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

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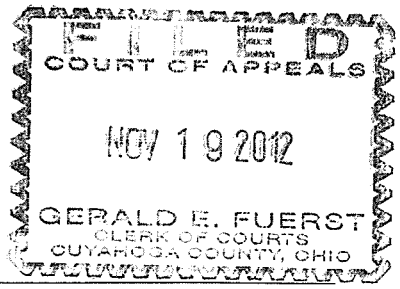
| NORTHEAST OHIO REGIONAL SEWER DISTRICT, | CASE NO. CA-12-098728 (Consolidated with Case Nos. CA-12-098729 and CA-12-098739) |
| Plaintiff/Appellee/ Cross-Appellant | Appeal from Cuyahoga County Court of Common Pleas Case No. CV-10-714945 |
| vs. | |
| BATH TOWNSHIP, OHIO, et al. | |
| Defendants/Appellants/ Cross-Appellee | |




**COMMON OPENING BRIEF OF DEFENDANTS-APPELLANTS 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 AND INTERVENING DEFENDANTS-APPELLANTS, 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., WITH SEPARATE ADDENDUM**

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## STATEMENT OF ASSIGNMENTS OF ERROR

**ASSIGNMENT OF ERROR NO. 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."** *(2/15/12 Opinion)*

**ASSIGNMENT OF ERROR NO. 2: The trial court erred in denying the Cities' and Property Owners' Counterclaims, to the extent that it 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.** *(4/21/11 Journal Entry and Opinion)*

**ASSIGNMENT OF ERROR NO. 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.** *(4/21/11 Journal Entry and Opinion)*

**ASSIGNMENT OF ERROR NO. 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.** *(2/15/12 Opinion)*

**ASSIGNMENT OF ERROR NO. 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.** *(11/10/10 Judgment Entry)*

**ASSIGNMENT OF ERROR NO. 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.** *(6/28/12 Supplemental Journal Entry)*

## STATEMENT OF ISSUES PRESENTED

**Under Controlling Ohio Supreme Court Law, the Trial Court's Own Findings Compel the Conclusion That the Sewer District's "Stormwater Fee" Is, in Fact and in Substance, an Unlawful Tax.** *(Assignment of Error No. 1)*

**The "Stormwater Fee" Fails Even Threshold Compliance with R.C. Chapter 6119's Conditions for Creating Legitimate "Rentals and Other Charges."** *(Assignment of Error No. 2)*

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**Title V Directly Conflicts with Specific Charter Provisions Prohibiting the Sewer District's Assuming Ownership, Control, and/or Any Responsibility for Locally Controlled Systems Without the Local Community's Written Consent.** *(Assignment of Error No. 3)*

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**The Trial Court Lacked Subject Matter Jurisdiction Over the Sewer District's Declaratory Judgment Action Because the Sewer District Failed to Join All Persons Who Have or Claim Any Interest That Would Be Affected by the Declaration.** *(Assignment of Error No. 5)*

**The Trial Court Lacked Subject Matter Jurisdiction to Oversee Amendments to Title V After Holding a Trial and Declaring the Rights of the Parties.** *(Assignment of Error No. 6)*

## INTRODUCTION[1]

The Northeast Ohio Regional Sewer District's ("Sewer District") wholly improper effort to impose its "Regional Stormwater Management Program" (the "SMP") on its Member Communities, and on property owners in its service area, is unlawful for many reasons:

- The SMP will be funded (at **$38 million per year** to start) by charging property owners an unvoted, phony service fee ("Stormwater Fee"), which is really a tax under the Ohio Supreme Court's recent decision in *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186,

[1] On August 23, 2012, the Court consolidated Case Nos. CA-12-098728 and CA-12-098729. As a result, in compliance with Local Rule 3(C)(1), Defendants-Appellants in Case No. CA-12-098728 (the "Property Owners") and in Case No. CA-12-098729 (the "Cities") have prepared this Common Opening Brief, which has an addendum submitted by only the Property Owners.

2012-Ohio-2370. The Sewer District has tax authority, but not without voter approval.

- If it is not a tax, the Stormwater Fee remains unlawful because, as enacted, it complies with none of the Sewer District's R.C. Chapter 6119 revenue-generation authority.

- The Stormwater Fee notwithstanding, neither R.C. Chapter 6119 nor the Sewer District's Charter authorize the SMP, which, as adopted, also violates the member municipalities' Constitutional powers (*e.g.*, "utility" powers under Section 4, Article XVIII, Ohio Const.), and the due process and equal protection rights of property owners in the Sewer District's Service Area.

Thus, the trial court erred in declaring the SMP to be lawful and in denying Appellant Cities' and Appellant Property Owners' Counterclaims to enjoin the SMP's implementation.

Additionally, the trial court never acquired jurisdiction over the Sewer District's declaratory judgment action. The Sewer District failed to join as parties "all persons who have or claim an interest that would be affected by the declaration," as R.C. 2721.12(A) requires. Deeming the Member Communities (many of which raised no objection to the SMP or Stormwater Fee, and some of which—such as Cleveland—made deals with the Sewer District in exchange for their support for the SMP) as adequately representing all Sewer District service area property owners subject to the Stormwater Fee made no sense at all. And, if jurisdiction was acquired, it ended once the trial ended and the parties' rights were declared in the February 15, 2012 Journal Entry. The trial court had no R.C. Chapter 2721 jurisdiction (or any other) thereafter to pursue its post-judgment-amendment effort to repair the legally faulty SMP.

## COMBINED STATEMENT OF THE CASE AND FACTS

### A. The Sewer District's creation and the establishment of its Service Area.

By the late 1960's and early 1970's, raw sewage discharge into Lake Erie was creating a serious health hazard and destroying the area's greatest natural resource. In 1972, after years of costly, protracted litigation, a regional sewer district was created through the R.C. Chapter 6119

petition process, which includes the assignment of a special Court, and notice and opportunity to be heard by all interested parties.[2] The Honorable George J. McMonagle's Orders charged the Sewer District with addressing the region's sanitary sewage disposal problems. (*See* Sewer District's original Petition (which includes its Plan of Operation) at Cuyahoga County Court of Common Pleas Court No. SD 69411.)

Between 1972 and 1975, the Sewer District's Plan of Operation and its authority were amended by various petitions and court orders, culminating in the August 28, 1975 Court Order that constitutes the Sewer District's "Charter." (*See* 8/28/75 Judgment by Judge George McMonagle, Defs.' Trial Ex. 8, App. 1 hereto.) Although subsequently amended by other court orders, the 1975 Charter's core substantive prohibitions and limitations remain in effect. In simplest terms, the approved plan charged the new Sewer District with acquiring and building regional sewage collection, treatment, and disposal facilities, and directed the consenting member communities to connect their sanitary sewers to these Sewer-District-owned facilities. (*Id.*) The Charter allowed the charging of a "sewer rate" based upon the water volume consumed by residents connecting to these facilities. (*Id.*)

The Sewer District's *raison d'etre* has always been to provide sewage disposal and treatment facilities to its Member Communities.[3] (*Id.*) And Sewer District membership—and its Service Area's geographic scope—arose based upon the consenting member communities' need

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[2] Note that proposed amendments to the Sewer District's Charter can only be heard by a statutory multi-county Court for the District, which is made up of a judge from each county within the Sewer District's territory to be assigned by the presiding judge of each of those counties. R.C. 6119.03.

[3] Exhibit A to the Charter provides, in part, that "[t]he territory to be included in the Northeast Ohio Regional Sewer District shall include all the territory located within the boundaries on the attached map, which territory is that portion of Cuyahoga County presently served, or mainly capable of being served by gravity, by sewers leading to the three wastewater treatment plants in the City of Cleveland plus the proposed Cuyahoga Valley Interceptor Sewer."

to connect to those facilities. (*Id.*) The original Sewer District members were communities (*i.e.*, cities, villages, and townships) that used Cleveland's sewage disposal and treatment facilities, the ownership of which Cleveland transferred to the Sewer District. (*Id.*) Later, additional communities (including some from Summit, Lorain, and Lake Counties) joined or contracted with the Sewer District to use those facilities.

Several Cuyahoga County communities (the "Non-Member Communities")—including Bay Village, Bentleyville, Chagrin Falls, Chagrin Falls Township, Fairview Park, Hunting Valley, North Olmsted, Rocky River, Westlake, and Woodmere—are not Sewer District members because they either have their own sewage disposal and treatment facilities or have access to other such non-Sewer District facilities. Similarly, large swathes of certain Member Communities (the "Excluded Portions of Member Communities")—*e.g.*, Bedford, Bedford Heights, Euclid, Lakewood, North Royalton, Olmsted Falls, Olmsted Township, Orange Village, Pepper Pike, and Strongsville—are not within the Sewer District's service area because they are serviced by non-Sewer District sewage disposal and treatment facilities. The Sewer District's Service Area is, thus, formed by a sanitary sewer connection network that includes only portions of many communities, and excludes much of Cuyahoga County. (*See* Court Orders.)

**B. The Sewer District's Regional Stormwater Management Program ("SMP").**

On January 7, 2010, the Sewer District's Board of Trustees amended the Sewer District's Code of Regulations by enacting Title V, "Stormwater Management Code" ("Title V"). (*See* Title V as Ex. 1 to Compl. (Pag. #1), App. 3 hereto.) Title V purports to create a stormwater utility within the Sewer District's territory, and an SMP contemplating no less than the "planning, financing, design, improvement, construction, inspection, monitoring, maintenance, operation and regulation" of such portions of Northeast Ohio as the Sewer District identifies as

its "Regional Stormwater System." (*See* Title V, Section 5.0501.)

***1. The Sewer District's ambitious vision for its SMP.***

The ambitious SMP far surpasses the Sewer District's decades-old Charter mandate to treat and dispose of sewage. In breathtakingly broad terms, the SMP claims to consist of:

> All activities necessary to operate, maintain, improve, administer, and provide Stormwater Management of the Regional Stormwater System and to facilitate and integrate activities that benefit and improve watershed conditions across the Sewer District's service area.

(Title V, Section 5.0219.) That Regional Stormwater System claims to include:

> The entire system of watercourses, stormwater conveyance structures, and Stormwater Control Measures in the Sewer District's service area that are owned and/or operated by the Sewer District or over which the Sewer 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 Sewer District shall maintain a map of the Regional Stormwater System that shall serve as the official delineation of such system.

(Title V, Section 5.0218.)

The SMP outlines an alarming breadth of unauthorized activities. Under the SMP, the Sewer District now deems itself a "stream system manager" and a "regional watershed integrator." (Transcript of Proceedings ("Tr."), filed 10/5/12, at 142.) The Sewer District declares that it will be regulating, managing, and performing maintenance (*i.e.*, engage in "projects") on watercourses and stormwater conveyances within municipalities and other political subdivisions of the State, and will be doing so without owning or controlling any watercourse and without actually treating or processing stormwater in any facility.

The Sewer District's Charter, however, prevents it from "assuming ownership or management" and from "assuming responsibility or incurring any liability for the planning, financing, construction, operation, maintenance or repair of any ***local*** sewerage collection

facilities and systems (including storm) without the local community's consent." (App. 1 hereto) (emphasis added). But the Sewer District seeks to elude these restrictions by arbitrarily reclassifying parts of the Member Communities' local stormwater systems—as the Charter defined "local"—as parts of Title V's so-called Regional Stormwater System, now supposedly under the Sewer District's regulatory control.

Indeed, Title V broadly defines the Regional Stormwater System to include watercourses, stormwater conveyances, and structures receiving drainage from 300 acres of land or more. (Title V, Section 5.0218.) The Sewer District concedes that this Regional Stormwater System "will include over four hundred and fifty (450) miles of streams, pipes, and culverts over the Sewer District's service area." (Compl. (Pag. #1) at ¶ 41.) (*See* Regional Stormwater System map, at Plaintiff's Trial Ex. 28, App. 4 hereto.) By default, therefore, according to the Sewer District the "Local Stormwater System" is just the remainder of watercourses, stormwater conveyances and structures that the Sewer District excludes from the Regional Stormwater System. (Title V, Section 5.0212.)

***2. The Sewer District's ambitious plan to fund its SMP.***

The Sewer District has created a $200 million "wish list" of projects for its SMP. (*See* Pl.'s Trial Ex. 44, App. 5 hereto.) The plan is to fund the SMP with a so-called user fee ("Stormwater Fee") to be paid by some, but not all, property owners in the Sewer District's Service Area, which will generate $38 million per year to start. (*See* Pl.'s Trial Ex. 47, App. 37 hereto.) The Stormwater Fee is scaled based on the square feet of a property's impervious surfaces, such as rooftops, parking lots, access roads, patios, etc. (Title V, Chap. 7.) Note that SMP expenditures from this Fee will not be like those the Sewer District incurs to fulfill its waste water treatment duties, *i.e.*, the "hard" operational and facility costs of treating or

processing waste water. Rather, SMP expenditures of the Stormwater Fee are slated to be used in the future to fulfill the Sewer District's wish list of projects, which are contingent and speculative, especially since, as of the time of trial, the Sewer District had no written consent from any property owner to construct anything on their property and no written consent from any municipality to construct a facility within its boundaries. (Tr. 1175; See Joint Stipulation 12/14/11, App. 38 hereto).

