its Petition and Plan for Operation, and as discussed above, the District has invested more than $12.9 million over the last thirty years in a series of stormwater-related studies and construction efforts without challenge. See Odeal MPSJ Aff., at ¶ 8; Tr. at 272-93 (Odeal), 865-74 (Greenland); Pl's Tr. Ex. 6-9, 18. Prior to the creation of its Program, the District also participated in the funding and construction of at least twenty-five stormwater-related projects beginning in the 1970s. Odeal MPSJ Aff., at ¶ 6. Mr. Odeal, the

[18] As discussed above, "wastewater" is defined in R.C. 6119.011(K) as "*any storm water* and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water." R.C. 6119.011(K) (emphasis added). This same definition existed at the time that the District's Petition and Plan for Operation were adopted.

District's former Executive Director and an employee of the District from 1974 through 2007, testified that, during his several decades at the District, he always understood the District to be responsible for the regional management of stormwater. Tr. at 269-70 (Odeal).

Based upon this and other evidence supporting the District's authority under its Petition and Plan for Operation to implement its Program, the trial court correctly found as follows:

> In this Court's previous order in 1975, the District was obligated to develop a detailed, integrated capital improvement plan for regional management of wastewater collection and storm drainage designed to identify a capital improvement program for the solution of all inter-community drainage problems (both storm and sanitary) in the District. While this order may not be a grant of authority to the District, it is a mandate from the Court to begin the development of a plan to study stormwater issues. *To a great extent the integrated capital improvement plan is the proposed Title V.*

See Apr. 2011 JE & O, at 4. This finding should be upheld by the Court.

III. THIS COURT SHOULD AFFIRM THE DENIAL OF APPELLANTS' COUNTERCLAIMS BECAUSE THE STORMWATER FEE IS AUTHORIZED BY, AND COMPLIES WITH, CHAPTER 6119 OF THE OHIO REVISED CODE AND THE DISTRICT'S PETITION AND PLAN FOR OPERATION, AND IS NOT AN UNLAWFUL TAX (AOE Nos. 1, 3).

A. The Stormwater Fee Is Authorized By, and Complies With, Chapter 6119 of the Ohio Revised Code (AOE No. 1).

In their Opening Brief, Appellants argue that the District's Stormwater Fee is not authorized by Chapter 6119 of the Ohio Revised Code. As correctly determined by the trial court, the Stormwater Fee is expressly authorized by the unambiguous words of the statutes, which Appellants work hard to misinterpret and misconstrue. Feb. 2012 Opinion, at 7.

> R.C. 6119.06(W) states, in pertinent part:
>
> Upon the declaration of the court of common pleas organizing the regional water and sewer district . . . , such district may:
>
> . . .
>
> (W) *Charge, alter,* and *collect* rentals and other charges for the use of services of any water resource project *as provided in section 6119.09 of the Revised Code* . . .

R.C. 6119.06(W) (emphasis added).

Pursuant to section 6119.09 of the Ohio Revised Code:

> A regional water and sewer district may *charge*, *alter*, and *collect* rentals or *other charges*, including penalties for late payment, for the *use or services of any water resource project or any benefit conferred thereby* and contract in the manner provided by this section with one or more persons, one or more political subdivisions, or any combination thereof, desiring the use or services thereof, and fix the terms, conditions, rentals, or other charges, including penalties for late payment, for such use or services. Such rentals or other charges shall not be subject to supervision or regulation by any authority, commission, board, bureau, or agency of the state or any political subdivision. . . .

R.C. 6119.09 (emphasis added).

The term "water resource project" is defined as:

> [A]ny *waste water facility* or *water management facility* acquired, constructed, or operated by or leased to a regional water and sewer district *or to be acquired, constructed, or operated by or leased to a regional water and sewer district* under this chapter, . . . including all buildings and facilities that the district considers necessary for the operation of the project, together with all property, rights, easements, and interest that may be required for the operation of the project.

R.C. 6119.011(G) (emphasis added).

The terms "waste water facility" and "water management facility" are defined as follows:

> "Waste water facilities" means facilities for the purpose of treating, neutralizing, disposing of, stabilizing, cooling, segregating, or holding waste water, including, without limiting the generality of the foregoing, . . . facilities for the temporary or permanent impoundment of waste water, both surface and underground, and *storm and sanitary sewers and other systems, whether on the surface or underground, designed to transport waste water*. . . .
>
> "Water management facilities" means facilities for the purpose of the development, use, and protection of water resources, including, without limiting the generality of the foregoing, *facilities for water supply, facilities for stream flow improvement, dams, reservoirs, and other impoundments, water transmission lines, water wells and well fields, pumping stations and works for underground water recharge, stream monitoring systems, facilities for the stabilization of stream and river banks, and facilities for the treatment of streams and rivers,* including, without limiting the generality of the foregoing, *facilities for the removal of oil, debris, and other solid waste from the waters of the state* and stream and river aeration facilities.

R.C. 6119.011(L), (M) (emphasis added).

There can be no dispute that the District's Program, and the list of stormwater projects that are to be completed thereunder, constitute "water resource projects" as defined in sections 6119.011(G), (L), and (M). Thus, the District only needed to demonstrate that the Stormwater Fee complies with sections 6119.06(W) and 6119.09, *i.e.*, that the Stormwater Fee will be imposed for: (1) each property owner's "use" of the Program; (2) "services" provided to each property owner under the Program; and/or (3) a "benefit conferred," whether direct or indirect,[19] upon each property owner by the Program.

The District introduced an abundance of undisputed evidence at trial demonstrating that this requirement has been met. For example:

- **Mr. Cyre** testified that: (a) it was clear to him that the activities under the Program "would provide service to not only the member communities individually and cumulatively, but to the property owners within those communities;" and (b) each individual is a very small part of the "cumulative contribution" of stormwater, and "[t]he service they are being provided is the capture, conveyance, control of stormwater from not only their property to receiving water, but from other properties to receiving water, in the sense that they are being protected from that stormwater emanating from other properties" (Tr. at 132, 164-65 (Cyre));

- **Mr. Reese** opined that the Program will provide a service to property owners within the District's service area (Id. at 666 (Reese));

- **Mr. Beach** testified that the benefits of investments in clean water such as the District's Program include "[i]ncreased tourism, fishing and recreation, increased coastal property values, reduced cost for water treatment, and improved quality of life making the region more attractive [to businesses and workers]" (Id. at 1500-01 (Beach));

- **Mr. Dorsey** testified that corrective programs that focus on small tributary watersheds (such as the District's Program) reverse the trend of causing channel incision, reduce

[19] In City of Cleveland v. N.E. Ohio Regional Sewer Dist., 8th Dist. No. 55709, 1989 WL 107162, *1 (Sept. 14, 1989), the City of Cleveland brought a declaratory judgment action against the District seeking invalidation of a resolution which provided that the total cost of designing and implementing the Intercommunity Relief Sewer Program ("IRSP") must be borne by all users of the District's facilities, including the City. In evaluating the City's argument that its residents would receive very little, if any, *direct* benefits from the IRSP (which would instead benefit the surrounding suburbs), the court found, in part, that "all users of the district including city residents will benefit from the IRSP" because "alleviation of the suburban overflow will reduce the wet weather flow into the Cleveland system, Lake Erie and the surrounding streams." Id. at *3.

the volume or rate of runoff off individual parcels, build back some of the lost riparian function, reconnect the stream to its floodplain, and, overtime, improve the biological community (Id. at 1264-65 (Dorsey));

- **Mr. Ciaccia** testified that the Program will provide a service to property owners within the District's service area, and assure that the downstream conveyance system is free and clear to take the stormwater leaving properties and prevent backups (Id. at 399-400, 417-18 (Ciaccia));

- **Mr. Greenland** testified that the District's Program will: (a) improve the function of the local communities' stormwater systems; (b) help to keep streets and properties free from flooding and erosion; (c) reduce damage to properties caused by stormwater; (d) enhance emergency service capabilities during and after wet weather events; (e) reduce siltation and high peak flows in streams; (f) reduce future problems relating to stormwater and minimize short-term and long-terms costs towards addressing stormwater issues; (g) provide health benefits because there are pathogens and bacteria in stormwater runoff, particularly when flooding occurs; (h) increase opportunities for recreational activities on waterways within the District; (i) help to preserve habitat and wildlife; and (j) prevent damage to the Metroparks (Id. at 1191-96 (Greenland));

- **Mr. Odeal** testified in great detail about how, based upon the stormwater studies conducted by the District, regional stormwater problems have increased dramatically over the past three decades because old problems have never been addressed and new problems are still arising, and that addressing these problems will provide a service and benefit to property owners within the District's service area (Id. at 272-94 (Odeal));

- **Ms. Dreyfuss-Wells** testified that the Program will provide a service and benefit to property owners because the Ohio EPA's NPDES Phase II Program and ordinances adopted by the District's Member Communities in response thereto do *not* address regional stormwater problems (Id. at 1531-36 (Dreyfuss-Wells));

- **Mayor Leiken** testified regarding the serious regional stormwater problems that are directly impacting the residents of Shaker Heights (*e.g.*, erosion from streams damaging homes and roads, degradation and siltation of the Shaker Lakes and dams, etc.), and how the District addressing these problems under its Program will provide an "enormous benefit" to the city and its residents (Id. at 1211-21 (Leiken)); and

- **Mayor Rinker** testified regarding: (a) the serious regional stormwater problems that are directly impacting the residents of Mayfield Village (*e.g.*, home and yard flooding, erosion, dealing with storm flows, etc.), and how the District addressing these problems under its Program will provide a benefit to village residents; and (b) the enormous amount of damage to the Metroparks caused by regional stormwater issues each year and how the District addressing these problems under its Program will provide a benefit to the residents of this region (Id. at 1407-21 (Rinker)).

Based upon this and other evidence presented by the District, the trial court properly concluded that:

- property owners will receive a *service* because the stormwater running off of each of their properties will be captured and controlled, and because the activities conducted under the Program will result in the improved transportation of stormwater through the Regional Stormwater System decreasing the flooding of homes and businesses, and preventing excess erosion and sedimentation (Feb. 2012 Opinion, at 5, 8, 11 (emphasis added));

- property owners will *use* the Regional Stormwater System as rainfall creates runoff from each parcel (Id. at 3, 8 (emphasis added));

- the Program will result in ecological and environmental *benefits*; (Id. at 6 (emphasis added)); and

- the Program will provide *benefits* by improving water quality and habitat for wildlife, and by reducing future costs relating to stormwater management (Id. at 8 (emphasis added)).

