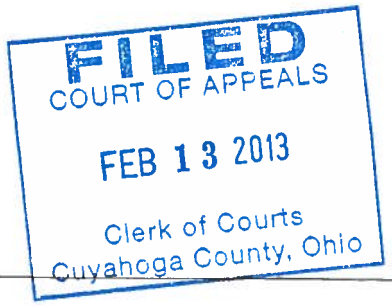
IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

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



COMMON APPELLANTS' REPLY BRIEF/ CROSS-APPELLEES' ANSWER BRIEF, WITH SEPARATE REPLY BRIEF ADDENDUM OF CERTAIN APPELLANTS

John H. Gibbon (Reg. No. 0010986)
Director of Law
City of Cleveland Heights
40 Severance Circle
Cleveland Heights, OH 44118
Phone: 216-291-5775
Fax: 216-291-3731
Email: jgibbon@walterhav.com

Christopher L. Gibbon (Reg. No. 0010983)
cgibbon@walterhav.com
Heather R. Baldwin Vlasuk (Reg. No. 0077459)
hvlasuk@walterhav.com
WALTER | HAVERFIELD LLP
The Tower at Erieview
1301 East Ninth Street, Suite 3500
Cleveland, OH 44114-1821
Phone: 216-781-1212

Attorneys for Defendants-Appellants City of Beachwood, City of Bedford Heights, City of Cleveland Heights, Village of Glenwillow,

Mark I. Wallach (Reg. No. 0010948)
THACKER MARTINSEK LPA
2330 One Cleveland Center
1375 East Ninth Street
Cleveland, Ohio 44114
Phone: 216-456-3848
Fax: 216-456-3850
Email: mwallach@tmlpa.com

James F. Lang (Reg. No. 0059668)
Matthew J. Kucharson (Reg. No. 0082388)
Molly A. Drake (Reg. No. 0083556)
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center, 800 Superior Avenue
Cleveland, Ohio 44114
Phone: 216-622-8200
Fax: 216-241-0816
Email: jlang@calfee.com
mkucharson@calfee.com
mdrake@calfee.com

Marlene Sundheimer (Reg. No. 0007150)

City of Independence, City of Lyndhurst, Village of Oakwood, City of Olmsted Falls, and City of Strongsville

David J. Matty (Reg. No. 0012335)
dmatty@rmmglaw.com
Shana A. Samson (Reg. No. 0072871)
ssamson@rmmglaw.com
Justin Whelan (Reg. No. 0088085)
jwhelan@rmmglaw.com
Rademaker, Matty, Henrikson & Greve
55 Public Square, Suite 1775
Cleveland, Ohio 44113
Telephone: 216-621-6570
Fax: 216-621-1127

Attorneys for Defendants-Appellants City of Brecksville

Director of Law
Northeast Ohio Regional Sewer District
3900 Euclid Avenue
Cleveland, Ohio 44115
Phone: 216-881-6600
Email: sundheimerm@neorsd.org

Attorneys for Plaintiff-Cross-Appellant Northeast Ohio Regional Sewer District

Sheldon Berns (0000140)
Benjamin J. Ockner (0034404)
Jordan Berns (0047404)
Gary F. Werner (0070591)
Timothy J. Duff (0046764)
Berns, Ockner & Greenberger, LLC
3733 Park East Drive, Suite 200
Beachwood, Ohio 44122
Telephone: (216) 831-8838
Facsimile: (216) 464-4489
Email: sberns@bernsockner.com
bockner@bernsockner.com
jberns@bernsockner.com
gwerner@bernsockner.com
tduff@bernsockner.com

Attorneys for 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.

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APPELLANTS' COMMON REPLY BRIEF

I. Summary of the Issues

This case's most critical issues are not complex, but they are deliberately obfuscated by Appellee, the Northeast Ohio Regional Sewer District ("District"), in its 68-page Answer Brief. To refocus, and state most succinctly, Appellants' essential arguments against the District's Regional Stormwater Management Program ("Stormwater Program" or "SMP), as set forth in newly adopted Title V in the District's Code of Regulations ("Title V"), are the following:

1. The proposed "Stormwater Fee" to be charged to the residents, businesses, and municipalities in the District's Member Communities to fund the District's Stormwater Program activities is, in fact, a "tax," which, because it was never submitted to the electorate for approval as R.C.6119.18 requires, is illegal. In any case, the Stormwater Fee is not a proper R.C. 6119.09 "charge."

2. As a creature of statute, the District possesses only the limited powers conferred upon it by R.C. Chapter 6119, which furnishes no authority for Title V.

3. Title V violates Constitutional due process and equal protection rights and the municipalities' Constitutional right to exclusively operate their own stormwater utilities.

4. Even if R.C. Chapter 6119 authorizes the Stormwater Program, and even if it is Constitutional, Title V is far beyond any activity authorized by the District's existing court-approved Petition and Plan of Operation ("Charter"). Therefore, enacting such a program requires an amendment to the District's existing Charter under R.C. 6119.051.

II. The District's "Stormwater Fee" Is a Tax Which Has Not Been Authorized by the Voters as Required Under R.C. 6119.18 and Is, Thus, Illegal.

The District has chosen to fund its Stormwater Program through a so-called "Stormwater Fee", which is ***not*** actually a "fee," but a "tax." Pursuant to R.C. 6119.18, the District has the authority to raise funds to pay for the costs of "water resource projects" by levying a tax. However, R.C. 6119.18 requires that such tax levy be submitted to the District's electors. The District has no power to impose the tax unless a majority of voting electors approve it. The District has not sought and obtained such approval; thus, the "Stormwater Fee" tax is illegal.

The District attempts to disguise the tax by calling it a "fee," and claims that it is authorized

by R.C. 6119.09 as a "rental or other charge" for the District's "services." However, the "Stormwater Fee's" true nature as a "tax" is revealed under the Ohio Supreme Court's decision in *Drees Company v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370.

In *Drees*, the Court reviewed a township impact fee assessment and determined it to be a tax. Its decision provided an extensive discussion and guidelines for Ohio courts and governmental bodies to distinguish between "taxes" and "fees." In its Answer Brief, the District wrongly attempts to prove *Drees* inapposite to its "Stormwater Fee" tax. But *Drees* is not limited to township impact fees; it applies to "fees" of all State governmental entities, including the District. In fact, the Court in *Drees* based its decision on two cases involving governmental entities that, like the District, are established and governed by Ohio statutes. *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St.3d 111 (1991) (involving the Petroleum Underground Storage Tank Release Compensation Board) and *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgt. Dist.*, 166 F.3d 835 (6th Cir. 1999) (involving a solid waste management district). The Ohio Supreme Court intends its tax-fee analysis in *Drees* to apply to more than just a township's impact fee assessment tax.

The District's "Stormwater Fee" is similar to the "impact fee" in *Drees*. In its Answer Brief, the District states that the Stormwater Fee "is based on the increased demand for stormwater services each property owner places upon the Regional Stormwater System due to the addition of impervious surface" to property. (Answer Br., 38.) The District's basis for its "Stormwater Fee" is analogous to the impact fee's purpose in *Drees,* which was to "offset increase services and improvements needed because of the development." *Drees*, at ¶3.

The cases the District cites to show that its "Stormwater Fee" is not a tax involve fees for

actual connections to and *actual* services provided by *actual existing* physical facilities,[1] and are, therefore, inapposite. A property owner charged the "Stormwater Fee" tax connects to no District facilities and obtains no District services, because no such facilities or services exist.

Under *Drees*, one of the major indices of a tax is its imposition upon a broad category of residents and the general benefit of the proposed use of the funds. "When the ultimate use is to provide a general public benefit, the assessment is likely a tax, while an assessment that provides a more narrow benefit to the requested companies is likely a fee." *Drees*, at ¶11. The trial testimony demonstrated that the District's "Stormwater Fee" tax will be imposed upon all property owners throughout the District whose property has impervious surface, i.e., essentially all developed property in the District. The District's trial witnesses repeatedly extolled the Stormwater Program's benefits for both those residing in and those visiting the District's territory, regardless whether they paid the "Stormwater Fee" tax. In *Drees*, the Supreme Court clearly stated **"It is difficult to imagine that an ordinance designed to protect and promote the public health, safety and welfare of an entire community could be characterized as anything but a tax."** *Drees* at ¶16.

Also, a critical component of any "fee" under *Drees* is that it is regulatory in nature. (See Answer Br. 37). The District, however, does not identify a single stormwater regulation which it has the legal authority to impose upon a property owner. Stormwater regulation is the function of the EPA and municipalities under the Clean Water Act Phase II. (See trial testimony of K. Wells, Tr. 1531-34) (Answer Br. 52).