Under the Stormwater Fee provisions for 2013, residential property owners will pay a flat rate Stormwater Fee (unilaterally set by the Sewer District) under a three-tier system based on the residence's size: those less than 2,000 sq. ft. ($3.03/month); those between 2,001 and 3,999 sq. ft. ($5.05/month); and those 4,000 sq. ft. or more ($9.09/month). (Title V, Sections 5.0707 & 5.0708.) For non-residential properties, the Stormwater Fee is calculated by multiplying a set rate ($5.05) per each 3,000 square feet of impervious surface on the property (including buildings and parking lots.) (*Id.*) Thus, based on the Sewer District's Title V formula a commercial facility with ten acres of impervious surface, for example, would have to pay Stormwater Fees of $8,847.60 annually.

Some owners of property with impervious surfaces, however, will pay no Stormwater Fee. Title V, Section 5.0705 exempts public road rights-of-way, airport runways, airport taxiways, and railroad rights-of-way. During the trial court's post-trial-amendment process, the Sewer District further amended Section 5.0705 to exempt "[c]emetaries that are owned and operated by the State of Ohio, a County, a Member Community, or not for profit entity." The Sewer District also then added an "Educational Economically Disadvantaged Stormwater Fee," *i.e.*, a reduced Stormwater Fee for schools demonstrating the eligibility of at least 25% of their current students for the Free Lunch Program (42 U.S.C. § 1751, *et seq.*). Title V provides a

credit system to offset part of a property owner's Stormwater Fee. (Title V, Chap. 8.) Property owners, however, have no way to "shut-off" the stormwater utility or to avoid the Stormwater Fee. (Title V, Section 5.0712.) And Title V's "Community Cost-Share Program" directs the return to the Sewer District's Member Communities a percentage of the Stormwater Fee revenues collected.[4] (Title V, Chap. 9.)

**C. Proceedings in this action.**

On January 7, 2012, the same day Title V was enacted, the Sewer District commenced this action. The Sewer District sought a declaratory judgment ("Complaint") on the validity of Title V and, alternatively, to have the Sewer District's governing judicial orders amended ("Petition") to include Title V. In its Complaint, the Sewer District named all of its Member Communities (which included the Cities) as defendants, but failed to name and join any property owners within its Service Area even though they would be the ones actually paying the Stormwater Fee.

Several groups intervened in the action, including the Property Owners. Both the Cities and the Property Owners counterclaimed, seeking a permanent injunction against the Sewer District to prevent the SMP's implementation. The Cities also filed a Motion for Preliminary Injunction, which the trial court denied. (*See* Answer & Countercl. filed 8/5/10 (Pag. #382); *see* 5/19/10 Mot. for Prelim. Inj. (Pag. #293).)

On June 25, 2010, the Cities moved to dismiss the action for lack of subject matter jurisdiction based on the Sewer District's failure to name necessary parties. (Mot. to Dismiss,

[4] The version of Title V attached to the Complaint sets this Community Cost Share amount at seven and one-half percent, but, as discussed below, after trial Title V was amended according to the trial court's orders to increase the amount to twenty-five percent. (Title V, Section 5.0903; See Op. dated 2/15/12 (Pag. #557) at page 18 & 20, App. 8; revised Title V, Section 5.0903 filed 6/7/12 (Pag. # 574), App. 9.)

filed 6/25/2010 (Pag. #343).) The Motion also sought dismissal of the Petition, since amendment of the Sewer District's Charter could be accomplished only through a separate R.C. Chapter 6119 petition process, not through a civil action. The Property Owners joined in the Cities' Motion to Dismiss. The trial court agreed that the Petition was not a proper pleading; nonetheless, it denied the Cities' and the Property Owners' motion. (11/10/10 Judgment Entry (Pag. #411), App. 6 hereto.)

The parties eventually moved for summary judgment. The Sewer District moved for partial summary judgment on its statutory and Charter authority to enact Title V. Excluded from the Sewer District's Motion, and reserved for trial, were issues relating to the validity and implementation of the "Stormwater Fee." (1/31/11 Motion for Partial Summary Judgment (Pag. #435).) Other defendants, including the Cities and the Property Owners, cross-moved for summary judgment. (2/22/11 Mots. for Summ. J. & Mem. in Support (Pag. #449 and #450).)

In its April 21, 2011 Journal Entry and Opinion, the trial court denied the Cities' and the Property Owners' cross-motions for summary judgment, finding that the Sewer District has authority under R.C. Chapter 6119 and its Charter to enact the SMP. (4/21/11 Journal Entry and Opinion (Pag. #473), App. 7 hereto.) The Court, however, did grant summary judgment to Defendant City of Richmond Heights, which argued that specific Title V enforcement provisions (*i.e.*, Sections 5.0602, 5.1005, and 5.1006) exceeded the Sewer District's statutory authority. (*See* City of Richmond Heights' 2/22/11 Cross-Mot. for Partial Summ. J. (Pag. #444); *see* 4/21/11 Opinion (Pag. #47).)

After a thirteen-day bench trial, the trial court addressed the remaining issue, *i.e.*, the validity of the Sewer District's Stormwater Fee for funding the SMP. In its 2/15/12 Opinion, the trial court declared that the Sewer District's proposed Stormwater Fee "is authorized under R.C.

6119.06(W) and 6119.09" (*id.* at 7) and "not otherwise restricted by [the Sewer District's] charter" (*id.* at 9); that the proposed Fee is not an unauthorized tax (*id.* at 11); that the methodology employed to calculate and impose the Fee was constitutional (*id.* at 13); and that the Fee did not violate any parties' equal protection rights. (*Id.* at 14.)

However, with respect to the Cities' and the Property Owners' constitutional challenges to the SMP, the trial court also declared that there exists "no rational basis for the disparate treatment of non-residential property owners" under Title V (*id.* at 16); that "the 7.5% cost share is unfair to member communities" (*id.* at 18); that "the [Sewer] District shall provide the school systems with appropriate curriculum for each of grades 1-12 to achieve the stated purposes of the credit" available to schools that teach stewardship of water resources (*id.* at 17); and that "the [Sewer] District shall submit a plan or formula providing for the accrediting of costs of [sic] licensed engineer in completing any applications for credits under the stormwater Fee Credit Manual." (*Id.* at 17.)

Subject to these Title V defects, the trial court declared that the Stormwater Fee, and its associated credit, exemption, and Community-Cost-Share components, did not violate any parties' substantive due process rights. (*Id.* at 16-17.) These declarations also in effect addressed the Cities' and the Property Owners' claims concerning the Sewer District's authority to expend funds to develop, implement, and promote its SMP and to impose the Title V Stormwater Fee. Accordingly, the trial court denied the Cities' and the Property Owners' claims for permanent injunction. (2/15/12 Opinion (Pag. #557), App. 8 hereto.) The trial court went further and required the Sewer District to propose certain Title V revisions:

1) To formulate an engineering cost credit against the Stormwater Fees;

2) To revise the Community Cost-Share formula such that Member

Communities would receive at least percent (25%) of the revenue the Stormwater Fees generate; and

3) To create a cap and sliding scale for non-residential property Stormwater Fee payors. (*Id.*)

The trial court set a post-trial conference to hear the Sewer District's proposed Title V changes, which took place on May 30, 2012. The Sewer District then submitted draft Title V revisions to the trial court on June 7, 2012. (6/7/12 Revised Title V as Exhibit 2 to Report to Court (Pag. #574), App. 9 hereto.) The Cities and the Property Owners objected to these proposed Title V revisions. (6/27/12 Reply and Objections (Pag. #577).)

The trial court then issued a Supplemental Journal Entry (6/28/12 Supplemental Journal Entry (Pag. #578), App. 10 hereto.) In this Entry, the trial court approved and adopted the Sewer District's proposed engineering cost credit, and found that the proposed declining-block rate structure for non-residential property Stormwater Fee payors satisfied equal protection requirements. (*Id.*) The Entry added, nonetheless, that "[t]he Court does not, however, adopt the proposal at this time without further argument." (*Id.*) It also did not address the Sewer District's proposed Community-Cost-Share revisions or proposed percentage increases. (*Id.*)

## ARGUMENT

### Standard of Review

Appellate courts review the denial of a motion for summary judgment de novo, using the same standard used by the trial court. *Smiddy v. Wedding Party, Inc.*, 30 Ohio St.3d 35, 36 (1987); *Siebert v. Lalich*, 8th Dist. No. 87272, 2006-Ohio-6274. A summary judgment motion should be granted if the movant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the non-movant. *Siebert*, at ¶ 14. Appellate courts also apply a de novo standard of review to a trial court's determinations of legal issues in a

declaratory judgment action. *Arnott v. Arnott.* 132 Ohio St.3d 401, 2012-Ohio-3208.

**ASSIGNMENT OF ERROR NO. 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."**

In its 2/15/12 Opinion, the trial court decided that the Sewer District's so-called "Stormwater Fee" for funding its SMP was "authorized by R.C. 6119.09 and not an unlawful imposition of a tax by the Regional Sewer District." (2/15/12 Op., p. 11.) In doing so, however, the trial court erred in that the Stormwater Fee is not only an unlawful tax, but also not even remotely authorized under R.C. 6119.09. The trial court erroneously upheld this Fee.

**A. Under controlling Ohio Supreme Court law, the trial court's own findings compel the conclusion that the Sewer District's "Stormwater Fee" is in both fact and substance an Unlawful Tax.**

The Sewer District's SMP proposes to generate in excess of $38 million ***annually*** to pay for its sundry regional stormwater projects by charging certain of the Sewer District's property owners a "Stormwater Fee"—some Sewer District property owners will be excepted or exempt from paying anything. The Fee is scaled based on the amount of impervious surface on the payor's property, and the Sewer District claims that the Fee is just another authorized "rental or other charge" under R.C. 6119.09. Under Ohio law, however, which elevates substance over form, the Stormwater Fee is, in reality, a tax. As such, it is invalid because it may only be levied if the Sewer District had complied with R.C. 6119.18. That section, which authorizes the Sewer District to "levy for current expenses of district," requires prior approval of a majority of the Sewer District's electors before such a $38 million "fee" is imposed. It was not followed.

In deciding that the Sewer District's Stormwater Fee was a valid "rental or other charge" under R.C. 6119.09 and not a tax, the trial court unambiguously distinguished taxes from fees:

Taxes are ***involuntary general burdens*** imposed for the purpose of supporting the

government ***for the benefit of all***. Fees are ***voluntary payments*** made in exchange ***for a specific service*** or benefit."

(2/15/12 Op., p. 9)(emphasis added). The trial court also found as follows regarding the Stormwater Fee:

1) The fee is essentially ***involuntary*** in that property ***owners cannot "shut off" the "service,"*** although they may limit their use of the stormwater runoff through stormwater credits.

2) The imposition of the SMP fee will ***generally benefit the public*** who reside in or frequent the service area of the Sewer District.

3) The charges ***will not exceed the cost of the SMP*** because there is a backlog of projects totaling in excess of $200 million within the Sewer District's plan.

4) The funds ***will be segregated from other monies*** of the Sewer District and used only for stormwater-related projects.

5) The fee would be paid in return for services provided by the Sewer District (stormwater maintenance and construction projects.)

(2/15/12 Op., p. 11) (emphasis added). The trial court also explicitly found, inter alia:

6) that the Sewer District fee "is a rational way to advance the Sewer District's legitimate governmental interest in the ***regional*** management of storm water" (2/15/12 Op., p. 16—emphasis added);

7) that the SMP's benefits include "improvements in ***water quality, habitat for wildlife and reduction of future costs*** relating to storm water management" (2/15/12 Op., p. 8—emphasis added); and

8) that the SMP is scaled to benefit and address storm water impacts affecting "***regional***" units, as defined in the Program, as opposed to those affecting the individual properties of fee-paying District residents. (2/15/12 Op., pp. 12-13—emphasis added).

On May 31, 2012, just three months after the trial court made these findings, the Ohio Supreme Court decided *Drees Company v. Hamilton Township,* 132 Ohio St.3d 186, 2012-Ohio-2370 (attached at App. 11). In *Drees Co.*, Hamilton Township imposed four so-called "impact fees" upon those applying for zoning certificates for new construction, purportedly to offset the

increased services and improvements that new development makes necessary. *Id.* at ¶¶ 3-4. The fee amounts were assessed on a calculated "per unit" standard for residential or temporary lodging land uses and on a "per-1,000 sq. ft." basis on most non-residential and institutional land uses. *Id.* at ¶ 4. The *Drees Co.* court unanimously invalidated the four "impact fees" as unlawful taxes, after "[h]aving analyzed the substance of the assessments, and not merely their form . . . ." *Id.* at ¶ 40. The decision is plainly dispositive on the question of whether the Stormwater Fee was really a tax. Although the Cities and the Property Owners promptly moved for reconsideration to bring the *Drees Co.* decision to the trial court's attention, the trial court erred denying that motion.

