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December 12, 2013

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Re: *Northeast Ohio Regional Sewer District v. Bath Township, Ohio, et al.*
Supreme Court of Ohio Case No. 13-1770
Appeal from Court of Appeals for the Eighth Appellate District
Case No. 098728 (Consolidated with Case Nos. CA 12 098729 and CA 12 098739); Cuyahoga County Court of Common Pleas
Case No. CV-10-714945

Dear Mark:

Enclosed is a copy of the Memorandum in Opposition to Jurisdiction of Respondents City of Beachwood, City of Bedford Heights, City of Brecksville, City of Cleveland Heights, City of Independence, City of Lyndhurst, City of Olmsted Falls, City of Strongsville, Village of Glenwillow, and Village of Oakwood.

Sincerely,

Michael J. Zbiegien Jr.

Michael J. Zbiegien, Jr.

Enclosure
cc: All Parties and Counsel of Record

IN THE SUPREME COURT OF OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	**: CASE NO. 13-1770**
	:
	: Appeal from Court of Appeals
Petitioner,	**: for the Eighth Appellate District**
	: CASE NO. CA 12 098728
v.	**: (Consolidated with Case Nos.**
	: CA 12 098729 CA 12 098739)
BATH TOWNSHIP, OHIO, et al.	**:**
	: Cuyahoga County
Respondents.	**: Court of Common Pleas**
	: Case No. CV-10-714945

MEMORANDUM IN OPPOSITION TO JURISDICTION OF RESPONDENTS CITY OF BEACHWOOD, CITY OF BEDFORD HEIGHTS, CITY OF BRECKSVILLE, CITY OF CLEVELAND HEIGHTS, CITY OF INDEPENDENCE, CITY OF LYNDHURST, CITY OF OLMSTED FALLS, CITY OF STRONGSVILLE, VILLAGE OF GLENWILLOW, AND VILLAGE OF OAKWOOD

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I. WHY THIS MATTER IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

Hidden beneath the heated rhetoric in the Memorandum in Support of Jurisdiction is the true nature of this case. Namely, the Northeast Ohio Regional Sewer District (the "District") initiated this case to accomplish through the courts what it should be pursuing politically. Indeed, the District's brief, with its speculation regarding possible future benefits of regional flooding and erosion control and the consequential parade of horribles if its course is not followed, reads like a campaign's literature or a lobbyist's entreachments for broad new powers or taxes.

But what the District's rhetoric masks are these basic truths. The Court of Appeals' ruling will not have a major impact in Ohio; indeed by the District's own references only two "stormwater districts"—not sewer districts—comprised of parts of four townships even exist statewide. And despite the District's suggestions to the contrary, the vast majority of what it wants to do represents contemplated *future* action, not present implementation, other than the $35 million in fee bills the District has sent out, $20 million of which was collected while this case was on appeal. Indeed, the Court of Appeals' ruling below works no sea-change, but maintains the status quo regarding the powers exercised by sewer districts before the adoption of Title V. And importantly, the resolution of this case depends upon the specific facts of this case, including an interpretation of the specific Plan of Operation or Charter that sets forth the District's authority. As such, this case is not of public or great general interest.

A. This case is not of great public or general interest because it turns on an interpretation of the District's unique Charter.

The District's Memorandum places much emphasis on its claim that the Court of Appeals' reading of R.C. 6119.011(K)'s definition of "waste water" was incorrect. On the contrary, not only was that interpretation correct, but it comports with the only other Ohio Court

of Appeals interpretation of the same language. Regardless, the District ignores that the Court of Appeals also determined that the Stormwater Management Program (the "Program") exceeds the authority conferred under the District's Charter, a fact unique to this District that does not involve the statutory definition of "waste water." *N.E. Ohio Reg'l Sewer Dist. v. Bath Twp*, 8th Dist. Cuyahoga Nos. 98728, 98729, 2013-Ohio-4186, --- N.E.2d ---, ¶¶ 59 – 68 ("*NEORSD*").

On August 28, 1975, after years of protracted litigation between the City of Cleveland and its suburbs, Cuyahoga Common Pleas Judge George J. McMonagle issued an order that constitutes the District's Charter. Under the Charter, which has not been amended since 1979, the District was charged with taking over Cleveland's existing sanitary sewer system and improving its sewage collection, treatment, and disposal facilities throughout the District. The Charter also contains express limitations on the District's ability to interfere with Member Communities' local sanitary and storm sewer systems without their consent.