Additionally, *Drees* requires that to be a fee, the funds must be sufficiently earmarked. The District acknowledges this requirement and claims its "Stormwater Fee" tax meets it because the funds are "for much needed stormwater construction projects as well as storm water inspection,

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[1] In its Answer Brief, at pages 34-36, the District cites to *City of Wooster v. Grains*, 52 Ohio St.3d 180 (1990), *Himebaugh v. Canton*, 145 Ohio St. 237 (1945), and *Cook Road Invests, LLC v. Cuyahoga County Bd. of Commrs.*, 194 Ohio App.3d 562, 2011-Ohio-2151 (8th Dist.).

operation, maintenance and monitoring activities throughout the district service area and around, (and off and on) the properties upon which it will be imposed." (Answer Br. 37) But by "earmarked" the *Drees* Court meant that the funds generated must be spent to improve the area around the particular fee payor's property. *Drees* held that the township's failure to establish geographic subaccounts for the expenditure of its proposed fee revealed that the alleged fee was, in fact, a tax. Its focus on watershed-wide projects notwithstanding, the District does not earmark its "Stormwater Fee" tax proceeds for project locations near each payor's property.

Further, the *Drees* case requires that fees be "tied to events, not the spending whims of government." *Drees*, at ¶ 9. The District alleges that the Stormwater Fee will not exceed the costs of its stormwater program projects and activities. But that is a thoroughly false limit. In reality, the projects and activities are no more than an ever-expanding "wish list." The "hard costs" of which are not associated with established stormwater treatment or facility operation objectives. (See "First Out" proposed project list, Pl. Trial Ex. 44.) A "fee" is a "tax" under *Drees* the more that the use of the funds it generates are tied only to the governmental entity's conjuring up of enough projects to use those funds up. Indeed, the District's Executive Director confessed that the District's Board of Trustee's "self-limit[ing]" discretion was the only control on District spending. (Ciaccia, Tr. 489.) Under the *Drees* test, the District's "Stormwater Fee" is a tax.

While the general public benefit of controlling stormwater flooding, erosion, and all of the other ills purportedly to be addressed by the District is laudable, the nobility of its purpose does not give the District the authority to ignore statutes and Supreme Court decisions.

III. The District Possesses Only the Limited Powers Conferred on It by R.C. Chapter 6119, and Title V, Including the Proposed "Stormwater Fee," Is Not Authorized by R.C. Chapter 6119.

A. Nothing in R.C. Chapter 6119 provides authority for Title V's "flooding" and "erosion" control objectives.

Chapter 6119 is the District's sole authority to carry out any program. If Chapter 6119 does not authorize the District's "***flooding***" and "***erosion***" program, then neither the District's Title V nor any Judge McMonagle decision can do so. Chapter 6119 contains no such authority.

According to the District's pleadings, briefs, exhibits, and testimony, Title V contemplates a quarter-of-a-BILLION dollars in projects aimed at managing regional "***flooding***" and "***erosion,***" as part of a "stormwater management plan" designed to protect the "regional stormwater system," on a "watershed" basis, from the effects of runoff increases due to "impervious surfaces." (Answer Br. 9; Pl. Trial Ex. 44; F. Greenland, the District's Director of Watershed Programs, Tr. 1190-91.) But ***the words "flooding," "erosion," "stormwater management," "regional stormwater system," and "impervious surface" appear nowhere in Chapter 6119.*** (Appellants' Br. 26.) The doctrine of *inclusio unius est exclusio alterius* requires a court to infer from the intentional inclusion of express terms and the intentional exclusion of terms omitted. Chapter 6119 contains no such authority.

Since no court order could confer on the District any power not contained in Chapter 6119, Judge McMonagle's 1975 approval of § 5(m)(1) and (3) in the District's Charter is a nullity, insofar as the District roots Title V's so-called "storm drainage" authority in it. (Answer Br. 6-7, 40-41.) First, like "flooding" and "erosion," the term "storm drainage" appears nowhere in Chapter 6119, so it was not among the Chapter 6119 powers that the District could seek or that Judge McMonagle could confer. Second, the only "drainage" authority Chapter 6119 does expressly confer it confers on ***counties***, not "regional sewer districts." Section 6119.36 expressly gives ***counties power to manage "the proper collection, control, abatement, or treatment of surface and subsurface***

drainage," both within the county and in areas "beyond the limits of the county but within the same drainage area as is in part within the county . . . ." (Emphasis added.) Chapter 6119 gives no similar authority to "regional sewer districts." Third, by its shifting use of the term "stormwater management," the District deliberately blurs the line between Title V's "flooding" and "erosion" control pretenses, for which Chapter 6119 furnishes no authority, and the District's limited, express statutory authority to sewer storm and sanitary flows. R.C. 6119.19. *A fortiori*, the District has no power to grow its statutory authority either by re-defining the term "waste water" (Answer Br. 23, n.16) or by unilaterally amending its Plan of Operation (Answer Br. 4).

The General Assembly ***has*** conferred regulatory "***flooding***" and "***erosion***" powers in R.C. Chapters 6101 (for Conservancy Districts), 6105 (for Watershed Districts), and 307 (for Counties). (Appellants' Br. 27-28.) The District knows these other "creatures of statute" exist, but contends that the General Assembly ***could*** have granted it "overlapping powers" with them to regulate "***flooding***" and "***erosion***." (Answer Br. 24, n.17.) But simply contrasting Chapter 6119 with these R.C. Chapters' terms proves that ***the General Assembly did not do so***. (Appellants' Br. 27-28.) Indeed, the General Assembly created "regional sewer districts" for one purpose: "[t]o provide for the collection, treatment, and disposal of waste water within and without the district." R.C. 6119.01(B).[2] Every Chapter 6119 power granted to a "regional sewer district" must be interpreted by reference to this statement of the District's statutory purpose and, where construction is required, construed narrowly to conform to it:

> "In construing a statute, a court's paramount concern is the legislative intent. In determining legislative intent, the court first reviews the applicable statutory language ***and the purpose to be accomplished***. In addition, statutes pertaining to the same general subject matter must be construed *in pari materia*." [Citations

[2]*See also* Section 6119.011(U), which underscores the separate operational scope of R.C. 6119.01's two alternative districts: regional water and regional sewer districts. The District is not providing water. R.C. 6119.01(A). Thus, the "water management facilities" that Chapter 6119 authorizes to implement a potable water supply are not at issue here. R.C. 6119.011(M).

> omitted.] *State ex rel. Watkins v. Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 535, 696 N.E.2d 1079. (Emphasis added.)

Fisher v. Hasenjager, 116 Ohio St.3d 53, 57, 2007-Ohio-5589; *State ex rel. Doersam v. Indus. Comm'n of Ohio*, 40 Ohio St.3d 201, 203 (1988) ("Courts look to the purpose of a statutory scheme in order to determine the rationality of an applicable statute."). Title V's "***flooding***" and "***erosion***" control objectives are not part of a "regional sewer district's" statutory purpose.

It bears repeating: the question here is Chapter 6119's authority for ***Title V***, and not, as the District prefers, the abstract one of the District's "statutory authority to manage stormwater." (Answer Br. 19.) To improvise statutory authority for Title V's "***flooding***" and "***erosion***" ambitions, the Trial Court necessarily had to imply them from Chapter 6119's terms. That too violated a clear prohibition against doing so for "creatures of statute" like the District. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 39 ("[I]f there be no express grant, it follows, as a matter of course, that there can be no implied grant.").

B. R.C. Chapter 6119's definition of "waste water" does not provide authority for Title V's flooding and erosion program.

In an attempt to contrive statutory support for Title V's "***flooding***" and "***erosion***" projects, the District disingenuously attempts to redefine "wastewater" to mean "storm water"—i.e., rain water fallen to the ground. But storm water uncontaminated by waste (i.e., sewage or other pollutants) is not waste water, notwithstanding the District's Chapter 6119 distortions.

The District first dismembers R.C. 6119.011(K)'s "waste water" definition. (Answer Br. 22-23.) The word "wastewater" joins two nouns: "waste" & "water." R.C. 6119.011(K)'s definition reflects this twofold sense of the word. It identifies (i) two possible liquid media ("any stormwater and any water") and (ii) the additives that convert either of them into "waste water" ("containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water"). The resulting "waste water" is that which the General Assembly created

"regional sewer districts" to "collect, treat, and dispose" of. R.C. 6119.01(B).