The *Drees Co.* Court acknowledged that Hamilton Township was a "creature of statute" with powers extending only within the precise limits set by its statutory grant. *Drees Co.* at ¶ 13; *Burger Brewing Co. v. Thomas*, 42 Ohio St.2d 377, 379 (1975). The same is true of the Sewer District. *See generally Hall v. Lakeview Local Sch. Dist. Bd. of Edn.*, 63 Ohio St.3d. 380 (1992). The *Drees Co.* Court also observed that the Township was endowed with various legitimate taxation powers, and that the "impact fees" in question there were not adopted pursuant to those grants of statutory taxation power. *Id.* at ¶ 14. These are also both true as regards the Sewer District and its "Stormwater Fee." (*See e.g.*, R.C. 6119.17 and 6119.18 for the Sewer District's taxation authority.[5]) The *Drees Co.* Court stated succinctly: "[I]f the impact fees are actually taxes, they violate R.C. 504.04." *Id.* at ¶ 14. Here, if the "Stormwater Fee" is in fact a tax, the Sewer District had power only under, *e.g.*, R.C. 6119.18 to adopt it, not under R.C. 6119.09.

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[5]Both R.C. 6119.17 and 6119.18 require, among other things, voter approval for the imposition of any tax. See also R.C. 6119.58, which details both procedures for the Sewer District to assess properties to fund project planning, and the due process and appeal rights of property owners so assessed.

To determine whether the "fee" was a tax, the *Drees Co.* Court examined whether (1) the fee is imposed in furtherance of a regulatory measure; (2) the fee is placed in a separate fund and used only "for narrow and specific purposes"; (3) the fee is charged in return for a service; and (4) the fee charged was "tied to events, not the spending whims of government." *Drees Co,* at ¶¶ 16-20, 24, citing *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St.3d 111 (1991). The *Drees Co.* Court also considered (1) the type of entity imposing the assessment (administrative versus legislative); (2) the parties upon whom the assessment is imposed (a larger group of parties making the assessment more like a tax); and (3) "whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed." *Drees Co.* at ¶ 27, citing *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgt. Dist.*, 116 F.3d 835, 837 (6th Cir. 1999), quoting *Bidart Bros. v. California Apple Comm.,* 73 F.3d 925, 931 (9th Cir. 1996).

Applying these *Drees Co.* factors to the trial court's own findings in this case leads to the same conclusion reached in *Drees Co.* The purported "fee" here is really a tax too, because:

- what the enacting agency calls the assessment is immaterial to discerning its actual nature as a tax (*Drees Co.* at ¶ 15);
- placing "fee" money collected into a segregated "fee" account does not transform a tax into a "fee," and is, in fact, ***irrelevant*** to a determination of its nature as a tax (*id.* at ¶¶ 22, 31);
- "fees" collected that are not used for specific improvements to the area around the particular property upon which the assessment is imposed are more general-purpose taxes (*id.* at ¶ 22);
- "fees" are in reality taxes if the assessed parties receive no greater benefit than any other taxpayer despite the payment of the additional assessment (*id.* at ¶ 23);
- a "fee" not designed to encourage the assessed party's compliance with that party's statutory obligations is more a general-purpose tax (*id.* at ¶ 21);

- a "fee" the expenditure of the proceeds of which is not tied to specific events, but instead to the spending whims of government, functions more as a general-purpose tax (*id.* at ¶ 24); and

- "fees" used to fund "public purposes" are more like general-purpose taxes used to promote the general welfare, a conclusion unchanged if their proceeds are dedicated to only a particular aspect of the general welfare. (*Id.* at ¶ 31.)[6]

The *Drees Co.* court also quoted approvingly from decisions on point from other states' highest courts. In one, *Home Builders Assn. of Greater Des Moines v. W. Des Moines*, 644 N.W.2d 339 (Iowa 2002), that court struck the "fee" there as an unlawful tax citing the lack of a special benefit inuring to the fee's payors. *Drees Co.* at ¶ 32. The *West Des Moines* court emphasized the vital check voters provide against abusive government taxing/spending:

> To conclude otherwise would in essence permit the City to assess property for a public improvement without regard to the limitation on its taxing authority.

*Id.,* 644 N.W.2d at 349, quoted by *Drees Co.* at ¶ 32. Finally, like these other states' highest courts, the *Drees Co.* Court found that the extent of the public benefit that the assessment produces is a key factor in the fee-tax analysis. *Id.* at ¶ 33. Applying these cases, the Court held:

> The impact fees are a revenue-generating measure designed to support infrastructure improvements benefiting the entire township. 'Taxation refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all people.' *Cincinnati v. Roettinger*, 105 Ohio St. 145, 153-154, 137 N.E. 6 (1922.)

*Id.* at ¶ 40.

The trial court's very findings describe the Sewer District's Stormwater Fee in terms

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[6] In *Am. Landfill*, the Court found that "the third factor pushed the assessment into the realm of a tax." Despite the revenues being placed in a separate fund, the revenues were used as a benefit to the public and not just the waste disposal facilities at issue (*e.g.*, recycling programs, road and public-facility maintenance, and emergency services). *Id.* at ¶ 31 ("'These purposes 'relate directly to the general welfare of the citizens of [Ohio],' and dedication to a particular aspect of state welfare makes them 'no less general revenue raising levies.'").

matching those the Supreme Court used in *Drees Co.* to describe the tax posing as an "impact fee" there. The Stormwater Fee is patently only for generating revenues, to be spent solely at the Sewer District's will, to produce (at best) generalized public benefits, which furnish the Fee's payors no benefit different in kind or degree from that enjoyed by any non-payers (either within or outside of the Sewer District's Service Area), and furthers no regulatory purposes[7]. *Drees*, 2012-Ohio-2370, at ¶¶ 17, 19, 23; *see also*, *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 & 271 (Mich. Sup. Ct. 1999); and *City of Cincinnati v. Roettinger*, 105 Ohio St.145, 153-154 (1922).

Under *Drees Co.*, the "Stormwater Fee" is plainly a tax. Because the Sewer District imposed it without complying with applicable statutory taxation procedures (*e.g.*, R.C. 6119.18), it is invalid. The trial court's contrary decision should be reversed.

**B. The "Stormwater Fee" fails even threshold compliance with R.C. Chapter 6119's conditions for creating legitimate "rentals and other charges."**

Regardless of whether the Stormwater Fee is an unlawfully adopted tax, the trial evidence also established that the Fee bears no resemblance to the legitimate "rental[s] or other charge[s]" R.C. 6119.09 actually authorizes, and is invalid for that reason too.

In support of its erroneous decision that R.C. Chapter 6119 authorizes the "Stormwater Fee," the trial court made the following findings:

> Initially, the Court finds that the Northeast Ohio Regional Sewer District's Stormwater Management Program fee is authorized under R.C. 6119.06(W) and 6119.09 because the fee is for the use of services of a water resource project or

[7] Other trial testimony only reinforced that the Stormwater Fee serves no regulatory purpose. Kyle Dreyfus Wells, the Sewer District's Manager of Watershed Programs, testified at length on the Sewer District's behalf concerning the Clean Water Act Phase II's ("Phase II") regulatory provisions and municipal responsibilities under them. (Tr. 1531-1534.) She clarified that the SMP plays no role in municipal compliance with Clean Water Act regulatory obligations—except, perhaps, incidentally through the former's public information aspect. (*Id.*) Phase II duties and discretion remain with the municipality, respecting which the Sewer District's SMP has no role. (*Id.*)

any benefit conferred thereby.

> The Court finds that property owners "use" the unmanaged Regional Stormwater System as rainfall creates runoff from each parcel. The Sewer District provides the service of effective transportation of stormwater decreasing the flooding of homes, businesses and preventing excessive erosion and sedimentation. The benefits include the improvements listed above,[8] as well as improvements in water quality, habitat for wildlife and reduction of future costs relating to stormwater management. Citations omitted.

(2/15/12 Op., p. 11.) Revised Code Section 6119.06 lists a district's "Rights, powers, and duties." As regards fee-charging authority, R.C. 6119.06(W) states in part that a district may:

> (W) Charge, alter, and collect ***rentals and other charges*** for the ***use or services*** of any ***water resource project as provided in section 6119.09*** of the Revised Code. Such ***district may refuse the services*** of any ***of its projects if*** any of such rentals or other ***charges * * * are not paid by the user*** thereof * * *. (emphasis added.)

Revised Code Section 6119.09 details district powers and procedures concerning "Service agreements; rentals; [and] bonds." It states in pertinent part:

> [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 * * * with one or more persons * * * desiring the use or services*** thereof, ***and fix*** the terms, conditions, ***rentals, or other charges * * * for such use*** or services. (Emphasis added.)

(R.C. 6119.09, App. 12 hereto.) A "water resource project" is "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...." (R.C. 6119.011(G), App. 13 hereto) (emphasis added). The Stormwater Fee's remoteness from these provisions, as a matter of law, is obvious.

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[8]Presumably the improvements "listed above" are those argued at trial by Plaintiff's expert witnesses and listed on pages 4-6 of the trial court's 2/15/12 Opinion.

### 1. *The Stormwater Fee does not arise from voluntary agreements for service between the Sewer District and the property owners who are forced to pay it.*

The language of R.C. 6119.09 denotes that "charges" arise incident to "voluntary" subscriptions by property owners, pursuant to agreement, for the "use" of the Sewer District's "water resource projects." This statutory authority to impose "rentals or other charges" in exchange for "the use or services of any water resource project or any benefit conferred thereby" clearly contemplates paying customers who have the choice of accepting, rejecting, or limiting their *use* of the *service*, or *benefit* being provided. Indeed, the Sewer District's existing customers have such a choice regarding the Sewer District's sewage treatment services (*i.e.,* they can restrict their water consumption or even turn off or reject water service—as most of the many vacant properties in the Sewer District do).

Everything about the Sewer District's Stormwater Fee, however, involves involuntary exactions from select Sewer District property owners, without their consent, in exchange for no discernible, tangible, direct benefit. "Customers" are charged a fixed rate scaled only to the amount of impervious surface on their property; they must pay it each and every quarter, regardless of how much or little it rains or snows; and they can never reject or turn off the "service." The trial court even found as much. (2/15/12 Op., p. 11.) Absent resort to illegal or impractical measures (*e.g.*, tearing out a driveway or parking lot or shrinking a rooftop), the select property owners within the Sewer District's Service Area have no choice and are forced to pay the Stormwater Fee. This is plainly not the "charge" that R.C. 6119.09 contemplates.[9]

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[9] R.C. 6119.06(W) also provides that the "***district may refuse the services*** of any ***of its projects if*** any of such rentals or other ***charges * * * are not paid by the user*** thereof" (emphasis added). But it is ***impossible*** for the Sewer District to "refuse the services" it purports to be providing under the SMP to any property owner, regardless of whether the property owner fails to pay the Stormwater Fee. This impossibility highlights both (1) that a proper R.C. 6119.09 arises in

### 2. *The Sewer District owns and operates no SMP "water resource facilities" and therefore cannot charge for the service or use of any such facilities.*

The Sewer District has no SMP "services" to sell, rent, or make available to District property owners for a "charge." The trial testimony and evidence demonstrated that other than Lakeview Dam (which was a joint project between the Sewer District and local municipalities undertaken more than 25 years ago), the Sewer District has no existing facilities by which it provides services to property owners, whom the Sewer District will nevertheless begin charging the Stormwater Fee on January 1, 2013. (Tr. 454-459; *See* Defs.' Trial Ex. 9.) The Sewer District can construct no SMP "water resource project" without first obtaining written consent from the owner of any property (or otherwise securing a legal interest in a property by agreement or by eminent domain) upon which such facility is to be constructed. (Tr. 463-466.) Moreover, the Sewer District stipulated in Court that no facility will be built in any municipality that does not want the facility. (Tr. 20.) As of the time of trial, the Sewer District did not have written consent from any property owner to construct a facility on their property and no written consents from any municipality to construct a facility within its boundaries. (Tr. 2674-2679; Joint Stipulation 12/14/11, App. 38 hereto.)

