

ORIGINAL

IN THE SUPREME COURT OF OHIO

NORTHEAST OHIO REGIONAL SEWER
DISTRICT,

Petitioner,

vs.

BATH TOWNSHIP, OHIO, et al.

Respondent.

CASE NO. 13-1770

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

**BRIEF OF *AMICUS CURIAE* CITY OF CLEVELAND
IN SUPPORT OF JURISDICTION**

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I. THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

A. The Decision by the Eighth District Court of Appeals Threatens the Ability of the City of Cleveland and Much of the Rest of Northeast Ohio, as Well as Hundreds of Thousands of Individual Property Owners Residing Therein, to Effectively Manage Stormwater.

There is a highly intricate intercommunity system of streams, rivers, and other watercourses in Northeast Ohio that meander their way north through the City of Cleveland's (the "City") surrounding communities and then eventually through the City itself into the region's most valuable asset, Lake Erie. Every time there is a heavy rainfall or significant snowmelt, a large volume of stormwater flows rapidly over all of the pavement, rooftops, and other impervious surfaces that have replaced absorbent natural green spaces and carries with it, among other things, pollutants and silt. The stormwater then empties into and overwhelms these intercommunity watercourses leaving a regional path of destruction in the form of flooding, erosion, sediment deposition, and loss of habitat and infrastructure. The City is at the tail end of this path, and feels the brunt of the destruction.

A recent article published by The Plain Dealer, the City's (and Ohio's) largest newspaper, summarizes the situation:

While the fight rages over a fee intended to help control storm water in a large chunk of Northeast Ohio, the region remains up to its neck in runoff. Increasingly intense storms dump deluges on rooftops and pavement in a part of the country where critics say development has sprawled far beyond what the market justifies. As rivers, creeks, streams and ditches overflow, water pours into old sanitary sewers through cracks and illegal connections before backing up into basements. Storm water floods the Cleveland Metroparks, which trace riparian corridors to form the celebrated "Emerald Necklace. . ." Fords clogged with debris regularly spill over and swamp roads in the Brecksville and Rocky River reservations [and] . . . sediment carried by runoff washes into sections of the Rocky and Chagrin rivers, pushing out oxygen and killing off insects that trout, a popular game fish, feed on. . . [I]t also piles up in the Cuyahoga River, contributing to the cost of dredging required to keep the channel open for commercial shipping. "It's not just an environmental issue. . ." "It's a public health issue as well as an economic issue."

Thomas Ott, *Storm water concerns mount in Northeast Ohio, fee or no fee*, The Plain Dealer, October 17, 2013, http://www.cleveland.com/metro/index.ssf/2013/10/storm_water_a_concern_in_north.html (quoting, in part, Jenn Grieser, Senior Natural Resource Manager at Cleveland Metroparks).

In finding that the Northeast Ohio Regional Sewer District (the "District") cannot implement its Regional Stormwater Management Program set forth in Title V of its Code of Regulations (the "Program"), the Eighth District Court of Appeals was persuaded by combined arguments presented by ten of the fifty-six communities within the District's stormwater service area (the 56 communities are referred to as the "Member Communities") and a group of large property owners.

The majority of the District's Member Communities, including the City (the District's Member Community with the highest population) believe that the District has the authority under Chapter 6119 of the Ohio Revised Code and the District's Petition and Plan for Operation (the District's governing document and what the Eighth District refers to as the District's "charter") to implement the program. The City and these supportive Member Communities have limited resources and capability to commit to the resolution of the flooding, erosion, and other stormwater problems experienced in their own communities, which are often caused by development and other activities conducted beyond their municipal boundaries in neighboring communities. The required solutions strain municipal budgets, as the problems span across hundreds of miles of regional watercourses.

Effective solutions to these problems require the collaboration and coordinated action of all of the District's Member Communities. The neglect of stormwater management or additional development in just one of the Member Communities can moot any efforts to mitigate

intercommunity stormwater problems experienced in the lower-elevation Member Communities such as the City. In other words, actions to control stormwater in all of the upstream communities are critical to the realization and maximization of benefits from investments in stormwater projects in the downstream communities, particularly projects in the City. This is why the District was planning under its Program to create detailed, watershed-based master plans to develop comprehensive (as opposed to piecemeal) solutions to regional stormwater problems both upstream of and within the City.

The City can more effectively manage local sanitary, combined, and storm sewer systems if stormwater is managed on a regional basis. When City streams overflow their banks due to heavy rainfall or significant snowmelt (much of which comes from upstream communities), not only do properties become flooded by stormwater, but these high stream flows also back up into the City's sanitary, combined, and storm sewer systems which leads to sanitary sewage being mixed in with that stormwater. This creates a serious health hazard in the City as well as in other Member Communities.