The District insists that "under [Appellants'] interpretation," sanitary water without storm water in it cannot be "wastewater." (Answer Br. 23.) The District's first mistake is plain. To say that those born in America are therefore Americans, is not the equivalent of saying that all Americans must be born in America. This is an error of rudimentary logic. Second, the District misreads R.C. 6119.011(K). The pollutant additives which that section identifies produce "waste water" when they are added to "***any water***" too. "Storm water" is not the exclusive statutory medium for carrying the waste. This second District error is grammatical. *See also Reith*, below.

Third, the absence of precipitation inside a public restroom does not convert its effluent into anything other than "wastewater." And the idea that before it hits a flower bed a given raindrop must be "collected, treated, and disposed of," as a distinct class of "wastewater," makes sense only to the District. Utterly lost on the District is the basic point, which R.C. 6119.011(K) states clearly, that "wastewater" must "contain" waste. Again, this is not subtle.

The District also misinterpreted and misstated a case Appellants cited that held for the exact R.C. 6119.011(K) interpretation Appellants espouse. *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852 (1st Dist.) (also attached as Appendix 1) *Reith* unequivocally concluded that "waste water" in R.C. 6119.011(K) "***means any storm water containing sewage or other pollutants***." *Id.* at ¶ 29-30. This plainly dispels the District's core statutory authority argument: i.e., that Title V is authorized because R.C. 6119.011(K) defines "storm water" as a type of "waste water" which the District may separately regulate. (Answer Br. 20.) The District said the following about *Reith*:

> In support of their strained interpretation of "waste water," Appellants cite only to ***dicta*** from one case, *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-0hio-4852, 840 N.E.2d 226 (1st Dist). *Reith* is irrelevant here, as it was a case involving claims of negligence and trespass in connection with ***flooding*** of a landowner's driveway and home, and the statute of limitations relating to same. *Id.* at

> ¶¶ 34, 48. Contrary to Appellants' claim, ***the court in Reith did not "conclude" anything with respect to the definition of waste water in R.C. 6119.011(K) as it had no application to the issues presented.*** (Emphasis added.)

(Answer Br. 23, n.16.) *Reith*, itself, quickly exposes the falsity of these representations.

The *Reith* court's analysis of "wastewater's" statutory definition was no dictum. Indeed, the court said it must dispose of that issue ***before*** analyzing the germane trespass and statute of limitations issues. *Id,* at ¶ 24. The Reiths admitted that they had notice of earlier ***flooding*** caused by surface "stormwater runoff." But they said that the later ***flooding***, which produced worse damage, was caused instead by underground "sewered" waters. The distinction, they contended, meant that their claim was not time barred due to the earlier notice of damage from the surface runoff. *Id.* at ¶ 35. ***Based in part on R.C. 6119.011(K)***, the Reiths argued that surface storm water changes into "sewer water" once it is piped underground. *Id.* at ¶ 29.

The *Reith* court rejected the Reiths' distinction between "surface" and "sewered" waters, and their reliance on R.C. 6119.011(K) to support the distinction. The court concluded that surface "stormwater" runoff remained as such even after entering a sewer. *Reith,* at ¶ 27, 30. In so doing, ***the court read R.C. 6119.011(K)'s "waste water" definition exactly as Appellants do:***

> [I]n their appellate brief, the Reiths cite the statutory definitions of sewage and waste water, and argue that surface water must become sewage if it passes underground. Sewage is defined as any substance containing excrement, while ***waste water means any storm water containing sewage or other pollutants***. Fn. 8 See *R.C. 6119.011(I)* and *(K)*. ***The difference between storm water and sewage lies in what the water contains,*** not in whether it is above or below ground. (Emphasis added.)

Id. at ¶ 29-30. The *Reith* court did, in fact, conclude that "storm water" becomes R.C. 6119.011(K) "wastewater" only after "pollutants" are added to it. That conclusion time barred the Reiths' trespass claims, since the sewered "stormwater" and the surface "stormwater" runoff were deemed parts of the same damage-causing agency. *Id.* at ¶ 45-47. What *Reith* said about R.C. 6119.011(K)'s "waste water" definition is true to the statute's language, Appellants' contentions,

common sense, and the District's own historical understanding, as is shown below. What the District said to this Court about *Reith* could hardly be more false.

Indeed, the District's own historic understanding is that "waste water" means exactly what both *Reith* and Appellants say it does. The District concedes that Titles I, II, and IV of its Code of Regulations defined "wastewater" to mean "a combination of water-carried waste * * * together with such ground, surface, or storm water as may be present." (Answer Br. 23, n.16.) With feigned nonchalance, the District adds that "[i]t would be surprising if Title IV contained *any other* definition of wastewater." (Answer Br. 23, n.16) (emphasis original). Appellants could not agree more, because Chapter 6119 contains no other definition of "waste water." And the Chapter 6119 enabling provisions creating the District's powers have not changed since 1972, a fact which the District has acknowledged. (Answer Br. 25, n.18.)

The District's current *ex post facto* twisting of its Code, claiming that it previously implemented "only one aspect" of the District's statutory authority, is pure historical revisionism. (Answer Br. 23, n.16.) Indeed, this assertion traps the District. It cannot claim both that it has legitimately been building "storm water-related projects since 1970" and "invested" more than $12.9 million over that period "in a series of storm water-related studies and construction efforts" (Answer Br. 7-8, 25) and contend that "waste water" as its Code defined it since 1972 excluded "storm water" as a stand-alone regulatory object (Answer Br. 23, n.16). Title V draws not a scrap of authority from R.C. 6119.011(K)'s definition of "waste water."

C. The District's proposed "Stormwater Fee" is not a valid "charge" under R.C. 6119.09.

If it were not a tax, the proposed "Stormwater Fee" could be valid only if it were an authorized R.C. 6119.09 "charge." But no ***factual or legal*** basis exists to regard that Fee as a legitimate R.C. 6119.09 "charge." The disputed portion of R.C. 6119.09 states plainly:

A regional water and sewer ***district may charge***, alter, and collect ***rentals or other charges***,

including penalties for late payment, ***for the use or services of any water resource project or any benefit conferred*** thereby ***and contract*** in the manner provided by this section ***with one or more persons***, one or more political subdivisions, or any combination thereof, ***desiring the use or services thereof***, and fix the terms, conditions, rentals, or other charges, including penalties for late payment, for such use or services. (Emphasis added.)

This section authorizes the District to "charge" for the "use" (or "benefits") of its "projects," pursuant to "contracts" it enters with persons "desiring" those "services." But the District exacts its Stormwater Fee" not from persons it contracts with but from persons ***it*** selects,[3] without their consent, regardless of the payor's "desire" for any "projects"' "use or services." Plainly, the Stormwater Fee resembles ***nothing*** derived from R.C. 6119.09's authority to "charge" willing customers for "services."

More fundamentally, the "Stormwater Fee" cannot be an R.C. 6119.09 "charge"' because the District has no "water resource projects" that it can "charge" anyone to "use." At the moment, it plans to begin exacting $38 million in Stormwater Fees from property owners, the District would have ***no*** "water resource projects" the "use" of which it could offer to anyone. (Ciaccia, Tr. 467-70, 474-75, 479.) The District presently owns and operates only one "storm water control measure"—the Lakeview Dam. (Ciaccia, Tr. 454-58.) The District has no control or authority over anything else, and it would need the consent of municipalities, private property owners, or both to perform any work in the so-called "regional stormwater system."

Aware that it has no services to offer, the District shreds R.C. 6119.09's patent quid-pro-quo sense, claiming that it can charge the Stormwater Fee ***now*** even for as yet non-existent, future "water resource projects." (Answer Br. 31.) To get there, the District bootstraps R.C. 6119.09's authority to "charge" facility "users" to R.C. 6119.011(G)'s definition of "water resource project," contending that the facilities it can "charge" folks to "use" are defined to include facilities "***to be***

[3] The District imposed its Stormwater Fee on a select subset of the property owners receiving its sanitary sewer services, whose opposition to the Fee was not politically significant enough to warrant exempting them. (Ciaccia, Tr. 406-07, 415-17, 576; L. Roesner, Ph.D., Tr. 1374.)

acquired, constructed or operated" in the future. *Id.* (emphasis original). This argument is fallacious for several obvious reasons.