The evidence also showed that there is no district-wide benefit from the Sewer District's fictional "Regional Stormwater System." Run-off from many Sewer District properties enters the ***Local*** Stormwater System of the ***municipality*** in which the property is located, ***flowing from it directly into Lake Erie, without touching any component of the fictional Regional Stormwater System.*** Indeed, that fictional "Regional Stormwater System" is almost entirely comprised of natural watercourses and culverts under the jurisdiction of the local communities,

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consensual, contractual service agreements with customers, and (2) that the Sewer District's SMP provides no utility service whatsoever to its customers.

over which the Sewer District has insisted that it is not acquiring ownership. And whatever benefit any Stormwater Fee-funded "water resource project" may produce, the benefit will never correspond in kind or degree to the Fee paid by any individual property owner so assessed. The benefit, per the trial court's own finding, was a generalized one, *e.g.*, to "wildlife habitat," or to residents, businesses, and property owners ***inside*** and ***outside*** the Sewer District's boundaries.

The Sewer District takes a most untenable position. It claims that starting January 1, 2013, it may impose and collect its Stormwater Fee from select Sewer District property owners for services which, on January 1, 2013, it will not be providing to them, and which, as regards any given Fee-paying property owner, the Sewer District may never actually provide to him or her. In short, the lack of any District owned, constructed or operated "water resource project" that a customer can actually and voluntarily "use" means no charge or fee is authorized under R.C. 6119.09. Therefore, R.C. Chapter 6119 does not in fact authorize the Stormwater Fee.

### *3. The Sewer District is unlawfully using its supposed Stormwater Fee to avoid other required R.C. Chapter 6119 revenue-generating procedures.*

The Sewer District has unilaterally and unlawfully employed its R.C. 6119.09 "charge" (the so-called Stormwater Fee) to generate revenues which the Sewer District is authorized to raise only under other R.C. Chapter 6119 provisions. Under R.C. Chapter 6119, the Sewer District is authorized to raise revenues by the following methods:

- R.C. 6119.18 authorizes the Sewer District to levy property tax millage "for the purpose of providing funds to pay" the "current expenses of the district," "any portion of the cost of one or more water resource projects," or both. ***This tax requires voter approval;***

- R.C. 6119.17 authorizes the Sewer District to levy property tax millage "to pay the interest on and to retire" any "bonds." The bonds, (*i.e.*, borrowing), which this section also authorizes, may be issued "to pay" for "any portion of the cost of one or more water resource projects or parts thereof" and "may include any portion of the cost of water resource projects to be specially

assessed." ***This tax and the associated bond issue both require voter approval***;

- R.C. 6119.42 authorizes the Sewer District to specially assess properties to pay for "all or any part of the cost connected with the improvement of any street, alley, or public road or place, or a property or easement of the district by constructing any water resource project or part thereof * * *" and for items listed in R.C. 6119.43. Only three methods of allocating these assessments are authorized: (i) by percentage of the property's tax value, (ii) the foot frontage of property abutting the project, or (iii) in proportion to the projects benefits to the property assessed. R.C. Chapter 6119's assessment procedure involves ***public inspection*** of all proposed projects to be funded by the assessment (R.C. 6119.46), ***notice*** of (R.C. 6119.47) and ***opportunity for owner objections*** to(R.C. 6119.48) proposed assessments, and a ***hearing*** before a disinterested "assessment equalization board" to consider owner objections and make appropriate assessment adjustments (R.C. 6119.49);

- R.C. 6119.58 authorizes the Sewer District to impose special assessments, under the foregoing procedures, "for planning purposes"; and

- R.C. 6119.09, which authorizes the Sewer District to impose "rentals or other charges" for the "use or services" of its "water resource projects."

The Sewer District may also issue unvoted "revenue bonds," that are "payable out of the revenues of the district which are pledged for such payment," the proceeds of which bonds may be used to fund the "paying any part of the cost of one or more water resource projects or parts thereof." R.C. 6119.12. And while R.C. 6119.06(I) permits a water and sewer district to levy a tax to pay for expenses, R.C. 6119.18 specifically limits the method of taxation to a real property tax, and only with a vote of the electors. Moreover, Section 2, Article XII of the Ohio Constitution requires that ***all*** real property taxes be based upon the value of the real property. *See State ex rel. Park Inv. Co. v. Board of Tax Appeals*, 32 Ohio St.2d 28 (1972.)

The Sewer District is using its Stormwater Fee to short-circuit all of these statutory procedures. In so doing, the Sewer District heedlessly disenfranchises all electors in its Service Area and denies them their legitimate, statutory oversight and control over the Sewer District's

operations, which the General Assembly conferred on those electors. The Sewer District's Stormwater Fee is not based upon the value of anyone's property, has not been submitted to the electors, is not charged for any identifiable service, and its payment has not been agreed to in advance by any charged property owner. It is the classic "***cart before the horse***" problem: the Sewer District is pretending to "charge" for "services" from projects that do not yet exist and, more fundamentally, which the Sewer District's electors have not yet seen or approved. In addition to its being an unlawfully imposed tax, the Stormwater Fee is not even a legitimate R.C. 6119.09 "rental or other charge."

**ASSIGNMENT OF ERROR NO. 2: The trial court erred in denying the Cities' and Property Owners' Counterclaims, to the extent that it 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.**

More basically still, R.C. Chapter 6119 does not authorize ***any*** sewer district to create and implement a separate utility or program to control flooding, erosion, and water-shed management, or to claim regulatory control over a very liberally defined "Regional Stormwater System," or to implement regional "Stormwater Control Measures." (Title V, Sections 5.0218 and 5.0222, respectively.) The Sewer District is utterly without statutory power under R.C. Chapter 6119 to enact Title V, *i.e.*, its sweeping SMP. The trial court, however, concluded as follows:

> The Court is not inclined to find the legislature's purpose while enacting Chapter 6119 was to establish separate political subdivision (bureaucracies) to address wastewater issues and separate political subdivision to address storm water issues that would result in duplicative and redundant government services. * * *
>
> For the foregoing reasons, the Court finds that Chapter 6119 authorizes the Sewer District to address intercommunity flooding, erosion and storm water-related water quality issues.

(5/5/11 Journal Entry & Op., p. 4.) But the trial court ignored several clear statutory terms and established rules of statutory interpretation to reach this erroneous conclusion.

1. The trial court ignored the rule that "creatures of statute," like the Sewer District, are strictly limited to their express statutory powers, and that no implied power exists where no express grant of power is codified. The Sewer District has no power to extend the authority which the General Assembly has conferred on it. *Burger Brewing Co. v. Thomas*, 42 Ohio St.2d 377, 379 (1975).

> Such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, ***if there be no express grant, it follows, as a matter of course, that there can be no implied grant.***

*D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 39 (emphasis added). In *D.A.B.E.*, the "creature of statute" was the Toledo-Lucas County Board of Health, and its statutory power under R.C. 3709.21 included the following fairly broad mandate:

> The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances.

Despite this seemingly broad grant of power, the *D.A.B.E.* court concluded that it did not authorize the Board of Health to adopt a regulation prohibiting smoking in all enclosed, indoor areas in Lucas County where members of the general public gather:

> "In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it." *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, 117 N.E. 6.

*Id.*, 2002-Ohio-4172, ¶ 40.

Ohio courts uniformly construe the powers of all such "creatures of statute" narrowly, inferring no grants of powers not strictly related to the "creature's" manifest statutory purposes. *See, e.g., In re Guardianship of Spangler,* 126 Ohio St.3d 339, 345-346, 2010-Ohio-2471; *Snyder v. Southeastern Local Sch. Dist.*, 171 Ohio App.3d 544, 547-48, 2007-Ohio-453 (4th Dist.); *Hall v. Lakeview Local Sch. Dist. Bd. of Edn.*, 63 Ohio St.3d 380, 383 (1992); *Rickard v. Trumbull Twp. Zoning Bd. of Zoning Appeals*, 11th Dist. No. 2008-A-0024, 2009-Ohio-2619, ¶ 56.

2. The trial court ignored R.C. Chapter 6119's complete lack of any express grant to sewer and water districts of powers touching any of the SMP's undisputed regulatory objects. The phrase "stormwater management" appears approximately 63 times in the Sewer District's Stormwater Management Code. It appears ***zero*** times in Chapter 6119. The same is true of the Stormwater Management Code's other regulatory objects (counts are approximate):

| The term/phrase | Appears this many times in the Stormwater Management Code: | And this many times in R.C. Chap. 6119: |
|---|---|---|
| "stormwater management" | 63 | 0 |
| "erosion" | 8 | 0 |
| "flooding" | 7 | 0 |
| "Regional Stormwater System" | 23 | 0 |
| "impervious surface" | 27 | 0 |
| "studies" | 1 | 0 |
| "storm water" | 221 | 2 |
| "water quality" | 8 | 1 |
| "watershed" | 45 | 1 |

Note that the single reference to "watershed" in Chapter 6119 is in the phrase "watershed districts," offered as just one among many examples of other political subdivisions. R.C. 6119.011(B). The single reference to "water quality" in Chapter 6119, oddly enough, relates to the Sewer District*'s* compliance with applicable water quality regulations with regard

to contracts it enters concerning water storage tanks. R.C. 6119.101.

3. The trial court discounted R.C. Chapter 6119's statement of the Sewer District's twofold statutory purposes. Entitled "Organization of District; Purpose," R.C. 6119.01 states:

> Any area situated in any unincorporated part of one or more contiguous counties or in one or more municipal corporations, or both, may be organized as a regional water and sewer district in the manner and subject to the conditions provided in Chapter 6119 of the Revised Code, ***for either or both of the following purposes:***
>
> (A) To ***supply water*** to users within and without the district;
>
> (B) To provide for the ***collection, treatment, and disposal of waste water*** within and without the district.

(R.C. 6119.01, attached at App. 14) (emphasis added). These delimiting purposes are underscored by the "regional water and sewer district" definition:

> "Regional water and sewer district" ***means a district organized or operating for one or both of the purposes described in section 6119.01 of the Revised Code*** and, if organized or operating for only one of those purposes, may be designated either a regional water district or a regional sewer district, as the case may be.

R.C. 6119.011(U) (emphasis added). The "regional sewer district" R.C. 6119.01 authorizes is one that "collects, treats, and disposes of waste water." This means that "waste water" is something that is "collected" ***and*** "treated" ***and*** "disposed of," conjunctively. And it also means that a "regional sewer district" is an entity that exists to do that "collecting, treating, and disposing of waste water." Every reference in Chapter 6119 to a "regional sewer district" must be read with reference to a district empowered to do only what R.C. 6119.01 authorizes. R.C. 1.49(A.) The SMP's regulatory ambitions appear nowhere in R.C. 6119.01, and the limiting legislative intent of these provisions has been completely ignored.

4. The trial court ignored the conspicuous absence in R.C. Chapter 6119 of storm water-related authority given by the General Assembly to other statutorily created agencies, *e.g.*:

- ***Watershed Districts*** (R.C. 6105.12, which are granted express statutory authority to "review and recommend plans for the development of the water resources," and "issue permits authorizing the construction, change, or alteration of a structure or obstruction in a restricted channel or relocation, alteration, restriction, deposit, or encroachment into or change of grade of a restricted channel or floodway * * *"; and

- ***Conservancy Districts*** (R.C. 6101.04—includes express statutory authority to "prevent floods," and "regulating stream channels," "irrigation," "diverting * * * watercourses," and "Arresting erosion".)

5. The trial court converted R.C. 6119.011(K)'s definition of "waste water" into the all-encompassing source of power for the Sewer District's expansive SMP. (5/5/11 Journal Entry and Op., p. 4, "The Court finds as a matter of law that the term 'wastewater' includes storm water, and as such, authorizes the Sewer District to generally implement a program to deal with regional storm water management.") This conclusion squared with neither the statutory definition of "waste water'" nor the Sewer District's own definition in its Code of Regulations.

Revised Code R.C 6119.011(K) defines "wastewater" as "any stormwater ***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, App. 13 hereto) (emphasis added). Note the Ohio General Assembly's use of the conjunctive word "and," rather than the disjunctive word "or." Thus, the definition of "waste water," the only water sewer districts may regulate (R.C. 6119.01), does not include stormwater standing alone. The court in *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852 (1st Dist.), concluded that "storm water" becomes "waste water" under R.C. 6119.011(K) *only* when mixed with sewage or other pollutants or contaminants. ***The Sewer District's own "waste water" definition***, in Titles I, III, and IV of its Code of Regulations, matches this interpretation exactly, where it is defined:

> [As a] ***combination*** of water-carried waste... ***together with*** such ground, surface or ***storm water*** as may be present."

(*See* Districts Code of Regulations at §§ 1.0280, 3.0224, 4.0225, at Exhibit C to Cross-Mot. for Summ. J. by Intervening Defs. (Pag.#442), App. 15 hereto.) Indeed, the trial court overlooked entirely the limited allowance R.C. Chapter 6119 does make for the Sewer District's powers concerning storm water: it may "sewer" it:

> [T]he board of trustees of a regional water and sewer district may provide a system of *sanitary* ***and/or*** *storm water sewerage*, for any part of the area included within the district.

R.C. 6119.19 (emphasis added). Logically, this "express" power permits a district to reduce loading in its sanitary sewerage lines, again relating back to the Sewer District's statutory purpose: "the collection, treatment, and disposal of waste water within and without the district." R.C. 6119.01(B).