Appellants offer their unsupported opinion that R.C. 6119.09 "denotes" that charges by the District arise "incident to 'voluntary' subscriptions" by property owners, and "clearly contemplates" that customers have the choice of accepting, rejecting, or limiting their use of the service, or benefit being provided. Opening Brief, at 20. This argument is supported solely by rhetoric, and adds a requirement that can be found nowhere in the plain language of the statute. It also contradicts the holding in City of Cleveland v. N.E. Ohio Regional Sewer Dist., 8th Dist. No. 55709, 1989 WL 107162, *1, 3 (Sept. 14, 1989), in which this Court held that the total cost of designing and implementing the Intercommunity Relief Sewer Program ("IRSP"), *i.e.*, a "water resource project," must also be borne by users within the City of Cleveland, regardless of the City's desire to not have its residents pay for those costs because most, if not all, of the direct benefits of the IRSP would inure to the residents of surrounding suburbs, not to them.[20]

[20] Appellants also argue in a footnote that, because the District "*may* refuse the services of any of its projects if any of such rentals or other charges, including penalties for late payment, are not paid by the user thereof" under R.C. 6119.06(W), the District *must* be able to refuse to provide

Appellants, with one paragraph purporting to cite evidence from the record and two paragraphs of straight rhetoric (which should be disregarded by this Court), further argue that the Stormwater Fee cannot yet be charged by the District because they assert that the only "waste water facility" or "water management facility" currently owned or operated by the District is the Lakeview Dam. Opening Brief, at 21-22. While the District presented evidence at trial demonstrating some of the facilities that it will begin owning and/or operating as soon as the Program commences (Tr. at 894-911 (Greenland); Pl's Tr. Ex. 29, 44), this argument must be rejected even without such evidence by a simple reading of Chapter 6119.

As referenced above, R.C. 6119.09 expressly permits the District to "collect rentals or other charges . . . for the use or services of any *water resource project* or any benefit conferred thereby. . . ." See R.C. 6119.09 (emphasis added). R.C. 6119.011(G) defines the term *water resource project*, in relevant part, as "any waste water facility or water management facility acquired, constructed, or operated by or leased to a regional water and sewer district *or to be acquired, constructed, or operated by or leased to a regional water and sewer district. . . .* R.C. 6119.011(G) (emphasis added). Thus, under the unambiguous language of R.C. 6119.09 and 6119.011(G), the issue of whether all of the District's facilities have already been acquired or constructed, or are already being operated, has no bearing upon the legality of the Stormwater Fee, as the District may collect the Stormwater Fee for facilities "to be acquired, constructed, or operated by or leased to" the District.[21] Further, the acquisition, construction, and operation of the

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stormwater services if the Stormwater Fee is not paid by a property owner for the Stormwater Fee to be valid. Opposition, at 20, fn. 9. Appellants once again ignore and misconstrue the plain language of the statute.

[21] Appellants also argue that the District cannot charge the Stormwater Fee because it has not yet obtained written consent from "any property owner" to construct a facility on their property or "any municipality" to construct a facility within its boundaries. Opening Brief, at 21. The evidence that Appellants cite in support of this statement is blatantly misrepresented to the Court.

facilities will be financed from moneys received through the collection of the Stormwater Fee, so it would make little sense for the District to be required to acquire, construct, and operate all such facilities prior to receiving *any* of those funds to do so.

Finally, Appellants assert that the Stormwater Fee is invalid because other mechanisms to fund the Program were available to the District under R.C. 6119.17, 6119.18, 6119.42, and 6119.58, and it instead chose to impose a charge under R.C. 6119.09. Opening Brief, at 22-24. The fact that the District had other options available is completely irrelevant. The District chose to fund its Program through a charge imposed under R.C. 6119.09 and, because it met all of the requirements for doing so, that funding mechanism is entirely proper.[22]

The District's Stormwater Fee is therefore being imposed pursuant to, and in compliance with, Chapter 6119, and the Court should uphold the trial court's opinion in this regard.

B. The Stormwater Fee Is Authorized By, and Complies With, the District's Petition and Plan for Operation (AOE No. 3).

In their Opening Brief, Appellants assert that the District's Petition and Plan for Operation "limits the Sewer District to charging for 'sewer rates,'" and therefore the District lacks authority to implement its Program. Opening Brief, at 31-32. In doing so, they completely ignore the unambiguous language contained therein. The Plan for Operation states that "*[a]ny projects* not

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The Joint Stipulation dated December 14, 2011 (App. 38, referenced in Tr. 2674-79) states *only* that a handful of Member Communities, including the Community Appellants, opposing the District's Program as of that date have not consented to the construction of any stormwater projects in their community or in any other community. It does *not* in any way state that the District has not obtained consent from "any property owner" or "any municipality." In fact, out of the District's fifty-six Member Communities, only the *eleven* Community Appellants are currently opposing the Program. Regardless, Appellants cite no legal authority in support of their position that the Stormwater Fee cannot be charged if they do not consent to the Program.

[22] Appellants seem to suggest that it would have been more equitable for the District to have funded the program through a property tax, which would have to be based on the value of each property within the District. The value of a property has *zero* relationship to the amount of additional stormwater runoff generated thereby due to the addition of impervious surface, and would have been an *inequitable* way to apportion the costs of the Program.

financed through the Ohio Water Development Authority, State of Ohio, or Federal Government would be financed in such a manner *as may be deemed appropriate by the Board of Trustees*." Def's Tr. Ex. 12, Exhibit "A," § 5(e)(3) (labeled "Other financing of District projects") (emphasis added). The Stormwater Fee was unanimously approved by the District's Board of Trustees on January 7, 2010, and is thus proper under the District's Plan for Operation.[23]

C. The Stormwater Fee is a Statutorily-Authorized Fee Being Imposed by a Utility, Not an Unlawful Tax (AOE No. 1).

Contrary to Appellants' assertion, nothing in the Supreme Court of Ohio's recent opinion in Drees Co. v. Hamilton Twp., 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, or in any other case cited in their Opening Brief, demonstrates that the Stormwater Fee should have been considered by the trial court to be anything but a *fee*. The Supreme Court of Ohio and other Ohio courts in more analogous cases have consistently found water and sewer fees to be valid when imposed pursuant to, and in compliance with, statutory requirements, as is the case here.

The Stormwater Fee, like fees for sewage, electricity, gas, etc., is a *statutorily-authorized* fee being imposed by a *utility* under R.C. 6119.06(W) and 6119.09 for the specific purpose of managing the stormwater running off of each property within the District's service area (Pl's Tr. Ex. 2, Chapter 3), and it is calculated using the most *widely-accepted method* for assessing such fees in Ohio and throughout the country, *i.e.*, impervious surface. Tr. at 650, 653 (Reese), 1272 (Dorsey); Pl's Tr. Ex. 36, at 3. The Stormwater Fee is *not* an arbitrary fee being imposed by a *township* upon a small group of developers pursuant only to *limited-home-rule township police*

[23] Appellants point to section 5(f) of the District's Plan of Operation, labeled "Sewer Rates," and argue that it only speaks in terms of "rates for sewage treatment and disposal," and that "sewage treatment and disposal is not stormwater management." Opening Brief, at 31. This argument also has no merit, as section 5(f) indeed *only* deals with rates for sewage and has nothing to do with fees being imposed pursuant to section 5(e)(3) for stormwater projects undertaken by the District under the Program.

powers to raise *general community funds* for roadway construction, police and fire services, and parks above and beyond the taxes already imposed for those *same exact* purposes as in Drees.

When fees imposed pursuant to *Ohio statutes* are challenged, and in particular water and sewer fees, the Supreme Court of Ohio, as well as other Ohio courts, have primarily focused their analysis on whether such fees comply with the statutory requirements to determine their validity.[24] A good example of this is the Supreme Court of Ohio's decision in City of Wooster v. Graines, 52 Ohio St.3d 180, 556 N.E.2d 1163 (1990). In Graines, the City of Wooster established a storm drainage utility to raise funds for maintaining, repairing, and improving its sewer systems under which it charged property owners a fee based upon the amount of impervious surface on their properties. The defendant, a property owner who failed to pay the fee, asserted that certain funds generated by the fee constituted an illegal tax. Id. at 181-182. The city countered by arguing that, because it complied with sections 729.49 and 729.52 of the Ohio Revised Code and had a prioritized list of future projects upon which the fee would be spent over a number of years, the fee did not constitute a tax. Id. at 182.

The Supreme Court of Ohio, upholding the fee based upon the city's compliance with *the statutes*, reiterated its holding in Himebaugh v. Canton, 145 Ohio St. 237, 61 N.E.2d 483 (1945):

> *Water rates or charges or 'rents' collected by a municipality cannot be classed as taxes so long as their use is limited to the waterworks purposes enumerated in*

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[24] In reality, Appellants are asking this Court to *invalidate R.C. 6119.06(W) and 6119.09* because they believe that a regional water and sewer district should not have the power to impose a charge "for the use or services of any water resource project or any benefit conferred thereby," and should have to satisfy a more stringent requirement. R.C. 6119.09. The issue in Drees was *not* the validity or interpretation of an Ohio statute. Rather, the analysis conducted by the Supreme Court of Ohio was to determine the validity of the impact fees imposed by the Township pursuant to its *limited police powers*. Drees, 132 Ohio St.3d, 2012-Ohio-2370, 970 N.E.2d 916 at ¶ 10. Regardless, Appellants have waived this argument because any party challenging the constitutionality of an Ohio statute is required to join the Ohio Attorney General to the action, and they have failed to do so. See, e.g., State ex rel. Republic Servs. of Ohio v. Pike Twp. Bd. of Trustees, 5th Dist. Nos. 2006 CA 00153, 2006 CA 00172, 2007-Ohio-2086, ¶ 73-76 (refusing to entertain new argument regarding constitutionality of Ohio statute where no attempt was made to join Attorney General).

> *Section 3939, General Code*; but if employed as a mere device to lessen the burden of taxation for general governmental purposes, such funds should be considered in the category of taxes.

