IN THE SUPREME COURT OF OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT, **Petitioner,** **vs.** **BATH TOWNSHIP, OHIO, *et al.*,** **Respondent.**	**CASE NO. 2013-1770** **Appeal from Court of Appeals for the Eighth Appellate District Case No. CA-12-098728 (Consolidated with Case Nos. CA-12-098729 & CA-12-098739)** **Cuyahoga County Court of Common Pleas Case No. CV-10-714945**

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE PROPERTY OWNERS: THE OHIO COUNCIL OF RETAIL MERCHANTS; THE GREATER CLEVELAND ASSOCIATION OF BUILDING OWNERS AND MANAGERS; THE CLEVELAND AUTOMOBILE DEALERS ASSOCIATION; CADA PROPERTIES, LLC; THE NORTHERN OHIO CHAPTER OF NAIOP, THE ASSOCIATION FOR COMMERCIAL REAL ESTATE; THE NORTHEAST OHIO APARTMENT ASSOCIATION; SNOWVILLE SERVICE ASSOCIATES LLC; BOARDWALK PARTNERS, LLC; CREEKVIEW COMMONS, LLC; FARGO WAREHOUSE LLC; HIGHLANDS BUSINESS PARK, LLC; JES DEVELOPMENT LTD.; LAKEPOINT OFFICE PARK, LLC; LANDERBROOK POINT, LLC; NEWPORT SQUARE, LTD.; PARK EAST OFFICE PARK LLC; PAVILION PROPERTIES, LLC; AND WGG DEVELOPMENT, LTD.

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I. Why This Case Involves No Question of Public or Great General Interest.

The Northeast Ohio Regional Sewer District ("Sewer District") overstates the breadth of the court of appeals' decision. That court did not decide that regional sewer districts formed under R.C. Chapter 6119 have no power to regulate stormwater. Rather, using basic statutory-interpretation principles, the court of appeals held that neither R.C. Chapter 6119 nor the Sewer District's Charter authorize the Sewer District's specific, sweeping "Regional Stormwater Management Program" (the "RSM Program"), and that even if they did, the Sewer District had no "water resource project" (as defined by R.C. 6119.011(G)) for the use of which it could legitimately charge property owners a fee.

The Sewer District erroneously portrays its RSM Program as Northeast Ohio's sole effective means to address flooding and erosion on a regional and watershed basis, which is the RSM Program's predominant goal. First, the General Assembly expressly gave to conservancy districts (R.C. Chapter 6101), watershed districts (R.C. Chapter 6105), and counties (R.C. Chapter 307), the flooding-and-erosion-control powers not found in R.C. Chapter 6119. Second, many municipalities in the Sewer District's service area have invested millions of dollars in stormwater management, frequently in collaboration with neighboring municipalities. Third, the Sewer District's service area is neither regional nor watershed based. Rather, it has always been determined entirely by physical connections to the Sewer District's sanitary sewers. Indeed, the so-called "Regional Stormwater System" that the Sewer District seeks to control comprises, at best, only a patchwork of geographic areas that the Sewer District does not control.

The court of appeals first analyzed the RSM Program under R.C. Chapter 6119's "purpose" clause (i.e., R.C. 6119.01(B)), which the Sewer District tellingly does not mention. The solitary "purpose" for which the General Assembly created regional sewer districts is "[t]o

provide for the collection, treatment, and disposal of waste water within and without the district." That section does not mention regional "flooding," "erosion," "water quality management," etc.

Indeed, although "stormwater management" appears roughly 63 times in the Sewer District's RSM Program, the terms "stormwater management," "flooding," "erosion," and "regional stormwater system" appear ***nowhere*** in R.C. Chapter 6119. The court of appeals accurately contrasted this with R.C. 6101.04, in which the General Assembly expressly gave "conservancy districts" power for "preventing floods," "regulating stream channels," and "arresting erosion." Even within R.C. Chapter 6119, the General Assembly expressly gave to counties power to finance projects for managing the "proper collection, control, abatement, or treatment of surface and subsurface drainage." R.C. 6119.36. And whereas the General Assembly gave "conservancy districts" express power for the "collection and disposal of sewage and other liquid wastes" (R.C. 6101.04(H)), which power the Sewer District shares, it did not list among a sewer district's R.C. 6119.01(B) purposes the "conservancy districts'" other "flooding" and "erosion" powers. Inclusio unius est exclusio alterius.