In January 2010, the District's Board of Trustees unilaterally created the Program by amending the District's Code of Regulations through the enactment of Title V. The Court of Appeals, however, held that Title V and the Program exceeded the powers granted in the Charter in three ways. First, the Program "goes far beyond the scope of sewage treatment and waste water handling facilities under the Charter." *NEORSD* at ¶ 61. Second, "the Charter does not authorize the District to impose a fee for a stormwater management program," and therefore the District's proposed impervious surface fee is invalid. *Id.* at ¶ 62. Third, the Program exceeds the authority under the Charter because the Charter prohibits the District from assuming ownership, control, or responsibility for locally owned and controlled systems, or for financing projects, without the local community's written consent. *Id.* at ¶ 63.

In fact, the District has known since at least 2008 that the Program violated the Charter because its own experts and legal counsel had told them so.[1] The Board, however, ignored or circumvented the expert advice and implemented Title V without amendments being authorized by the Court of Common Pleas and the Member Communities. Instead, the District belatedly appended updated versions of the proposed amendments to Count Two of its Complaint in this suit, which the trial court struck as an improper, non-adjudicatory pleading. Thus, the Court of Appeals Opinion, which merely echoed the findings of the District's retained experts and legal counsel regarding the necessity for an amendment to the Charter, was clearly correct and need not be further reviewed. *See NEORSD* ¶¶ 61-62.

B. Contrary to the suggestions by the District, the Court of Appeals' ruling maintains the status quo.

While the District claims that doom and gloom will result if the Program is not implemented, the District in fact does not own, operate, or have consent to use any watercourse, stormwater conveyance, or wastewater project that could be part of its proposed Regional Stormwater System as defined at Title V § 5.0501 (the "Regional System"). Instead, all member municipalities have and continue to own and operate their local stormwater systems. These are multi-million dollar systems that the municipalities have constructed over time. They are operated, maintained, and funded by taxes, levies, assessments and fees paid by the

[1] In its August 12, 2008 Stormwater Related Legal Questions Report, the District's expert consulting firm, AMEC, publicly advised the District that "there needs to be clarified language inserted in the Plan [Charter] defining a regional drainage system that is distinct from the 'local sewerage collection facilities and systems.'" (Defendant's Ex. 71 § 4.1 (emphasis in original).) In addition, because the Charter expressly authorized only "sanitary sewage rates," that same Report also stated that for the District to be able to levy the stormwater impervious surface fee "there needs to be clarified language inserted in the Plan [Charter] allowing for such stormwater charges." (*Id.* § 4.4 (emphasis in original).) To effectuate these needed amendments, the Report further stated that outside legal counsel had prepared "Proposed Amendments to Court-Approved Plan [Charter]" that specifically added authorization to establish a regional stormwater system and authorization to impose a stormwater impervious surface fee.

municipalities' residents and businesses. In fact, many municipalities individually spend approximately $1 million or more per year operating and maintaining their local systems, which collect and control stormwater from impervious surfaces and other natural features safely and efficiently for their citizens and those in surrounding communities. These local systems are public utilities protected from interference by Article XVIII, § 4 of the Ohio Constitution and the express provisions of the District's Charter.

In contrast, the "Regional System" does not currently exist, except as a mere fiction on paper, and as such the District would have to obtain the consent of all 56 Member Communities before its entire so-called Regional System (which is not truly regional) could be intact, operable, and possibly effective. It also does not exist because sewer districts in Ohio have traditionally not addressed stormwater management for flood and erosion control separate and apart from their sanitary sewage powers.[2] The Court of Appeals' decision here maintains that status quo.

The District, however, asserts that the Court of Appeals' ruling somehow changes the status quo by stripping sewer districts of the power to create a separate utility to manage

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[2] The Court should afford little, if any, credence to the arguments regarding the Deerfield Regional Stormwater District and the ABC Water and Storm Water District. First of all, they were not formed as regional sewer districts, but as water districts. And in the case of Deerfield, the term "regional" is a misnomer. It comprises only Deerfield Township with one board member appointed by each township trustee. Its petition says it was formed because "townships have limited authority to address every stormwater issue." It was created by a non-adjudicatory proceeding under R.C. 6119.02, the results of which are not binding on this Court. The Final Entry approving it, indicates that written notice was published for the creation of a "regional water district," but the same Entry approves "the Deerfield Regional Stormwater District," even though there is no mention of an entity denominated a "regional stormwater district" anywhere in Chapter 6119.