First, R.C. 6119.09 expresses the District's authority to impose "charges," not R.C. 6119.011(G). Section 6119.011(G)'s definition addresses only the timing of when "water resource projects" are or may be "acquired, constructed or operated"; R.C. 6119.09 governs the timing of when "charges" may be imposed (i.e., when customers who so "desire" "contract" for the "use or benefit" of such "projects"). Second, R.C. 6119.09 authorizes "charges" only for the "use or benefit" of "water resource projects"; thus, no "use or benefit," no "charge," a point R.C. 6119.011(P) underscores by defining "revenues" to include "charges received by a district for the use or services of any project," not for a plan hopefully build projects, five or more years out, and for which the District has no unilateral authority to construct. "Future projects," when read together with R.C. 6119.09, cannot be interpreted to mean a proposed one with no present certainty it can be accomplished. Again, the District is misusing R.C. 6119.09 "charges" to circumvent Chapter 6119's expressly authorized means for generating funds to finance "water resource project" "planning" and "construction" costs, and doing so almost certainly because virtually all of them require prior voter approval.[4]

Second, the District's inability to put meat on the bones of its SMP and Stormwater Fee is as much due to the lack of bones as to the lack of meat. There is no "Regional Stormwater System" over which the District has taken or can take control, much less one it can "charge" others to use. That "System" is just a patchwork of man-made and natural features, ***the virtual entirety of which***

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[4] *See* R.C. 6119.18 (***taxes*** to defray "current [district] expenses" or "any portion of the cost of one or more water resource projects"); 6119.17 (***taxes*** to amortize ***indebtedness*** incurred for "any portion of the cost of one or more water resource projects"); 6119.42 (***special assessments*** for "all or any part of the cost connected with...constructing any water resource project"); and 6119.58 (***assessments*** "to obtain funds for the preparation of plans, specifications, estimates of cost, tentative assessments, and a plan of financing for any water resource project"). Section 6119.09 does not authorize the imposition of "charges" for any of these purposes.

the District does not own or control, did not build or buy, does not maintain, and has no right to access. Indeed, Executive Director Ciaccia invented the "300-acre" drainage area constituting the alleged "System's" smallest unit. (Tr. 458.) These natural and man-made features, under the jurisdiction and control of countless private and municipal entities regionally, are united as a singular "system" under the District's authority only on paper in Title V.

Title V's myriad "***flooding***" and "***erosion***" projects (Pl. Trial Ex. 44) add no substance to this "System" or to the SMP, as they could hardly be more contingent themselves. Mr. Ciaccia testified that (i) not a single "storm water" project has been vetted by the Title V "watershed committee" or approved by ODNR, (ii) the District has obtained no easements or Member Community consents for any project, (iii) the District has entered no agreements with any Member Community regarding the scope or funding for any project, and (iv) no watershed plan has yet been reviewed. (Tr. 450-51, 470-74, 485, 563, 570-73.) The District controls no "Regional Stormwater System," has no "water resource projects" the use or benefits of which it can sell, and its planned "flooding" or "erosion" control projects are at this point purely speculative. The Stormwater Fee is simply not a legitimate R.C. 6119.09 "charge" for anything.

IV. The District's Stormwater Program Violates Ohio and Federal Constitutional Provisions.

In addition to lacking statutory authority for its Title V, the District's Stormwater Program violates Constitutional equal protection and due process guaranties and violates the Ohio Constitution's Utility Clause providing municipalities with exclusive utility rights.

A. The Stormwater Fee violates Constitutional equal protection and due process guaranties.

The District maintains that the Stormwater Fee is charged to property owners based on the "burden" that their impervious surfaces place on the "regional stormwater system." If that is so, the District's imposing that charge violates the equal protection and due process rights of those forced

to pay it. ***No rational basis exists*** for the District requiring some property owners to pay the charge while simultaneously (i) exempting owners of property containing airport runways (and taxiways) or railroad right-of-ways, (ii) exempting owners of property consisting of cemeteries, or (iii) giving a credit to property owners who operate a school offering a stormwater-pollution-prevention curriculum or a discount to property owners who operate a school with economically disadvantaged students. The District's attempts to justify distinguishing between "special" property owners who do not have to pay the fee and the remaining property owners who do are egregious and downright disingenuous. The real reason for the exemptions is that the District was making deals with the "special" property owners to gain their support and avoid their opposition.[5] (The exemptions for public road rights-of-way and non-self-supporting governmental functions are addressed in the Property Owner's Addendum to Combined Reply.)

The District contends that airport runways (and taxiways) "tend" to do a good job handling stormwater runoff, thus justifying their exemption from stormwater-fee liability. (Answer Br. 48.) The real reason why the District exempted airport owners from paying the stormwater fee, however, was unrelated to the "Stormwater Program's" ostensible "flooding" and "erosion" control purposes; it was political. Mr. Ciaccia testified that the exemption was offered precisely to gain the support for the proposed "Stormwater Management Program" from Cleveland's Mayor and his appointees to the District's Board of Trustees. (Tr. 407.) Indeed, the District originally exempted city-owned airports (*i.e.*, not county-owned airports), and only amended Title V to exempt airport runways and taxiways at airports owned by the State of Ohio, Cuyahoga County, and cities during Fall 2012 in response to objections raised by Appellants during this litigation. As for railroad rights-of-way, if, as the District asserts, they are "really" not impervious then the exemption would be a nullity

[5]It should not be forgotten that except for the express power to discount or reduce rentals or charges to those aged sixty-five years or older, Chapter 6119 gives the District no authority to dispense exemptions, credits, or discounts ***of any kind*** to its "customers." R.C. 6119.091.

because they would not be subject to the fee in the first place.[6] In sum, no rational basis exists for exempting the owners of airport runways (and taxiways) or railroad right-of-ways from paying a stormwater fee supposedly based on the "burden" on the "regional stormwater system" caused by impervious surfaces. Stormwater running off thousands of square feet of impervious airport runways (and taxiways) or many miles of railroad rights-of-way "burdens" the "regional stormwater system" no differently than that running off a single-family lot's impervious surfaces, except that the former do so in far greater magnitudes.

The District's exemption of owners of property used as cemeteries was also driven by politics, not science or policy, and was just another buy-out to quell opposition to the stormwater program. The cemetery exemption was offered as part of the District's settlement with the Diocese of Cleveland and the Catholic Cemeteries Association, after the trial court entered its February 15, 2012 Opinion. To quell the Diocese's legal claims, the District simply amended Title V to exempt cemetery owners from stormwater fee liability. (*See* District's 6/6/12 Report to the Court, at 3, with attached revised Title V, Section 5.0705.) However convenient this quid-pro-quo, it reflects no rational basis for discriminating between those who must pay the fee and the cemetery owners, whose properties include miles of roads and other impervious surfaces. The impacts of both on the so-called "regional stormwater system" are indistinguishable.

How much less rational still, therefore, is the District's offering fee credits to property owners for operating a school that includes a stormwater-pollution-prevention curriculum approved by the District, or offering a discount to schools enrolling economically disadvantaged students? The District justifies the school credit for approved stormwater-pollution-prevention curricula

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[6]The District asserts that "[t]he gravel ballast around railroad rights-of-way consists uniformly-sized, coarse rocks that allow for percolation of stormwater (unlike impervious surface), and one of its purposes is to provide drainage for the track." (Answer Br. 48.) Under Title V, however, impervious surfaces include "traveled gravel areas."

claiming that it "encourages the youth in this region to (in the future) implement responsible stormwater management practices on their properties (*e.g.*, rain barrels, rain gardens, etc.), which could reduce future demand on the Regional Stormwater System." (Answer Br. 49.) And, the so-called "Educationally Disadvantaged Stormwater Fee" discount was, like the cemetery exemption, swapped in the District's settlement with the Cleveland Municipal School District after the trial court's February 15, 2012 Opinion was entered. The District simply amended Title V to offer the discount to schools demonstrating the eligibility of at least 25% of their students for the federal Free Lunch Program. (*See* District's 6/6/12 Report to the Court, at 3, with attached revised Title V, Section 5.0713.) These bases for reduced fees are completely unrelated to the "Stormwater Program's" "flooding" and "erosion" control purposes, both substantively and temporally. Runoff from a school's impervious surfaces has no relationship to its teaching a stormwater-pollution-prevention curriculum or to its students' income levels.

The District also violates the equal protection and due process rights of those forced to pay the stormwater fee by the manner in which the District calculates the fee. First, no rational basis exists for the District's discrimination between non-residential and residential property owners, in terms of how their fees are calculated. The stormwater fee charged to the former is the only one calculated based upon the actual amount of the property's impervious surfaces. Residential property owners are instead lumped into one of three "tiers," and charged without calibration to their specific amount of impervious surfaces. And all residential property owners with impervious surfaces at or exceeding 4,000 square feet pay the same fee, regardless of the amount by which their impervious areas exceed that floor. The District's assertion that charging all parties based on actual impervious surface area would be "unduly burdensome" and "inefficient" for it provides no rational basis for this unequal treatment. This defect is discussed more fully in Appellants' response to the District's first assignment of error.