The court of appeals' decision reflects a routine exercise in statutory interpretation not requiring this Court's oversight. To reverse the trial court, the court of appeals simply read R.C. Chapter 6119 as it was required to do: by construing the Sewer District's powers strictly, in pari materia with R.C. Chapter 6119's other terms, conforming them all to the Sewer District's explicit statutory purpose, and implying no powers not expressly stated. This led the court of appeals to restate the obvious: R.C. Chapter 6119 confers on regional sewer districts none of the ample flooding, erosion, and stormwater management powers permeating the Sewer District's RSM Program. Indeed, the General Assembly has created other "creatures of statute" to address "flooding," "erosion," and "water quality management" at the regional and watershed levels.

And it has done so using language plain enough to dispel the Sewer District's attempt to shoehorn the express statutory purposes those other "creatures of statute" serve into R.C. Chapter 6119 through the term "wastewater." The court of appeals got this absolutely right.

Likewise, the court of appeals properly found no authority for the RSM Program in the Sewer District's Charter, which only further limits the Sewer District's statutory authority. The court of appeals found in the Charter's terms no grant of authority either to regulate the "watercourses, stormwater conveyance structures, and Stormwater Control Measures" targeted by the RSM Program, or to impose the RSM Program's proposed stormwater fee. Thus, whatever authority R.C. Chapter 6119 confers, the Charter's specific provisions independently prohibit the Sewer District from implementing both the RSM Program and the stormwater fee.

The amici curiae give ample cause for this Court's wariness. Some cities have taken the unusual step of filing an amicus brief in a case in which they are parties because they stand to benefit from the RSM Program. They know that, either in the form of projects in their communities or as direct "Community Cost-Share Program" cash transfers, the RSM Program will redistribute stormwater fees taken from property owners without voter approval. Indeed, the latter Program will share with them 25% of all stormwater fees collected. The park district is equally biased, since it received a $3 million "education center" (Tr. 342-43) and will have RSM Program projects performed on its property, again without any voter approval. Other amici curiae erroneously claim that the RSM Program furthers the Sewer District's regulatory compliance, a fact thoroughly refuted at trial. As for amici curiae Deerfield Regional Stormwater District and the ABC Water and Stormwater District, they were formed as ***water*** districts not ***sewer*** districts (a significant distinction (*see* R.C. 6119.011(U))), serving smaller areas and purposes distinct from the Sewer District's.

The court of appeals rightly observed that to allow the Sewer District's RSM Program to proceed condones "an entity with the size and expanse of the Sewer District [that] could redefine its own existence…from the confines of a boardroom with limited oversight and review…[w]hile local school boards and municipal entities struggle with limited budgets." (Op. ¶ 67). The RSM Program is also manifestly not, as the Sewer District insists, Northeast Ohio's last line of defense against the parade of horribles threatened by regional stormwater-related "flooding" and "erosion." The court of appeals simply held that the Sewer District's sweeping RSM Program is not authorized by the plain language of either R.C. Chapter 6119 or the Sewer District Charter. No matter of "public or great general interest" abides in these questions, thus, no basis exists to support this Court's jurisdiction.

II. Counter-Statement of the Case and Facts.

A. The Sewer District's creation and raison d'etre.

The Sewer District was created in 1972 to address the region's sewage-disposal problems, thus ending the City of Cleveland's multi-year lawsuit with its surrounding communities. These facilities included unitary-sewer systems that combined wastewater with stormwater, resulting in combined sewer overflow ("CSO") during heavy precipitation. The Sewer District has always existed to provide sanitary sewers and treatment facilities to its member communities. (Even the power to appoint a Sewer District trustee is apportioned based on sewage-flow volumes.)

