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

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13-1770

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	:	CASE NO. _____
Petitioner,	:	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)
vs.	:	
BATH TOWNSHIP, OHIO, et al.	:	
Respondent.	:	Cuyahoga County Court of Common Pleas CASE NO. CV-10-714945

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Notice of Appeal of Appellant Northeast Ohio Regional Sewer District

Appellant, Northeast Ohio Regional Sewer District, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. CA-12-098728 (consolidated with Case Nos.CA-12-098729 & CA-12-098739) on September 26, 2013.

This case is one of public or great general interest for the reasons set forth in the Memorandum in Support of Jurisdiction being filed concurrently herewith.

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[Cite as *Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 2013-Ohio-4186.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 98728 and 98729

NORTHEAST OHIO REGIONAL SEWER DISTRICT

PLAINTIFF-APPELLEE
CROSS-APPELLANT

vs.

BATH TOWNSHIP, OHIO, ET AL.

DEFENDANTS-APPELLANTS
CROSS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-714945

BEFORE: S. Gallagher, J., Jones, P.J., and Rocco, J.

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SEAN C. GALLAGHER, J.:

{¶1} Defendants-appellants/cross-appellees appeal (1) the trial court's judgment denying their motion to dismiss; (2) the trial court's judgment granting partial summary judgment in favor of plaintiff-appellee/cross-appellant; and (3) the trial court's opinion issued after a bench trial and the supplemental judgment entry.

{¶2} Plaintiff-appellee/cross-appellant cross-appeals from partial findings in the trial court's opinion issued after the bench trial.[1]

I. The Parties

{¶3} Plaintiff-appellee/cross-appellant is the Northeast Ohio Regional Sewer District ("the Sewer District" or "the District").

{¶4} Of the 56 member communities in the Sewer District named in the action ("member communities"), 11 appealing communities ("appealing communities") are among the defendants-appellants/cross-appellees that have appeared and litigated in this appeal.[2] Defendants-appellants/cross-appellees also consist of a group of intervening property owners located in the Sewer District (collectively "appellants").[3]

II. Background

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[1] Amicus briefs have been filed in support of plaintiff-appellee/cross-appellant by (1) the 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; and (2) the Coalition of Ohio Regional Districts ("CORD").

[2] The appealing communities are Beachwood, Bedford Heights, Brecksville, Cleveland Heights, Glenwillow, Independence, Lyndhurst, North Royalton, Oakwood Village, Olmsted Falls, and Strongsville.

[3] The intervening property owners are 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, L.L.C.; The Ohio Council of Retail Merchants; Snowville Service Associates L.L.C.; Boardwalk Partners, L.L.C.; Creekview Commons, L.L.C.; Fargo Warehouse, L.L.C.; Greens of Lyndhurst, Ltd.; Highlands Business Park, L.L.C.; JES Development Ltd.; Lakepoint Office Park, L.L.C.; Landerbrook Point, L.L.C.; Newport Square, Ltd.; Park East Office Park, L.L.C.; Shaker Plaza, Ltd.; Pavilion Properties, L.L.C.; and WGG Development, Ltd.

{¶5} In 1972, by judgment of the Cuyahoga County Court of Common Pleas and pursuant to R.C. Chapter 6119, the Sewer District was officially organized and declared a political subdivision of the state of Ohio.[4] The necessity for the Sewer District arose from "the increase in the amount of wastewater in the Metropolitan Cleveland area resulting from the increase in population and the expansion of industry * * *." Exhibit A, ¶ 3, 1972 Judgment.

{¶6} The Sewer District was formed for "the establishment of a total waste water control system for the collection, treatment and disposal of waste water within and without the District." *Id.* at ¶ 4. To effectuate that purpose, the Sewer District was charged with, among other things, planning, financing, constructing, operating, and controlling "waste water treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, storm handling facilities, and all other water pollution control facilities of the District." *Id.* at ¶ 5(c).

{¶7} The Sewer District's initial plan of operation was amended by various petitions and court orders, culminating in a 1975 court order that constitutes the Sewer District's Charter ("Charter").[5] Under the Charter, the Sewer District

> shall have authority pursuant to Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate local sewerage

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[4] The Northeast Ohio Regional Sewer District was originally named the Cleveland Regional Sewer District; its name was changed by court order to its current name in 1979.

[5] Although the Charter has been amended by other court orders, the core of it remains and governs this case.

> collection facilities and systems within the District, including both storm and sanitary sewer systems.

Exhibit A, ¶ 5(m), 1975 Judgment.

{¶8} Exhibit A to the Charter recognizes the territory to be included in the Sewer District was to include "that portion of Cuyahoga County presently served, or mainly capable of being served by gravity, by sewers leading to the three wastewater treatment plants in the City of Cleveland plus the proposed Cuyahoga Valley Interceptor Sewer." Sewer District membership arose based upon the consenting member communities' need to connect to and use those facilities. The member communities include some from Cuyahoga, Summit, Lorain, and Lake Counties.

{¶9} Under the Charter, the plan for operation of the Sewer District entails the construction, operation, and financing of District and local facilities.

> The District will plan, finance, construct, operate and control 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 of the District * * *."

Exhibit A, ¶ 5(c), 1975 Judgment. The Charter provides the Sewer District's Board of Trustees with authority to determine rates for sewage treatment and disposal in accordance with its terms. *Id.* at ¶ 5(f).

{¶10} With regard to local sewerage collection facilities, the Charter provides:

> 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 * * * specifically provided for in a written agreement between the District and the respective local community.

Id. at ¶ 5(m).

{¶11} The Charter provides the Sewer District with regulatory authority over "all local sewerage collections facilities and systems in the District, including both storm and sanitary sewer systems." *Id.* at ¶ 5(m)(1). However, the Sewer District only has the authority to "assume the responsibility for operating, maintaining, and repairing local sewerage collection facilities when requested to do so by a local community and upon mutually agreeable terms." *Id.* at ¶ 5(m)(2). Likewise, the District is only authorized to construct local sewerage collection facilities and systems "when requested to do so by a local community and upon mutually agreeable terms." *Id.* at ¶ 5(m)(4). With regard to planning local sewerage collection facilities and systems, the Charter further charged the Sewer District with developing a capital improvement plan:

> 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 inter-community drainage problems (both storm and sanitary) in the District.

Id. at ¶ 5(m)(3).