The ABC District was formed out of part of the territory of three townships. It was formed as a regional water, not sewer, district, to address a local water supply issue. Regional water districts do have some ancillary stormwater management authority to protect a water supply, e.g. R.C. 6119.011(M)(F).

These "water districts" were formed by the same attorney who also authored their amicus brief. They represent a minuscule segment of Ohio's population and only partial areas in four Ohio townships out of 1,309 statewide.

stormwater for the sole purpose of controlling flooding and erosion. But the District in fact has never possessed and never exercised such powers, nor has any other regional sewer district that manages a sewerage collection system. Instead, as the District admits in its Memorandum, it has been "collecting" and "treating" stormwater in order to remove sewage and other pollutants from it through the District's sanitary sewage system for over forty years.

The Court of Appeals rejected the District's power grab based on the fact that "nothing" in Chapter 6119 gives the District the authority to adopt Title V with its broad flood and erosion control objectives. But contrary to the District's assertions, no one argues that this District, or any other, lacks the authority to collect and treat waste water, including stormwater (however defined), to the extent it enters or directly affects the District's sanitary sewer facilities or treatment plants. *See* R.C. 6119.011(K). The District has long operated under this understanding and has adopted express regulations as Titles I, II, and IV of its Code of Regulations, which manage infiltration and inflow and combined storm and sanitary sewers, in recognition of this express statutory purpose. In fact, as the Court of Appeals noted, in these Regulations, the District itself has defined "waste water" as a "combination of water carried waste * * * together with such ground, surface or stormwater as may be present." *NEORSD* at ¶ 44. Thus, the Court of Appeals' ruling comports with the status quo—embodied in the District's own regulations—and consequently, does not present an issue of great public or general interest.

C. The issues presented in this appeal should be left to the General Assembly.

The gross expansion of sewer district powers sought by the District in this appeal is best left to the General Assembly. No one in this case, including the Court of Appeals majority, has questioned whether some improved methods of controlling flooding and erosion might be welcome if it were collaboratively established, by the appropriate political entities, with effective cost and other controls. But the District's assertion that there is no other solution to flooding and

erosion control issues except Title V, in addition to being hyperbole, is wrong as a matter of law. The General Assembly delegated such express authority only to watershed districts, conservancy districts, and counties, in addition to municipalities. *NEORSD* at ¶ 46.

Further, the District itself recognizes this question is appropriate for the General Assembly. In its announcement stating that it would seek this Court's discretionary review, the District, through its Director, stated that it would also attempt to obtain those statutory amendments necessary to legitimize Title V from the General Assembly. Thomas Ott, *Appellate court bars sewer district from collecting storm-water fee*, http://www.cleveland.com/metro/index.ssf/2013/09/appellate_court_bars_sewer_dis.html (accessed Dec. 10, 2013). This underscores the point that this Court's additional judicial review is not necessary at this time. Instead, as the Court of Appeals suggested, the extent of a sewer district's authority over flooding and erosion is one best left for the legislature to initially determine and define.

II. STATEMENT OF CASE AND FACTS

The District simply omits much of the pertinent evidence from its truncated statement of the case and facts. The actual record established that the Program and so-called "Regional System" are "pie in the sky" plans on paper that do not presently exist. Instead, the only reality today is that all of the current ratepayers have received bills to pay for a program to manage this non-existent system and its non-existent projects, which bills total approximately $35 million in the aggregate for the first year, much of which has already been collected. Title V also attempts to impose an additional four years of "regional" fees voted for by the District's unaccountable, unelected Board, which together total approximately a quarter of a billion dollars, and which further stretch the budgets of member cities and their residents and businesses in these already

difficult economic times. Moreover, the imposition of additional fees ignores the millions of dollars spent annually by municipalities to manage stormwater.

As was true when it first adopted Title V on January 1, 2010, when it sent out its first bills for fees, and even today, the District does not own or control anything as part of its proposed "Regional System." It also does not have any unilateral statutory power, authority, or ability to obtain the necessary property nor to force the required consents from all of the 56 Member Communities, which would be required for it to acquire and operate the entire Regional System that it has proposed, but for which it billed *as if it actually existed.*

The District also conveniently fails to mention that its alleged Regional System and Program are not really regional at all. The District's sanitary sewer boundaries, and thus its stormwater boundaries, encompass only approximately two-thirds of Cuyahoga County and small areas of a few surrounding counties.[3] It is, therefore at best, a "sectional" plan, not truly regional – as it does not even include the entirety of Cuyahoga County. Nor are the system and Program watershed-based as Title V proclaims. Large segments of the three major river watersheds in the area are not within the District's stormwater boundaries, and, in fact, 78% of the area's watersheds are outside of the District's control. (Tr. Ct. Pg. 18.)