The Sewer District's Charter requires it to acquire and build regional facilities to collect, treat, and dispose of sewage, and requires consenting member communities to connect their sanitary sewers to those District-owned facilities. The Charter authorizes the Sewer District to charge residents connecting to these sanitary-sewer facilities a "sewer rate" based upon water

volume usage. Given the Sewer District's purpose, its code of regulations defines wastewater as a "combination of water-carried waste ... together with such ground, surface or stormwater as may be present." (Op. ¶ 44.) Prior to implementing its RSM Program, the Sewer District's only "stormwater management" projects were those designed to limit CSOs.

The Sewer District service area's geographic shape has always been determined only by sanitary-sewer connections. The service area was not conceived or based on, nor does it reflect, regional, watershed, or even stormwater geography. Many entire Cuyahoga County communities, and large portions of others, are either not Sewer District member communities or not in the service area because they have access to non-Sewer District sewage disposal and treatment facilities. Connection to its facilities, and the need for its sanitary-sewer service, has alone determined both Sewer District membership and, accordingly, its service area's footprint.

B. The RSM Program and its so-called user fee.

In January 2010, the Sewer District radically departed from its statutory and historic purpose to collect, treat, and dispose of sewage by amending its code of regulations to include Title V, Stormwater Management Code, thereby creating its RSM Program. This grandiose "stormwater utility" was conceived to address "flooding," "erosion," "acquatic and terrestrial habitat" impairment, and "stormwater management," all on a "watershed-based approach." (Title V, §§ 5.0301 and 5.0302.) Indeed, the RSM Program declares its purpose to include:

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

(Title V, § 5.0219)(emphasis added). Consequently, the Sewer District also now declared itself to be a "stream system manager" and a "watershed integrator." (Tr. 142.)

The RSM Program embraced the "planning, financing, design, improvement,

construction, inspection, monitoring, maintenance, operation, and regulation" of a hypothesized "Regional Stormwater System" (Title V, § 5.0501), described in breathtakingly broad terms as:

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

(Title V, § 5.0218.) The Sewer District ordained that it would regulate, manage, and perform maintenance on watercourses and stormwater conveyances within municipalities and other political subdivisions in that "System," despite not owning or controlling any watercourse, and without actually treating or processing stormwater in any facility. Importantly, and contrary to what some amici curiae assert, the RSM Program did not arise in response to any regulatory mandate, statutory obligation, or federal judicial consent decree. It is pure regulatory overreach.

To fund the Program—and its more than $200 million in initial "wish list" of projects—the Sewer District created a stormwater fee designed to generate (initially) $38 million annually. This so-called "user" fee would be charged based upon the square footage of a property's impervious surfaces (e.g., rooftops, parking lots, access roads, etc.). (Title V, Chap. 7.) But select owners of service-area property with impervious surfaces would pay no stormwater fee. The Sewer District's unelected board decided to exempt airports—purely to gain Cleveland's support for the RSM Program (Tr. 407)—and cemeteries; public road rights-of-way, railroad rights-of-way, and "non-self-supporting municipal functions" (Title V, § 5.0705); and to give certain schools an "Educational Economically Disadvantaged Stormwater Fee" to settle litigation. And it created a "Community Cost-Share Program" by which it would redistribute to member communities some of the "fee" money collected—taken without taxpayers' consent—to

fund municipal stormwater projects.

C. Proceedings in this action.

On the same day its board enacted Title V, the Sewer District commenced this case seeking a declaratory judgment on the validity of the RSM Program and, alternatively, the amendment of its Charter. (The trial court later found the Sewer District's amendment request to be an improper pleading.) Appellee Property Owners intervened and, along with the Appellee Cities, opposing the RSM Program, counterclaimed, seeking to permanently enjoin the Sewer District from implementing the RSM Program and its stormwater fee.