{¶12} For financing local sewerage collection facilities and systems, "[t]he 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." *Id.* at ¶ 5(m)(5).

III. Facts

{¶13} In January 2010, the Sewer District's Board of Trustees amended the District's Code of Regulations by enacting Title V, "Stormwater Management Code," which created a "Regional Stormwater Management Program" ("the RSM Program"). Under Title V, the Board defined the scope of its RSM Program, which included "planning, financing, design, improvement, construction, inspection, monitoring, maintenance, operation and regulation" of its own defined "Regional Stormwater System." Title V, Section 5.0501. The definition of "Regional Stormwater System" is expansively written to include the following:

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

Id. at Section 5.0218.

{¶14} The stated purpose of Title V is to "establish the Regional Stormwater Management Program through which the District and each Member Community served by the Regional Stormwater Management Program shall work in a cooperative manner to address stormwater management problems." *Id.* at Section 5.0303. In broad terms, the RSM Program consists of the following:

> 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.

Id. at Section 5.0219.

{¶15} As stated in Title V, the RSM Program was needed because

> (a) Flooding is a significant threat to public and private property.
>
> (b) Streambank erosion is a significant threat to public and private property, water quality, wildlife, and aquatic and terrestrial habitats.
> (c) Inadequate stormwater management damages the water resources of Northeast Ohio, impairing the ability of these waters to sustain ecological and aquatic systems.
>
> (d) A watershed-based approach to stormwater management is necessary to effectively and efficiently plan, design, construct, and maintain long-term solutions to stormwater problems.
>
> (e) An adequate funding source is necessary to provide a watershed-based approach to stormwater management.
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> (f) Impervious surface on a given parcel relates to the volume, rate, and/or pollutant loading of stormwater runoff discharged from that parcel.
>
> (g) The measurement of impervious surface that causes stormwater runoff provides an equitable and adequate basis for a system of fees for funding a watershed-based approach to stormwater management.

Id. at Section 5.0301.

{¶16} The Sewer District intends to fund projects under the RSM Program through the imposition of a stormwater fee. The fee is based on the square feet of a property's impervious surfaces, which are defined in Title V as follows:

> Developed surfaces that either prevent or significantly slow the infiltration of water into the ground compared to the manner that such water entered the ground prior to development, or which cause water to run off in greater quantities or at an increased rate of flow than that present prior to development. Impervious surfaces shall include, without limitation,

> rooftops, traveled gravel areas, asphalt or concrete paved areas, private access roads, driveways and parking lots, and patio areas.

Id. at Section 5.0210.

{¶17} "Based on analysis by the District of impervious surfaces on parcels throughout the District's service area, an impervious surface of three thousand (3,000) square feet shall be designated as one (1) Equivalent Residential Unit (ERU) * * *." *Id.* at Section 5.0706.

{¶18} For calculating the fee for residential properties, the Sewer District structured a three-tiered scale based on the size of the residential parcel. *Id.* at Section 5.0707. Residential parcels with less than 2,000 square feet of impervious surface will be classified as equal to 0.6 of an ERU and will be charged $3.03 per month in 2013. *Id.* Residential parcels with 2,000 to 3,999 square feet of impervious surface will be classified as equal to 1.0 ERU and will be charged $5.05 per month in 2013. *Id.* And residential parcels with 4,000 or more square feet of impervious surface will be classified as equal to 1.8 ERUs and charged $9.09 per month in 2013. *Id.*

{¶19} For nonresidential property owners, the Sewer District will individually determine their fees by measuring impervious surfaces on their parcels, and then multiplying (1) the total number of ERUs for a given parcel (which will be derived from calculating the total square feet of impervious surface divided by 3,000), by (2) the fee established per ERU, which is $5.05 per month in 2013. *Id.* at Section 5.0708.

{¶20} Title V requires that the collected fees be maintained in a separate account "dedicated to the implementation and administration of the Regional Stormwater Program * * *." *Id.* at Section 5.0701.

{¶21} Title V exempts certain properties from the fees: public road rights-of-way; airport runways and taxiways; railroad rights-of-way; parcels with less than 400 square feet of impervious surface; and "[p]arcels whose use has been designated as a Non-Self Supporting Municipal Function owned by Member Communities." *Id.* at Section 5.0705.

{¶22} Title V also has a "Community Cost-Share Program," which requires the Sewer District to place a minimum amount of all funds collected from the fees in a separate account for each of the 56 member communities to use for District-approved projects to "promote or implement the goals and objectives" of Title V within the member communities.[6] *Id.* at Sections 5.0901 and 5.0902.

{¶23} Credits are a part of Title V, and are available for applicants who maintain and operate stormwater-control measures. *Id.* at Section 5.0801. The credits consist of (1) stormwater-quantity credit, (2) stormwater-quality credit, (3) stormwater-education credit, and (4) residential credit. Credits can be combined for a maximum credit of 100 percent. *Id.* at Section 5.084.

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[6] Title V set the minimum amount of funds that would go into the Community Cost-Share Program's account at 7.5 percent. However, the trial court ordered the Sewer District to increase the amount to 25 percent.

IV. Procedural History

{¶24} In January 2010, on the same day that the District's Board of Trustees enacted Title V, the Sewer District filed this action in the trial court seeking (1) a judgment declaring that the Sewer District had the authority to implement its RSM Program with respect to all the member communities served by the District and (2) an order permitting the Sewer District to amend its Plan for Operation to include Title V. The 56 member communities were named as defendants.

{¶25} The trial court allowed the intervening property owners to join the action; they filed an answer and counterclaim.[7] The intervening property owners sought, among other things, to permanently enjoin the Sewer District from implementing its RSM Program. The appealing communities filed an answer and counterclaims, in which they also sought, among other things, to permanently enjoin the Sewer District from implementing its RSM Program.

{¶26} In June 2010, the appealing communities filed a motion to dismiss for lack of subject matter jurisdiction; the intervening property owners joined in the motion. In their motion, they contended, among other things, that the Sewer District could not obtain judgment because it failed to name as defendants the individual property owners within the Sewer District's service area.

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[7] Other parties were also permitted to intervene in the action. The additional intervenors included Richard Lennon, Bishop of the Diocese of Cleveland in his capacity of Trustee of an Implied Charitable Trust, the Catholic Cemeteries Association of the Diocese of Cleveland, and the Cleveland Municipal School District Board of Education.