Second, the District arbitrarily ignores all but one factor (impervious surfaces) in calculating a property's overall stormwater runoff. The evidence showed that impervious surfaces, standing alone, are an inaccurate, inconsistent, and invalid basis for determining the "burden" that a property's runoff places on the supposed "regional stormwater system." As a result, the District's impervious-surface calculation unreasonably disregards a property's threshold stormwater runoff levels, which as Mr. Clar testified, depends upon numerous variables. Those variables include the amount of precipitation, size of drainage area, soil type, land use, percent of total land surface that is impervious, slope of the land, roughness of the surface of the land, water content of the soil, and storage. The fee fails to account for these baseline factors. Instead, it is grounded entirely and improperly on a single datum, i.e., that incremental increase in stormwater runoff attributable to the size of its impervious surfaces. (Tr. 2307-15.) Mr. Clar also testified about the difference between a "primary" factor and a "sole" factor. (Tr. 2581.) Impervious surface is a primary contributing factor to stormwater runoff increase, but so are many other factors (e.g., soil type and land use). (Id.) None of these factors—including impervious surface—is the sole factor. The District's attempt to justify its stormwater fee by discrediting Mr. Clar's testimony also failed. The District's own experts acknowledged this "sole" versus "primary" distinction. Mr. Cyre similarly testified that in addition to impervious surfaces such things as soil type and slope not only impact stormwater runoff, but can, in fact, be the main factor. (Tr. 165-66.) And Mr. Dorsey testified that impervious surface is only one of a number of factors contributing to stormwater runoff, which include the ratio of green space to impervious surface on a parcel, soil composition, and slope. (Tr. 1275-79.)

Last but by no means least, in determining who will pay the fee that funds the SMP, the District makes categorically irrational distinctions among populations within the territory that the SMP supposedly benefits. Judge McMonagle clearly gave the District sanitary sewage authority

throughout Cuyahoga County. *See* 1979 Judgment Entry; 4/14/82 Mem. of Op. (J. McMonagle); *Parma v. Cleveland*, 9 Ohio St.3d 109, 111 (1984) (affirming the trial court's interpretation of the District's Charter as contemplating a "county-wide solution to the area's sewage problems"). And the trial court correctly found that any benefit the SMP might produce will inure to the ***general public in Cuyahoga County***. But the District will be charging its stormwater fee only to properties inside the District's "service area." That "service area" was specifically created for, and out of hardware used to deliver, sanitary sewage service. Its shape, size, and location were established without regard to any county "watersheds" or other "flooding" or "erosion" considerations. So who pays the fee will be determined solely by who collects, treats, and disposes of the payers' sanitary sewage. No rational connection exists between SMP users/beneficiaries and SMP fee payers. In this way, the District completely ignores the scope of its jurisdiction. The irrationality is only compounded when one factors in the District's various exemptions, credits, and discounts to users ***within*** that "service area," such that a subset of a subset of the county, comprising only folks connected to the District's sewer hardware, are funding the entire county-wide SMP.

B. Title V is in violation of the Utility Clause of Ohio Constitution.

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 that service the municipalities or their respective inhabitants. In *State ex rel. Toledo Edison Co. v. City of Toledo*, 76 Ohio St.3d 508 (1996), the Ohio Supreme Court held that a municipality's powers under the Utility Clause are exclusive, meaning a municipality has the powers to exclude others from competing with it in its operations of a utility.

The evidence presented by the Member Community Appellants at trial demonstrates at that

the communities, in fact, do operate their own stormwater utilities.[7] However, there is no mechanism for a Member Community operating its own stormwater utility to be removed from the District's Stormwater Program. Thus, the Stormwater Program is unconstitutional.

The District has asserted that the Member Community Appellants do not have an automatic exclusive right to operate a utility when a conflict arises with a sewer or water district, but rather the court should apply a balancing test, citing to *Board of Cnty. Commrs. of Ottawa County v. Village of Marblehead*, 86 Ohio St.3d 43 (1999) and *Village of Grafton v. Rural Lorain County Water Authority*, 316 F. Supp.2d 568 (N.D. Ohio, 2004) (Answer Br. 54, 55) The District's assertion and its reading of case law are completely erroneous as the cases cited by the District are inapplicable to the situation before this Court because a balancing test is only applied to determine the constitutionality of *a statute* under the Utility Clause.

The Ohio Supreme Court's holding in the *City of Northwood v. Wood County Regional Water and Sewer District*, 86 Ohio St.3d 92 (1999), unequivocally upholds a city's power under the Utility Clause to exclude a water and sewer district serving its territory and exclusively operate a utility within its borders ***without*** any balancing test. See also *Hudson v. Summit County*, 97 Ohio St.3d 296 (2002).

V. The District's Stormwater Program is Not Authorized By, and Directly Conflicts with, the District's Charter, Thus, the Program Is Not Legally Permissible

Even if the District has the statutory authority under R.C. Chapter 6119 to enact a stormwater management program such as that set forth in Title V (which it does not), and even if such a program was found to be Constitutional (which it is not), the District's Stormwater Program is still invalid because it is not permitted under the District's Charter, as explained below.

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[7] See Trial testimony of Jerry Hubry (Tr. 1906-75), Joseph M. Cicero, Jr., (Tr. 2035-68), Frederick Glady, III (Tr.1975-2035), Dennis Zentarski (Tr. 2108-57), and Thomas Perciak (Tr. 2589-2650).

A. The District's Stormwater Program is not authorized by its Charter.

While the District makes representations regarding the provisions of its Title V, Title V can be changed at any time, unilaterally by the District's Board of Trustees. Thus, reliance on any of the District's statements regarding what Title V does, or does not, provide for is misplaced. There is no guarantee that the District will refrain from changing Title V in the future - even after such provisions are expressly ruled upon by this Court. The only way to ensure that the District is bound to any parameter, restriction, or provision is to include such provision in the District's Charter.

The District's Charter does not, in anyway, contemplate a "regional" stormwater system. Rather, the Charter characterizes the sewerage collection facilities and systems in terms of what is owned/operated by the District (for example, sewage treatment and disposal facilities, major interceptors etc.) and in terms of all other facilities and systems, which the Charter refers to as the "local" facilities and systems. A "regional stormwater system" is a definition and concept created solely by the District in Title V. (The District's 1975 "Petition to Amend the Petition and Plan of Operation" and Judge George McMonagle's 1975 Order are attached hereto as Appendices 2 and 3, respectively.) (See also Defs. Trial Ex. 7, 8.)

The District's Charter places very specific restrictions on the District's authority and activities, which are violated by Title V. The District's Charter specifically forbids the District from assuming responsibility for the "planning, financing, construction, operation, maintenance or repair" of any local collection system ***except through "written agreement" with the local community***. (See Exhibit A to 1975 Order, Section 5(m), p. 7.) In this regard, the District's Charter unambiguously states:

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

> **construction, operation, maintenance or repair of any local sewerage collection facilities and systems *unless*** the assumption of such ownership, responsibility or liability is specifically provided for in a **written agreement between the District and the respective *local community***. (Emphasis added.) (Exhibit A to 1975 Order, Section 5(m), at p.7)

Furthermore, specifically with respect to "Operation, Maintenance, and Repair" of local sewerage collection facilities, the District's Charter states:

> "The 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**." (Emphasis added.) (See Exhibit A to 1975 Order, Section 5(m)(2), pp. 7-8)

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

> "The District may construct local sewerage collection facilities and systems **when requested to do so by a local community upon mutually agreeable terms**. (Emphasis added.) (See Exhibit A to 1975 Order, Section 5(m)(4), p. 8)

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

> "The method of financing particular projects shall be **agreed to between the district and the respective local communities at the time the project is undertaken** by the District." (Emphasis added.) (See Exhibit A to 1975 Order, Section 5(m)(5), p. 8)

The District pays lip-service to these Charter restrictions by stating that "Title V does not conflict with the District's Plan of Operation because the District is not managing any 'local sewerage collection facilities and systems without agreement of the local communities." (Answer Br. 39) However, ***nowhere*** in Title V is there any mention of the District seeking or obtaining written agreement of the local communities in any situation. Rather, provisions of Title V give the District unrestricted authority to plan, finance, construct, operate, maintain or repair all portions of the local sewerage collection facilities and systems of the local communities that the District determines falls into its unilaterally, self-created definition of "Regional Stormwater System." Title V, under its Chapter for "Authority and Responsibility", states in Section 5.0501:

> Management of the Regional Stormwater System. – The District shall provide overall Stormwater Management of the Regional Stormwater System, including planning, financing, design, improvement, construction, inspection, monitoring, maintenance,

operation, and regulation for the proper handing of storm water runoff...