The proposed Program is not only not regional nor watershed-based, it is not fair or equitable either. Only two-thirds of Cuyahoga County residents and a few adjacent communities are being forced to pay for an expansive program that the District claims will benefit a multi-county area, Lake Erie, and beyond. Consider also that large shopping centers and developers operating in Beachwood, Independence, and other District communities not only paid dearly for effective stormwater control measures when their individual projects were developed, but they

[3] In fact, only portions of some communities, such as Strongsville, are within the District and required to pay the fee. (Tr. 2593.)

are also now subject to an additional, significant stormwater fee. Competing developers in Rocky River, North Olmsted, Westlake, and beyond, however, are not within Title V's area and are not charged a fee, even though they compete for the same customers and even though the alleged region-wide benefits from this proposed Program will benefit them as well.

Finally, while the District's Memorandum mentions its recent compromise with the United States Environmental Protection Agency for failing to meet its sanitary sewer obligations, it fails to mention the cost of this settlement. According to the District's Director "we're still putting 4.7 billion gallons of sewage into the lake," and due to the settlement, sanitary sewer bills will be increasing 18% a year, for the next 20 years. Michael Scott, *Cleveland, Northeast Ohio sewer rates would more than double under deal with federal government*, http://blog.cleveland.com/metro/2010/10/ sewer_rates_in_cleveland_north.html (accessed Dec. 9, 2013). Notably, the Program is not part of the District's settlement with the EPA. Thus, if the District is to charge additional fees for new responsibilities, extending generations into the future, this should be expressly authorized by statute as well as by the Member Communities and their citizens in a voted tax – a course of action that the Court of Appeals' decision requires.

III. ARGUMENT AND OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

A. Proposition of Law I is a vague general legal pronouncement, which is inapplicable and immaterial to the facts of this case.

The District's Proposition of Law No. I actually comprises two propositions of law. This Court should decline to exercise jurisdiction over both propositions because neither offers this Court the opportunity to meaningfully clarify Ohio law.

1. The District's first proposition misstates the applicable issue and ignores the plain language of R.C. Chapter 6119.

In its first proposition, the District attempts to frame the issue as whether Chapter 6119 districts have the power to manage stormwater in the abstract. But the question here is whether

Chapter 6119 districts have specific authority over stormwater solely for the purposes of **"flooding"** and **"erosion"** control—terms that appear nowhere in Chapter 6119. As a result, the Court of Appeals held that "R.C. Chapter 6119 does not authorize the District to implement a 'stormwater management' program to address flooding, erosion, and other stormwater issues or to claim control over a 'Regional Stormwater System.'" *NEORSD* at ¶ 46.

Ignoring this lack of authority, the District retreats to R.C. 6119.011(K)'s definition of "waste water." But the statutory definition of "waste water" does not provide authority for the District's flooding and erosion Program. R.C. 6119.011(K) defines "waste water" as "any stormwater ***and*** any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water." (Emphasis added.) This definition 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"). In addition, as the Court of Appeals noted, "[t]he term waste water necessarily means ***water carrying waste***." *NEORSD* at ¶ 44 (emphasis added). This definition is consistent with the statutory purpose of regional sewer districts to "provide for the collection, treatment, and disposal of waste water" as stated in R.C. 6119.01(B), and with the District's own definition of "waste water" in Titles I, II, and IV of its Code of Regulations as a "combination of water carried waste * * * together with such ground, surface or storm water as may be present." *NEORSD* at ¶¶ 43-45. Thus, stormwater uncontaminated by waste is not "waste water." *Id.*

The District twists logic to assert that under the Court of Appeals Opinion, "6119 Districts cannot operate their sewage treatment facilities on dry-weather days." While stormwater must be mixed with waste to constitute "waste water," waste need not be mixed with

stormwater to satisfy the statutory definition. Under R.C. 6119.011(K), waste can still be mixed with "any water" to create "waste water."

The District's argument that R.C. 6119.011(M), which states that "water management facilities" include "stream flow improvements, dams, reservoirs * * * stream monitoring systems," etc., supplies it with broad stormwater management authority is similarly wrong. "Water management facilities" are those for the use or protection of "water resources," which in R.C. 6119.011(F) means water in streams or reservoirs to be made available for domestic users. Thus, this section applies to only regional water districts, not sanitary sewer districts.