{¶27} The trial court denied the motion, and stated in regard to the failure to join claim, that there was no necessity that the Sewer District had to name all the property owners in the District because they were represented by the public officials of their respective communities.

{¶28} The parties filed motions for summary judgment. The Sewer District moved for partial summary judgment, seeking a determination that, under its Charter and statutory authority, it properly enacted Title V. The appealing communities, intervening property owners, and other defendants filed cross-motions for summary judgment on that issue. The issue of the validity and implementation of the stormwater fee was reserved for trial.

{¶29} In April 2011, the trial court issued its ruling on the summary judgment motions, finding that the Sewer District had the authority under R.C. Chapter 6119 and its Charter to enact its RSM Program.

{¶30} In late 2011, a bench trial was had on the issue of the validity and implementation of the stormwater fee. In February 2012, the trial court issued an opinion in which it found that the stormwater fee (1) was authorized under R.C. Chapter 6119, (2) was not restricted by the Sewer District's Charter, (3) was not an unauthorized tax, and (4) did not violate the parties' equal protection rights. The court further found the methodology used to calculate and impose the fee was constitutional.

{¶31} But the court found that there was no rational basis for the Sewer District's disparate treatment of nonresidential, as compared to residential, property owners. The

court also found that the 7.5 percent minimum allocation into the Cost-Share Program was unfair to the member communities, and that it should be no less than 25 percent.

{¶32} Moreover, relative to the stormwater education credit, the court ordered that the Sewer District "shall provide the school systems with appropriate curriculum for each of grades 1–12 to achieve the stated purposes of the credit." The court also ordered, relative to the credits in general, that the Sewer District "shall submit a plan or formula providing for the accrediting of costs of a licensed engineer in completing any applications for credits under the stormwater Fee Credit Manual."

{¶33} Post-trial proceedings were had relative to the trial court's orders. During those proceedings, the Sewer District submitted draft revisions to Title V, to which the appealing communities and intervening property owners objected. In June 2012, the trial court issued a supplemental journal entry, in which it adopted the Sewer District's revisions.

{¶34} The appellants filed a motion for reconsideration based on the Ohio Supreme Court's then-recent ruling in *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, which was issued approximately three months after the trial court's 2012 ruling. The trial court denied the motion.

V. The Appealing Communities and Intervening Property Owners' Assignments of Error

{¶35} The appealing communities and intervening property owners have assigned the following as errors:

I. The trial court erred in denying the Cities' and Property Owners' Counterclaims, to the extent that they sought permanently to enjoin the Sewer District from imposing and collecting its unlawful "Stormwater Fee."

II. The trial court erred in denying the Cities' and Property Owners' Counterclaims, to the extent that it sought permanently to enjoin the Sewer District from undertaking a comprehensive Stormwater Management Program (i.e., its Title V) for which it has no authority under R.C. Chapter 6119.

III. The trial court erred in denying the Cities' and the Property Owners' Counterclaims to the extent that they sought permanently to enjoin the Sewer District from undertaking an SMP[8] not authorized by its Charter.

IV. The trial court erred in denying the Cities' and Property Owners' Counterclaims, to the extent that they sought permanently to enjoin the Sewer District from undertaking its SMP, because that SMP, as applied, violates numerous Ohio and Federal Constitutional provisions.

V. The trial court erred in denying the Cities' and Property Owners' motion to dismiss because the trial court lacked subject matter jurisdiction due to Plaintiff's failure to join all necessary parties in the action.
VI. The trial court erred when it oversaw amendments to Title V after holding a trial and after its February 2012 Opinion declaring the rights of the parties.

VI. The Sewer District's Cross-Assignments of Error

{¶36} In its cross-appeal, the District has assigned the following as errors:

I. The trial court erred in finding that there is no rational basis for disparate treatment of residential and nonresidential property owners with respect to the stormwater fee.

II. The trial court had no legal basis for requiring the District to provide the school systems with appropriate curricula for grades 1–12 to further the stated purpose of the stormwater education credit set forth in Title V.

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[8] Stormwater management program.

III. The trial court had no legal basis for requiring the District to accredit costs of licensed engineers in completing nonresidential property owners' applications for credits available under Title V.

IV. The trial court had no legal basis for requiring the District to revise, or to increase the amount of, the community cost-share set forth in Title V.

VII. Law and Analysis

A. The Appellants' Appeal

1. The Stormwater Management Program and the Stormwater Fee Under R.C. Chapter 6119 and the District's Charter.

{¶37} Appellants' first, second, and third assignments of error relate to the authority of the Sewer District to implement Title V and the RSM Program, along with its associated stormwater fee.

{¶38} In their first assignment of error, the appellants contend that the stormwater fee is an unlawful tax. They further argue that even if it is not an unlawful tax, it is not authorized under R.C. 6119.09. In their second assigned error, the appellants contend the Sewer District has no authority under R.C. Chapter 6119 for undertaking a comprehensive stormwater management program. In their third assignment of error, the appellants argue that the RSM Program is not authorized by the Sewer District's Charter.

{¶39} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Under Civ.R. 56, summary judgment is appropriate when (1) no genuine issue as to any material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving

party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party. Appellate review of a trial court's determinations regarding questions of law in a declaratory judgment action are also reviewed de novo. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586.

{¶40} The District is a "creature of statute" whose authority is strictly limited to the powers specifically conferred upon it or clearly implied by the statute. *See In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-2471, 933 N.E.2d 1067, ¶ 17; *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536. "Implied powers are those that are incidental or ancillary to an expressly granted power; the express grant of power must be clear, and any doubt as to the extent of the grant must be resolved against it." *Spangler* at ¶ 17. The Sewer District does not have the power to extend the authority conferred on it by the General Assembly. *D.A.B.E., Inc.* at ¶ 38.

{¶41} The appellants contend that the Sewer District was "utterly without statutory power under R.C. Chapter 6119 to enact Title V * * *." They cite the following reasons in support of their contention: (1) the Sewer District had no express authority for its RSM Program under R.C. Chapter 6119; (2) the Sewer District's program is not in keeping with the purposes of R.C. Chapter 6119 as set forth in R.C. 6119.01; (3) other agencies such as watershed districts and conservancy districts are charged with dealing with stormwater-related issues; and (4) the definition of waste water in both R.C. 6119.011 and the Charter demonstrate that the Sewer District's RSM Program was not authorized.