Moreover, in its Answer Brief, the District attempts to narrow the language of the Charter so that the requirement for an agreement with the local community only applies to situations where the community is the title owner or operator of the portion of the stream, water course, or other stormwater facility over which the District is asserting responsibility or management. The District does so by asserting that Title V makes no attempt to take "ownership of or responsibility for" local stormwater facilities and systems (natural or otherwise) *"owned and/or operated by Member Communities*", arguing that the local communities do not own or operate all river, streams, creeks or other watercourses within their boundaries. However, the unrebutted testimony at trial established that Member Community Appellants' local stormwater system includes all culverts, streams, pipes, spillways, and other watercourses which convey stormwater through the community to its corporate boundaries irrespective of whether the ground beneath them is owned by the municipality.

Further, the Charter, itself, does not make a distinction between specific portions of the local stormwater system located on land owned by the local community and the portions of the local stormwater systems within the boundaries of private property. Rather, the Charter broadly prohibits "planning, financing, construction, operation, maintenance or repair ***of any local sewerage collection facilities and systems"*** without written agreement with the "respective local community." The District's argued limitation on the Charter language treats its obligation to obtain a written agreement from the local community as merely a function of land ownership, not any higher level of governmental authority. This was not the intent or meaning of the restricting language of the Charter.

B. Changes to the District's Charter must have court approval through the R.C. 6119.051 Charter amendment process.

The District asserts that it is not required to go through the Charter amendment process of R.C. 6119.051 in order to adopt and implement its new Title V. The District argues it must only seek court-approval for changes to the "petition" portion of it's Charter (allegedly Sections 1-4 and 6-8 of Judge McMonagale's 1975 Order) while the "plan of operation" portion of its Charter (Section 5, pages 2-8, of the 1975 Order) may be changed unilaterally by the District's Board of Trustees without court approval. (See Answer Br. 39 and fn. 4.) However, the District's assertion is wrong on several accounts.

First, Section 5 of the District's Charter, as it was approved by the 1975 Order and in all of Judge McMonagle's prior and subsequent Orders approving or amending the District's Charter, contains the core authority, restrictions, and parameters for the District's operations - in short, it's the "guts" of the District's Charter. It contains the provisions for the sewer rates, construction of facilities, and the scope of the authority of the District with respect to local sewerage collection facilities and systems. Allowing these provisions of the District's Charter to be changed unilaterally, at any time in any way, by the District's Board would negate all meaningful judicial oversight over the District's scope of authority, as such was intended by the Ohio General Assembly through Chapter 6119.

Second, the District's assertion is contrary to the Eighth District Court of Appeals decision, in *Kucinich v. Cleveland Regional Sewer District*, 64 Ohio App.2d 6 (8th Dist. 1979) which states, at Syllabus, "The approved ***petition*** filed under R.C. 6119.02 ***and the approved plan of operation for the district*** filed under R.C. 6119.04 ***may only be amended or modified by the Common Pleas Court upon a petition*** being filed containing a request for such amendment or modification." *Id.*

Third, the District's assertion is also contrary to the history of the District's proceedings before Judge McMonagle of the Common Pleas Court. At each step of the District's procedural history before Judge McMonagle, the District has petitioned the Court for amendments to both the "petition" sections and the "plan of operation" section of the Charter, and Judge McMonagle ruled on such amendments in both portions. "Exhibit A" to Judge McMonagle's has always been treated as one, unified Charter document needing Court approval for amendment or modification.

Chapter 6119 of the Ohio Revised Code gives procedural as well as substantive protections to persons and entities affected by the District's activities and proposed activities. Chapter 6119 requires that a sewer district's initial Petition and Plan of Operation (Charter) be approved by the Court after opportunity for all interested parties to be heard, and R.C. 6119.051 provides for a similar process for *amendment* of the Charter. Title V is vastly different in scope and content from the Charter which was approved by Judge McMonagle in 1975 and is outside of the Charter's parameters and, in some instances, directly in conflict with the current Charter provisions. Any such change in District's Charter can only be accomplished through a petition for amendment of the existing Charter through Section 6119.051. This was affirmed by the 8th District Court of Appeals in the *Kucinich* case, cited earlier.

Clearly, in this case, the trial court erred in not striking down the District's Stormwater Program.

CROSS-APPELLEES' COMMON ANSWER BRIEF TO CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

CROSS-ASSIGNMENTS OF ERROR (AS STATED BY CROSS-APPELLANTS)

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

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

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

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

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District's voluntary compliance with the trial court's judgment through its Board of Trustee's amendments to Title V to its Code of Regulations renders the Districts appeal on such judgment moot. (District's AOE 1, 2, 3, and 4.)

2. Whether Title V is unconstitutional because it treats non-residential property owners differently from residential property owners without any rational basis for doing so. (District's AOE 1.)

3. Whether the trial court's order increasing the Community Cost Share is supported by sufficient evidence presented at trial. (District's AOE 4.)

STATEMENT OF THE CASE AND FACTS

For their Statement of the Case and Statement of Facts, Cross-Appellees adopt the Combined Statement of the Case and Facts from their Combined Opening Brief.

ARGUMENT

I. The District's Cross-Assignments of Error Should be Dismissed as Moot. (AOE 1 – 4.)

As a general proposition, an appeal from a judgment with which the appellant has voluntarily complied will be dismissed as moot. *Sunkin v. Collision Pro, Inc.*, 174 Ohio App.3d 56, 65-66 (9th Dist. 2007) (quoting *American Book Co. v. Kansas*, 193 U.S. 49, 52 (1904)). Since trial, Plaintiff has voluntarily complied with the Trial Court's judgment, and has taken actions that render its Cross-Assignments of Error moot.

In its February 15, 2012 Opinion, the Trial Court ruled and indicated that Title V required certain modifications in order to be fully legal. The Court required that these modifications be made before Title V could be implemented. The Trial Court prescribed a course of action that the Plaintiff could take to make its program legal, and the Plaintiff accordingly submitted its revised plan in its Report to the Court filed on June 7, 2012. While the legality of this post-trial amendment process is also at issue in this action, the fact remains that the Plaintiff assented to changing its program after the Trial Court made a declaration as to the legality of the program as it was proposed. The District then voluntarily adopted changes to Title V, and is currently billing customers in accordance with these amendments.

The changes that the District voluntarily adopted to Title V have rendered moot its assignments of error. The Distirct outlined these changes in its Report to the Court filed June 7, 2012. First, the District amended Section 5.0707(e) to charge owners of non-residential properties having more than 10 Equivalent Residential Units (ERUs) of impervious surface based upon a declining block rate. Second, the District established an educational curriculum, which appears

guided by the Trial Court's Order. See Sec. 5.0804(c). Third, the District revamped Section 5.0806 of Title V to include a credit for the cost of licensed engineers. Finally, the District changed Title V's Community Cost-Share amount from 7.5% to 25%. See Section 5.0905. Also regarding the Community Cost-Share percentage, the District has recently entered into a settlement agreement with the City of North Royalton whereby the 25% community cost share was adopted and consented to. (See Settlement Agreement, City of North Royalton, attached as Appendix 4). [8]

As these actions taken by the District have rendered moot each of the four Cross-Assignments of Error presented, the Cross-Assignments of Error should accordingly be dismissed.

II. The Trial Court Properly Determined That Title V Is Unconstitutional Because It Treats Non-Residential Property Owners Differently From Residential Property Owners Without Any Rational Basis for Doing So. (AOE 1)

The trial court properly determined that no rational basis exists for the District's treating nonresidential property differently from residential property. The 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. Non-residential property owners are charges in strict multiples of this rate based on their impervious surfaces areas. Residential property owners, however, 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. The trial court found that no rational basis exists for this disparate treatment of non-residential property owners and residential property owners. (2/15/12 Op., at 16.) The trial court was correct in reaching this conclusion. No rational basis exists for charging nonresidential property owners based on the amount of impervious surfaces on their

[8] An appellate court can generally consider only the evidence that was before the trial court; however, an event that causes a case to become moot can be proved by extrinsic evidence outside the record. *State ex rel. Luchette v. Pasquerilla*, 182 Ohio App. 3d 418 (11th Dist. 2009).

property while capping the charge imposed on residential property owners no matter how much impervious surface area their property contains. According to the District, the stormwater fee is "based on the incremental increase in the demand on the Regional Stormwater System caused by development on parcels of land." (Answer Br. 11.) To put it simply, this "incremental increase in demand" is not affected by whether a property owner uses his or her property for residential purposes or non-residential purposes, and there is no rational basis for treating these two groups of property owners differently.[9] Therefore, the District's first Assignment of Error is meritless.