In sum, the District's first proposition is not supported by a plain reading of the entire statute because there is no express statutory power authorizing a comprehensive stormwater management program to control flooding and erosion – as opposed to "treating" stormwater and removing sewage from it.

2. The District's second proposition misconstrues the Court of Appeals' ruling, which is consistent with the plain reading of R.C. 6119.09.

Contrary to the District's assertions, the Court of Appeals' ruling did not modify or misconstrue R.C. 6119.09 in holding that it does not permit this District's impervious surface fee as part of its newly proposed flooding and erosion control Program. The impervious surface fee is calculated based on the square footage of a property's impervious surfaces and on whether the property is residential or nonresidential. Under R.C. 6119.09, sewer districts are authorized to charge "rentals and other charges * * * 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 * * *." *See also* R.C. 6119.06(W) (authorizing rentals and other charges for the use of services of any water resource project "as provided in section 6119.09").

The District, however, does not own, operate, or have a right to use any water resource

project—or anything else for that matter—as part of the Regional System or Program. Consequently, there is nothing for anyone to "use" or "obtain the services of" that justifies the District's charging an impervious surface fee under R.C. 6119.06(W) or 6119.09. Because the impervious surface fee was not shown to provide any finite service or benefit, and thus was unrelated to any use or services afforded by a District facility to a property owner, the Court of Appeals held that it was invalid. *NEORSD* at ¶¶ 53-56.

In an attempt to artificially create an intra-district conflict, the District distorts the holding in *City of Cleveland v. N.E. Ohio Reg'l Sewer Dist.*, 8th Dist. Cuyahoga No. 55709, 1989 WL 107162 (Sept. 14, 1989). In *Cleveland*, the court determined that intercommunity relief sewers were not "local sewers" under the District's Plan of Operation, which required local communities to fund construction of local sewers. *Cleveland* at *3. The court did not consider the validity of the charges for the intercommunity relief sewers under R.C. 6119.09. "The issue [wa]s not one of benefits but rather of judicial interpretation of the NEORSD Plan of Operation and its regulations." *Id.* Since the issue here is whether property owners receive benefits or finite services—as opposed to general benefits to the entire region—*Cleveland* does not conflict.

In fact, because the District's Program allegedly will provide general benefits to the entire region and not finite benefits or services to specific property owners, the District's impervious surface "fee" constitutes a tax under this Court's standards announced in *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E. 2d 916. While the District may levy taxes for water resource projects, R.C. 6119.18 requires that the tax levy be submitted to the District's electors for approval. Because the District has not obtained approval from its electors, among other reasons, the "impervious surface fee" tax is illegal. Although not

addressed by the Court of Appeals, this issue is an additional ground for affirming that the "impervious surface fee" tax violates R.C. Chapter 6119.[4]

B. Proposition of Law II presents only a local issue of Charter construction.

Irrespective of whether the District had statutory authority to implement Title V and impose its fee, Title V is also illegal for the independent reason that it exceeds the District's authority under the Charter, as the Court of Appeals correctly determined. *NEORSD* ¶¶ 59-68. The Charter cannot contravene Chapter 6119, but it can and does limit such powers. It provides for the operation, construction, and financing of sewage treatment and other wastewater treatment and disposal facilities. While "stormwater handling facilities" are mentioned in the Charter, they must necessarily be limited to "wastewater treatment and disposal facilities" being included within this general term.

The Charter also expressly prohibits the District from assuming ownership or management of any local sewage collection facilities and systems, including storm and sanitary, and from assuming responsibility or incurring any liability for the planning, financing, construction, operation, maintenance, or repair of any local system without the local communities' consent. As the District's experts had warned and the Court of Appeals ultimately found, the Charter does not provide authority for the District to unilaterally create an expansive "Regional Stormwater System" that overlaps parts of all the Member Communities' local

[4] The District is using its impervious surface "fee" to circumvent the requirement of voter approval before the District may borrow money or levy taxes to cover the construction costs of water resource projects under R.C. 6119.17 and 6119.18. The District also is not imposing "special assessments" permitted under R.C. 6119.42 – 6119.58 on property owners who would be "specifically benefited" by construction of a water resource project, presumably to avoid the ample notice, disclosure, and due process protections afforded to the property owners in those statutory provisions.

stormwater systems, and that purports to designate parts of those systems as comprising its Regional System, which it can control, manage, and charge a fee for its alleged use by mere fiat.