Graines at 183 (emphasis added); see also Huber v. Denger, 38 Ohio St.3d 162, 164, 527 N.E.2d 802 (1988) ("[T]he sewers and sewerage works for which reasonable rates may be assessed pursuant to R.C. 6117.02 *are those described in R.C. 6117.01* as constructed or maintained by the district," and "there is nothing in either of these sections which precludes a county from assessing a ratepayer for a treatment plant servicing another part of the District.") (emphasis added). This precedent also demonstrates that a charge or fee imposed for a waterworks project, including a stormwater-related project, generally does *not* constitute a "tax."[25]

Another, more recent, example is this Court's analysis in Cook Road Invests., L.L.C. v. Cuyahoga Cty. Bd. of Commrs., 194 Ohio App.3d 562, 2011-Ohio-2151, 957 N.E.2d 330 (8th Dist.). In Cook Road, a developer filed an action against the Cuyahoga County Board of Commissioners seeking a declaration that the sanitary-connection fees charged to the developer's property were unconstitutional, and the trial court found in the Board's favor. Id. at ¶ 9-10. One

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[25] Another example is the holding in Kibicki v. N. Royalton, 139 Ohio App.3d 127, 743 N.E.2d 411 (8th Dist. 2000). In Kibicki, the City of North Royalton, which maintained several sewer districts, sought to assess residents serviced by sewer district "C" (serviced by the District) for the costs of improvements to sewer districts "B" and "C" (serviced by the city itself) even though the sewer district "C" residents were not serviced by those districts and would receive no benefit from the improvements. Id. at 128-29. The residents filed a lawsuit seeking to invalidate the assessments on the grounds that they constituted an unlawful tax, and the court, citing Himebaugh and Huber, held:

> [W]e necessarily reject their argument that there is no reasonable relationship between the rates charged to them (which are devoted to improvements in other districts within the system) and services provided to district C. Being a part of the city sewer system, plaintiffs derive a benefit from the improvement of the *sewer system as a whole*, not just from the improvement of individual districts within the system.

Id. at 132.

of the developer's arguments on appeal was that the trial court erred in failing to apply the "dual rational-nexus test" set forth by the Supreme Court of Ohio in Home Builders Assn. of Dayton & Miami Valley v. Beavercreek, 89 Ohio St.3d 121, 129, 729 N.E.2d 349 (2000), a case in which the plaintiffs unsuccessfully challenged the constitutionality of impact fees imposed by a city pursuant to a local ordinance.[26] In overruling this assignment of error,[27] this Court explained:

> [T]he authority to impose the impact fees in *Home Builders* was derived by *local ordinance*. Connection fees for sewer installations are authorized by *R.C. Chapter 6117*, which provides a less stringent standard.
>
> . . .
>
> Therefore, the dual rational-nexus test set forth in *Home Builders* for assessing the constitutionality of impact fees authorized by local ordinance does not apply to sewer-connection fees. *R.C. Chapter 6117 authorizes counties to allocate the cost of a sewer system among all residents of the district even if some of those residents do not directly benefit from the system.*

Id. at ¶ 15, 17 (citing Huber at 165) (emphasis added).

Even under the analysis conducted in Drees (and ignoring the District's statutory authority), the only conclusion that could be reached is that the Stormwater Fee is in fact a "fee,"

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[26] In Beavercreek, a homebuilders association and developers challenged impact fees enacted by the City of Beavercreek to fund roadway improvements made necessary by new development. Beavercreek, 89 Ohio St.3d at 124. The Supreme Court of Ohio *approved* the methodology used by the city to develop and calculate the impact fees even though it was not a "precise mathematical formulation," and reinstated the trial court's opinion in favor of the city that "the fees were reasonable and that a reasonable relationship existed between the fee paid and the benefits accruing to developers." Id. at 129-31.

One difference between (a) the impact fees imposed by the city in Beavercreek and the Stormwater Fee imposed by the District in this case and (b) the impact fees imposed by the Township in Drees is that no methodology appears to have been employed by the Township to ensure that a reasonable (or any) relationship existed between the impact fees paid and the benefits accruing to the home builders.

[27] The developer's second assignment of error in Cook Road was well taken, in that the developer demonstrated it had already paid duplicative sanitary-connection fees to the City of North Olmsted acting as the county's agent.

and not an unlawful "tax." In Drees, the Supreme Court of Ohio determined that the impact fees constituted unlawful taxes because, among other things, they:

(a) were not regulatory in nature nor imposed in furtherance of statutes designed to protect the public from specific harms or threats;

(b) were spent on "typical township expenses" inuring to the benefit of the entire community, designed to raise general revenue for the "public's benefit," and expressly enacted in the resolution for "the protection of the health, safety, and general welfare of the citizens and property owners of the Township;"

(c) were not earmarked to be spent on improvements to the areas around the particular properties upon which they were imposed;

(d) were duplicative in that the payees were already being charged taxes for those same exact services, *i.e.*, roadway construction, police and fire services, and parks;

(e) were not tied to any particular type of expenditure within the four funds, and thus not responsive to any specific need;

(f) provided no greater benefit to the payees than that provided to any other property owner within the Township not obligated to pay them; and

(g) resulted in no service to the payees other than the issuance of a zoning certificate, for which there was already a separate $200 fee.

Id. at ¶ 21-40. None of these facts are present in this case.

Title V of the District's Code of Regulations is *regulatory* in nature, and the Stormwater Fee contained therein is being imposed *in furtherance of statutes* designed to protect the public from the hazards caused by unmanaged stormwater and sewage, *i.e.* Chapter 6119. The Stormwater Fee also will not be spent on "typical [District] expenses," and is instead *earmarked for* a backlog of much needed stormwater construction projects as well as stormwater inspection, operation, maintenance, and monitoring activities throughout the District's service area and around (and often on) the properties upon which it will be imposed. Tr. at 894-911, 948-54 (Greenland); Pl's Tr. Ex. 2 (§§ 5.0506, 5.0507), 29-32, 43-46, 59. As demonstrated at trial, the Stormwater Fee will *not exceed the cost* of these projects and activities. Tr. at 947-48, 955-56 (Greenland).

Further, the Stormwater Fee is not duplicative of any other fees or taxes already being imposed by the District. Id. at 946-47. It is also not aimed at raising revenue from one targeted group of property owners, *e.g.*, home builders and developers, to provide a benefit shared equally by all property owners within the District. Pl's Tr. Ex. 2, § 5.0704 (Stormwater Fee is imposed "on every parcel within the District's service area" based upon amount of impervious surface).

Finally, unlike the impact fees in Drees, the Stormwater Fee is not being assessed on an arbitrary, irrational, or unsupportable basis.[28] It is based on the *increased demand for stormwater services* that each property owner places upon the Regional Stormwater System due to the addition of impervious surface, which is the most *widely-accepted method* for assessing fees by stormwater utilities in Ohio and throughout the country. Tr. at 650, 653 (Reese), 1272 (Dorsey), 1580-81 (Dreyfuss-Wells); Pl's Tr. Ex. 36, at 3. Based upon the evidence presented, the trial court correctly determined that "*property owners 'use'* the unmanaged Regional Stormwater System as rainfall creates runoff from *each parcel*," and "the District *provides the service* of effective transportation of stormwater decreasing the flooding of homes, businesses and preventing excessive erosion and sedimentation." Feb. 2012 Opinion, at 8 (emphasis added). All property owners paying the Stormwater Fee will receive a corresponding service and benefit from having the increased runoff from the impervious surface on their properties managed by the District.

Therefore, the trial court properly found that the Stormwater Fee is a lawful fee imposed pursuant to, and in compliance with, R.C. 6119.06(W) and 6119.09, not an unlawful tax. This Court should affirm that finding.

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[28] Appellants ignore the overwhelming evidence presented by the District at trial, including the testimony of Hector Cyre and Andrew Reese, arguably the country's top two experts on stormwater utilities, and Larry Roesner, one of the country's top hydrologists, regarding the direct relationship between impervious surface and the increased volume and rate of stormwater runoff from a property. Tr. at 142-46 (Cyre), 651-53 (Reese), 1321-25 (Roesner).

IV. THIS COURT SHOULD AFFIRM THE DENIAL OF APPELLANTS' COUNTERCLAIMS BECAUSE TITLE V DOES NOT CONFLICT WITH ANY PROVISIONS OF THE DISTRICTS PETITION AND PLAN FOR OPERATION (AOE No. 3).

In their Opening Brief, Appellants assert that Title V violates the District's Plan for Operation because the District "unilaterally declared to subject to its control parts of what have always been member communities' local systems," but fail to ever define what actually constitutes the "local systems." Opening Brief, at 32-35. In doing so, Appellants greatly misconstrue the provisions in the District's Plan for Operation and Title V's definitions of "Regional Stormwater System" and "Local Stormwater System."

Title V does not conflict with the District's Plan for Operation because the District is not managing any "local sewerage collection facilities and systems" without the agreement of the local communities. The District's Petition,[29] which defines the scope of the District's authority and describes its purpose and territory (R.C. 6119.02(A)), authorizes the District to exercise all powers of Chapter 6119 by establishing "a total wastewater control system for the collection, treatment and disposal of wastewater within and without the District." Def's Tr. Ex. 12, at Exhibit "A," § 4. The District's Plan for Operation, which describes how the District's board intends to operate in carrying out the District's purpose and which the board of trustees may unilaterally "amend, modify, change, or alter . . . as [it] from time to time may determine necessary" (R.C. 6119.04(D)), matches the breadth of the District's stated purpose by committing the District to plan, build and maintain facilities and systems to manage waste water, including stormwater:

> The District *will* plan, finance, construct, operate and control wastewater treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basis, *storm water handling facilities*, and all other water pollution control facilities of the District.

[29] As more fully described in footnote 4, *supra*, the Petition is sections 1-4 and 6-8 of Exhibit "A," and the Plan for Operation is section 5 of Exhibit "A."

Id. at § 5(c)(1) (emphasis added). Indeed, as discussed above, the District received a mandate from Judge McMonagle to plan and identify solutions for "all *intercommunity* drainage problems (both storm and sanitary) in the District." Id. at § 5(m)(3) (emphasis added).

As explained in the Plan for Operation, Member Communities would remain responsible for owning and maintaining their own facilities and systems:

> Except as otherwise provided in Chapter 6119 and paragraph 5(m) hereof, the construction and financing of *local sewerage collection systems* will be the responsibility of the individual municipalities or political subdivisions.

Id. at § 5(c)(3) (emphasis added);[30] see also § 5(k) ("Individual suburban communities will retain *ownership* of all *local suburban facilities*, subject to the provisions of subsection "m" below). The District's Plan for Operation explains that the District has the authority to construct, operate and regulate "local" facilities and systems, but it would not be held responsible for the facilities constructed by Member Communities absent its written agreement assuming that responsibility:

> The District shall have authority pursuant to Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate *local sewerage collection facilities and systems* within the District, including both storm and sanitary sewer systems. The District shall not *assume ownership* of any *local sewerage collection facilities and systems* nor shall the District *assume responsibility or incur any liability for* the planning, financing, construction, operation, maintenance, or repair of any *local sewerage collection facilities and*

[30] Appellants attempt to mislead this Court into thinking that the method of financing of *all projects*, local and regional, must be agreed to between the District and the local communities by citing only the second sentence of section 5(m)(5) of the District's Plan for operation. Opening Brief, at 32. Section 5(m)(5) only applies to *local sewerage collection facilities and systems*, and states, in its entirety:

> The District shall have authority to finance the planning, construction, operation, maintenance, and repair of *local sewerage collection facilities and systems* as provided for in Chapter 6119 of the Ohio Revised Code. The method of financing particular projects shall be agreed to between the District and the respective local communities at the time the project is undertaken by the District.