{¶42} The first rule of statutory construction requires courts to look at a statute's language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms. *Lancaster Colony Corp. v. Limbach*, 37 Ohio St.3d 198, 199, 524 N.E.2d 1389 (1988).

{¶43} Pursuant to R.C. 6119.01(A) and (B), the purpose of a regional water and sewer district is for "either or both" of the following purposes: "(A) [t]o supply water to users within and without the district"; and "(B) [t]o provide for the collection, treatment, and disposal of waste water within and without the district." "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). Essentially, the statutory terms authorize the Sewer District to collect, treat, and dispose of waste water entering the sewer system.

{¶44} The term waste water necessarily means water containing waste. Under R.C. 6119.011(K), "waste water means" "*any storm water containing sewage or other pollutants.*" (Emphasis added.) *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852, 840 N.E.2d 226 (1st Dist.). Indeed, the District's own "waste water" definition in Titles I, II, and IV of its code of regulations recognizes it as a "combination of water-carried waste * * * together with such ground, surface or storm water as may be present."

{¶45} The General Assembly created regional sewer districts to "collect, treat, and dispose" of "waste water." Implicit in this express grant of power is that a Sewer District is charged with removing sewage or other pollutants from storm water as well as other water containing such waste. The definition of waste water cannot be read to authorize the Sewer District to unilaterally exercise control over a broad range of stormwater-related issues that are not mentioned under and bear no resemblance to the powers conferred through R.C. Chapter 6119.

{¶46} 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." Such terms appear nowhere in R.C. Chapter 6119. Unlike the authority granted to the Sewer District, the General Assembly gave specific stormwater-related authority to watershed districts and conservancy districts. *See* R.C. 6105.12 (providing watershed districts with authority to review and recommend plans for the development of the water resources), and R.C. 6101.04 (providing conservancy districts with authority to "prevent floods" and "regulating stream channels," "irrigation," "diverting * * * watercourses," and "arresting erosion.")

{¶47} In promulgating its RSM Program and in defining its terms, the Sewer District's board engaged in policy-making over matters that are legislative in nature. By engaging in such actions, the Sewer District has gone beyond administrative rule-making and usurped power delegated to the General Assembly.

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

R.C. 6119.19.

{¶48} With regard to the challenge to the stormwater fee being an unlawful tax,[9] we are cognizant that other jurisdictions have found stormwater charges are fees. We need not decide whether this is the case under Ohio law.[10] Rather, our focus is on whether the Sewer District possesses the authority under R.C. Chapter 6119 to implement its RSM Program and the associated stormwater fee.

{¶49} The stormwater fee is being imposed by the Sewer District to advance Title V and address regional stormwater management problems that will serve to benefit the entire region. The benefits to the community at large include decreasing flooding, preventing erosion, collecting sediment and debris, maintenance of various protective and control structures with a "regional stormwater system." Other benefits include improvements in water quality, habitat for wildlife and reduction of future costs relating to stormwater management. The Sewer District ignores the complete lack of any express grant of powers under R.C. Chapter 6119 relating to any of the RSM Program's regulatory objects.

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[9] We note that R.C. 6119.17 and 6119.19 authorize the Sewer District to levy a tax for "any portion of the cost of one or more water resource projects[.]"

[10] In *Drees Co.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, the Ohio Supreme Court set forth a number of factors for analyzing the substance of an assessment to determine whether it is a fee or a tax.

{¶50} R.C. 6119.09 provides in part that, "[a] regional water and sewer district may charge, alter, and collect rentals or 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, and fix the terms, conditions, rental, or other charges * * * for such use or services." R.C. 6119.09.

{¶51} Additionally, R.C. 6119.06 governs the rights, powers, and duties of a regional water and sewer district, and provides that the district may, in relevant part, do the following:

> [a]cquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent to or from, or contract for operation by or for, a political subdivision or person, water resource projects within or without the district

R.C. 6119.06(G);

> [c]harge, alter, and collect rentals and other charges for the use of services of any water resource project as provided in section 6119.09 of the Revised Code. Such district may refuse the services of any of its projects if any of such rental or other charges, including penalties for late payment, are not paid by the user thereof * * *

R.C. 6119.06(W); and

> [d]o all acts necessary or proper to carry out the powers granted in Chapter 6119 of the Revised Code.

R.C. 6119.06(BB).

{¶52} A "water resource project" is defined under R.C. 6119.011(G) as "any waste water facility or water management facility acquired, constructed, or operated by or

leased to a regional water and sewer district or to be acquired, constructed, or operated by or leased to a regional water and sewer district under this chapter * * *."

{¶53} In this case, we find the stormwater fee was unrelated to any use or services afforded to a property owner by a "water resource project." This case is wholly unlike the tap-in fee charged in *Wyatt v. Trimble Twp. Waste Water Treatment Dist.*, 4th Dist. Athens No. 1521, 1992 Ohio App. LEXIS 5749 (Nov. 3, 1992), where the charge was for the installation of a plug-in system at the point where each premises was to be connected to an existing sanitary sewer and waste water treatment project as authorized by R.C. 6119.09(Z), and which project was found necessary to bring the communities into compliance with the Clean Water Act (Federal Water Pollution Control Act) (33 U.S.C. 1251 et seq.).

{¶54} Here, there was no service connection being made from the properties to a water resource project. Further, Kyle Dreyfus Wells, the Sewer District's manager of watershed programs, testified that the stormwater management plan plays no more than an incidental role in municipal compliance with Clean Water Act regulatory obligations. Tr. 1531-1534.

{¶55} Finally, while R.C. 6119.06(BB) authorizes the Sewer District to do all acts necessary to carry out its authorized powers, the Sewer District cannot exceed the authority granted. While the Sewer District's authority is broad, we are unable to conclude that the legislature intended to allow the Sewer District to expand upon its

statutory authority through Title V and its RSM Program and impose an unauthorized charge.

{¶56} Here, the Sewer District improperly employed R.C. 6119.09 to generate revenues for the costs of its RSM Program. The waste water fee was not for the "use or service" of a "water resource project." Accordingly, we find that the stormwater fee is not a legitimate "rental or other charge" under R.C. 6119.09.