The Court of Appeals also held that the impervious surface fee exceeds the authority under the existing Charter because while the Charter permits a charge or rate for "sewage treatment and disposal," it does not mention a fee for a stormwater management program. *NEORSD* at ¶ 62. Therefore, the doctrine of *expressio unius est exclusio alterius* negates any authority for the District to impose an impervious surface fee for the Program.

The Court of Appeals also noted the Charter's limitation on financing projects, which requires the District to obtain agreement from the local communities before beginning a project:

> 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. Charter at 5(m)(5).

Title V improperly imposed its regional impervious surface fee on respective local communities without proof that any agreement exists between the local communities and the District regarding particular projects, much less the overall impervious surface fee method for financing them. Moreover, the District's impervious surface fee was imposed long before any particular projects were being undertaken. The present financing of future, proposed projects by reason of the District's "fee" is expressly prohibited by the Charter, as well as by statute.

The District's assertion that the Charter's provision providing that "any projects not financed through the Ohio Water Development Authority * * * should be financed in such a manner as may be deemed appropriate by the Board * * *" gave it authority to impose the fee, without a Charter amendment, is clearly unsupported. Such an interpretation would negate the specific limitations of the Charter concerning financing projects in Section 5(m)(5) mentioned above. The impervious surface fee further violates Section 5(m)(5)'s requirement that financing be for "particular projects" because it was imposed to fund the entire Program, including stream

monitoring, master planning, stormwater project review, watershed coordination and planning, and a wide range of administrative duties not related to financing specific "projects."

In any event, the scope of authority conferred under the Charter is a discrete local issue that does not warrant this Court's review.

C. Proposition of Law III presents issues that need be decided only if the Court accepts jurisdiction over Proposition of Law I or II.

If this Court declines jurisdiction on Propositions of Law I and II, it need not address the issues presented in the District's Proposition of Law III. The Joint Respondents, however, agree with the District that if the Court were to accept jurisdiction over this appeal, it should address the issues presented in Proposition of Law III because Title V violates several Ohio and federal constitutional provisions and illegally charges a tax that is masquerading as a "fee."

Title V violates the Equal Protection Clause of the United States and Ohio Constitutions. It treats similarly situated persons differently in numerous respects: (1) It is imposed only on property within the District's sanitary service area despite the District's countywide authority; (2) It discriminates against commercial property owners verses residential, as the Trial Court found; (3) It discriminates against small lot owners; (4) It ignores significant stormwater runoff from non-impervious areas; and (5) It arbitrarily exempts many different properties from the stormwater fee, for example, Cleveland Hopkins Airport's runways—one of the most extensive impervious surfaces in the County—were given a special exemption less than three weeks before the Program was adopted to obtain the City of Cleveland's support for the Program.

In addition, Title V violates the substantive due process guarantees of the U.S. and Ohio Constitutions, because the impervious surface fee itself is not rationally related to its purpose. Any effect or burden on the alleged Regional System is entirely dependent upon the amount of stormwater control and management imposed by the local community in operating its system.

There is no direct relationship between a homeowner's runoff into its local system and its possible effect on the alleged Regional System.

Title V also violates the home rule and utility powers of the Joint Respondents pursuant to Sections 3 and 4 of Article XVIII of the Ohio Constitution. As to Section 4, each local community owns and operates its own local stormwater utility, and charges its residents. Therefore, the District's regional stormwater fee that has been imposed on these same residents for allegedly managing the same stormwater is a direct violation of the local communities' exclusive right to maintain their own public utility without interference and competition from others without their consent. *State ex rel. Toledo Edison Co. v. City of Toledo*, 76 Ohio St.3d 508, 668 N.E.2d 498 (1996).

Finally, in addition to all of its other infirmities, the impervious surface fee constitutes an illegal unvoted tax under the *Drees* decision. The stormwater fee is patently only for generating revenues, to be spent solely at the District's whims and not tied to specific events, to produce (at best) future general welfare benefits, which furnish the fee's payors no benefit different in kind or degree from that enjoyed by any non-payors (either within or outside of the District), and as such furthers no regulatory purposes. *Drees*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E. 2d 916, at ¶¶ 17, 19, 23.

IV. CONCLUSION

For all of the foregoing reasons, the Court should not grant jurisdiction over this appeal.

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