On the parties' cross-motions for partial summary judgment concerning the RSM Program's validity, the trial court granted the Sewer District's and denied the Cities' and the Property Owners'. After a bench trial, the trial court declared that the stormwater fee was not a tax, was authorized under R.C. Charter 6119, and was "not otherwise restricted" by the Charter. The trial court also declared, however, that, among other defects, no rational basis existed for the stormwater fee's disparate treatment of non-residential property owners. Subject to the identified defects, the trial court found the RSM Program constitutional, and denied the Appellee Property Owners' and Appellee Cities' claims for permanent injunctive relief.

The court of appeals reversed both the trial court's entry of partial summary judgment for the Sewer District and its denial of Appellees' request for permanent injunctive relief. (Op. ¶ 82.) The court of appeals found that the Sewer District's sweeping RSM Program and related stormwater fee were authorized by neither R.C. Chapter 6119 nor its Charter. (*Id.*) The court of appeals further enjoined the Sewer District from implementing Title V and the RSM Program and from implementing, levying, and collecting the stormwater fee. (*Id.*)

III. Argument

A. Proposition of law concerning R.C. Chapter 6119.

The Sewer District's verbatim Proposition of Law No. I:

> A district formed pursuant to R.C. Chapter 6119 is authorized to manage stormwater which is not combined with sewage, and to impose a charge for that purpose. Such a charge is one "for the use or service of a water resource project or any benefit conferred thereby"

This proposition obscures the question of law the court of appeals correctly decided and distorts the Sewer District's own declaratory relief claim. The court of appeals did not have before it the generic and deceptively basic question of whether R.C. Chapter 6119 authorizes "stormwater management." The legal question has all along been whether this Sewer District's particular RSM Program—with its sweeping purpose to regulate "flooding," "erosion," and "regional water quality management"—is authorized by R.C. Chapter 6119.

The court of appeals recognized that creatures of statute (e.g., the Sewer District) have only those powers expressly given them by the General Assembly, no power to expand the authority so conferred, and only those implied powers incidental or ancillary to an express power. *Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 379, 329 N.E.2d 693 (1975). By its terms, the RSM Program comprises projects for managing regional "***flooding***" and "***erosion***," on a "watershed" basis, as part of a "stormwater management plan" designed to protect the "regional habitats" and "stormwater system" from increased runoff impacts due to "impervious surfaces." The court of appeals quite properly found no express or implied R.C. Chapter 6119 authority for such an RSM Program.

The Sewer District's proposition of law, with its affected focus on the elastic phrase "manage stormwater," invites at least two distractions. It purposefully diverts attention from the core object of judicial scrutiny, i.e., the RSM Program's manifold "flooding" and "erosion"

provisions. And it slyly conflates the RSM Program's "flooding" and "erosion" control pretenses, which R.C. Chapter 6119 does not authorize, and the Sewer District's limited, express statutory authority to build storm sewers. *See* R.C. 6119.19 (authority to "provide a system of sanitary and/or stormwater sewerage ... for any part of the area included within the district.").

The Sewer District correctly posits that the General Assembly could have granted to sewer districts powers overlapping with those given to conservancy districts (express R.C. Chapter 6101 regulatory power over "flooding" and "erosion"), to watershed districts (similar powers under R.C. Chapter 6105), and to counties (similar powers under R.C. Chapter 307). But that the General Assembly did not do so is manifestly shown simply by contrasting, as the court of appeals did, R.C. Chapter 6119 with the express authority these other R.C. Chapters contain.

The RSM Program cannot be squared with the General Assembly's unambiguous purpose for creating "regional sewer districts": "[t]o provide for the collection, treatment, and disposal of waste water within and without the district." R.C. 6119.01(B). From this unmistakable bar, the Sewer District pivots to extrude RSM Program authority through a definition, i.e., R.C. 6119.011(M), which states that "water management facilities" include "stream flow improvements, dams, reservoirs ... stream monitoring systems," etc. But "water management facilities" are only for the use or protection of "water resources," which R.C. 6119.011(F) defines as "all waters of the state ... available to ... users." Thus, "water management facilities" relate to the authority and purposes served by ***water*** districts, not by ***sewer*** districts, a distinction R.C. Chapter 6119 clearly marks. *See* R.C. 6119.011(U); R.C. 6119.01(A-B).