III. The Trial Court's Order Increasing the Community Cost Share is Supported by Sufficient Evidence Presented at Trial. (AOE 4.)

Assuming, *arguendo*, that this Court finds that the District has authority to implement is Stormwater Management Program, the Trial Court's finding that "the 7.5% cost share is unfair to member communities" was based on evidence set forth at the Trial and should not be disturbed. There was testimony at trial that the AMEC study of August 2008 considered cost-share proposals of up to 20%. Plaintiff's Trial Ex. 74. This Exhibit also indicates that the 7.5% is arbitrary. According to Julius Ciaccia, Jr., Executive Director of the NEORSD, and Frank Greenland, Director of Watershed Programs, the Community Cost Share percentage of 7.5% was determined based upon and exercise at the SWAC (Stormwater Advisory Committee) meetings. (Tr. 784, 944, 945.) According to Plaintiff's Trial Exhibit 4, the SWAC group was asked what percentage was appropriate to give back to the communities for cost share between 1% and 20%. (Tr. 787.) Apparently, the group came up with a number in the range of 6% and the District chose 7.5%.

[9]The District has created a cap for residential property owners and there no reason exists why it cannot do the same for nonresidential property owners. Indeed, in response to the trial court's finding that no rational basis exists for treating nonresidential property differently than residential property owners, the District developed a declining-block rate for non-residential property owners, albeit one that hardly begins to solve the problem. (*See* District's 6/6/12 Report to Court, at 3; revised Title V, Section 5.0707 (providing for declining-block fee for non-residential parcels having more than 10 ERUs).) In addition, as for the District's assertion that it would be too onerous to calculate the impervious surfaces on residential properties, it would have to do so for each residential property anyway to determine which tier it falls into.

Testimony at Trial from Mr. Ciaccia, Brecksville Mayor Hruby and Lyndhurst Mayor Cicero confirmed that there was never a focus group of mayor from across the region to discuss the Community Cost Share percentage. (Tr. 789, 1943, 1945, 2055).

Additionally, defense expert Michael Clar testified that building water resource projects on areas that drain 300 acres in local municipal systems will actually cause a greater impact on the local systems that drain less than 300 acres by causing water to accumulate. As such, a percentage of 7.5% is inadequate to address these problems especially given the fact that the communities must adhere to the regulations set forth by the District with regard to community cost share projects.

IV. Conclusion

For the foregoing reasons, all of the District's Assignments of Error lack merit and the District's appeal should be dismissed.

Respectfully submitted,

/s/ David J. Matty (per consent)
David J. Matty (0012335)
Shana A. Samson (0072871)
Justin Whelan (0088085)
Rademaker, Matty, Henrikson & Greve
55 Public Square, Suite 1775
Cleveland, Ohio 44113
Phone: 216-621-6570
Fax: 216-621-1127
Email: dmatty@rmmglaw.com
ssamson@rmmglaw.com
jwhelan@rmmglaw.com

Attorneys for Defendant-Appellant
City of Brecksville

Sheldon Berns (0000140)
Benjamin J. Ockner (0034404)
Jordan Berns (0047404)
Gary F. Werner (0070591)
Timothy J. Duff (0046764)
Berns, Ockner & Greenberger, LLC
3733 Park East Drive, Suite 200
Beachwood, Ohio 44122
Phone: (216) 831-8838
Fax: (216) 464-4489

Email: sberns@bernsockner.com
bockner@bernsockner.com
jberns@bernsockner.com
gwerner@bernsockner.com
tduff@bernsockner.com

Attorneys for Intervening Defendants-Appellants The Greater Cleveland Association of Building Owners and Managers, et al.

John H. Gibbon, Director of Law (0010986)
~~City of~~ Cleveland Heights
40 Severance Circle
Cleveland Heights, OH 44118
Phone: 216-291-5775
Fax: 216-291-3731
Email: jgibbon@walterhav.com
Christopher L. Gibbon (0010983)
Heather R. Baldwin Vlasuk (0077459)
WALTER | HAVERFIELD LLP
The Tower at Erieview
1301 East 9th Street, Suite 3500
Cleveland, OH 44114-1821
Phone: 216-781-1212
Fax: 216-575-0911
cgibbon@walterhav.com
hvlasuk@walterhav.com

Attorneys for Defendants-Appellants
City of Beachwood, City of Bedford Heights, 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

Property Owners' Addendum to Common Reply Brief

In addition to violating equal protection and due process guarantees by requiring some property owners whose property contains impervious surfaces to pay the stormwater fee while exempting certain "special" property owners whose property also contains impervious surfaces as discussed in the Combined Reply, the District violates equal protection and due process guarantees by further exempting property owners whose property contains impervious surfaces consisting of public road right-or-ways and non-self-supporting municipal functions.

First, the District's purported reason for treating impervious surfaces consisting of public road right-of-ways differently from other impervious surfaces is that they are part of its amorphous "regional stormwater system." (Answer Br. 48.) There is no question, however, that if impervious surfaces add to stormwater runoff, then the thousands of miles of roads in the District's service area are not the solution. Distinguishing between public roads and private roads provides a particularly glaring example of this inequality given that for the most part private roads are required to be built and maintained to the same standards as public roads. (Or, for that matter, distinguishing between private roads located in cemeteries and private roads not located in cemeteries.) No basis—rational or otherwise—exists for treating impervious surfaces consisting of public roads differently from other impervious surfaces and exempting them is completely arbitrary.

Second, the District asserts that it exempted non-self-supporting municipal functions because doing so is consistent with Section 5(k)(1) of its Charter and how it charges for sewer rates. This does nothing more than once again highlight the difference between the District's traditional collecting, treating, and disposing of sewage with its new plan to manage stormwater. Cleveland's exemption from paying sewage fees for its non-self supporting municipal functions arose from its originally having owned the sewage treatment plants and pipes, and the exemption continued as part of the exchange in which their ownership was transferred to the District. As Judge McMonagle put

it, he considered Cleveland's receiving free sewage treatment part of the contractual arrangement involving the District and the City. (See 12/28/81 Mem. of Op., at 5-6, Defs Trial Ex. 185). This exemption was then carried over to all non-self-supporting municipal functions in the District. This historical exemption from paying sewage fees has absolutely no relationship to a fee to support the District's plan to manage stormwater based on the "burden" that a property owner places on the "regional stormwater system" calculated by the amount of impervious surfaces on his or her property. No rational basis exists for exempting non-self-supporting municipal functions and exempting them from a fee based on the "burden" a property owner places on the "regional stormwater system" calculated by the amount of impervious surfaces on his or her property is completely arbitrary.

Respectfully submitted,

Sheldon Berns / 24th

Sheldon Berns (0000140)

One of the Attorneys for Intervening Defendants-Appellants The Greater Cleveland Association of Building Managers, et al.

CERTIFICATE OF SERVICE

A copy of the foregoing Common Appellants' Reply Brief/Cross-Appellees' Answer Brief, With Separate Reply Brief Addendum Of Certain Appellants was sent to the following via U.S. Mail, postage prepaid, this 13th day of February, 2013 addressed to:

John B. Albers
Eric J. Luckage
Albers and Albers
88 North Fifth Street
Columbus, OH 43215

Attorneys for Amicus, CORD

Nathan Gardner-Andrews
National Association of Clean Water Agencies
1816 Jefferson Place, NW
Washington, DC 20036

Attorney for Amici Curiae, National Association of Clean Water Agencies, The National Association of Flood and Stormwater Management Agencies, The American Public Works Association, American Rivers, and The Association of Ohio Metropolitan Wastewater Agencies

A copy of the foregoing Common Appellants' Reply Brief/Cross-Appellees' Answer Brief, With Separate Reply Brief Addendum Of Certain Appellants was served via electronic mail, on this 13th day of February, 2013, upon the following:

Party/Municipality	**Attorney Representative**	**Service Address**
Plaintiff	Mark I. Wallach James F. Lang Matthew J. Kucharson Molly A. Drake Marlene Sundheimer	mwallach@tmlpa.com jlang@calfee.com mkucharson@calfee.com mdrake@calfee.com sundheimerm@neorsd.org
Bath Township	Mary Ann Kovach Michael D. Todd	kovach@prosecutor.summitoh.net toddm@prosecutor.summitoh.net See also: Summit County Defendants
Beachwood	Stephen M. O'Bryan Rebecca M. Schaltenbrand	sobryan@taftlaw.com rebecca.schaltenbrand@icemiller.com officeservicescleveland@taftlaw.com
Bedford	Kenneth A. Schuman Charles A. Bakula	kas@rgm-law.com charlesbakula@netscape.net
Bedford Heights	Ross S. Cirincione	rsc@rgm-law.com
Berea	Gregory M. Sponseller	gsponseller@bereaohio.com
Boston Heights	Constance A. Hesske	attyhesske@hesske.com