{¶57} We further recognize that in this case, there was no vetting as to the allowance for the Sewer District to fund its stormwater management program with a stormwater fee. By implementing the stormwater fee, the Sewer District has effectively taken upon itself to claim a share of community dollars, while other public entities such as school districts must continue their struggle to obtain public funding.

{¶58} We find that the General Assembly has not indicated any intent through R.C. Chapter 6119 to vest regional water and sewer districts with the authority to adopt a stormwater management program or to implement the stormwater control measures set forth in Title V. The General Assembly did not intend to permit the Sewer District to expound upon its own powers without any oversight, proclaim the scope and breadth of its authority over stormwater management issues, and impose an associated stormwater fee. There is no doubt that with the increased development in the region over the last several decades, regulations are needed over the stormwater-related issues that plague the region. However, such regulatory authority must be explicitly granted by the General

Assembly. Therefore, we conclude the enactment of Title V exceeds the statutory powers conferred upon the District under R.C. Chapter 6119.

{¶59} The appellants further contend that the Sewer District's RSM Program is not authorized under the Charter for the following three reasons: (1) the Charter dealt with sanitary sewerage issues and considerations that "share no kinship" with the Sewer District's RSM Program; (2) Title V conflicts with Charter provisions limiting the Sewer District to charging for sewer fees; and (3) Title V conflicts with Charter provisions prohibiting the Sewer District from assuming ownership, control, or responsibility for locally controlled systems without the local community's written consent.

{¶60} Consistent with R.C. Chapter 6119, the Charter set forth the Sewer District's purpose of "the establishment of a total wastewater control system for the collection, treatment and disposal of waste-water within and without the District." Exhibit A, ¶ 4, 1975 Judgment. The Charter's provisions pertain to the operation, construction, and financing of the Sewer District's sewage treatment and other water pollution control facilities, as well as local sewerage collection facilities and systems. The Charter provides the Sewer District with authority over "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.* at ¶ 5(c).

{¶61} Through its enactment of Title V, the District unilaterally defined a "local stormwater system" and created an expansive definition of a "regional stormwater

system" over which it claims the power to establish and administer its RSM Program. The expansive scope of the "regional stormwater system" goes far beyond the scope of sewage treatment and waste water handling facilities under the Charter and encompasses the following:

> 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. * * *

Title V, Section 5.0218.

{¶62} Further, while the Sewer District may charge for "sewage treatment and disposal," the Charter does not authorize the District to impose a fee for a stormwater management program. The Charter contemplates charges assessed for the use of the Sewer District's wholly-owned treatment facilities, with rates encompassing planning expenses, operation and maintenance expenses, and capital costs for existing and future waste-water handling facilities. Exhibit A, ¶ 5(f), 1975 Judgment.

{¶63} Insofar as the Charter authorizes the district to assume the ownership, responsibility, or liability for any local sewerage collection facilities and systems, it may do so only at the request of the local community and upon mutually agreeable terms provided for in a written agreement. *Id.* at ¶ 5(m)(2) and (4). With regard to local sewerage and collection facilities, while the Sewer District was charged with developing a "detailed integrated capital improvement plan for regional management of wastewater collection and storm drainage," it was within the confines of its authority "to plan local

sewerage collection facilities and systems pursuant to Chapter 6119 of the Ohio Revised Code." *Id.* at ¶ 5(m)(3). Also, the method of financing particular projects must be "agreed to between the District and the respective local communities at the time the project is undertaken by the District." *Id.* at ¶ 5(m)(5).

{¶64} Finally, in order to amend its Charter, the Sewer District is required to go through the Charter amendment process of R.C. 6119.051. "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." *Kucinich v. Cleveland Regional Sewer Dist.*, 64 Ohio App.2d 6, 410 N.E.2d 795 (8th Dist. 1979), syllabus. Any amendment to the Charter cannot exceed the authority conferred by R.C. Chapter 6119.

{¶65} Here, the Sewer District's board, whose composition is largely unknown to the general public, met and decided the long-term future of all water management in the region well into the next generation.

{¶66} There is no question the Sewer District and many of its individual board members have done great things over the years for the region. There is also no doubt that there have been problems that must be addressed. The sheer size and power of the Northeast Ohio Regional Sewer District[11] is daunting. The consent decree the District signed with the Federal Environmental Agency in 2011 is enlightening:

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[11] Also known as "NEORSD."

NEORSD serves all or part of 62 communities and over one million people in a 350 square-mile tributary area, 80 square miles of which is served by combined sewers. NEORSD is responsible for operation and maintenance of 305 miles of interceptor sewers including 40 miles of intercommunity relief sewers. The system includes 126 permitted combined sewer overflow outfalls and 26 automated regulators. These facilities were built as early as 1876.

NEORSD is responsible for operation and maintenance of three WWTPs [waste water treatment plants], Easterly, Southerly and Westerly, which were built in 1922, 1928, and 1922 respectively. Improvements to these plants have been made continuously.

NEORSD is also responsible for operation and maintenance of the Combined Sewer Overflow Treatment Facility (CSOTF) located near the Westerly plant, which was constructed in 1983.

NEORSD states that it has invested over $2.0 billion in facilities and collection system improvements since 1972, and has spent over $850 million to reduce CSO discharges by nearly 50%.

NEORSD states that between 1972 and 2006, NEORSD constructed the Northwest Interceptor, Cuyahoga Valley Interceptor, Southwest Interceptor and Heights/Hilltop Interceptor. These interceptors have diverted approximately 1.65 billion gallons of sanitary flow out of the combined system directly to the WWTPs.

In addition, NEORSD states that it has taken certain incremental steps to reduce CSO discharges that it believes are in compliance with EPA's CSO Policy. It states that these steps are:

(a) NEORSD completed a system-wide CSO Facilities Plan Phase I Study in 1994;

(b) Pursuant to its CSO NPDES Permit, NEORSD's CSO Operational Plan was submitted in 1998 and approved by Ohio EPA in 1999;

(c) In 1995 NEORSD began developing its CSO Long Term Control Plan, which is embodied in separate Facilities Plans for the Mill Creek, Westerly, Southerly and Easterly sewersheds. Facility planning efforts included interceptor inspection and evaluation, extensive system investigation,

mapping and flow monitoring during facilities planning, and sewer and stream modeling;

(d) NEORSD submitted for Ohio EPA approval the Mill Creek and Westerly Facilities Plans in 1999, and the Southerly and Easterly Facilities Plans in 2002;

(e) In 2008 NEORSD completed its studies of feasible alternatives to minimize wet weather bypasses at the Southerly and Easterly WWTPs;

(f) Implementation of the District's facilities plans has included rehabilitation and early action projects in all three treatment plant service areas. The early action projects have controlled approximately 480 million gallons of CSO;

(g) NEORSD has completed construction of the major portion of the Mill Creek Tunnel, which is designed to reduce overflows to Mill Creek by over 500 million gallons per year.