Since its creation, the District has invested billions of dollars in waste water treatment plants, interceptor sewers, intercommunity relief sewers, combined sewer overflow projects, and stormwater improvements within the City and its other Member Communities. These investments become severely compromised every time stream flooding occurs, and are often damaged as a result thereof. This will continue to occur unless stormwater is managed on a regional basis as set forth in the District's Program.

In summary, the City believes that the District, through its Program, has the legal authority, resources, and capacity to address these problems. If the Eighth District's majority opinion is not reversed, the City and the other communities in Northeast Ohio will be left with

the task of individually addressing regional stormwater problems that originate beyond their political boundaries or that are difficult for any one of them to handle on its own.

B. Several Difficult Regional Stormwater Issues Within the City Will Be More Difficult to Resolve If the Eighth District's Decision is Permitted to Stand.

If the Eighth District's majority opinion is permitted to stand, the City and its residents will be greatly harmed. The City contains 65.6 miles of regional waterways that were to be inspected, maintained, and operated by the District under its Program, including *inter alia* Euclid Creek, Green Creek, Doan Brook, Big Creek, and the Cuyahoga River. The City experiences flooding, erosion, and water quality problems across these waterways that will be more difficult to address without the Program. For example, during significant rain events, properties in the City near sections of Euclid Creek and Big Creek experience mass flooding resulting in basements being filled with stormwater and other property damage. A main roadway in the City, Martin Luther King Jr. Drive, is flooded out and made impassable by stormwater near a section of Doan Brook following such events. In each case, there are a significant number of communities contributing stormwater to these watercourses upstream of the problem flooding areas, which is why they can only be resolved effectively with comprehensive, regional solutions.

District projects planned to address these problems include, among other things:

- *Euclid Creek Concrete Spillway Repair*—The collapse of a Euclid Creek spillway threatens the upstream, active railroad bridge operated by New York Central Lines and the downstream Interstate 90 culverts operated by the Ohio Department of Transportation. The estimated construction cost of this project is \$400,000.
- *Euclid Creek Flood Control Rehabilitation Project*—This is a U.S. Army Corps of Engineers compliance project to control flooding in Euclid Creek. The estimated cost of the study for this project is \$200,000, and the estimated construction costs are between \$4 million and \$6 million.
- *Big Creek Streambank Erosion at John Nagy Boulevard*—Eroding streambanks and failing slopes of Big Creek at John Nagy Boulevard need to be stabilized

because they are threatening the railroad and roadway. The estimated construction cost of this project is \$7 million.

- *Doan Brook Stream Restoration and Bank Stabilization*—Eroding streambanks and slopes of Doan Brook are threatening the Cleveland Museum of Art's parking garage as well as the only available access drive to that parking garage. The estimated design and construction costs to complete this stabilization are \$4 million.

Numerous other District projects that would be performed in Member Communities upstream of the City will also help to alleviate the City's major stormwater problems.

Further, the City will be deprived of the maintenance of its streams that the District would perform under its Program, which would help to mitigate the City's stormwater problems. For example, from January to September 2013, the District removed 377 cubic yards of large woody debris and 75 cubic yards of sediment from streams throughout the City.

The District also was committed to assuming responsibility for the maintenance of large regional stormwater retention facilities located in the City, such as the Kerruish Basin along Mill Creek and the Puritus Basin along Big Creek. These basins receive stream flows from several other communities, yet the City currently bears the inequitable brunt of having to manage, maintain, and fund them.

Without the District's Program and all of the projects and maintenance that will be undertaken and performed thereunder, stormwater runoff and stream overflows will continue to infiltrate the City's sanitary and combined sewers. This noxious mixture will continue flooding basements and overflowing to waterways creating serious public health hazards.

Finally, under the District's Community Cost-Share Program, the City, like all of the District's other Member Communities, would be entitled to receive twenty-five percent (25%) of the total annual stormwater fees collected from the property owners residing therein to be used towards local stormwater projects. The City's Community Cost-Share amount in 2013 alone was

estimated to be approximately \$3.6 million (assuming full collection of the stormwater fees), which is several times the amount that the City itself is able to allocate to such projects. The Eighth District's decision threatens to divest the City of tens of millions of dollars over the duration of the Program, which funds are necessary for the City to properly maintain and improve its own local stormwater system that drains into the regional stormwater system.