Against these straightforward definitions, the manifest lack of expressly granted statutory powers, and the many interpretation rules requiring strict statutory construction, the trial court still found in R.C. Chapter 6119 strikingly unlimited power for the Sewer District to "address intercommunity flooding, erosion and storm water-related water quality issues." (5/5/11 Journal Entry and Opinion, p. 4.) An error of law more patent is difficult to conceive.

**ASSIGNMENT OF ERROR NO. 3: The trial court erred in denying the Cities' and the Property Owners' Counterclaims to the extent that they sought permanently to enjoin the Sewer District from undertaking an SMP not authorized by its Charter.**

**A. The Sewer District's Charter contains no stormwater-utility authority.**

According to R.C. Chapter 6119, sewer districts are created and changed only by petition, only through their Plan of Operation (a.k.a. their "charter"), and only by judicial order. The Chapter affords interested persons and member communities multiple procedural safeguards.

As to "changes" in the Charter, R.C. 6119.051, entitled "Petition for Change," provides:

> At any time after the creation of a water and sewer district, the district, after action by its board of trustees, may file a petition in the court of common pleas requesting the order of such court permitting the district to: ... (A) Increase or add to its purposes heretofore approved by the court...or (C) Amend any provision of the petition filed pursuant to Section 6119.02 of the Revised Code ....

(R.C. 6119.051, App. 16 hereto) (emphasis added). A sewer district's judicially-approved Charter may not be changed by any other process. *Kucinich v. Cleveland Regional Sewer District,* 64 Ohio App.2d 6 (8th Dist. 1979).

The Sewer District claims that its expansive SMP was in fact authorized over 40 years ago in its Charter. The claim is a complete fabrication. The SMP's pretenses share no kinship with the Charter's sanitary sewerage plan, which the following four examples expose:

(1) Under the 1975 Charter, the sewage pipes owned, operated, and managed by the local political subdivisions remained theirs, while the City of Cleveland transferred to the Sewer District ownership of its facilities (*e.g.*, pipes and treatment plants) for the collection, treatment, and disposal of the sewage. Local communities retained control of their local systems. Contrast the new SMP, by which the Sewer District wrests jurisdiction, management, and control over all man-made ***and*** natural stormwater system elements (*e.g.*, streams, culverts, and pipes) that are still owned, controlled or managed by the local community within which those elements reside.

(2) The 1975 Charter involved user charges assessed against land owners for use of the Sewer District's wholly-owned treatment facilities to which the owners connected. Contrast the new SMP, by which the Sewer District intends to levy an unvoted Stormwater Fee on select land owners based upon the amount of impervious surface on their property, even though the land owners connect to no District-owned stormwater facility.

(3) The 1975 Charter established a "bright line" between Sewer District-owned and local community-owned facilities. Contrast the new SMP, by which the Sewer District purports to

appropriate regulatory, ownership-type control over a "Regional Stormwater System" of its own creation, a Regional Stormwater System comprising streams and watercourses crisscrossing local political subdivisions (of whose local Stormwater Systems they are a part), which the Sewer District in nowise "owns."

(4) Finally, unlike the 1975 Charter as currently amended, which arose by contractual agreements with the local communities, the new SMP dictates its arrival to local communities, mandating, *inter alia*, their adoption of construction and other regulations conforming to standards that the Sewer District unilaterally imposes. (Title V, Section 5.0601.)

The regional sanitary sewage issues presented to the Court in 1975 raised practical, legal, and operational considerations completely foreign to the Sewer District's new SMP. The Sewer District quite disingenuously suggests that Judge McMonagle's 1975 Order, with the subsequent amendments now comprising the Sewer District's current Charter, encompassed the unilateral and unlimited designs on regional control the Sewer District's SMP exhibits.

**B. Title V directly conflicts with specific Charter provisions limiting the Sewer District to charging for "sewer" fees.**

Judge McMonagle made very clear that the Sewer District does not have "jurisdiction to make charges beyond those authorized or restricted by its Charter." (12/21/81 Mem. of Op., at 6, (App. 40 hereto).) It is also very clear that the Charter limits the Sewer District to charging for "sewer rates." (*See* Charter, Section 5(f), "Sewer Rates.") While the Charter is very detailed in prescribing the nature and components of the rate that the Sewer District may charge for "sewage treatment and disposal," it makes no provision for charging for "stormwater management." Sewage treatment and disposal is not stormwater management. So even if the SMP were constitutional, and were authorized under R.C. Chapter 6119, the Sewer District still lacks

jurisdiction under its Charter to impose the Stormwater Fee and, as a result, lacks authority to implement the SMP.

### C. Title V directly conflicts with specific Charter provisions prohibiting the Sewer District's assuming ownership, control, and/or any responsibility for locally-controlled systems without the local community's written consent.

Comparing the Sewer District's Charter more closely to its proposed SMP underscores how the two clash, not their affinity as the Sewer District suggests. The Sewer District's Charter manifestly requires a local community's written consent to any encroachments by the Sewer District on local control of local sewering infrastructure. The Charter is unambiguous:

> The Sewer 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 Sewer District, including both storm and sanitary systems. The Sewer District shall ***not*** assume ownership of any local sewerage collection facilities and systems, ***nor*** shall the Sewer District assume responsibility or incur any liability for the **planning, financing, construction, operation, maintenance or repair of any local sewerage collection facilities and systems *unless*** the assumption of such ownership, responsibility or liability is specifically provided for in a **written agreement between the Sewer District and the respective local community**. (Exhibit A to 1975 Order, at page 7, paragraph (m), App.1) (emphasis added).

The Charter is specific as regards local consent on "Operation, Maintenance, and Repair" issues:

> "The Sewer District may assume the responsibility for operating, maintaining, and repairing local sewerage collection facility **when requested to do so by a local community and upon mutually agreeable terms**." (Exhibit A to 1975 Order, at pages 7-8, paragraph (m)(2), App. 1) (emphasis added).

With respect to "Construction," the Sewer District's Charter states:

> "The Sewer District may construct local sewerage collection facilities and systems **when requested to do so by a local community upon mutually agreeable terms**. (Exhibit A to 1975 Order, at page 8, paragraph (m)(4), App. 1) (emphasis added).

Even with respect to "Financing," the Sewer District's Charter states explicitly:

> "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 Sewer District." (Exhibit A to 1975 Order, at page 8, paragraph (m)(5), App. 1)

(emphasis added).

In the face of these explicit Charter conditions, the Sewer District has in Title V appropriated unto itself the power to define a "Local Stormwater System":

> Section 5.0212 "Local Stormwater System"—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 Sewer District. The Local Stormwater System shall include those watercourses, stormwater conveyance structures, or Stormwater Control Measures ***NOT DESIGNATED*** **[by the Sewer District] as part of the Regional Stormwater System.** (Title V, Section 5.0212) (emphasis added).

The Sewer District then unilaterally invented a stunningly expansive definition of the so-called "Regional Stormwater System" now under its authority:

> Section 5.0218 "Regional Stormwater System"—The **entire system of watercourses, stormwater conveyance structures, and Stormwater Control Measures in the Sewer District's service area** that are owned and/or operated by the Sewer District **or over which the Sewer 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 (300) acres of land or more**. This District shall maintain a map of the Regional Stormwater System that shall serve as the official delineation of such system. (Title V, Section 5.0218) (emphasis added).

Note that this definition does not concretely delineate what the Regional Stormwater System is. Rather, it reserves to the Sewer District discretion to include in the Regional Stormwater System any watercourses, stormwater conveyance structures, and Stormwater Control Measures ***"that District has right of use for the management of stormwater."*** Because of its inherently unpredictable application, the contrived limitation to areas that receive drainage from 300 or more acres offers only false clarity.

Within this newly defined Regional Stormwater System, the Sewer District claims plenary power to establish and administer its SMP, ***all without the member communities'***

***consent***:

> Section 5.0219 "Regional Stormwater Management Program"—All activities necessary to operate, maintain, improve, administer, and provide Stormwater Management of the Regional Stormwater System and to facilitate and integrate activities that benefit and improve watershed conditions across the Sewer District's service area. (Title V, Section 5.0219.)

The "managerial" authority claimed by the Sewer District regarding its SMP is equally broad:

> Section 5.0225 "Stormwater Management"—The process and activities involved in planning, financing, design, improvement, construction, inspection, monitoring, maintenance, operation, and regulation for the handling of stormwater runoff, considering both the quantity and quality of the runoff and the stability and function of Stormwater Systems. (Title V, Section 5.0225.)

Indeed, the Sewer District reserved the discretion in Section 5.0601(b) unilaterally to add standards in the future, leaving no functional limit on its power to define its own jurisdiction.

Contrast these presumptuously grandiose SMP and Title V dictates with the Charter's clear, delineated, and manifestly collaborative intentions and operation. Title V's purposes are plainly stated nowhere in the Charter, explicitly or implicitly. But the SMP does as plainly violate the Charter. For example, through Title V's redefining of "local" and "regional" systems, the Sewer District unilaterally declared to subject to its control parts of what have always been member communities' local systems. In fact, the municipal mayors and service directors who testified indicated that the Sewer District's desire to manage and maintain parts of their local stormwater systems (within the 300 acre delineation) has not been consented to, and is unnecessary and a substantial interference with their local utilities because the cities were already performing such activities. This plainly circumvents the manifold Charter provisions requiring municipal consent to any Sewer District management over local systems. Moreover, the suggestion that the SMP's scope and objectives share even remote relation to the Charter, with its explicit and sole focus on regional sanitary sewerage concerns, is totally unserious.

Through Title V, the Sewer District has arbitrarily created completely new definitions for "regional" and "local," at odds with its Charter's express and implied terms, and did so to serve the District's wholly contrived and new area of regulatory control: flooding, erosion, and water-quality management. The Sewer District has no power to do this, under its Charter or otherwise.

**ASSIGNMENT OF ERROR NO. 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.**

**A. The "Stormwater Fee" violates equal protection guarantees.**

The proposed Stormwater Fee violates the Equal Protection clauses of the U.S. and Ohio Constitutions by improperly treating similarly situated persons differently, in that:

1) it is imposed only on owners of property within the Sewer District's sanitary Service Area, despite the District's county-wide authority under its Charter;

2) it treats residential and non-residential (*i.e.*, commercial) property owners differently without any rational basis for such disparate treatment;

3) it discriminates against small lot owners;

4) it ignores the significant stormwater runoff impact from non-impervious areas;

5) it exempts without a rational basis certain properties from Stormwater Fee liability, including, *e.g.*, airport runways, airport taxiways, and railroad rights-of-way;

6) it provides without any rational basis "credits" or reduced Stormwater Fees to certain schools on grounds totally unrelated to the property's stormwater runoff impacts; and

7) it discriminates by forcing some District residents to pay to fix runoff problems others create, for remedial work benefiting the general public and others who do not pay.

These are further addressed below.

The original Charter gave the Sewer District authority throughout Cuyahoga County. *See* 1979 Judgment Entry; Memorandum Opinion, April 14, 1982 (Judge George J. McMonagle); *City of Parma v. City of Cleveland*, 9 Ohio St.3d 109, 111 (1984) (affirming the trial court's

interpretation of the Sewer District's Charter as contemplating a "county-wide solution to the area's sewage problems"). But the current SMP does not apply throughout Cuyahoga County. Instead, it applies only to properties within the District's Service Area.

This necessarily creates multiple arbitrary classifications among Sewer District properties. Numerous Cuyahoga County communities (*i.e.*, "Non-Member Communities") are outside the Sewer District's Service Area despite being within the same watersheds as most Member Communities. And portions of some Cuyahoga County Member Communities that are within the Service Area's boundaries are excluded from that Service Area (*i.e.*, "Excluded Portions of Member Communities"),[10] even though they too are within the same watersheds as the balance of the Service Area Member Communities of which they are part.

Thus, Cuyahoga County property owners in both the Non-Member Communities and Excluded Portions of Member Communities (*i.e.*, Group 1) will be spared Stormwater Fee liability, while select Service Area property owners located in the Member Communities will be forced to pay it (*i.e.*, Group 2). This the Sewer District intends even though property owners in both Groups are similarly situated, *i.e.*, located within the same watersheds in the same County. And this the Sewer District intends despite the similar behavior of stormwater running off impervious surfaces in either Group. Property owners in both Groups equally burden the area's Stormwater Systems, and (purportedly) will equally enjoy any SMP benefits. But not all will pay.