Id. at § 5(m)(5).

> *systems* unless the assumption of such ownership, responsibility, or liability is specifically provided for in a written agreement between the District and the respective local community.

Id. at § 5(m) (emphasis added).

Each Member Community therefore remains responsible for maintaining its local sewerage collection facilities and systems, which, pursuant to the District's Plan for Operation, including sections 5(c)(1), (c)(3), (k) and (m), include sanitary and stormwater facilities and systems that they *own and/or operate*. As a matter of law, the local communities do not own or operate all rivers, streams, brooks, creeks, or other natural watercourses within their "entire geographic boundaries," which primarily flow through *privately-owned property*.[31]

Title V makes no attempt to alter this decades-long arrangement. It makes no effort, either directly or indirectly, to take ownership of or responsibility for the local sewerage collection facilities and systems *owned and/or operated* by Member Communities, who remain responsible for those facilities and systems. In fact, the District has gone so far as to stipulate on the record that it will not even undertake any construction projects on the Regional Stormwater System

[31] As fully set forth in Plaintiff's Supplemental Trial Memorandum on Ownership of Rivers and Streams filed on November 14, 2011, under Article I, § 19b, of the Ohio Constitution and applicable common law, the waters, beds and banks of rivers and streams are *privately owned*, either by the owner of property through which the watercourse flows or, if a watercourse is the boundary between properties, to the center or "thread" of the watercourse by each adjoining property owner. The *only* public interest in these waters is an easement of navigation that applies *only* to navigable watercourses. See, e.g., Ohio Constitution, Article I, Section 19b(E); Gavit v. Chambers, 3 Ohio 495, 498 (1828). Article I, Section 19b(E), makes clear that "nonnavigable waters located on or flowing through privately owned land shall *not* be held in trust by any governmental body," but authorizes the "state, and a political subdivision to the extent authorized by state law," to provide for the regulation of non-navigable waters. Id. (emphasis added). The District is just such a political subdivision, and Chapter 6119 provides the state law authority to manage stormwater within and without the District, regardless of whether the stormwater is flowing through navigable or nonnavigable watercourses. See, e.g., R.C. 6119.01(B), 6119.011(E), 6119.08. Importantly, Article I, Section 19b, through reference to Article XVIII, Sections 3 and 7, makes clear that municipal home rule powers cannot be used to "impair or limit" any of the rights recognized by this constitutional provision, including private property rights in Ohio's rivers and streams and the District's regulation of stormwater as authorized by Ohio law. Ohio Constitution. Article I, Section 19b(G).

without the consent of the Member Community in which such project will be undertaken. See Apr. 2011 JE & O, at 3; Feb. 2012 Opinion, at 12.

Consistent with section 5(m) of the District's Plan for Operation, the definitions of "Regional Stormwater System" and "Local Stormwater System" contained in Title V require the District to obtain the agreement of a property owner prior to managing any watercourse, stormwater conveyance structure, or Stormwater Control Measure[32] that is not owned and/or operated by the District. If owned by a local community, it will not be managed by the District as part of the Regional Stormwater System absent the local community's agreement. The same is true for private property owners.

Section 5.0218 of Title V defines "Regional Stormwater System" as follows:

> The entire system of watercourses, stormwater conveyance structures, and Stormwater Control Measures in the District's service area *that are owned and/or operated by the District or over which the District has right of use for the management of stormwater*, including both naturally occurring and constructed facilities. The Regional Stormwater System shall generally include those watercourses, stormwater conveyance structures, and Stormwater Control Measures *receiving drainage from three hundred (300) acres of land or more.* The District shall maintain a map of the Regional Stormwater System that shall serve as the official delineation of such system.

Pl's Tr. Ex. 2, § 5.0218 (emphasis added). This definition serves two purposes. First, after conducting a four-year-long study, one the District's consultants, Camp, Dresser & McKee, recommended focusing on drainage areas larger than 300 acres because this represented the

[32] Section 5.0555 of Title V defines Stormwater Control Measure as follows:

> An activity, measure, structure, device, or facility that helps to achieve stormwater management objectives including, without limitation, schedules of activities, prohibitions of practices, operation and maintenance procedures, treatment requirements, and other practices to prevent or reduce the pollution of water resources, to control stormwater volume and/or rate, or to otherwise limit impacts to the Regional Stormwater System. SCMs shall be designed to minimize maintenance and reduce the potential for failure.

See Pl's Tr. Ex. 2, § 5.0555.

"backbone" of the *intercommunity* storm drainage system. Tr. at 877-79; Pl's Tr. Ex. 9, at 6.[33] The definition therefore excludes from the Program's scope any watercourse, stormwater conveyance structure, or Stormwater Control Measure that does not receive drainage from 300 acres or more.

Second, the definition of Regional Stormwater System further limits the District's management efforts to those watercourses, stormwater conveyance structures, and Stormwater Control Measures that the District either (a) owns, (b) operates, or (c) has the right to use for the management of stormwater. Pl's Tr. Ex. 2, § 5.0218. Thus, if a watercourse, stormwater conveyance structure, or Stormwater Control Measure is not owned by the District, and the District does not currently operate it, the District *must* obtain a "right of use for the management of stormwater," which would be obtained through entering into an agreement with the local community, private entity, or private individual having ownership and/or operational control. Id.

"Local Stormwater System" is defined in Title V as follows:

> The entire system of watercourses, stormwater conveyance structures, or Stormwater Control Measures owned and/or operated by a private entity or a unit of local government other than the District. The Local Stormwater System shall include those watercourses, stormwater conveyance structures, or Stormwater Control Measures not designated as part of the Regional Stormwater System.

Id. at § 5.0212. This means that if a watercourse, stormwater conveyance structure, or Stormwater Control Measure is owned or operated by a private entity, private individual, or local community, and the District has not otherwise obtained a "right of use for the management of stormwater" by entering into an agreement with that private entity, private individual, or local community, then the watercourse, stormwater conveyance structure, or Stormwater Control Measure is considered to be part of the Local Stormwater System, *i.e.,* it will not be managed under the District's Program. Id.

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[33] Mr. Cyre and Mr. Reese testified that the District's 300-acre cutoff is reasonable given the geomorphology of the District's service area, and also that other stormwater programs utilize similar cut-offs. Tr. at 171, 173 (Cyre), 657-58 (Reese).

Therefore, because Title V requires the District to obtain the agreement of an owner and/or operator of a watercourse, stormwater conveyance structure, or Stormwater Control Measure prior to managing it under the Program, including situations in which that owner or operator is a local community, Title V more than complies with the limitation contained in section 5(m) of the District's Plan for Operation with respect to "local sewerage collection facilities and systems."

Based upon this and other evidence, the trial court correctly found that the "definition of 'Regional Stormwater System,' 'Local Stormwater System,' 'Stormwater Management' and other related sections [of Title V] do not, on their face, violate previously issued Court orders," which finding should be upheld by this Court. Apr. 2011 JE & O, at 5.

V. THIS COURT SHOULD AFFIRM THE DENIAL OF APPELLANTS' COUNTERCLAIMS BECAUSE TITLE V FULLY COMPLIES WITH ALL OHIO AND FEDERAL CONSTITUTIONAL PROVISIONS (AOE No. 4).

A. The Stormwater Fee Does Not Violate Equal Protection Under the United States and Ohio Constitutions (AOE No. 4).

In their Opening Brief, Appellants assert that the District's Program violates the Equal Protection Clauses of the U.S. and Ohio Constitutions because the Stormwater Fee: (a) is imposed only upon owners of property within the District's service area; (b) treats residential and nonresidential properties differently; (c) allegedly discriminates against small lot owners by ignoring stormwater runoff from non-impervious areas; (d) exempts airport runways and taxiways, railroad rights-of-way, public roads, and Non-Self Supporting Municipal Functions; and (e) provides a Stormwater Education Credit to schools. See Opening Brief, at 35-40, 58-60. None of these arguments have any merit.

"Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution guarantee every person equal protection under the law." Cuyahoga Cty. Support Enforcement Agency v. Lozada, 102 Ohio App.3d 442, 452, 657 N.E.2d 372 (8th Dist.

1995) (citing Kinney v. Kaiser Aluminum & Chem. Corp., 41 Ohio St. 2d 120, 123, 322 N.E.2d 880 (1975)). "Both constitutional provisions place the same limits on governmental classifications." Id. "However, neither the state nor the federal Constitution prevents a governmental body from treating persons differently in appropriate situations." T.W. Grogan Co. v. N. E. Ohio Regional Sewer Dist., 41 Ohio App.3d 387, 388-89, 536 N.E.2d 19 (8th Dist. 1987). "Absent a suspect classification like race, religion, or alienage, the government need only show that its classification *relates rationally* to a *legitimate governmental interest.*" Id. (emphasis added). "Under rational-basis scrutiny, legislative distinctions are invalid only if they bear *no relation* to the state's goals and no ground can be conceived to justify them." State v. Thompkins, 75 Ohio St.3d 558, 561, 664 N.E.2d 926 (1996) (emphasis added).