Similarly, the court of appeals correctly found that the Sewer District's statutory purpose equally prevents extruding authority for its flooding-and-erosion-control ambitions through a

single term (i.e., "stormwater") used in the statutory definition of wastewater. (Op. ¶¶ 44-45.) The word wastewater joins the nouns "waste" and "water," and both are accounted for in its statutory definition. R.C. 6119.011(K). That definition identifies (1) two possible liquid media ("any storm water and any water") and (2) the additives that change either into wastewater ("containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water"). The only apposite case law extant, relied upon and quoted by the court of appeals (Op. ¶ 44), confirms this interpretation. *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App. 3d 709, 2005-Ohio-4852, 840 N.E.2d 226, ¶¶ 29-30 (1st Dist.)(under R.C. 6119.011(K), wastewater "means any stormwater containing sewage or other pollutants."). This portion of *Reith* was no dictum, given that Judge Painter's conclusion resulted in the Reiths' trespass claims being time barred. *Id.* ¶ 45-47. Other courts have also found that stormwater is not, as the Sewer District claims, wastewater per se. *E.g.*, *Inland Prods., Inc. v. City of Columbus*, 193 Ohio App. 3d 740, 2011-Ohio-2046, 954 N.E.2d 141, ¶ 5 (10th Dist.) (noting that a combined sewer separately "collects both wastewater and stormwater"); *Gabel v. Miami East School Bd.*, 169 Ohio App. 3d 609, 2006-Ohio-5963, 864 N.E.2d 102, ¶ 18 (2nd Dist.) (finding that processed wastewater was no less clean than unprocessed stormwater).

The Sewer District has historically understood that wastewater means stormwater (or any water) containing waste, as the court of appeals noted. The Sewer District has itself always defined wastewater as "a combination of water-carried waste ... together with ground, surface, or stormwater as may be present." (Sewer District's Code of Regulations, Titles I, II, and IV.) The Sewer District and amici curiae argue ad absurdum that this meaning necessarily requires all wastewater to contain stormwater. But they ignore that stormwater is not the exclusive waste-carrying medium—"any water" can too—and, therefore, that it is also not a necessary

component of wastewater (the way that the "waste" is).

Resolving this controversy, however, has never turned on whether stormwater standing alone is "wastewater," despite the Sewer District's misplaced hopes that it does. The court of appeals belabored the obvious in concluding that the RSM Program's expansive flooding-and-erosion-control regulations find no authorization in either R.C. 6119.01(B)'s limited statutory purpose to collect, treat, and dispose of wastewater, or anywhere else in R.C. Chapter 6119.

Regardless, the Sewer District's stormwater fee is not a valid R.C. 6119.09 "charge." The controlling portion of R.C. 6119.09 provides:

> 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.) The court of appeals rightly found that the "stormwater fee" cannot be an R.C. 6119.09 "charge'" because the Sewer District has no "water resource projects" that it can "charge" anyone to "use." (Op. ¶ 56.) The Sewer District admitted that on day one, when its collection of the first $38 million in annual Stormwater Fees started, it would have had ***no*** "water resource projects" that are part of the RSM Program the "use" of which it could offer to anyone. (Tr. 467-70, 474-75, 479.) Indeed, the Charter requires the consent of municipalities, private property owners, or both, before the Sewer District may perform any work in the so-called regional stormwater system for which it might "charge" customers. (Op. ¶ 10; Charter, §5(m).)

B. Proposition of law concerning the Sewer District's Charter.

The Sewer District's verbatim Proposition of Law No. II:

> When a Petition and Plan of Operations grant a R.C. Chapter 6119 district the authority to operate stormwater handling facilities, that District is

> authorized to create and implement a regional stormwater management program, including imposing appropriate charges to operate that program.