Because the Eighth District's majority opinion threatens to deprive the City and the District's other Member Communities in Northeast Ohio of an effective means of managing stormwater and will serve as a roadblock to the resolution of the serious stormwater problems that continually plague this region, the City urges the Court to accept jurisdiction of this case.*

II. STATEMENT OF THE CASE AND FACTS

The City adopts the statement of the case and facts from the District's Brief in Support of Jurisdiction.

* The Cleveland City Council supports the Regional Stormwater Management Program. On November 11, 2013, the Council passed Resolution No. 1535-13 resolving, "That this Council hereby supports the efforts of the Northeast Ohio Regional Sewer District to reinstate its Regional Stormwater Management Program."

III. PROPOSITIONS OF LAW AND ARGUMENTS IN SUPPORT THEREOF

PROPOSITION OF LAW NO. I: Chapter 6119 of the Ohio Revised Code Confers Upon the District the Authority to Manage Stormwater, Regardless of Whether It is Combined with Sewage, and the Eighth District's Majority Opinion Attempts to Rewrite Chapter 6119 by Eliminating this Power.

The Eighth District's majority opinion disregards the plain text of Chapter 6119, and judicially strips away half of the District's clear statutory authority. The majority opinion holds that the District and all other regional water and sewer districts throughout Ohio no longer have authority over stormwater issues unless the issues involve "*stormwater containing sewage or other pollutants.*" See *Northeast Ohio Reg'l Sewer Dist. v. Bath Twp.*, 8th Dist. Nos. 98728 and 98729, 2013-Ohio-4186, ¶ 44 (hereinafter, "*NEORSD*") (emphasis in original). This finding disregards the unambiguous language of R.C. 6119.011(K) as correctly pointed out in the dissenting opinion of Judge Larry A. Jones, Sr., and prohibits the District from undertaking several projects that are *expressly authorized* in other sections of Chapter 6119.

There is no dispute that the District has the authority to collect, treat, and dispose of "waste water"—it is the definition of that term that the Eighth District has misconstrued. "Waste water" is defined as "*any storm water and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water.*" R.C. 6119.011(K) (emphasis added). The definition repeats the word "water," making clear that it covers both types of "water" and that Ohio regional water and sewer districts have authority over "storm water." Instead of analyzing the actual statutory language, the majority opinion relies on a definition stated in an irrelevant civil negligence and trespass case, which incorrectly cites R.C. 6119.011(K) as stating "any storm water containing sewage or other pollutants." *NEORSD*, at ¶ 44. If the majority opinion is permitted to stand, this oversight will effectively rewrite the actual

language of the statute and wrongfully divest the District and all other Ohio regional water and sewer districts of their statutory stormwater authority.

Further, Chapter 6119 makes abundantly clear that the District can undertake “water resource projects” for or relating to “stream flow improvement,” “dams,” “reservoirs,” “impoundments,” “stream monitoring systems,” and “the stabilization of stream and river banks”. R.C. 6119.011(G), (M). These are *exactly* the types of projects that would be undertaken by the District under its Program within the City and the District’s other Member Communities. Because these are purely stormwater projects that do not involve “removing sewage or other pollutants from storm water as well as other water containing such waste,” *NEORS*D, at ¶ 45, the District and all other Ohio regional water and sewer districts would be prohibited from undertaking any of them under the majority opinion.

The Eighth District’s majority opinion must be reviewed and reversed by this Court because, if permitted to stand, it will have the effect of divesting the District and all other Ohio regional water and sewer districts of their express statutory powers under Chapter 6119. This will greatly harm the City and all other communities served by those districts in need of their stormwater management services.

PROPOSITION OF LAW NO. II: Chapter 6119 of the Ohio Revised Code Confers Upon the District the Authority to Impose Its Fee for Stormwater Management Because It Is a Charge Imposed for the Use or Service of a Water Resource Project or Any Benefit Conferred Thereby, and the Eighth District's Majority Opinion Attempts to Abrogate this Clear Statutory Authority.

R.C. 6119.09, as well as the Eighth District's own precedent, demonstrate that the District may impose its stormwater fee upon property owners within the City and the District's other Member Communities because it is a charge imposed "for the *use* or *services* of any water resource project or any benefit conferred thereby." R.C. 6119.09 (emphasis added). The Eighth District's majority opinion modifies this statute by greatly restricting the ability of the District and other Ohio regional water and sewer districts to raise revenue for much needed water resource projects in the City and throughout Ohio.