NEORSD states that it has imposed appropriate and necessary rate increases to pay for these efforts. The District states that it has raised rates in 17 out of the last 20 years, in amounts varying from 4.5% to 22.2%, resulting in rate increases during this period of 350%.

See Case: 1:10-cv-02895-DCN Doc #: 23 Filed: 07/07/11.

{¶67} The view that an entity with the size and expanse of the Sewer District could redefine its own existence through Title V from the confines of a boardroom with limited oversight and review is not supported by R.C. Chapter 6119. While local school boards and municipal entities struggle with limited budgets, the Sewer District expands its authority and imposes its will on constituents with limited oversight and control. Clearly, if regional entities like the Sewer District are going to expand their power and redefine their purpose, albeit for a claimed good purpose, it should be accomplished by the legislature's defining the terms and the scope of authority of these entities to make

these changes. Further, long-term stormwater management is interrelated with regional expansion and what some have termed "urban sprawl." Clearly, if one or the other is to be comprehensively addressed, it must be done with authority conferred by the legislature.

{¶68} Accordingly, we find that Title V exceeds the express statutory authority granted to the Sewer District under R.C. Chapter 6119 and the authority conferred under the Charter. We further find that the stormwater fee is an unauthorized charge. Appellant's first, second, and third assignments of error are sustained.

2. Title V and Constitutional Provisions

{¶69} Having already sustained the first, second, and third assignments of error, we need not address the constitutional challenges raised by appellants. Accordingly, we find the fourth assignment of error is moot.

3. Denial of Motion to Dismiss based on Failure to Join all Property Owners

{¶70} For their fifth assigned error, the appellants contend that the trial court erred in denying their motion to dismiss for lack of subject matter jurisdiction because all of the individual property owners were not named as parties. We disagree.

{¶71} Civ.R. 19(A) governs "[p]ersons to be joined *if feasible*," and provides in part as follows:

> A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to

> protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee.

(Emphasis added.)

{¶72} Joinder of all the thousands of property owners was not feasible, and the property owners' interests were protected by the community law directors. *See* R.C. 733.53 ("[t]he city director of law, when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of the city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute").

{¶73} In light of the above, the fifth assignment of error is overruled.

4. Post-Trial Amendments

{¶74} In their sixth and final assignment of error, the appellants contend that the trial court erred when it oversaw post-trial amendments to Title V.

{¶75} The trial court's February 2012 judgment concludes, in part, as follows: "[t]he Court will set a conference within 30 days and hear proposed changes to Title V * * *. Upon its conclusion, [the District] shall submit a proposed journal entry not inconsistent with this opinion."

{¶76} The appellants filed notices of appeal from the February 2012 judgment, but this court dismissed the appeals as not being taken from a final order because the trial court contemplated further action. *N.E. Ohio Regional Sewer Dist. v. Bath Twp.*, 8th

Dist. Cuyahoga Nos. 98108 and 98112, motion Nos. 453509 and 453511, respectively. The appellants filed motions to reconsider, which this court denied, stating as follows:

> The trial court's opinion on February 15, 2012 specifically directs that, at the conclusion of a future hearing, the "[p]laintiff shall submit a proposed journal entry not inconsistent with this opinion." The opinion clearly contemplates that future action must be taken before any judgment of the court becomes final. Therefore, it is not an appealable order.

Id. at motion Nos. 453917 and 453855.

{¶77} In light of the above, the trial court's February 2012 judgment was not its final judgment and its subsequent judgment issued in June 2012 was proper. The seventh assignment of error is, therefore, overruled.

B. The Sewer District's Cross-Appeal

{¶78} In the trial court's February 2012 opinion, which it issued after the bench trial, the court found that certain provisions in Title V needed to be modified; the court charged the District with making the modifications before legally implementing Title V. The District revamped the offending provisions, which were presented to the trial court in a June 2012 report. The trial court found the District's revisions acceptable and adopted them in its June 2012 final judgment. The District's assignments of error relate to findings the trial court made in its February 2012 opinion.

{¶79} Under its assignments of error, the District contends that (1) the trial court erred in finding that there was no rational basis for distinguishing between residential property owners and nonresidential property owners with respect to the stormwater fee; (2) the trial court had no legal basis for requiring the District to provide the school

systems with appropriate curricula for grades 1–12; (3) the trial court had no legal basis for requiring the District to come up with a formula for accrediting the costs of licensed engineers for completing any applications for credit; and (4) the trial court had no legal basis for requiring the District to revise, or to increase the amount of, the community cost-share set forth in Title V.

{¶80} Since the trial court rendered its decision, the District voluntarily adopted changes to Title V that rendered its assignments of error moot. Generally, an appeal from a judgment with which the appellant has voluntarily complied renders the appeal moot. *Sunkin v. Collision Pro, Inc.*, 174 Ohio App.3d 56, 65-66, 2007-Ohio-6046, 880 N.E.2d 947, citing *Am. Book Co. v. Kansas*, 193 U.S. 49, 52, 24 S.Ct. 394, 48 L.Ed. 613 (1904). In any event, because we have already determined that Title V is invalid, we need not address the District's assignments of error.

{¶81} Nonetheless, we do express concern over the trial court's revisions to Title V in an effort to correct what the court viewed as infirmities. It is not within the province of the court to draft such measures. Moreover, any expansion of the Sewer District's powers, including the allowance for implementation of a stormwater management program and the parameters thereof, are matters that must be determined by the legislature.

VIII. Conclusion

{¶82} The trial court's ruling on the motion to dismiss is affirmed. We reverse the trial court's decision granting partial summary judgment in favor of plaintiff-appellee/cross-appellant and its decision denying the motion for a permanent injunction. The judgment of the trial court on the declaratory action is reversed; judgment is entered in favor of appellants as follows:

1. The Sewer District is enjoined from implementing Title V and its Regional Stormwater Management Program. The Sewer District had no authority under R.C. Chapter 6119 or its Charter to enact it.
2. The Sewer District is enjoined from implementing, levying, and collecting its stormwater fee. The Sewer District has no authority under R.C. Chapter 6119 or its Charter to enact said fee.