The Charter may create no more authority for the RSM Program than R.C. Chapter 6119 provides, and the latter provides none. Regardless, the court of appeals correctly held that the RSM Program's "flooding," "erosion," and "regional water quality management" pretenses are completely foreign to the Charter's sanitary-sewerage mandate. Given the RSM Program's complete irrelevance to the sewage-treatment issues that the Sewer District was created to address, the so-called regional stormwater utility directly contradicts the Charter's terms.

Using novel and contrived flooding, erosion, and water-quality management regulations, the Sewer District's RSM Program also categorically transgresses the Charter's careful and consequential demarcation between "regional" and "local" jurisdictions. Although Cleveland transferred ownership of its sanitary sewers and treatment plants to the Sewer District, the Charter confirmed that local systems owned, operated, and managed by the local political subdivisions remained theirs. The Charter explicitly forbade the Sewer District from assuming responsibility for the "planning, financing, construction, operation, maintenance, or repair" of any local collection system without the local community's express written consent. (Charter, § 5(m).) The court of appeals recognized the Charter's bright lines distinguishing local systems, over which member communities retained control, from the Sewer District's.

As the court of appeals details, however, the Sewer District ignored these explicit Charter provisions and arrogated to itself both the power to define a "Local Stormwater System," and the discretion to exclude from it, and include in the so-called "Regional Stormwater System," any watercourses, stormwater conveyance structures, and Stormwater Control Measures ***"that [the Sewer] District has right of use for the management of stormwater."*** **(Title V, §§ 5.0212, 5.0218.)** Within the newly-defined "Regional Stormwater System," the Sewer District claims

plenary power to establish and administer its RSM Program—***all without the member communities' consent.*** (*See, e.g.*, Title V, §§ 5.0219, 5.0225, and 5.0501.) Indeed, the Sewer District reserved the discretion to unilaterally add standards in the future, leaving no functional limit on its power to define its own jurisdiction. (Title V, § 5.0601(b).) Thus did the court of appeals easily discern the utter disconnect between the Charter and the RSM Program.

In the end, the Sewer District hangs its Charter authority argument on its claim to having addressed stormwater in the past and on the following sentence from a Charter section entitled "Planning" under "Local Sewerage Collection Facilities and Systems":

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

(Charter, § 5(m)3.) On its face, this single sentence from the Charter is too slim a reed to support a regulatory overreach of the RSM Program's magnitude. Indeed, whatever this Charter excerpt means, it provides at most only authority to develop a detailed integrated capital improvement ***plan***, within the Charter's parameters, and says nothing about implementing it.

Regardless, the previous stormwater work referenced actually related to the Sewer District's sole R.C. 6119.01(B) purpose of collecting, treating, and disposing of waste water. It involved reducing CSO's by decreasing stormwater infiltration into the Sewer District's sanitary-sewer system. That is work to which the expansive RSM Program's "flooding," "erosion," and "water quality" programs and purposes have no relation whatsoever. However it characterizes its prior work, the Sewer District may not in any case, by that past conduct, unilaterally create for itself "stormwater utility" powers of the RSM Program's nature, which at turns either exceed or contradict the Charter's (and R.C. Chapter 6119's) substantive enabling provisions.

Finally, the court of appeals also properly found no Charter authority for the Sewer

District's so-called "storm water fee." The Charter authorized the Sewer District to charge only for "sewage treatment and disposal." (*See* Charter, § 5(f), "Sewer Rates.") Sewage treatment and disposal, however, is not "stormwater management" as the RSM Program describes it. Thus, charging stormwater fees directly conflicts with the limited Charter fee-charging authority. And without amending the Charter, the Sewer District's board cannot simply create new types of fees.

C. Proposition of law concerning issues the court of appeals found moot.

Sewer District's verbatim Proposition of Law No. III:

> Stormwater management programs, paid for through charges for stormwater management services, do not violate the Ohio or United States Constitutions. Further, such charges, when based upon the amount of impervious surface on a property, do not constitute an illegal tax.