Party/Municipality	Attorney Representative	Service Address
		See also: Summit County Defendants
Bratenahl	David J. Matty Shana A. Samson Erin Hooper	dmatty@rmmglaw.com ssamson@rmmglaw.com ehooper@rmmglaw.com
Brecksville	David J. Matty Shana A. Samson	dmatty@rmmglaw.com ssamson@rmmglaw.com
Broadview Heights	Vince Ruffa Ann C. Oakar	vruffa@oakarandruffa.com aoakar@oakarandruffa.com annieoakar@hotmail.com
Brook Park	Neal M. Jamison	njamison@cityofbrookpark.com neal.jamison@yahoo.com
Brooklyn	Scott D. Claussen	sclaussen@brooklynohio.gov scott.claussen@lakewoodoh.net
Brooklyn Heights	Jerome E. Dowling	benru677@att.net kbaciak@brooklynhts.org
Cleveland	Catherine Ma Shirley Tomasello	cma@city.cleveland.oh.us stomasello@city.cleveland.oh.us jscott@city.cleveland.oh.us
Cleveland Heights	John H. Gibbon William R. Hanna	jgibbon@walterhav.com whanna@walterhav.com docket@walterhav.com
Columbia Township	Dennis P. Will Gerald A. Innes	lcp@lcprosecutor.org
Cuyahoga Heights	Jonathan D. Greenberg Aimee W. Lane	jgreenberg@walterhav.com alane@walterhav.com docket@walterhav.com
East Cleveland	Ronald K. Riley	rriley@eastcleveland.org
Euclid	L. Christopher Frey	cfrey@cityofeuclid.com
Garfield Heights	Timothy J. Riley Kevin P. Weiler	lawtjr@aol.com triley@garfieldhts.org kweiler@garfieldhts.org
Gates Mills	Charles T. Riehl Aimee W. Lane	criehl@walterhav.com alane@walterhav.com docket@walterhav.com
Glenwillow	Stephen M. Klonowski	sklonowski@glenwillow-oh.gov smk@rgm-law.com
Highland Heights	Timothy G. Paluf	tpaluf@highlandhts.com
Highland Hills	Thomas P. O'Donnell	todonnell@todlaw.com
Hudson	Charles T. Riehl	criehl@walterhav.com docket@walterhav.com
Independence	Gregory J. O'Brien	gobrien@taftlaw.com officeservicescleveland@taftlaw.com
Lakewood	Kevin Butler Scott Claussen	law@lakewoodoh.net Kevin.Butler@lakewoodoh.net
Linndale	George T. Simon	hellogeorgesimon@gmail.com
Lyndhurst	Paul T. Murphy	carbmurph@aol.com

Party/Municipality	Attorney Representative	Service Address
	David Maistros Robert J. Foulds Kevin P. Roberts	davidmaistros@maistroslaw.com rfoulds@dsf-law.com kroberts@dsf-law.com
Macedonia	Joseph W. Diemert, Jr. Thomas M. Hanculak Mark V. Guidetti	receptionist@diemertlaw.com jwdiemert@diemertlaw.com tmhanculak@diemertlaw.com mvguidetti@diemertlaw.com See also: Summit County Defendants
Maple Heights	John J. Montello	jmontello@bedfordlawyers.com mainoffice@bedfordlawsyers.com
Mayfield Heights	L. Bryan Carr	carrlawfirm@aol.com
Mayfield Village	Joseph W. Diemert, Jr. Diane A. Calta	receptionist@diemertlaw.com dacalta@diemertlaw.com jwdiemert@diemertlaw.com
Middleburg Heights	Peter H. Hull	peterhhull@gmail.com
Moreland Hills	Margaret Anne Cannon	mcannon@walterhav.com
Newburgh Heights	Luke F. McConville	luke@healthlaw.com
North Randall	Leonard A. Spremulli	spremullil@aol.com
North Royalton	Donna M. Vozar Thomas A. Kelly	dvozar@northroyalton.org tkelly@northroyalton.org dvoz74@hotmail.com tak@kellyandkelly.us carolyn@kellyandkelly.us
Northfield (Village)	Bradric Bryan	bbryan@gbs-llp.com gbsllp@gbs-llp.com See also: Summit County Defendants
Northfield Center Township	Mary Ann Kovach Michael D. Todd	kovach@prosecutor.summitoh.net toddm@prosecutor.summitoh.net See also: Summit County Defendants
Oakwood	Stephen Klonowski	sklonowski@glenwillow-oh.gov smk@rgm-law.com
Olmsted Falls	Robert J. Foulds Kevin P. Roberts	rfoulds@dsf-law.com kroberts@dsf-law.com
Olmsted Township	Mrs. Sherri Lippus, Trustee	slippus@olmstedtownship.org
Orange Village	Stephen L. Byron	sbyron@walterhav.com
Parma	Timothy Dobeck	tdobeck@parmalaw.org bwirtz@cityofparma-oh.gov
Parma Heights	Marcia E. Hurt Thomas A. Kelly C. Anthony Stavole	mehurt@stavoleandmiller.com admin@stavoleandmiller.com tak@kellyandkelly.us carolyn@kellyandkelly.us
Pepper Pike	Stephen L. Byron	sbyron@walterhav.com docket@walterhav.com
Richfield (Village of)	Charles T. Riehl William R. Hanna	criehl@walterhav.com whanna@walterhav.com docket@walterhav.com See also: Summit County Defendants

Party/Municipality	Attorney Representative	Service Address
Richfield Township		See: Summit County Defendants
Richmond Heights	R. Todd Hunt Aimee W. Lane	rthunt@walterhav.com alane@walterhav.com docket@walterhav.com
Sagamore Hills	Jeffrey J. Snell	jeff@attorneysnell.com See also: Summit County Defendants
Seven Hills	Richard A. Pignatiello Patrick DiChiro	pignatiellolaw@aol.com sevenhillslaw@aol.com
Shaker Heights	William M. Ondrey Gruber	william.gruber@shakeronline.com
Solon	David J. Matty Shana A. Samson Erin Hooper	dmatty@rmmglaw.com ssamson@rmmglaw.com ehooper@rmmglaw.com
South Euclid	Michael P. Lograsso	lograssolaw@aol.com
Strongsville	Kenneth A. Kraus Daniel J. Kolick	strongsville.law@strongsville.org dkolick@kolick-kondzer.com docket@kolick-kondzer.com
Twinsburg	David M. Maistros	dmaistros@twinsburg.oh.us davidmaistros@maistroslaw.com See also: Summit County Defendants
Twinsburg Township	Alfred E. Schrader	alschrader@choiceonemail.com See also: Summit County Defendants
University Heights	Kenneth J. Fisher	kfisher@fisher-lpa.com
Valley View	David A. Lambros	law2direct@aol.com
Walton Hills	John J. Montello Blair N. Melling	jmontello@bedfordlawyers.com mainoffice@bedfordlawyers.com
Warrensville Heights	Teresa M. Beasley	tmbeasley@calfee.com
Willoughby Hills	Thomas Lobe	tomlobe@yahoo.com lawdirector@willoughbyhills-oh.gov
Summit County Defendants: Bath Township Boston Heights Hudson Macedonia Northfield Village Northfield Center Township Richfield (Village) Richfield Township Sagamore Hills Twinsburg Twinsburg Township	Sherri Bevan Walsh Mary Ann Kovach Michael D. Todd	kovach@prosecutor.summitoh.net toddm@prosecutor.summitoh.net
Bishop Lennon Intervenors	L. James Juliano Matthew J. Fitzsimmons Michael E. Cicero	juliano@nicola.com fitzsimmons@nicola.com cicero@nicola.com

Party/Municipality	Attorney Representative	Service Address
Intervenors	Sheldon Berns Benjamin J. Ockner Jordan Berns Gary F. Werner Timothy J. Duff	sberns@bernsockner.com bockner@bernsockner.com jberns@bernsockner.com gwerner@bernsockner.com tduff@bernsockner.com
Intervenor, The Cleveland Municipal School District Board of Education	Adrian D. Thompson Brian E. Ambrosia	athompson@taftlaw.com bambrosia@taftlaw.com
Attorneys for Amicus, CORD	John B. Albers Eric J. Luckage	John.Albers@alberslaw.com
Attorneys for Amici Curiae, Water Agencies	Nathan Gardner-Andrews	ngardner-andrews@nacwa.org

John H. Gibbon, one of the Attorneys for Appellants