{¶83} Affirmed in part; reversed in part.

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

KENNETH A. ROCCO, J., CONCURS (WITH SEPARATE OPINION);
LARRY A. JONES, SR., P.J., DISSENTS (WITH SEPARATE OPINION)

KENNETH A. ROCCO, J., CONCURRING:

{¶84} While I agree with the majority opinion's disposition of this appeal, I write separately only because I disagree with the majority opinion's characterization of the Sewer District's actions in ¶ 47. Using the word "usurp" to describe what the Sewer District sought to accomplish is too strong.

{¶85} In my view, the district simply was making a well-meaning effort to deal with Northern Ohio's need for clean water. That need should be a high priority in this state, especially in light of the fact that Lake Erie and its watercourses arguably are Ohio's greatest natural resource.

{¶86} As the majority opinion suggests, the need for clean water is one that can no longer be handled locally. The Ohio legislature, nevertheless, delegated most of the responsibility of safeguarding this natural resource to local governments, thus abdicating its proper role. Nature abhors a vacuum. So, too, apparently, does the Sewer District. Because I believe that the District merely was making a misguided attempt to deal with a comprehensive problem that affects the health and welfare of the citizens of this area, I would choose to describe the Sewer District's action as having inappropriately assumed the mantle of responsibility from which the government of the state of Ohio has walked away.

LARRY A. JONES, SR., P.J., DISSENTING AND CONCURRING:

{¶87} Respectfully, I dissent as to the decision to sustain the first, second, and third assignments of error of appellants' appeal. I concur as to the decision to overrule (1) appellants' fifth assignment of error regarding the denial of their motion to dismiss based on failure to join all property owners and (2) appellants' sixth assignment of error regarding the trial court's jurisdiction to make post-trial amendments. Moreover, while I agree with the majority that the appellees' cross-appeal is moot, I do not share the same concerns about issues raised in the appeal as the majority does.

I. Authority for Title V

{¶88} The powers granted to a regional water and sewer district under R.C. Chapter 6119 are "very broad." *Wyatt v. Trimble Twp. Waste Water Treatment Dist.*, 4th Dist. Athens No. 1521, 1992 Ohio App. LEXIS 5749, *6 (Nov. 3, 1992). The majority agrees that the "Sewer District's authority is broad," but it is "unable to conclude that the legislature intended to allow the Sewer District to expand its statutory authority through Title V and its RSM Program and impose an unauthorized charge." Majority Opinion, ¶ 55.

{¶89} I do not believe that Title V is an unlawful expansion of the District's statutory authority; rather, I believe that it is specifically authorized under the governing statutory authority, both procedurally[12] and as I will discuss in more detail, substantively.

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[12] *See* R.C. 6119.051(A), providing that "[a]t any time after the creation of a water and sewer district, the district, after action by its board of trustees, may file a petition in the court of common pleas requesting the order of such court permitting the district to: (A) Increase or add to its purposes

Further, I believe that the District's Program is authorized under its Charter. I also do not believe that the fee imposed under the Program is an unauthorized charge.

Express Authority under R.C. Chapter 6119

{¶90} The purpose of a regional water and sewer district is for "either or both" of the following purposes: "(A) [t]o supply water to users within and without the district"; and "(B) [t]o provide for the collection, treatment, and disposal of waste water within and without the district." R.C. 6119.01(A) and (B). "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." (Emphasis added.) R.C. 6119.011(K).

{¶91} The majority holds that under the statutory definitions, in order to qualify as waste water, storm water must be mixed with water containing sewage or industrial waste or other pollutants or contaminants. I disagree.

{¶92} It is true that, generally, the word "and" is a conjunctive. *McIntire v. Patrick*, 85 Ohio Misc.2d 83, 87, 684 N.E.2d 391, 1997 Ohio Misc. LEXIS 274 (C.P.). But the conjunctive "and" and the disjunctive "or" are sometimes used interchangeably. *See Skiba v. Mayfield*, 61 Ohio App.3d 373, 378, 572 N.E.2d 808 (11th Dist.1989). "[W]e are not empowered to read into the law that which is not there, and it is our duty to give effect to the plain meaning of the statute's language." (Citation omitted.) *Id.*

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heretofore approved by the court so long only as its purposes are those described in section 6119.01 of the Revised Code * * *."

Statutes should not be construed to produce unreasonable or absurd results. *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382, 384, 481 N.E.2d 632 (1985).

{¶93} In interpreting the definition of R.C. 6119.011(K) under its plain language, I would find that waste water is (1) "any storm water" or (2) "any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water."

{¶94} I believe to find otherwise would create an absurd result. Specifically, if the District could manage storm water only if it was mixed with polluted or contaminated water, then it would also necessarily only be able to manage polluted or contaminated water if it was mixed with storm water. I do not think that the General Assembly intended such a result.

{¶95} I am not persuaded by the majority's reliance on *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852, 840 N.E.2d 226 (1st Dist.), which was decided on a statute-of-limitations issue on the plaintiffs-property owners' claims of negligence and trespass due to flooding of their driveway, yard, and home.

{¶96} In deciding the limitations issue, the court had to consider whether there was a "legal distinction between storm water when it is above the ground and storm water when it is channeled through underground pipes." *Id.* at ¶ 24. The plaintiffs contended that surface water becomes sewer water once it enters an underground pipe, but the court disagreed, stating that "[s]ewage is defined as any substance containing excrement, while waste water means any storm water containing sewage or other pollutants." *Id.* at ¶ 29.

The majority relies on this narrow statement for its finding that storm water must contain pollutants or contaminants.

{¶97} But, the issue in *Reith* differed from the issue here, and if the First Appellate District intended to hold that in all instances waste water can *only* be storm water mixed with polluted water, I respectfully disagree.

{¶98} Morever, I am not persuaded by the majority's citation to the District's definitions in *other* Titles of its Code of Regulations to support its finding that waste water is limited to only storm water mixed with pollutants or contaminants. The definitions in those Titles apply to those Titles. I believe for our purpose, we are restricted to the definition of waste water set forth in R.C. 6119.011(K). Under that section, I would find that waste water can be (1) "any storm water" or (2) "any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water."