The court of appeals found the question of whether the stormwater fee is a tax to be moot. Under *Drees Co. v. Hamilton Township*, 132 Ohio St. 3d 186, 2012-Ohio-2370, 970 N.E.2d 916, however, both the trial court's and the court of appeals' findings establish that the stormwater fee is, in reality, a tax given the general public benefit manifestly served by the RSM Program's goals and operation.

The court of appeals also found the question of the stormwater fee's constitutionality to be moot. Regardless, the Sewer District contends that its stormwater fee is proportional to the "regional stormwater system" "burden" created by the impervious surfaces on the fee-payer's property. If that is so, however, then no rational basis exists for exempting vast areas of impervious surfaces (e.g., airports, cemeteries, railroad rights-of-way, public road rights-of-way, and non-self-supporting municipal functions) or for discriminating between non-residential and residential property owners using differential fee calculations, both of which the RSM Program does. Moreover, stormwater fees based solely on impervious-surface sizes produce arbitrary fee liabilities, by unreasonably discounting a property's threshold stormwater runoff levels, which is

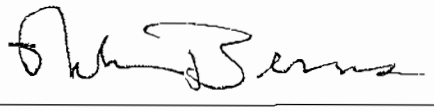
affected by, e.g., precipitation, lot size, drainage area size, soil type, land use, percent of total impervious land surface, land slope, surface roughness, vegetation, and the soil's water content.

Moreover, no rational basis exists for the arbitrary fee-liability distinctions the RSM Program makes among various groups of RSM Program "beneficiaries" within Cuyahoga County. The Sewer District has sanitary-sewage authority ***throughout Cuyahoga County***. *See* 1979 J. Entry; 4/14/82 Op. (J. McMonagle); *Parma v. City of Cleveland*, 9 Ohio St. 3d 109, 111, 459 N.E.2d 528 (1984) (affirmed trial court's interpretation of Sewer District Charter as contemplating a "county-wide solution to the area's sewage problems"). But the Sewer District planned to impose stormwater fees only on select ***service area*** properties. So property owners within the county but outside the Sewer District's service area, whose impervious surfaces likely impact regional storm systems like everyone else's, pay no fee. And who pays this stormwater fee, imposed ostensibly to rectify regional "flooding," "erosion," and "water quality management" for the ***general public in Cuyahoga County,*** is based solely on who collects, treats, and disposes of the property owners' sewage.

IV. Conclusion

This Sewer District's particular RSM Program grossly oversteps the authority of both R.C. Chapter 6119 and the Sewer District's Charter. That is the nub of the decision below, which creates no uncertainty for any other less-adventurous Ohio sewer district acting within its R.C. Chapter 6119 authority. The General Assembly has created "creatures of statute" with regulatory power to manage the "flooding," "erosion," and "water quality" management matters, so the Sewer District is not the last hope northeast Ohio has to address these issues. No question of public or great general interest inheres in this case, and this Court is, accordingly, respectfully urged to decline jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of this **Memorandum in Opposition to Jurisdiction of Appellee Property Owners: The Ohio Council of Retail Merchants; The Greater Cleveland Association of Building Owners and Managers; The Cleveland Automobile Dealers Association; Cada Properties, LLC; The Northern Ohio Chapter of NAIOP, The Association for Commercial Real Estate; The Northeast Ohio Apartment Association; Snowville Service Associates LLC; Boardwalk Partners, LLC; Creekview Commons, LLC; Fargo Warehouse LLC; Highlands Business Park, LLC; Jes Development Ltd.; Lakepoint Officepark, LLC; Landerbrook Point, LLC; Newport Square, Ltd.; Park East Office Park LLC; Pavilion Properties, LLC; and WGG Development, Ltd.** has been served this 11th day of December 2013, by e-mail and Regular U.S. mail, postage prepaid, upon:

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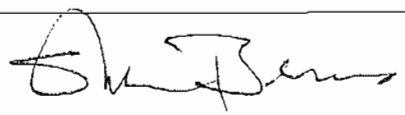

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