In ruling against the Member Communities on this point, the trial court stated "the fact that the Sewer District may have authority countywide and has not exercised its authority over

[10] Again, the Non-Member Communities and Excluded Portions of Member Communities are not included in the Sewer District's Service Area because they either have their own sewage disposal and treatment facilities or have access to other such non-Sewer District facilities.

all communities within Cuyahoga County does not result in a violation of equal protection rights to those member communities who may be required to pay the fee." (2/15/12 Op., at 14.) But the arbitrary Stormwater Fee exemptions, exclusions, and applications quite obviously treat similarly situated persons unequally. ***Indeed, the trial court's Order hazarded no rationale for how Equal Protection rights are honored when, as between two neighbors in the same city or village who similarly burden the local storm water systems, their liability (or not) for a Stormwater Fee turns upon who collects and treats their sanitary sewage.*** Treating these classes of property owners so disparately clearly violates Constitutional Equal Protection rights.

The Sewer District's claim that its SMP treats all residential and nonresidential Sewer District property owners equally is also false. The Sewer District calculates the Stormwater Fee for each property using an "Equivalent Residential Unit" (ERU). Each ERU represents 3,000 sq. ft. of impervious surface and in 2013, the Stormwater Fee rate will be $5.05 per ERU, per month. (*See* http://www.neorsd.org/stormwaterfees.php.) Non-residential properties pay in strict multiples of this rate based on their impervious surfaces areas. But residential properties are charged differently. Their ERUs are established in tiers, based upon the amount of the property's impervious surface, as follows: 0.6 ERUs for less than 2,000 sq. ft. (roof plus driveway); 1.0 ERU for 2,000 to 3,999 sq. ft.; and 1.8 ERUs for 4,000 sq. ft. or more.

Applying these formulas reveals their arbitrary, discriminatory effects. An owner of non-residential property with ***1,500 sq. ft.*** of impervious surface would pay $30.30 per year in Stormwater Fees (*i.e.*, $5.05 x. 0.5 x 12), while an owner of a residential property with the same amount of impervious surface would pay $36.36 per year (*i.e.*, $5.05 x 0.6 x 12). Similarly, an owner of a non-residential property with ***6,000 sq. ft.*** of impervious surface would pay $121.20 per year (*i.e.*, $5.05 x 2.0 x 12), while an owner of a residential property having the same square

footage of impervious surface would pay only $109.08 per year (*i.e.*, $5.05 x 1.8 x 12). The small property owner bears the brunt and the trial court concluded that no rational basis exists for this disparate treatment of non-residential property owners. (2/15/12 Order, 2/15/12, at 16.)[11] His conclusion was correct. A droplet of water runoff does not distinguish between residential and non-residential surfaces.

Other trial evidence showed that the Stormwater Fee discriminates against small-lot owners. Defense expert and water resource engineer Michael Clar testified that the fee is inequitable because larger lots will produce proportionately more runoff than is captured in the Sewer District's ERU equivalent table. (Tr. 2492.) Clar opined that by basing the fee on impervious surfaces alone, the Sewer District is placing an undue burden on small homeowners (Tr. 2494), and that the Sewer District must also consider soil type, land use, and slope to produce an equitable ERU equivalent rate among properties.

Neither does any rational basis exist to support the Stormwater Fee exemption under Title V, Section 5.0705 for certain properties, including (without limitation) airport runways, airport taxiways, and railroad rights-of-way.[12] These properties account for a significant proportion of all County and Sewer District Service Area impervious surfaces. Again, the massive runoff they produce is presumably no less burdensome to the regional "system" than that from any non-exempt property. No rational basis exists for the disparate treatment this exemption reflects.

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[11] Based upon this conclusion, the trial court purported to direct the Sewer District to provide either a cap or a reasonable declining block scale for non-residential properties. (2/15/12 Op., at 16.) But as detailed above, a trial court has no jurisdiction in a declaratory judgment action to give such directives. And even with a cap or declining block scale, the Stormwater Fee would still discriminate improperly between residential and non-residential properties.

[12] In its post-trial Title V amendments, the Sewer District added "[c]emetaries that are owned and operated by the State of Ohio, a County, a Member Community, or not for profit entity" to the Section 5.0705 Stormwater Fee exemptions, an addition also for which no rational basis exists.

How much less rational then is Section 5.0804(c)'s "Stormwater Education Credit." This entitles schools that provide "approved stormwater pollution prevention curricula to their students" to receive a 25% credit against Stormwater Fees otherwise due. This "Education Credit" lacks all trace of a connection to either the school's runoff impacts or to the Sewer District's purported SMP goals. All of these violate the U.S. and Ohio Constitutions' Equal Protection Clauses.[13]

Courts have repeatedly recognized that "[w]hile the 'rational basis' standard is the least demanding test used by the courts to uphold legislative action, it is not 'toothless.'" *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998), quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Courts have struck down laws that treat groups differently when such treatment is arbitrarily and not rationally related to the government's objectives.

In *Berger,* the U.S. Sixth Circuit Court of Appeals held that a city's vegetation control standard for large vacant lots, which differed from that for small vacant lots, was not rationally related to the government's purpose of protecting power lines in the right-of-ways. *Id.,* 154 F.3d at 625. The city required that vacant lots having 100 feet or less of street footage be "clear cut" over the entire lot, while larger vacant lots were required to be mowed only in the areas that were within twenty feet of the right-of-way. Essentially, the court found that "vegetation is vegetation," regardless the size of the lot it is on. The distinction was deemed to be arbitrary as regards the law's stated purpose, and was struck on equal protection grounds.

Also, in *Royal American Corp. v. City of Euclid,* 8th Dist. No. 34018, 1975 WL 182856 (Aug. 21, 1975), this Court held that a city ordinance which treated commercial apartments

[13] In its post-trial Title V amendments, the Sewer District established an "Educational Economically Disadvantaged Stormwater Fee"—reducing Stormwater Fees for schools demonstrating that at least 25% of their current students are Free Lunch Program eligible (42 U.S.C. §1751, et seq.) Like the "Stormwater Education Credit," this reduction violates equal protection guarantees because it has no rational relation at all to the school's runoff impacts.

differently than single-family and two-family homes for purposes of city garbage services violated equal protection guarantees. *Id.* The court recognized that "[t]he classification does not take cognizance of the fact that people in apartments and people in single- or two-family dwellings produce the same type of refuse." *Id.* at *3. Similar to the *Berger* holding, the *Royal American Corp.* court essentially held that "garbage is garbage," regardless of who generates it.

The SMP's differential treatment of Stormwater Fee payors is not rationally related to the Sewer District's purported interest in maintaining its Regional Stormwater System. Accordingly, the Sewer District's SMP violates Constitutional Equal Protection guarantees and legally cannot be implemented.

**B. The "Stormwater Fee" is unreasonable, arbitrary, and capricious and therefore violates substantive-due-process guarantees.**

A substantive due process violation occurs where "the government's actions were not rationally related to a legitimate government interest or were in fact motivated by bias, bad faith or improper motive." *Sameric Corp. of Delaware, Inc. v. City of Philadelphia,* 142 F.3d 582, 590–91 (3rd Cir.1998) (citations and internal quotations omitted). In the present case, the Sewer District's SMP, and particularly the Stormwater Fee as applied, violates the substantive due process rights of those Sewer District property owners who will pay that Fee. The so-called Stormwater Fee is not rationally related to a legitimate government interest, and it deprives the property owners of a protected property interest by arbitrary or capricious government action. *See Taylor Investment, Ltd. v. Upper Darby Twp.,* 983 F.2d 1285, 1292 (3d Cir.1993).

The trial evidence substantiated the lack of a reasonable or rational relationship between the amount of the Stormwater Fee charged and the amount of burden supposedly placed on the "Regional Stormwater System" by the property owner so charged. Defense expert and water

resource engineer Michael Clar testified at trial to the flaws in the Sewer District's impervious surface approach to formulating its Stormwater Fee. Clar testified that the Stormwater Fee calculations as presently set do not correlate the Fee's size to the runoff impact of the payor's property on the regional system, and are not, therefore, equitable. (Tr. 2458-59.) Clar contrasted the Sewer District's proposed "impervious surface method" to a "rational method" employed elsewhere in the United States. He noted that the "impervious surface method" places a disproportionately larger fee burden on smaller lots. (Tr. 2458-59, 2495.) Clar testified that the equivalent runoff volume used in the District's proposed fee schedule is significantly lower than the actual runoff volumes generated using an accepted runoff method like the aforementioned "rational method." (Tr. 2455.)

The trial evidence demonstrated other critical deficiencies in the Sewer District's Stormwater Fee methodology. Because it is calibrated solely based upon the amount of a property's impervious surface, the Stormwater Fee inaccurately estimates stormwater runoff volumes and rates, given the many other variables affecting runoff. Standard practice in the field of hydrologic engineering requires that, in calculating the volume and rate of a parcel's stormwater runoff, several parameters are relevant, including (1) amount of precipitation; (2) size of drainage area; (3) soil type; (4) land use; (5) percent of the land surface which is impervious; (6) slope of the land; (7) roughness of the surface of the land; (8) water content of the soil at the beginning of the precipitation event; and (9) storage. (Tr. 2307-15.) Clar's testimony stressed the importance of several of these factors, including soil type (Tr. 2441-42), land use (Tr. 2442-44), and slope (Tr. 2445), and he showed that implementing a fair rate requires consideration of these various relevant factors.

The Sewer District unreasonably neglected virtually all of these standard runoff

parameters. Instead, it elected to predicate its Stormwater Fee on a runoff calculation derived from only a single datum (*i.e.*, impervious surface size). Indeed, in Title V, Section 5.0301 the Sewer District affirmatively asserts, as one of the seven "findings" justifying its SMP, that "the measurement of impervious surface that causes stormwater runoff provides an equitable and adequate basis for a system of fees for funding a water-shed based approach to stormwater management." The Sewer District further argues that a Stormwater Fee so derived is fair, reasonable, and bears a substantial relationship to the cost of providing the SMP. (*See* Title V, Section 5.0702, General Funding Policy.) But competent expert trial evidence demonstrated otherwise.

The Sewer District's fatally incomplete foundation for its Stormwater Fee renders that Fee arbitrary and unreasonable. This is especially so in light of accepted hydrologic engineering practices and the ready availability of data relevant to runoff calculations. Similarly, the SMP's various exemptions (*e.g.*, airport runways, airport taxiways, and railroad rights-of-way under Section 5.0705, and the "Stormwater Education Credit" under Section 5.0804(c)) also violate substantive due process, since they are not rationally related to the proffered legitimate governmental interest in managing stormwater runoff through the region's "system."[14] As applied, therefore, the Stormwater Fee did violate substantive due process protections.

### C. The Sewer District's Regional Stormwater Management Plan is unconstitutional because it violates "home rule" provisions of Section 3, Article XVIII of the Ohio Constitution.

The Ohio Constitution's "Home Rule Amendment" in Section 3, Article XVIII

[14] Likewise, other Sewer District post-trial amendments to Title V (*e.g.*, exempting "[c]emetaries that are owned and operated by the State of Ohio, a County, a Member Community, or not for profit entity" and establishing an "Educational Economically Disadvantaged Stormwater Fee") also violate substantive due process; neither is rationally related to the Sewer District's proffered governmental interest in managing stormwater runoff through the region's "system."

unequivocally mandates that "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." The Sewer District's Title V conflicts directly with the Home Rule powers of all chartered political subdivisions because it purports to grant the Sewer District impermissible and excessive regulatory authority over its Home Rule Member Communities.

Title V requires all Member Communities to adopt regulations created by the Sewer District:

> Section 5.0601 Standards for Stormwater Management—In order to insure the protection of the Regional Stormwater System, **all Member Communities shall adopt** minimum stormwater design and programmatic standards consistent with:
>
> (a) The requirements of the Ohio Environmental Protection Agency's National Pollutant Discharge Elimination System (NPES) General Permit for Municipal Separate Storm Sewer Systems, if applicable to the Member Community...
>
> (b) **Additional standards that may be promulgated by the Sewer District**....

(Title V, Section 5.0601) (emphasis added). Title V also gives the Sewer District oversight authority for all Stormwater Management Plans for proposed development projects within a Member Community, requiring the latter to report same to the District:

> Section 5.0508 Review of Stormwater Management Plans – Member Communities shall provide the Sewer District, or require to be provided to the Sewer 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 wholly within the Sewer District's service area. **Submission to the Sewer District shall occur within seven (7) business days** of the submission of such plans to the Member Community...

(Title V, Section 5.0508) (emphasis added).

Such mandates on Home Rule municipalities violate their plenary Constitutional Home Rule powers and are impermissible. Plainly the Sewer District has no power so to impose.

## D. The Sewer District's Regional Stormwater Management Plan is unconstitutional because it violates municipalities' utility powers under Section 4, Article XVIII of the Ohio Constitution.

The Sewer District's Title V violates the Member Communities' constitutional and exclusive right to provide a stormwater public utility within their boundaries, under Section 4, Article XVIII of the Ohio Constitution. Assuming, arguendo, that the Sewer District had the power to force the Member Communities' inclusion in its SMP, Title V leaves no mechanism for a Member Community operating its own stormwater utility to be removed from its regulations. Thus, the SMP impermissibly interferes with the Member Communities' express constitutional power over its utilities.