First and foremost, the District's jurisdiction is *limited* to its Member Communities, who all voluntarily joined the District in whole or in part. See Def's Tr. Ex. 12, at Exhibit "A(1)." The District's Program is being applied *equally* to all residential and non-residential property owners residing in those Member Communities. Appellants' first argument, *i.e.*, that the Program violates equal protection because the District cannot charge the Stormwater Fee to property owners outside of its service area, is the equivalent of arguing that Cuyahoga County would violate equal protection if it charged a fee to its residents for maintenance of the Cuyahoga River but did not charge the same fee to residents of northern Summit County through which it also flows, or arguing that Ohio would violate equal protection if it charged a fee for maintenance of its major streams and rivers but did not charge the same fee to residents of neighboring states through which they also flow. This argument was quickly refuted at trial by one of the District's experts, Hector Cyre, who testified that, in his *decades* of experience with stormwater programs, no regional

authority such as the District has had complete control of a watershed, "save perhaps an *island*." Feb. 2012 Opinion, at 5 (emphasis added) (referring to Tr. at 244 (Cyre)).[34]

With respect to Appellants' second argument (and as set forth more fully in the District's Cross-Appeal), the trial court erred in finding that the disparate methods for charging the Stormwater Fee to residential and nonresidential property owners had "no rational basis." As explained above (see description of residential and nonresidential fees, supra), the District, with the assistance of AMEC, conducted a rigorous statistical analysis of residential properties within its service area and rationally determined that: (a) measuring the exact amount of impervious surface on each of the hundreds of thousands of residential properties within its service area to calculate the Stormwater Fee would be unduly burdensome and an inefficient use of time, resources, and funds; and (b) the three-tier system for charging the Stormwater Fee to residential properties is equitable, cost-effective, and accurate. Pl's Tr. Ex. 36, at 3-7. Also, unlike residential properties, non-residential properties in the District's service area could vary widely in their amounts of impervious area, which is why the District rationally determined, and AMEC recommended, that it is more equitable and efficient to individually determine the charges for these properties by measuring their actual impervious surface. Id. at 7-8; Tr. at 921-22 (Greenland). As discussed in the District's Cross-Appeal, the disparate treatment of residential and nonresidential property owners has been upheld by the Supreme Court of Ohio.[35]

The District likewise rationally determined that the Stormwater Fee should be based solely on the amount of impervious surface, which Appellants assert discriminates against small

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[34] Mr. Greenland testified that the District would prefer to be able to control all of the watersheds in this region, but some of the watersheds are simply not fully encompassed within the District's service area. Tr. at 883 (Greenland). However, the District can still be "highly effective" in accomplishing improvements within the District's service area with respect to flooding, water quality, and erosion without controlling all of the complete watersheds. Id. at 883-86.

[35] See Cross-Appeal, pages 61-64, infra.

lot owners because it ignores other factors such as the total land area (including the amount of non-impervious area), soil type, land use, and slope. Appellants' expert who offered this opinion, Michael Clar, has very little (if any) experience in designing stormwater utility rates. Tr. at 2523-32 (Clar). Unlike Mr. Clar, Mr. Cyre and Mr. Reese, two of the country's leading experts on stormwater utility rates with decades of experience, testified that: (a) very few, if any, stormwater utilities base their fee on factors such as slope and soil type (Id. at 239-40 (Cyre)); and (b) because the regional system consists mostly of natural watercourses, it was *more* fair and equitable to use impervious surface as a gauge for the fee calculation (Id. at 651-52 (Reese)).

Further, prior to deciding to use impervious surface as the sole basis for assessing the Stormwater Fee, the District, under AMEC's guidance, conducted a rigorous evaluation of a range of stormwater funding mechanisms. Tr. at 650 (Reese), 912-16, 971-72 (Greenland); Pl's Tr. Ex. 36, at 2-3. District employees also reviewed and/or visited other stormwater utilities to assess the bases upon which they charge fees, measure the effectiveness of their programs, and solicit their guidance and advice. Tr. at 913-14 (Greenland); Pl's Tr. Ex. 36, at 3. Like the vast majority of stormwater utilities in Ohio[36] and throughout the country, and upon AMEC's recommendation, the District rationally determined that basing the Stormwater Fee solely on impervious surface is the best and most equitable parameter for apportioning the costs of the Program. Tr. at 651-53 (Reese), 914-17 (Greenland); Pl's Tr. Ex. 36, at 3. There is clearly a rational basis to support the District's determination, and the existence of other factors that could possibly cause a greater *volume* of stormwater to run off of larger (as opposed to smaller) lots does not render the Stormwater Fee unconstitutional—the Stormwater Fee is based upon the *incremental increase* in

[36] Mr. Reese testified that "35 of the 40 some stormwater utilities in Ohio" found that basing their fee on impervious surface area "was the best way to go." Tr. at 653 (Reese).

stormwater runoff from a property caused by the addition of impervious surfaces, not the *total volume* of stormwater runoff.[37]

The District also offered evidence demonstrating the following rational bases for exempting certain types of properties from the Stormwater Fee challenged by Appellants (all of which Appellants have chosen to ignore):

- Public roads function as part of the storm drainage system, and are highly engineered and designed to deal with drainage issues and to properly convey stormwater (private roads may or may not be). Unlike private roads, they are also routinely maintained by local governments through allocations of public funds. Tr. at 935-36, 1065-66, 1200 (Greenland); Pl's Tr. Ex. 36, at 8-9, Billing Data Policy #s 1 and 2; see also Tr. at 251 (Mr. Cyre further explaining why public roads are often exempt);

- Airport runways and taxiways tend to utilize control measures to deal with stormwater runoff that get the stormwater off of the surfaces and into a control facility. With respect to stormwater, airports are among "the most controlled sites around." Tr. at 250 (Cyre);

- The gravel ballast around railroad rights-of-way consists of uniformly-sized, coarse rocks that allow for percolation of stormwater (unlike impervious surface), and one of its purposes is to provide drainage for the track. Tr. at 936 (Greenland); Pl's Tr. Ex. 36, at Billing Data Policy # 15; and

- Non-Self-Supporting Municipal Functions[38] are exempt because this is consistent with section 5(k)(1) of the District's Plan of Operation, and how the District charges its sewer rates. Tr. at 937-38 (Greenland); Pl's Tr. Ex. 46, at 21; Def's Tr. Ex. 12, Exhibit "A," § 5(k)(1).

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[37] If no impervious surface was ever added to this region, the Regional Stormwater System would function satisfactorily and there would be no need for the Program. Tr. at 1338 (Roesner).

[38] As defined in Title V, § 5.0214, Non-Self-Supporting Municipal Functions generally consist of municipal buildings which house municipal functions that are not proprietary in nature, including city halls, police and fire departments, service garages, and recreation facilities such as parks, playgrounds, indoor recreation facilities, swimming pools, and ice rinks. Pl's Tr. Ex. 2, § 5.0214. The argument that the impervious surface contained thereon should *not* be exempt was set forth in the Property Owner Appellants' Addendum to Appellants' Combined Opening Brief (as opposed to in the Opening Brief itself) because the exemption benefits the Community Appellants and, if declared invalid, the amounts of their Stormwater Fees would be greatly increased.

AMEC recommended that the District incorporate these exemptions to the Stormwater Fee into its Program. Tr. at 933 (Greenland).[39]

Finally, the District introduced evidence at trial demonstrating a rational basis for the Stormwater Education Credit set forth in Title V. Pl's Tr. Ex. 2, § 5.0804(c). Ms. Dreyfuss-Wells testified that the District included this credit in its Program because it encourages the youth in this region to (in the future) implement responsible stormwater management practices on their properties (*e.g.*, rain barrels, rain gardens, etc.), which could reduce future demand on the Regional Stormwater System. Tr. at 1569-70; Pl's Tr. Ex. 3, at 31. The credit is therefore a rational way to advance the District's legitimate governmental interest in regional stormwater management.

Each of Appellants' arguments should be rejected by this Court, as the District's Program fully comports with equal protection under the U.S. and Ohio Constitutions.

B. The Stormwater Fee Does Not Violate Substantive Due Process Under the United States and Ohio Constitutions (AOE No. 4).

In arguing that the Stormwater Fee violates substantive due process under the U.S. and Ohio Constitutions because it is based solely upon impervious surface (Opening Brief, at 40-42), Appellants ignore the overwhelming evidence introduced by the District at trial demonstrating that the use of impervious surface is the most *widely-accepted method* for assessing stormwater fees in Ohio and throughout the country, is a rational way to advance the District's legitimate governmental interest in regional stormwater management, and is not arbitrary, discriminatory, capricious, or unreasonable.[40] Appellants also contradict the testimony of their own expert.

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[39] In footnote 12, Appellants challenge for the first time an amendment to Title V exempting from the Stormwater Fee cemeteries owned or operated by the State of Ohio, a County, a Member Community, or a not-for-profit entity. Opening Brief, pg. 38, fn. 12. This challenge should be disregarded by the Court since it was never made in the trial court.

[40] "[A] court applies a rational-basis test in examining the constitutionality of a rule on substantive due process grounds when a constitutionally-protected interest is not implicated." Kistler v. Ohio

For example, at trial:

- **Mr. Cyre** testified that: (a) other stormwater utilities use impervious surface as the basis for calculating their stormwater fees, and it is a technically appropriate measure to use; (b) impervious surface is "the most predominant single factor" impacting stormwater runoff based upon the literature and studies prepared by "a whole series of consulting firms"; (c) he is not aware of any stormwater utilities that base their fee on slope or soil type (as suggested by Appellants) (Tr. at 139-40, 159, 187-88, 239-40);

- **Mr. Reese** testified that: (a) AMEC and the District evaluated "six or seven" options for the Stormwater Fee prior to choosing to base it solely on impervious surface, which is the method utilized by 70% of all stormwater utilities; (b) using impervious surface makes the most sense for this region's stormwater system because it is derived in large part from natural sources (*e.g.*, lakes, rivers, and streams); and (c) "35 of the 40 some stormwater utilities in Ohio" use impervious surface to calculate their fees. (Id. at 650-53) (Reese));

- **Mr. Greenland** testified that: (a) in choosing to base the Stormwater Fee on impervious surface only, the District evaluated how other stormwater utilities funded their programs (and even visited some utilities); (b) the District relied upon the advice of AMEC in making this decision, and thoroughly considered alternative funding mechanisms; and (c) the availability of aerial photography enables the District to determine with a high degree of accuracy the impervious surface on parcels (Id. at 912-16, 918, 971-72, 983 (Greenland));

- **Mr. Dorsey** testified that: (a) every stormwater utility fee that he has "looked at has been based on some level of impervious area;" (b) monitoring the actual volume of stormwater flowing off of a single parcel of property to calculate a stormwater fee (as opposed to just basing it off the amount of impervious surface) could cost $25,000 per parcel; and (c) the use of impervious surface is "the simplest starting point for gauging the relative volume leaving any property" (Id. at 1272, 1297-98 (Dorsey));

- **Mr. Roesner** testified that: (a) "[t]he increase in runoff resulting from the creation of impervious surface area on a lot is directly proportional . . . to the amount of impervious area added to the lot and it's independent of the soil type that underlies the lot;" (b) there is not "any factor that . . . better correlates with [increased flow caused by development] than impervious surface;" (c) it would not be more accurate to base the Stormwater Fee partly on impervious surface and partly on gross area on a lot because "the increase in runoff is due to the addition of imperviousness;" and (d) impervious surface is easy and inexpensive to calculate (Id. at 1316, 1337-38, 1397 (Roesner)); and

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Bur. of Workers' Comp., 10th Dist. Nos. 04AP-1095, 04AP-1100, 2006-Ohio-3308, ¶ 17. "Under that test, a rule need only bear a *rational relationship* to a legitimate state purpose, and must not be arbitrary, discriminatory, capricious, or unreasonable." Id. (emphasis added). Thus, the test for equal protection and substantive due process is the same. Id.