The stormwater projects to be completed under the District's Program are statutorily authorized "water resource projects," as they are projects for or relating to "stream flow improvement," "dams," "reservoirs," "impoundments," "stream monitoring systems," and "the stabilization of stream and river banks." R.C. 6119.011(G), (M). The property owners paying the stormwater fee will *use* these water resource projects and receive a *service* and *benefit* from them (although only one of these is required) because, among many other things: (a) stormwater from properties runs off into, and is eventually captured, controlled, conveyed, and transported by, the regional stormwater system which will be improved by the projects; (b) the projects will greatly reduce flooding, erosion, and damage to their homes and businesses caused by stormwater, and provide protection from stormwater emanating from other properties; (c) the projects will greatly reduce the flooding of streets and other roadways improving the local transportation system and enhancing emergency service capabilities during and after wet weather events; (d) the projects will greatly reduce harmful pathogens and bacteria in stormwater runoff

that thrive in flooded areas; (e) the projects will improve water quality in Northeast Ohio, the habitat for wildlife, and provide several other environmental benefits; and (f) the projects will reduce the future, unavoidable costs relating to stormwater management. Thus, as correctly determined by the trial court, the District's stormwater fee is authorized by R.C. 6119.09.

The Eighth District's majority opinion incorrectly construed R.C. 6119.09 to require a direct "service connection" from each property to a water resource project, and ignores the clear statutory language that the stormwater fee may be imposed for "any benefit" conferred by the District's Program. *NEORSD*, at ¶ 54. This contradicts a prior Eighth District decision against the City that is directly on point and that involved the District's construction of intercommunity relief sewers, *i.e.*, a "water resource project." *City of Cleveland v. N.E. Ohio Regional Sewer Dist.*, 8th Dist. No. 55709, 1989 WL 107162, *1 (Sept. 14, 1989). In that case, the City argued that its property owners should not have to share in the multi-million dollar cost of constructing those sewers because they were all being constructed outside of the City in its surrounding suburbs. *Id.* at *3. The Eighth District upheld the charge and determined that "all users of the [D]istrict including [C]ity residents will benefit from the IRSP" because "alleviation of the suburban overflow will reduce the wet weather flow into the Cleveland system, Lake Erie and the surrounding streams." *Id.* The majority opinion in this case cannot be reconciled with this Eighth District decision.

The Eighth District's majority opinion must be reviewed and reversed by this Court because, if permitted to stand, it will greatly abrogate the District's statutory authority and the authority of other Ohio regional water and sewer districts to raise revenue for water resource projects in the City and throughout Ohio.

PROPOSITION OF LAW NO. III: The District's Program is Expressly Authorized by the District's Petition and Plan for Operation, and the Eighth District's Majority Opinion Attempts to Modify the District's Stated Purposes and Limit Its Powers.

The City has *always* understood that the District's Petition and Plan for Operation (referred to in the Eighth District's majority opinion as the "charter"), which was agreed to by *all* of the District's Member Communities in 1972, bestows upon the District the authority to manage stormwater as set forth in the District's Program. The language of the Petition and Plan for Operation makes this clear, which is why the District has invested tens of millions of dollars in stormwater studies and projects in the City and throughout Northeast Ohio over the past four decades without objection from *any* of its Member Communities. The Eighth District's majority opinion improperly attempts to modify and diminish the purposes and powers of the District set forth in this governing document in holding that it does not give the District the power to manage stormwater on a regional basis.

The stated purpose of the District in its Petition is "the establishment of a total wastewater control system for the collection, treatment and disposal of wastewater within and without the District," which includes *stormwater* under R.C. 6119.011(K). *NEORS*, at ¶ 60. In the Plan for Operation, the District is charged with planning, financing, constructing, operating and controlling "*wastewater* treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, *storm water handling facilities*, and all other water pollution control facilities." *Id.* (emphasis added). The District was even expressly given an *affirmative obligation* to develop a plan for regional stormwater management, a relevant portion of which the Eighth District fails to cite:

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

Id. at ¶ 63 (emphasis added).

As correctly determined by the trial court, the District's Program is the "detailed integrated capital improvement plan for regional management of . . . storm drainage" referred to in the Plan for Operation. Because the Plan for Operation unambiguously provides that any projects not financed through the Ohio Water Development Authority, State of Ohio, or Federal Government should be financed in such a manner as may be deemed appropriate by the Board of Trustees, and because the District's Board of Trustees unanimously approved the stormwater fee, the District is authorized to finance its Program through the stormwater fee.

The Eighth District's majority opinion must be reviewed and reversed by this Court because, if permitted to stand, it will improperly modify and diminish the purposes and powers of the District set forth in its Petition and Plan for Operation.

IV. CONCLUSION

For the above-stated reasons, the City of Cleveland, as *amicus curiae*, respectfully requests that the Court assume jurisdiction over this appeal.

Respectfully submitted,

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