### *1. Member Communities operate their own stormwater utilities.*

The testimony presented at trial clearly demonstrates that the Cities, as charter municipalities, do, in fact, actively operate their own stormwater utilities. Multiple witnesses from the Cities testified that each community's stormwater utilities encompass the entire Stormwater System within each municipality's borders, including *all* streams, culverts, storm sewers, pipes, and all other natural and man-made stormwater facilities. *See Britt v. City of Columbus*, 38 Ohio St.2d 1, 8 (1974) (holding "a sewerage system owned and operated by a municipality for the benefit of its inhabitants is a public utility within the meaning of 'public utility' in Sections 4 and 6, Article XVIII."); *see also Bd. of Cnty. Commrs. of Delaware Cnty. v. City of Columbus*, 26 Ohio St.3d 179, 181-182 (1986). The witnesses further testified these are some of the very same watercourses and facilities over which the Sewer District, through its SMP, is now attempting (even preemptively) to exercise jurisdiction. Additionally, each of the Cities both perform regular maintenance and capital improvements on their stormwater systems and comprehensively regulate the system and stormwater in general.

For example:[15]

a. Jerry Hruby, Mayor of the City of Brecksville testified that Brecksville owns, operates, and maintains its own local Stormwater System, which encompasses everything from collection ditches and basins, to streams and pipes. Beyond the more than $250,000 Brecksville spends annually to maintain that system, it has invested more than $7.5 million on storm projects since 2006. (Tr.1909-22, 47, App. 17 hereto.) (*See* Map of Regional Stormwater System in Brecksville as Defs.' Trial Ex. 155A, App. 18 hereto.) (*See* Defs.' Trial Ex. 155.8, p. 2-8, App. 19 hereto, (for specific projects) and 155.1, App. 20 hereto (for regulations).)

b. Joseph Cicero, Jr. Mayor, City of Lyndhurst and Frederick Glady, III, Service Director, City of Lyndhurst testified that Lyndhurst also operates its own stormwater utility, and owns (outright or by easement) the storm water system network of creeks, catch basins, etc., on which the City has spent approximately $10 million since 1999. (Tr. pp.1977, 1979-2004, and 2050-51, App. 21 and 22 hereto) (*See* Map of Regional Stormwater System in Lyndhurst as Defs.' Trial Ex. 159A, App. 23 hereto.) (*See* Defs.' Trial Ex. 159.9, App. 24 hereto (for specific projects) and 159.1A, B, and C, App. 25 hereto (for regulations).)

c. Dennis Zentarski, Utilities Commissioner, City of Cleveland Heights testified similarly about Cleveland Heights' Stormwater System, on which the City spends approximately $500,000 annually to maintain it and in which the City has invested approximately $1 million over the last ten years. (Tr. p.2113, 2115, 2119-20, 2122-23, App. 26 hereto) (*See* Map of District's Regional Stormwater System in Cleveland Heights as

[15] The Sewer District stipulated that witness testimony from the representatives of the Cities was generally representative of the testimony that would have been given by the mayors and other representatives of the other Cities had they been called to testify. (See Tr. 2677, App. 38 hereto.)

Defs.' Trial Ex. 156A, App. 27 hereto) (*See* Defs.' Trial Ex. 156.2 and 156.1, App. 28 and 29 hereto (for regulations).)

d. Mark Allen Schmitzer, City Engineer, City of North Royalton testified that North Royalton's Stormwater System consists of "both manmade and natural features," on which the City has spent approximately $6.9 million through 2010 on stormwater capital improvements, with a $4.1 Million project forthcoming. (Tr. p. 2204-12, 2214-15, App. 30 hereto.) (*See* Map of Regional Stormwater System in North Royalton as Defs.' Trial Ex. 160A, App. 31 hereto) (*See* Defs.' Trial Ex. 160.1, App. 32 hereto (for regulations).)

e. Thomas Perciak, Mayor, City of Strongsville testified similarly that Strongsville owns and operates a Stormwater System comprising natural and man-made facilities, on which the City has spent approximately $9.5 million over the past ten years. (Tr. pp. 2595-96, 2599-2601, 2604-06, 2609-10, App. 33 hereto) (*See* Map Regional Stormwater System in Strongsville as Defs.' Trial Ex. 163A, App. 34 hereto) (*See* Defs.' Trial Ex. 163.8A, App. 35 hereto (for specific projects) and 163.1A-F, App. 36 hereto (for regulations).)

Thus, there can be no question that the Cities do, in fact, own and operate their own stormwater utilities over the same watercourses that the Sewer District attempts to encumber under its SMP. These municipal representatives also testified that because of this attempted "takeover" of parts of their local systems, the SMP substantially interfered with the operation of their local utilities because, for instance, the duplication, confusion and competitive charges to their taxpayers that would result.

### *2. The SMP impermissibly interferes with the Member Communities' municipal stormwater utilities and prevents a Member Community from operating its municipality's exclusive stormwater utility.*

Section 4, Article XVIII of the Ohio Constitution, the "Utility Clause," provides

municipalities with the *exclusive* authority to acquire, construct, own, lease, and operate public utilities within or without their corporate limits:

> Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Section 4, Article XVIII of the Ohio Constitution.

This Constitutional grant of power to municipalities is "plenary" and "cannot be lessened by statute." *Dravo-Doyle Co. v. Village of Orrville*, 93 Ohio St. 236, 244 (1915), and paragraph one of the syllabus. In *Swank v. Village of Shiloh*, 166 Ohio St. 415 (1957), the Ohio Supreme Court emphasized that "the General Assembly is without authority to impose ***restrictions or limitations*** upon that power." *Id.,* at paragraph one of the syllabus (Emphasis added); *see also State ex rel. McCann v. City of Defiance*, 167 Ohio St. 313 (1958), paragraph one of the syllabus ("The General Assembly has no power to enact any statute for the purpose of limiting or restricting by regulation or otherwise the power and authority of a municipality, that owns and operates a public utility for the purpose of supplying the product thereof to such municipality or its inhabitants") (emphasis added); *City of Wooster v. Graines*, 52 Ohio St.3d 180 (1990); *City of Wapakoneta v. Priest*, 24 Ohio Law Abs. 214, 32 N.E.2d 869, 879 (3d Dist. 1937) (recognizing that the grant of power in Section 4, Article XVIII of the Ohio Constitution is self-executing and no action by the state legislature is necessary to make it available to the municipality).

The exclusivity of this Constitutional municipal utility authority means a municipality may exclude all competitors of the municipality respecting those services:

> The [municipality's] right to require a contract necessarily also ***means the ability to***

> ***exclude competitors of a municipal utility. Permitting competition inside the municipal utility boundaries would be inconsistent with a municipality's right to require a contract to serve the municipal inhabitants.*** Therefore, absent a franchise or contract with a municipality giving a public utility the right to serve the municipal inhabitants, that public utility has no right to serve those customers within its service territory that are located within a municipality with a Section 4, Article XVIII utility. Accordingly, a municipality may exclude another energy provider, including the local public utility, from attempting to provide utility service inside the municipal boundaries.

*State ex rel. Toledo Edison Co. v. City of Toledo*, 76 Ohio St.3d 508, 517 (1996) (emphasis added); *see also Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102 (1996) ("Moreover, Grafton had the right to create a municipal utility monopoly inside Grafton and exclude Ohio Edison from serving Grafton's inhabitants. This position stems from an exclusive grant of power to municipalities in Section 4, Article XVIII of the Ohio Constitution.") (internal citations omitted).

The SMP's restrictions and limitations either completely or substantially interfere with the Member Communities' ability to operate their own stormwater utilities and, hence, their constitutional authority to do so. Either way, the interference is unlawful. To the extent the SMP purports to regulate some local watercourses already within the Member Communities' stormwater utility that they own or operate under the Ohio Constitution, by "locating" them within the Sewer District's purported Regional Stormwater System, the interference is complete. That interference necessarily violates the Member Communities' power to "exclude" all competition within their municipal boundaries regarding that utility.

Should this Court not deem that a complete interference with the "exclusivity" aspect of the Member Communities' Constitutional utility powers, Title V nonetheless violates the Ohio Constitution's Utility Clause because it substantially interferes with each municipality's operation of its own stormwater utilities. When the Sewer District was created in the 1970's,

and as communities were added to its territorial jurisdiction, the Sewer District's Member Communities were all political subdivisions *needing* sanitary sewer services. But now, Title V requires *all* Member Communities in the Sewer District to be subject to the Sewer District's new SMP, regardless of whether the Member Community actively operates its own stormwater utility, or even *needs* the Sewer District's help in that regard. Moreover, there is no mechanism for a Member Community operating its own stormwater utility to be removed from the Sewer District's SMP. Thus, by mandating participation and providing no exit mechanisms, the SMP (at the very least) impermissibly interferes with the Member Communities' powers under the Ohio Constitution's Utility Clause.

The Ohio Supreme Court has held that even so-called "mere statutory regulation" by the General Assembly, which in actuality "limits or restricts something," is unconstitutional. *See, e.g., McCann*, 167 Ohio St. at 316-17; s*ee also City of Seven Hills v. City of Cleveland*, 1 Ohio App.3d 84, 90 (8th Dist. 1980) (stating that the statutory limit on the eminent domain power of a sewer district, contained in R.C. 6119.06, precluding appropriations of municipal-owned water management facilities, demonstrates the General Assembly's understanding that a grant of power to the contrary would "be in derogation of the Constitutional grant of power to municipalities" to operate their public utility). The General Assembly may not restrict a municipality's powers to operate a public utility. The Sewer District, therefore, having only statutory powers, plainly may not impose limitations or restrictions on that municipal power. Thus, the SMP is unlawful here because it precludes and/or interferes with, the Member Communities' Utility Clause powers.

**ASSIGNMENT OF ERROR NO. 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.**

The Revised Code states that "when declaratory relief is sought ... in an action or proceeding, ***all*** persons who have or claim any interest that would be affected by the declaration ***shall*** be made parties to the action or proceeding." R.C. 2721.12(A) (emphasis added). The Supreme Court of Ohio further clarified that "a party's failure to join an interested and necessary party constitutes a jurisdictional defect that precludes the Court from rendering a declaratory judgment." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 99. Furthermore, "[t]he absence of a necessary party renders all other issues moot, including the merits." See *Driscoll v. Austintown Assocs.*, 42 Ohio St.2d 263 (1975) (held that all interested parties must be joined in a declaratory action); *Plumbers & Steamfitters Local Union 83 v. Union Local Sch. Dist. Bd. of Educ.*, 7th Dist. No. 97-BA-40, 1998 WL 473335, at *3 (July 22, 1998).

The Sewer District failed to join property owners and other governmental agencies having a legal interest in the declaratory judgment action's outcome. That failure deprived the trial court of subject matter jurisdiction, and denying Defendants' motion to dismiss was error.

Property owners in the Sewer District—both private and public[16]—have a legal interest in the Action's outcome and should have been joined as parties pursuant to R.C. 2721.12(A). Their legal interest is obvious: if the Sewer District's SMP is permitted, they will be compelled to pay

[16] Public entity-owned properties in the Sewer District's Service Area that are subject to the Stormwater Fee include those owned by the United States (*e.g.*, the Carl B. Stokes Federal Court House Building, the Anthony J. Celebreeze Federal Building, and numerous post offices); the State of Ohio (*e.g.*, the Frank J. Lausche State Office Building); Cuyahoga County (*e.g.*, the Justice Center, the Cuyahoga County Courthouse, the Cuyahoga County Administration Building, the Cuyahoga County Juvenile Court, the Cuyahoga County Detention Center); Cleveland State University; Cuyahoga Community College; the Cuyahoga County Public Library; and school districts throughout northeastern Ohio.

a Stormwater Fee based upon their status as owners of property in the Sewer District.

The Eighth District Court of Appeals requires the joinder of individual property owners in declaratory judgment actions where the declaratory judgment would result in the imposition of a fee on individual property owners. *Cerio v. Hilroc Condominium Assoc., Inc.*, 8th Dist. No. 83309, 2004-Ohio-1254. In *Cerio*, a condominium association imposed assessments on all of its members for balcony repair, including those unit owners without balconies. *Id.* at ¶ 2. Certain owners without balconies filed a complaint seeking a declaratory judgment that the balconies affixed to some, but not all, of the units constituted a "limited common area." They so argued because unlike "common areas," the maintenance and repair expense of which all unit owners share, "limited common areas" are the responsibility of individual unit owners. *Id.* at ¶ 3. The Eighth District Court of Appeals held that all unit owners were interested and necessary parties for R.C. 2721.12 purposes because all potentially faced liability for balcony repairs expenses. Jurisdiction was lacking to render a declaratory judgment since not all unit owners were joined.