- **Ms. Dreyfuss-Wells** testified that, based upon independent research conducted by the District, the majority of stormwater utilities in Ohio base their fees solely off of impervious surface (Id. at 1580-81 (Dreyfuss-Wells)).

To rebut this and other evidence, Appellants offered the testimony of Mr. Clar, who has very little (if any) experience in designing stormwater utility rates. Id. at 2523-32 (Clar). As stated in Appellants' Opening Brief, Mr. Clar criticized the use of impervious surface as the sole basis for calculating the Stormwater Fee. Opening Brief, at 40-42. Yet, Mr. Clar conceded over and over again that, in Volume One of the Stormwater Best Management Practices Design Guide that he prepared for the U.S. EPA, he specifically cites impervious surfaces on properties as being the *primary factor* increasing both stormwater volume and velocity, and explains how increases in imperviousness appear to have detrimental effects on the integrity of the biological community beginning at fairly low levels of impervious cover. Tr. at 2539-44, 2564 (Clar). Mr. Clar's lack of experience and credibility were properly weighed by the trial court.

Therefore, the trial court properly determined that the District's use of impervious surface as the sole basis for calculating the Stormwater Fee is a rational way to advance the District's legitimate governmental interest in regional stormwater management, and not arbitrary, discriminatory, capricious, or unreasonable.[41]

C. Title V is Not Contrary to Any Constitutional Right of the Member Communities to Operate a Utility, Nor Does it Unconstitutionally Conflict with Any Home Rule Powers of the Member Communities (AOE No. 4).

In their Opening Brief, Appellants assert that Title V violates Article XVIII of the Ohio Constitution, specifically Sections 3 (their "Home Rule" powers) and Section 4 (their "municipal utility" power) because it allegedly: (a) imposes regulations upon them; and (b) restricts their right

[41] Appellants briefly assert that the District's various exemptions from the Stormwater Fee are irrational and therefore violate due process. Opening Brief, at 42. The District has already discussed the rational basis behind all of these exemptions in response to Appellants' equal protection arguments above.

to operate stormwater utilities within their municipal boundaries. Opening Brief, at 42-49. These arguments lack merit, and were properly rejected by the trial court.

As set forth in the District's Plan for Operation, which was accepted by each of the Community Appellants prior to adoption and/or upon joining the District, the District is expressly permitted to exercise its *regulatory authority* over stormwater systems through rules and regulations adopted by the Board of Trustees:

> The District shall have *regulatory authority* over all local sewerage collection facilities and systems in the District, *including both storm and sanitary sewer systems*. This authority shall be exercised by the District through rules and regulations adopted by the Board of Trustees pursuant to Chapter 6119 of the Ohio Revised Code.

See Def's Tr. Ex. 12, § 5(m)(1) (emphasis added). Elements of the District's Title V are just such an exercise of regulatory authority. The Community Appellants cannot now, more than three decades later, argue that the District is impermissibly interfering with their right to operate a utility or their Home Rule powers under the Ohio Constitution.

As evidence of the "impermissible and excessive regulatory authority" allegedly being exercised by the District, Appellants point to sections 5.0601 and 5.0508 of Title V. Section 5.0601, which Appellants misrepresent by selectively reciting only certain language, requires only that the District's Member Communities comply with state law, *i.e.*, the Ohio EPA's NPDES General Permit requirements. Pl's Tr. Ex. 2, § 5.0601(a). Further, no additional standards have been promulgated by the District under section 5.0601(b). Regardless, the remainder of section 5.0601(b) (omitted by Appellants) explains that the "Additional standards that may be promulgated by the District as may be necessary and reasonable to protect the Regional Stormwater System . . . *shall be developed with review and comment of the Watershed Advisory Committees, based on findings in Stormwater Master Plans, and provided for Member Community review and comment prior to adoption by the Board of Trustees.*" Id. at § 5.0601(b) (emphasis

added). The Watershed Advisory Committees (composed of representatives from the Member Communities per Title V, § 5.0504) and the Member Communities themselves, including the Community Appellants, have the opportunity to review and comment upon any new additional standard prior to its consideration and possible adoption by the District's Board of Trustees to prevent any such interference. Id.

Section 5.0508, which requires Member Communities to submit to the District "copies of the proposed Stormwater Management Plan for any project that is regulated by the Member Community by ordinance or resolution and is located solely within the [District's] service area," does not even mildly interfere with Member Communities' local stormwater efforts, but is a necessary exercise of the District's regulatory authority to ensure that it can consistently plan for stormwater projects and improvements throughout the region. Id. at § 5.0508. *Nothing* in section 5.0508 gives the District authority to *reject* any proposed Stormwater Management Plan submitted by a Member Community—just to *review* them. Id. As explained in the portion of that section selectively omitted by Appellants, the District simply needs to know what projects are taking place in its service area, and how, if at all, these projects will "impact[] . . . the Regional Stormwater System and/or District-owned or -operated Stormwater Control Measures." Id.

Further, the Community Appellants summarize testimony from a handful of their public officials regarding the amounts that they spend each year maintaining their own local stormwater systems (not all of which is even spent on stormwater as misrepresented), which expenditures they conclude constitute "stormwater utilities," and then assert that the District's Program "either completely or substantially interfere[s] with the Member Communities' ability to operate their own stormwater utilities" under Article XVIII, Section 4, of the Ohio Constitution. Id. at 44-69.

Article XVIII, Section 4, of the Ohio Constitution permits a municipality to:

> "[A]cquire, construct, own, lease and operate within or without its corporate limits, any *public utility* the products or service of which is or is to be supplied to the municipality or its inhabitants.

Ohio Const., Art. XVIII, § 4. The Community Appellants' expenditures on certain local stormwater issues do not equate to the operation of "public utilities" supplying "products" or "service" to their residents within the meaning of that provision.

Many of the public officials even admitted on cross-examination that: (a) their Member Communities have difficulty raising funds to address stormwater issues or to complete stormwater studies on regional watercourses, or no longer have a dedicated source of revenue for stormwater projects (Tr. at 1959 (Hruby), 2143-44, 2153-54 (Zentarski), 2238-39 (Schmitzer), 2643 (Perciak)); and (b) they previously expressed *support* for the District's Program because of the need for an agency that can regulate stormwater on a regional basis (Id. at 1969-70 (Hruby), 2061-62 (Cicero), 2236-37 (Schmitzer)).[42] The Community Appellants have not adopted (and cannot adopt) programs addressing the *regional* stormwater issues addressed by the District's Program.

Even if the Community Appellants' expenditures of funds constituted "public utilities" (which the District disputes), municipalities do not have an automatic right to own and operate stormwater utilities within their boundaries to the exclusion of county and regional sewer and water districts under Article XVIII, Section 4. The Supreme Court of Ohio has held that a municipality does not automatically have an *exclusive* right to operate a water and sewer utility pursuant to Section 4 when a conflict arises with a county or regional sewer and water district. See, e.g., Ottawa Cty. Bd. of Commrs. v. Marblehead, 86 Ohio St.3d 43, 45-47, 711 N.E.2d 663 (1999). In Marblehead, the Court declined to find that Section 4 confers absolute authority on a municipality to construct and maintain a water utility within its borders and to contract for water

[42] The City of North Royalton actually passed an *emergency ordinance* "urging the [District] to complete the necessary studies to evaluate the viability of a regional storm water system in order to provide relief to overburdened drainage systems." Tr. at 2236-37 (Schmitzer).

services for its residents. Id. The Court instead "balanced the interests" of the municipality against those of the county, holding in favor of the county that was setting up a county-wide water supply system. Id. at 46-47; see also Village of Grafton v. Rural Lorain Cty. Water Auth., 316 F.Supp.2d 568, 577-78 (N.D. Ohio 2004) (granting summary judgment in favor of a regional water and sewer district in an action brought by a municipality seeking a declaration that it had an exclusive right pursuant to Section 4 to provide water to municipal residents).

Finally, section 5.0107 of Title V states, in no uncertain terms:

> *Nothing* in this Title shall be construed to infringe upon or supplant a Member Community's, or other local government's, power and responsibility, however derived, *to plan, finance, construct, maintain, operate, and regulate the Local Stormwater System within their jurisdiction.*

Pl's Tr. Ex. 2, § 5.0107 (emphasis added). The District has also stipulated on the record that it will not undertake *any* construction projects on the Regional Stormwater System without the consent of the Member Community in which such project will be undertaken. Apr. 2011 JE & O, at 3.

Therefore, the trial court correctly found that "while Title V may impact member communities' operations of local stormwater management programs, it does not unlawfully interfere with a municipality's home rule power or rights to the operation of a public utility." Apr. 2011 JE & O, at 5. This Court should uphold that finding.

VI. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF APPELLANTS' MOTION TO DISMISS BECAUSE THE DISTRICT JOINED ALL INTERESTED PARTIES TO THE DECLARATORY JUDGMENT ACTION (AOE No. 5).

In their Opening Brief, Appellants assert that each of the *hundreds of thousands* of individual property owners within the District must have been served with, and joined as parties to, this action under R.C. 2721.12(A), and that the Member Communities' elected public officials and counsel have *not* been representing the interests of their respective property owners. This

argument is absurd and inconsistent with Chapter 6119 of the Ohio Revised Code, the District's Petition and Plan for Operation, and the Community Appellants' own public representations.

Both Chapter 6119 and the District's Petition and Plan for Operation demonstrate that the District's governance relationship is with its Member Communities, not with each of the hundreds of thousands of individual property owners residing therein. The District is a political subdivision of the State of Ohio organized in accordance with, and governed by, the provisions of Chapter 6119. Pursuant to Chapter 6119, the members of a regional sewer district are the counties, townships, municipal corporations, and other political subdivisions within its service area.[43] The General Assembly created these special districts to be answerable to the member communities that they serve, whose elected public officials in turn represent the individual landowners. The District's Petition and Plan for Operation are consistent with Chapter 6119, and address the role of the District only as it pertains to its Member Communities, *not* individual property owners. See, e.g., Def. Tr. Ex. 12, Exhibit "A(1)" (listing "[t]he political subdivisions to be included in whole or in part in the Northeast Ohio Regional Sewer District . . .") (emphasis added).

Further, it is beyond dispute that the elected public officials of the District's Member Communities are "charged by law" with representing the best interests of all citizens residing therein, and may represent such interests in a lawsuit. See, e.g., Clarke v. Warren Cty. Commrs.,

[43] The following statutes illustrate this point quite well:

- **R.C. 6119.02--Organization procedure**: "The petition [for the organization of a district] shall be signed by one or more *municipal corporations*, one or more *counties*, or one or more *townships*, or by any combination of them, after having been authorized by the legislative authority of the *political subdivision*. . . ." (emphasis added).