Likewise, in *Bretton Ridge Homeowners Club v. DeAngelis*, 51 Ohio App.3d 183 (8th Dist. 1988), this Court held that in a declaratory judgment action involving the extent of each property owner's liability for association dues, all 508 of the subdivision's owners had to be made parties. They were all deemed interested parties for R.C. 2721.21 purposes because the declaratory judgment would determine their rights and liabilities. *Id.* Likewise here, the Complaint's outcome will determine the rights and duties of all land owners in the Sewer District, since they may be forced to pay a "fee" assessed against their own private properties.

Moreover, the trial court clearly erred by finding that "there is no necessity to name individual property owners as parties" and that "[a]ll property owners within the Sewer District are properly represented by Member Communities' elected officials." (11/10/10 Judgment

Entry.) Elected officials and their counsel represent a body politic, and do not represent the legal interests of individual residents. *See* R.C. 715.01 (stating that "each municipal corporation is a body politic and corporate . . ."); *see also* R.C. 705.11 (stating that the "city director of law shall act as the legal advisor to and attorney for the *municipal corporation* . . . .") (emphasis added).

Specifically, a city plainly does not represent its property owners' interests where the interests of the city and those of its property owners conflict. *See, e.g.*, *Peterman v. Patalaskala*, 122 Ohio App.3d 758 (5th Dist. 1997) (residents' duly elected officials did not represent the interests of the residents when it was apparent that the city and the residents had different interests); *Chiglo v. City of Preston*, 104 F.3d 185, 187-188 (8th Cir. 1997) ("the government only represents the citizen to the extent his interests coincide with the public interest. If the citizen stands to gain or lose from the litigation in a way different from the public at large, the *parens patriae* would not be expected to represent him"); *National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977) ("We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which on its face is impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation").

Here, Member Community property owners have a legal interest in this matter's outcome because they will be assessed the Stormwater Fee. The Member Communities themselves, however, are largely exempt from that Fee. Indeed, each stands to receive a portion of the Fees paid by its property owners. Moreover, each Member Community may strike a deal with the Sewer District—as some of them have done—to enhance its positions at its property owners' expense. And yet, remarkably, the trial court deemed these interests to be aligned.

Additionally, numerous governmental bodies that are not Member Communities also have a legal interest in the Complaint's outcome under R.C. 2721.12, and, therefore, should have been joined in the action. Title V states that the SMP will involve "[p]ublic agencies with control over infrastructure in a District watershed, including but not limited to the Ohio Department of Transportation ("ODOT"), Counties, and Regional Park Districts . . . ." (Title V, Section 5.0504(a).) Title V's express language makes clear its purpose to affect directly, by its implementation, these identified governmental agencies, making manifest their interest herein.

Ohio law is well-settled that where an action for declaratory judgment will affect the powers and duties of public officers, such officers should be made parties to the action or proceeding in which the relief is sought. *City of Cincinnati v. Whitman*, 44 Ohio St.2d 58 (1975), *see also Mad River Egg Farm, Inc. v. York Township of Union Cty.*, 3rd Dist. No. 14-85-5, 1986 WL 7470 (June 27, 1986). The Sewer District was statutorily obligated to identify and join these agencies in this matter but failed to do so. Because the Sewer District failed to join all necessary parties in the action, the trial court erred in not dismissing the Complaint for lack of subject matter jurisdiction.

**ASSIGNMENT OF ERROR NO. 6: The trial court erred when it oversaw amendments to Title V after holding a trial and after its February 2012 Opinion declaring the rights of the parties.**

The Title V that exists today is not the same Title V that caused this action to be commenced, discovery to be conducted, a trial to be held, experts to opine, and the trial court to issue its February 2012 Opinion declaring the parties' rights. Instead, the Title V that exists today resulted from the trial court's completely inappropriate post-trial-amendment process. Even if this Court finds that the trial court initially had jurisdiction over the Sewer District's declaratory judgment action, that jurisdiction would have ended when the trial court declared the

rights of the parties under Title V in its February 2012 Journal Entry.

The Sewer District sought declaratory relief under R.C. Chapter 2721 in its Complaint. Following its ruling on cross-motions for partial summary judgment, and after conducting a bench trial, the trial court adjudged the remaining issue of the Sewer District's proposed Title V Stormwater Fee, and declared the parties' rights by declaring which portions of Title V's funding provisions are enforceable and which are not. (2/15/12 Op.)

R.C. 2721.02(A), pursuant to which the trial court adjudicated these issues, provides:

> [C]ourts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that t declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. ***The declaration has the effect of a final judgment or decree.***

(Emphasis added.) As a matter of law, declarations under R.C. 2721.02 result in a final appealable judgment for R.C. 2505.02(B)(2) purposes when they affect a substantial right and delineate the rights of all parties to the case. *General Acc. Ins. Co. v. Ins. Co. of North America,* 44 Ohio St.3d 17, 22 (1989). Moreover, the scope of any declaratory judgment action is constrained by the precise declarations sought in the pleadings. *See Segal v. Fleisher*, 93 Ohio App. 315 (1952) (finding that "[w]hile the court was required to consider the contract as a whole in connection with deciding the issues confined to paragraph 13, it appears from the declaratory judgment that it extended its jurisdiction beyond that invoked by the pleadings and assumed to decide issues upon which neither party offered evidence or requested decision ... [t]his, we think, was error....").

The Sewer District's Complaint expressly sought a declaration as to the Title V version

attached to its Complaint.[17] Any "proposed changes" to Title V made after the trial court declared (on 2/15/12) the parties' "rights, status, and other legal relations" were literally not at issue in this declaratory judgment action. R.C. 2721.02(A). By statute, therefore, the trial court's declaration of the parties' rights and obligations under Title V ended any jurisdiction the trial court possessed over the declaratory judgment action. The trial court's attempt to alter Title V to correct what the trial court viewed as its infirmities was completely inappropriate. The trial court, therefore, acted without jurisdiction, at a minimum, after entering its February 2012 Opinion.

## CONCLUSION

Ultimately, the Sewer District's only authority to do anything is Revised Code Chapter 6119, under which, and by the consent of its Member Communities, the Sewer District was created. Furthermore, the Sewer District possesses only such elements of that Chapter's authority as were incorporated into its Charter, as delimited therein, by Judge McMonagle. Because neither that Chapter nor the Charter expressly empower the District to regulate flooding, erosion, and region-wide water quality issues, the Sewer District's proposed SMP is without statutory or charter authority and void. Moreover, the trial court erred interpolating such authority into the single word "wastewater" (R.C. 6119.011(K).) The trial court both mis-interpreted that term and ascribed to it fantastically exaggerated import, particularly as measured against the totality of what R.C. Chapter 6119 says and, as importantly, what it does not say.

If R.C. Chapter 6119 and the Charter did authorize stormwater management regulations like the Sewer District's SMP, the SMP would still be invalid. The Stormwater Fee created to

[17] Although the Sewer District did not amend its Complaint to account for some changes made to Title V a few weeks before trial, Title V was the subject of trial in its then-current form, which, of course, differs from its present form.

fund this SMP is in substance a tax, and void because the Sewer District ignored its taxation enabling procedures in adopting it. And if it is not a tax, it is certainly not a "rental or other charge" given the meaning ascribed to those terms by the General Assembly in R.C. 6119.09.

Whatever else it is, the SMP formulation and its associated Stormwater Fee, credits, and exemptions, as applied, violate the substantive due process and equal protection rights of the Sewer District's Fee-paying property owners, and the constitutional powers of the Sewer District's member municipalities. Moreover, the Sewer District's Charter, which further constrains the District's operational powers, also, by its terms, provides no footing for either the Sewer District's expansive stormwater management program, or its associated fee.

The Sewer District is a statutory sewer district, charged with "collection, treatment, and disposal of waste water within and without the district." R.C. 6119.01. The SMP, and its pretenses to flooding, erosion, and water quality management, region-wide, is quite obviously not within the Sewer District's statutory charge. Accordingly, the Cities and the Property Owners respectfully request that this Court reverse the trial court and enter judgment in favor of the Cities and the Property Owners as follows:

1. Dismiss the Sewer District's declaratory judgment claim for lack of jurisdiction;

2. Enjoin the Sewer District from implementing its SMP, based upon a finding that:

    a. the Sewer District has no authority under R.C. Chapter 6119 to enact it;

    b. the Sewer District has no authority under its Charter to enact it;

    c. the SMP, as applied, violates the equal protection and/or substantive due process rights of the Sewer District's property owners; and/or

    d. the SMP, as applied, violates the Constitutional "home rule" and "utility power" authority of the Sewer District's member municipalities; and/or

3. Enjoin the Sewer District from implementing, levying, and collecting its

Stormwater Fee, based upon a finding that:

a. it is in substance a tax, and invalid for not having been properly adopted;

b. the Sewer District has no authority under R.C. Chapter 6119 to enact it;

c. the Sewer District has no authority under its Charter to enact it; and/or

d. as applied, it violates the equal protection and/or substantive due process rights of the Sewer District's property owners.

Respectfully submitted,

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**PROPERTY OWNERS' ADDENDUM TO COMBINED OPENING BRIEF**

In addition to the exemptions discussed in the Combined Opening Brief (*e.g.*, for railroad rights-of-way and airport runways and taxiways), Title V, Section 5.0705 also exempts from Stormwater Fee liability public road rights-of-way and parcels owned by Member Communities and used for a "Non-Self Supporting Municipal Function"[18] (collectively "Public Function Lands"). Once again, the Equal Protection clauses of the U.S. and Ohio Constitutions prohibit the Sewer District from treating similarly situated persons differently if such treatment is not rationally related to any legitimate governmental purpose. Similarly, substantive due process violations arise when "the government's actions were not rationally related to a legitimate government interest or were in fact motivated by bias, bad faith or improper motive." *Sameric Corp. of Delaware, Inc. v. City of Philadelphia,* 142 F.3d 582, 590–91 (3rd Cir.1998) (cites and internal quotes omitted).

Here, no legitimate governmental purpose exists to exempt the Public Function Lands from Stormwater Fee liability. As the Sewer District representatives' trial testimony showed, public roads are no different from private roads, parking lots, or driveways as to their storm drainage network function, *i.e.*, to channel water away from properties. (Tr. 1062-1070.)

[18] To wit, they "can be shown to house 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." Title V, Section 0217.

Accordingly, no rational basis exists for treating these two road categories dissimilarly. And a property's use for a "Non-Self Supporting Municipal Function" is totally unrelated to its stormwater management impact. Thus, exempting such properties from Stormwater Fee liability is arbitrary and capricious. These and the other Stormwater Fee exemptions in Title V prove that the Sewer District's SMP violates both Equal Protection and substantive Due Process provisions of the Federal Constitutions.

The Sewer District has claimed all along that its Charter requires the exclusion of Public Function Lands from Stormwater Fee liability. (*See* Sewer District's Trial Br., filed 10/21/11, page 13 (Pag. #526), (stating "the exemption for Non-Self Supporting Municipal Functions is consistent with prior orders of this Court").) The Sewer District is wrong. The Charter amendment Judge McMonagle approved on May 25, 1979 (App. 39 hereto) provides in paragraph 5(k)(1):

> All non-self supporting municipal functions of the City of Cleveland shall continue to receive ***sewage service*** free of charge and the Board of Trustees shall afford the same treatment to similar non-self supporting municipal functions of the suburban municipalities as soon as possible after it commences operation of the system.

(Emphasis added.)[19] This Charter provision addressing "sewage service" does not authorize, much less mandate, a Public Function Lands exemption from ***Stormwater Fees***, even were those Fees lawful. And given Judge McMonagle's clear order that the Sewer District has no "jurisdiction to make charges beyond those authorized or restricted by its Charter" (12/21/81 Mem. of Op., at 6, App. 40 hereto), the Charter plainly confers no power to "authorize" or "restrict" other fees.

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[19] Free "sewage service" for Cleveland was part of the Sewer District's consideration to the City for transferring all City sewerage facilities to the District when it was formed. (12/21/12 Mem. of Op. (App. 40 hereto).)

Neither the Stormwater Fee nor the Public Function Lands exemption from it are authorized by R.C. Chapter 6119 or the Charter.[20] Regardless, as applied, the exemption violates the Equal Protection Clauses of the U.S. and Ohio Constitutions, and the Due Process provision of the U.S. Constitution, since it unreasonably and arbitrarily discriminates among similarly situated properties in the Sewer District as regards Stormwater Fee liability. The SMP therefore is unlawful.

Respectfully submitted,

Sheldon Berns (0000140)
***One of the Attorneys for Intervening Defendants-Appellants The Greater Cleveland Association of Building Owners and Managers, et al.***

[20] These same infirmities apply to the "Educational Economically Disadvantaged Stormwater Fee."

## CERTIFICATE OF SERVICE

A copy of the foregoing **Common Opening Brief of Defendants-Appellants 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 and Intervening Defendants-Appellants, 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., with Separate Addendum** was served via electronic mail, on this 19th day of November 2012, upon the following:

| Party/Municipality | Attorney Representative | Service Address |
|---|---|---|
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