- **R.C. 6119.05--Application for inclusion in district; procedure**: "At any time after the creation of a regional water and sewer district, any *county, township, or municipal corporation* whose territory is not wholly included within such district may file an application with such district setting forth a general description of the territory it desires to have included within such district. . . ." (emphasis added).

12 Dist. No. CA2000-01-009, 2000 WL 1336684, *3 (Sept. 18, 2000); State v. Cuyahoga Cty. Bd. of Elections, 8th Dist. No. 45980, 1982 WL 5991, *2 (Oct. 28, 1982); Williams v. City of Avon, 52 Ohio App.2d 210, 212, 369 N.E.2d 486 (9th Dist. 1977). Throughout the forty-year history of the District, the individual property owners residing within the various Member Communities have *never* all been made parties to any lawsuit filed by or against the District, including declaratory judgment actions directly affecting their rights.

For example (as referenced earlier in this Brief), the City of Cleveland brought a declaratory judgment action against the District seeking invalidation of a resolution which provided that the total cost of designing and implementing the IRSP must be borne by all the users of the District's facilities. City of Cleveland v. N.E. Ohio Regional Sewer Dist., 8th Dist. No. 55709, 1989 WL 107162, *1 (Sept. 14, 1989). The Resolution was declared to be legally binding upon all users and communities in the District, including the City of Cleveland, and the decision was upheld on appeal. Id. Despite affecting their rights (*i.e.*, having the cost of the IRSP added to their bills), the hundreds of thousands of individual property owners residing within the District's service area were not made parties to the declaratory judgment action, as they were already being represented by the Member Communities.

Similarly, the City of Parma and other Member Communities brought a declaratory judgment action seeking interpretation of the District's Petition and Plan for Operation. See City of Parma v. City of Cleveland, No. 82-039984 (Ohio Com. Pl., Cuyahoga Cty. 1982), attached as Exhibit "A" to September 22, 2010 Sur-Reply in Further Opposition to Certain Opposition Defendants' Motion to Dismiss ("Sept. 2010 Sur-Reply"). The trial court declared, among other things, that the District has the authority to exercise in its service area "all rights and powers granted by ORC Chapter 6119, including the right of eminent domain . . . ," and also that the Suburban Council of Governments, not the City of Cleveland, had the power to appoint the

seventh member to the District's current Board of Trustees. Id. at 10-11. Despite affecting their rights (*i.e.,* the possible taking of their property), the hundreds of thousands of property owners were not made parties to the action, as they were being represented by the Member Communities.

Here, the District named all of its Member Communities as defendants in the Declaratory Judgment Action because it correctly understood that their elected public officials represent, and are charged by law with representing the best interests of, those property owners. Appellants have failed to identify *any* cases in which *hundreds of thousands* of property owners were all required to be joined in a declaratory judgment action, especially cases where, as here, the property owners were being represented by their communities and elected public officials. No such cases exist.

The Community Appellants have also made clear in their court filings and public statements that they are not only protecting their municipal interests, but also the interests of the property owners. See Sept. 2010 Sur-Reply, at 5-6 (listing statements made in court filings). They even issued a public statement to The Plain Dealer on September 20, 2010, proclaiming that "as Mayors and Managers" they "have joined together to challenge the Sewer District's action *on behalf of [their] citizens*," and they are "undertaking whatever efforts are appropriate and lawful to fight *on behalf of all [their] residents, churches and businesses.*" Id. at Exhibit "C."

Finally, if it were true that each property owner should have been made a party to this action (even though the property owners' taxes are funding the Member Communities' representation of them), the trial court was left with only three alternatives:

(1) Hold that the District may never bring a declaratory judgment action with respect to its authority to implement the Program because all of the hundreds of thousands of property owners must be made parties to and served with the lawsuit, which would be impossible for the District to do and the trial court to manage;

(2) Hold that the District may bring a declaratory judgment action with respect to its authority to implement the Program, but that representatives of defendant classes or subclasses must be appointed to represent the interests of the property owners; or

(3) Hold that the District may bring a declaratory judgment action with respect to its authority to implement the Program, and that the Member Communities' elected public officials and counsel do, in fact, represent the interests of the property owners who reside in those communities.

The District is legally entitled to file a declaratory judgment action, so alternative (1) was not a legitimate consideration. With respect to alternative (2), the trial court could have theoretically appointed representatives of defendant classes or subclasses *other than* the elected public officials and counsel for the Member Communities to represent those individuals, but this would have been procedurally complicated. The trial court chose the correct option, alternative (3), which, consistent with Chapter 6119, Ohio common law, and the District's Petition and Plan for Operation, permitted this action to proceed as filed because the Member Communities' public officials and counsel represent the property owners residing therein. Nov. 2010 JE, at 2.[44]

This Court should affirm the trial court's decision, and overrule Appellants' assignment of error.

VII. THE TRIAL COURT PROPERLY OVERSAW AMENDMENTS TO TITLE V AFTER HOLDING A TRIAL AND ISSUING ITS PRELIMINARY FEBRUARY 2012 OPINION AS ALREADY DETERMINED BY THIS COURT (AOE No. 6).

In their final assignment of error, Appellants assert that the trial court erred by ordering the District to make certain post-trial amendments to Title V prior to issuing what the trial court determined to be its final order. This argument, like Appellants' preceding arguments, has no merit, and has already been rejected by this Court.

In its February 15, 2012 Opinion, the trial court indicated that it did not intend for the findings contained therein to constitute its final declaration, and that further proceedings were to be conducted. Feb. 2012 Opinion, at 20. Despite this fact, Appellants filed Notices of Appeal of

[44] It should also be noted that, despite the large amount of publicity that this case has received over the past three years, only a handful of property owners have sought to intervene, including the Property Owner Appellants.

that Opinion (Nos. 12-098108, 12-098112). These appeals were dismissed by this Court for lack of a final appealable order on March 28, 2012 on the grounds that "the common pleas court's opinion of Feb. 15, 2012 contemplates further action." March 28, 2012 Journal Entry (Nos. 12-098108, 12-098112). The Property Owner Appellants then filed a Motion for Reconsideration of the dismissal on April 3, 2012, asserting the *very same arguments* that are now asserted in Appellants' Opening Brief. April 3, 2012 Motion for Reconsideration, at 6-7 (Nos. 12-098108, 12-098112). This Court rejected those same arguments on April 9, 2012, stating:

> The trial court's opinion on February 15, 2012 specifically directs that, at the conclusion of a future hearing, the "[p]laintiff shall submit a proposed journal entry not inconsistent with this opinion." The opinion clearly contemplates that future action must be taken *before any judgment of the court becomes final.*

April 9, 2012 Journal Entry (Nos. 12-098108, 12-098112) (emphasis added).

Regardless of the fact that all of Appellants' arguments have already been rejected by this Court, and as set forth in the District's Cross-Appeal below, the trial court had no legal basis for requiring the District to make any of its proposed changes to Title V, which was lawful as written. Therefore, Appellants' assignment of error is irrelevant and should be overruled by this Court.

LEGAL ARGUMENT RELATING TO CROSS-APPEAL

I. STANDARD OF REVIEW.

When reviewing civil appeals from bench trials, the appellate court must apply a "manifest-weight standard of review" with respect to rulings on factual issues. Domaradzki v. Sliwinski, 8th Dist. No. 94975, 2011-Ohio-2259, ¶ 6. However, appellate courts should apply a *de novo* standard of review in regard to the trial court's determination of "legal issues" in the case. Arnott v. Arnott, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 13.

II. THE TRIAL COURT ERRED IN FINDING THAT THERE IS NO RATIONAL BASIS FOR DISPARATE TREATMENT OF RESIDENTIAL AND NON-RESIDENTIAL PROPERTY OWNERS WITH RESPECT TO THE STORMWATER FEE.

In its February 15, 2012 Opinion, the trial court found that "no rational basis exists for the disparate treatment of non-residential property owners" in Title V, referring to the fact that, unlike residential properties that are charged the Stormwater Fee based upon where the estimated amount of their impervious surface falls within a three-tiered system adopted by the District, the top tier serving as a cap (see Pl's Tr. Ex. 2, § 5.0707(a)-(c)), the Stormwater Fee for non-residential properties is charged based upon the actual amount of their impervious surface, without the use of any tiered system or cap (Id. at § 5.0707(d)). Feb. 2012 Opinion, at 16. The trial court then ordered the District to "re-work this portion of the fee schedule providing either a cap or a reasonable declining block scale to non-residential property owners." Id. As discussed below, the trial court erred because it ignored the evidence introduced by the District at trial demonstrating a rational basis for Title V's treatment of residential and non-residential property owners, which treatment is also supported by Ohio law.

"Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution guarantee every person equal protection under the law." Cuyahoga Cty. Support Enforcement Agency v. Lozada, 102 Ohio App.3d 442, 452, 657 N.E.2d 372 (8th Dist. 1995) (citing Kinney v. Kaiser Aluminum & Chem. Corp., 41 Ohio St. 2d 120, 123, 322 N.E.2d 880 (1975)). "Both constitutional provisions place the same limits on governmental classifications." Id. "However, neither the state nor the federal Constitution prevents a governmental body from treating persons differently in appropriate situations." T.W. Grogan Co. v. N.E. Ohio Reg'l Sewer Dist, 41 Ohio App.3d 387, 388-389, 536 N.E.2d 19 (8th Dist. 1987). "Absent a suspect classification like race, religion, or alienage, the government need only show

that its classification *relates rationally* to a *legitimate governmental interest*." Id. (emphasis added). "Under rational-basis scrutiny, legislative distinctions are invalid only if they bear *no relation* to the state's goals and no ground can be conceived to justify them." State v. Thompkins, 75 Ohio St.3d 558, 560, 664 N.E.2d 926 (1996) (emphasis added).

The evidence presented by the District at trial established that, in determining the unit of measurement for the Stormwater Fee (*i.e.*, the ERU), the District, with the assistance of AMEC, conducted a statistical analysis of 870 residential properties within its service area to obtain the average amount of impervious surface thereon. Pl's Tr. Ex. 36, at 3-7. During this process, the District and AMEC determined that calculating the Stormwater Fee based upon the exact (as opposed to an estimated) measurement of impervious surface on each of the hundreds of thousands of residential properties within its service area would be unduly burdensome and an inefficient use of time, resources, and funds. Id. at 5. Based upon its statistical analysis, the District and AMEC found the three-tiered system for charging the Stormwater Fee to residential properties set forth in section 5.0707 of Title V to be equitable, cost-effective, and accurate.[45] Id. at 7; Pl's Tr. Ex. 2, § 5.0707(a)-(c); Tr. at 928-31 (Greenland).

The evidence also established that, unlike residential properties, non-residential properties in the District's service area vary widely in their amounts of impervious area. Pl's Tr. Ex. 36, at 7. The District determined, and AMEC recommended, that it is both more equitable and efficient to individually determine the charges for these properties by measuring their exact amount of impervious surface, and then computing their Stormwater Fee based upon those measurements. Id. at 7-8; P's Tr. Ex. 2, § 5.0707(d); Tr. at 921-22 (Greenland) (describing computation). Thus, the

[45] AMEC and the District determined that the three-tiered system for charging the Stormwater Fee to residential properties had an accuracy rate of at least 86%. See Pl. Tr. Ex. 36, at 7.

District clearly established at trial a rational basis for its differential treatment of residential and non-residential property owners in Title V.

Further, the disparate treatment of residential and non-residential property owners has repeatedly been upheld by Ohio courts as rational in the face of equal protection challenges, including by the Supreme Court of Ohio. For example, in Roosevelt Properties Co. v. Kinney, 12 Ohio St.3d 7, 465 N.E.2d 421 (1984), owners of multi-unit apartment complexes and other rental properties asserted an equal protection challenge to an administrative rule adopted by the tax commissioner designed to reduce the effect of inflation on the tax liability of owners of owner-occupied residential and agricultural properties only, *i.e.*, properties not primarily used for business or commercial purposes. Id. at 8-9. The Supreme Court of Ohio, in rejecting their challenge, held:

> We conclude, however, that since the Equal Protection Clause does not impose an "iron rule of equality," the line drawn in the subject cause is reasonable. *Although the classification places a greater tax burden on those who are using their residential property primarily for income producing purposes, this is rational.* The classification will withstand equal protection arguments on the basis of the state's interest in reducing the tax burden on specified property owners to further economic policies.

Id. at 15 (emphasis added).

The disparate treatment of owners of different types of properties in the face of equal protection challenges has been reaffirmed as rational by the Supreme Court of Ohio, as well as by this Court. See, e.g., Ohio Apt. Assn. v. Levin, 127 Ohio St.3d 76, 2010-Ohio-4414, 936 N.E.2d 919 (citing Roosevelt, and upholding as rational an administrative tax rule treating owners of residential rental property having four or more units differently than owners of property containing three or fewer units); T.W. Grogan Co. v. N. E. Ohio Reg'l Sewer Dist., 41 Ohio App.3d 387, 536 N.E.2d 19 (8th Dist. 1987) (holding that an exception to the regular billing practice of the District which permitted owners of certain larger properties with disproportionate water disposal outside

the sewers (but not owners of other types of properties) to measure sewer usage by metering the sewage itself was rational and did not deny equal protection).

Therefore, the trial court erred in finding that there is no rational basis for the disparate treatment of residential and non-residential property owners in Title V, and in ordering the District to provide either a cap or a declining block scale to non-residential property owners. The District's first assignment of error should be sustained.

III. THE TRIAL COURT HAD NO LEGAL BASIS FOR REQUIRING THE DISTRICT TO PROVIDE THE SCHOOL SYSTEMS WITH APPROPRIATE CURRICULUM FOR GRADES 1-12 TO FURTHER THE STATED PURPOSE OF THE STORMWATER EDUCATION CREDIT SET FORTH IN TITLE V.

In its February 15, 2012 Opinion, the trial court held that the District's Stormwater Fee Credit system, "[w]ith a few exceptions, is a rational way to advance a legitimate governmental interest, and not arbitrary, capricious or unreasonable." Without further explanation, the trial court then ordered the District to "provide the school systems with appropriate curriculum for each of grades 1-12 to achieve the stated purpose of the [Stormwater Education Credit]." Feb. 2012 Opinion, at 17. Simply put, the trial court had no legal basis for ordering the District to do so.

The Stormwater Education Credit is available to public and private primary, elementary, and secondary schools recognized by the State of Ohio that provide to students a regular and continuing program of education concentrating on stewardship of water resources and minimization of demand on the regional drainage system. Pl's Tr. Ex. 3, at 31. If obtained, it will reduce a school's Stormwater Fee by 25%. Id. The District's Stormwater Fee Credit Manual specifically includes a list of suggested course topics that could be provided by schools to obtain the credit. Id.

Although the trial court may have felt that the District providing specific curriculum to the schools would achieve the purpose of the Stormwater Education Credit *better than* providing a list

of suggested course topics, this was not an issue for its determination. The trial court's task was to determine whether the credit is a rational way to advance the District's legitimate governmental interest in regional stormwater management, which it clearly is. Therefore, the trial court had no legal basis for ordering the District to provide curriculum, and the District's second assignment of error should be sustained.

IV. THE TRIAL COURT HAD NO LEGAL BASIS FOR REQUIRING THE DISTRICT TO ACCREDIT COSTS OF LICENSED ENGINEERS IN COMPLETING NON-RESIDENTIAL PROPERTY OWNERS' APPLICATIONS FOR CREDITS AVAILABLE UNDER TITLE V.

In its February 15, 2012 Opinion, after finding the District's Stormwater Fee Credit system to be rational "[w]ith a few exceptions" as stated above, the trial court ordered the District to "submit a plan or formula providing for the accrediting of costs of licensed engineer in completing any applications for credits under the [S]tormwater Fee Credit Manual," and further prescribed that "[s]uch credit shall not exceed 10% of the stormwater fee" and "shall only be available to non-residential property owners, including school districts." Feb. 2012 Opinion, at 17. The trial court once again had no legal basis for ordering the District to make this modification to Title V and the Stormwater Fee Credit Manual.

The District, in determining that property owners could obtain credits against their Stormwater Fees for stormwater control measures implemented or constructed on their properties, also determined that, with respect to some of those credits, documentation must be completed by a licensed engineer and submitted with the credit application to demonstrate that the stormwater control measure meets certain minimum standards. See, e.g., Pl's Tr. Ex. 3, at 22, 28. Mr. Reese testified that these types of requirements are in place so that property owners can prove that they "deserve a credit." Tr. at 728 (Reese). He also testified that, in his vast experience, he has *never* seen a stormwater utility reimburse property owners for costs incurred in meeting engineering

requirements for credits, and "[t]he onus is *always* on the rate payer themselves to claim a credit." Id. at 727-28 (Reese) (emphasis added). As such, reimbursing engineering costs was not factored into the District's financial plan for the Program and projected revenue requirements. See generally Pl's Tr. Ex. 46.

Despite this and other evidence demonstrating a rational basis for the District's decision to not reimburse engineering costs, and the fact that *no* evidence was introduced by Appellants to refute it, the trial court nevertheless determined that the District should credit a portion of these costs against the Stormwater Fee (up to 10% thereof—no evidence was ever introduced to support this percentage), and ordered the District to amend Title V and the Stormwater Fee Credit Manual to incorporate this change. The trial court had no legal basis for its determination and order, and the District's third assignment of error should be sustained.

V. THE TRIAL COURT HAD NO LEGAL BASIS FOR REQUIRING THE DISTRICT TO REVISE, OR TO INCREASE THE AMOUNT OF, THE COMMUNITY COST-SHARE SET FORTH IN TITLE V.

In its February 15, 2012 Opinion, the trial court determined that "the 7.5% cost share is unfair to member communities because many flooding problems are in areas that drain far less than 300 acres, and the communities are in need of additional funds to deal with these local stormwater issues." Feb. 2012 Opinion, at 18. The trial court then ordered that "[e]ither the meaning of 'regional' must be arrived at by means of a consensus of the District and its member communities or cost share must reflect an amount no less than 25% to member communities for local stormwater projects." As with the District's other three Cross-Assignments of Error, the trial court had no legal basis for its determination and order.

In incorporating the Community Cost-Share into Chapter 9 of Title V, the District decided to place a percentage of funds collected through the Stormwater Fee from property owners in a Member Community into a separate account to be allocated to that Member Community for its use

towards local stormwater-related projects. Pl's Tr. Ex. 2, Chapter 9; Tr. at 942-46 (Greenland). The District recognized that the Member Communities have local stormwater systems that feed the Regional Stormwater System that need to be maintained and upgraded. Tr. at 942-43 (Greenland).

Mr. Greenland testified that the District set the Community Cost-Share percentage at 7.5% based upon a survey conducted at a Stormwater Advisory Committee meeting. Id. at 944 (Greenland). The multiple survey participants voted, on average, to set the percentage at 6.5%, which percentage the District decided to increase by one percent. Id.; see also Pl's Tr. Ex. 25, at 3. The District also considered the revenue needed to address regional stormwater problems under the Program in choosing this percentage. Tr. at 944 (Greenland); Pl's Tr. Ex. 46, at 15.

This evidence clearly demonstrates that the District had a rational basis for setting the Community Cost-Share percentage at 7.5%, and *no* evidence was introduced demonstrating that this percentage was irrational or arbitrary. Moreover, *no* evidence was introduced demonstrating (or even suggesting) that the percentage should be "no less than 25%" as determined by the trial court. The trial court had no legal basis for its determination and order, and the District's fourth assignment of error should be sustained.

CONCLUSION

There can be no dispute that Northeast Ohio has experienced an exponential increase in serious stormwater-related problems over the past several decades caused by development and the replacement of natural green spaces with impervious surface. By adopting Title V, the District has taken steps to manage stormwater on a regional basis that *no other* local agency, organization, or political subdivision has ever been willing to begin, or has ever had the capacity and resources to carry out. However, despite the District's extensive planning and efforts, eleven of the District's Member Communities and a group of intervening commercial property owners, *i.e.,* Appellants,

continue to oppose the District's Program because they simply do not want to pay anything for regional stormwater management.

From the outset of this litigation through trial, the District conclusively demonstrated that its Program is fully authorized by, and fully complies with all requirements imposed under, Ohio law. The Assignments of Error set forth in Appellants' Opening Brief have no merit, rely largely upon unsupported rhetoric, and misstate, misinterpret, and misconstrue facts, statutes, and the District's Petition and Plan for Operation. The District respectfully requests that this Court overrule them in their entirety and uphold the trial court's findings.

The trial court also had no legal basis for ordering the District to make *any* of the revisions to Title V and the Stormwater Fee Credit Manual discussed in the District's Cross-Appeal. The District respectfully requests that this Court sustain all of the District's Cross-Assignments of Error and reverse these specific findings in the trial court's February 15, 2012 Opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a duplicate of the foregoing was served this 4th day of January, 2013, by first class U.S. mail, postage pre-paid upon the following:

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