{¶99} The majority states that the General Assembly has charged other statutorily created agencies such as watershed districts under R.C. 6105.12 or conservancy districts under R.C. 6101.04 to deal with stormwater-related issues. But neither a watershed district created under R.C. 6105.12 nor a conservancy district created under R.C. 6101.04 have the *exclusive authority* to implement a program such as the District's Program. Therefore, the issue in this case is whether the District has the authority to implement its Program.

{¶100} I am also not persuaded by the proposition that the governing statutes mandate that waste water be "'collected' and 'treated' and 'disposed of,' conjunctively," and that a regional sewer district is an "entity that exists to do that "'collecting, treating, and disposing of waste water.'"

{¶101} In my view, the plain meaning of R.C. 6119.01(B) grants the District authorization to collect, treat, or dispose of waste water. To hold that it must do all three conjunctively would create absurd results.

Title V vis-a-vis the District's Charter

{¶102} The Charter states that the District's purpose was the "establishment of a total wastewater control system for the collection, treatment and disposal of wastewater within and without the District * * *." Exhibit A to 1975 Charter, ¶ 4. The Charter further provides that the District

> shall have regulatory authority over all local sewerage collection facilities and systems in the District, including both storm and sanitary sewer systems. This authority shall be exercised by the District through rules and regulations adopted by the Board of Trustees pursuant to Chapter 6119 of the Ohio Revised Code.

Id. at ¶ 6(m)(1).

{¶103} Moreover, the Charter charged the District with developing a plan for regional storm water management:

> [t]he 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 ¶ 5(m)(3).

{¶104} The charge given to the District in its Charter "shares kinship" with Title V, which stated purpose is to "establish the Regional Stormwater Management Program through which the District and each Member Community served by the Regional Stormwater Management Program shall work in a cooperative manner to address stormwater management problems." Title V, Section 5.0303. Further, Title V describes the Program as

> [a]ll 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 District's service area.

Id. at Section 5.0219.

{¶105} Given the above, I would hold that the District's Charter authorized implementation of its Program as set forth in Title V.

Ownership, Control, or Responsibility for Locally-Controlled Systems without Local Community's Written Consent

{¶106} I do not see the District's Program as conflicting with the requirement, as stated in the Charter, that the District cannot own, control, or be responsible for locally-controlled systems without the local community's written consent.

{¶107} Title V explicitly provides that the District's member communities will remain responsible for owning and maintaining their own facilities and systems. For example, section 5(k) of the Title provides as follows: "[i]ndividual suburban communities will retain ownership of all local suburban facilities, subject to the

provisions of subsection 'm' below." Subsection m provides that the District will not be responsible for any local sewerage collection facility absent written consent between the District and the respective local community.

{¶108} Thus, under the plain language of Title V each member community will remain responsible for maintaining its local sewerage collection facilities and systems. To that end, the District stipulated on the record that it will not undertake any construction projects under Title V, without the consent of the member community in which the project will be undertaken. *See* April 2011 opinion at 3; February opinion at 12.

II. The Stormwater Fee Under Title V

{¶109} I disagree with the majority's finding that the stormwater fee is "not a legitimate 'rental or other charge' under R.C. 6119.09." Majority Opinion, ¶ 56.

{¶110} The majority finds that *Wyatt*, 4th Dist. Athens No. 1521, 1992 Ohio App. LEXIS 5749, is completely distinguishable from this case because the issue there involved a tap-in fee for premises to be connected to an existing sanitary sewer and waste water treatment project. The fact remains, however, that the Fourth Appellate District concluded that a sewer district's powers under R.C. Chapter 6119 are "very broad." The broadness, as it relates to fees or charges, is indicated by the very use of the words "other charge" in R.C. 6119.09. The "other charge" in *Wyatt* was a tap-in fee, while the "other charge" here was a fee for stormwater management. I believe both are permissible under R.C. Chapter 6119.

{¶111} Further, I believe that the projects that will be funded through the fees in this case are for the benefit of the member communities and property owners.

{¶112} For example, one of the District's experts, Hector Cyre,[13] was of the opinion that projects under the Program would "provide service to not only the member communities individually and cumulatively, but to the property owners within those communities."

{¶113} Another example of the benefits of the District's Program from the testimony of two mayors from the non-appealing member communities.[14] The mayors testified about "serious" regional stormwater problems in their communities, such as home and yard flooding, damage to the Metroparks, road damage, and degradation and siltation of the Shaker Lakes and dams. The mayors testified that they believed the District's Program will help to alleviate these problems and, thus, provide an "enormous benefit" not only to their residents, but to residents of the region generally.

{¶114} Because I believe that the District's Program was authorized under R.C. Chapter 6119 and that it provides a benefit, I would not be persuaded by the appellants' argument that the District was required to pay for its Program through other revenue-generating procedures. According to the appellants, the District should have

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[13]Cyre, founder and owner of Water Resource Associates, has provided consultation for hundreds of stormwater utility programs throughout the United States and internationally since the early 1970s.

[14]*See* the testimony of Earl Leiken, Mayor of Shaker Heights and Bruce Rinker, Mayor of Mayfield Village.

sought to raise revenues through the procedures outlined in R.C. 6119.17, 6119.18, or 6119.42.

{¶115} R.C. 6119.17 and 6118.19 require voter approval; but, they each are for a tax. For the reasons I will discuss below, I would find that the fee here is not a tax.

{¶116} R.C. 6119.42 governs special assessments and provides in part that:

> [a]ny regional water and sewer district may levy and collect special assessments as provided in Chapter 6119 of the Revised Code. The board of trustees of such district may assess upon abutting, adjacent, contiguous, or other specially benefited lots or lands in the district all or any part of the cost *connected with the improvement of any street, alley, or public road or place, or a property or easement of the district* by constructing any water resource project or part thereof which the board declares conducive to the public health, safety, convenience, or welfare * * *.

(Emphasis added.)

{¶117} Pursuant to the plain language of the statute, the construction of a water resource project is incidental to improving "any street, alley, or public road or place, or a property or easement of the district." Such is not the circumstance here and R.C. 6119.42 is, therefore, not applicable.

{¶118} The appellants also contend that the District could have issued water resource revenue bonds and notes under R.C. 6119.12. The District could have; but it chose to fund its Program through a fee ("other charge") imposed under R.C. 6119.09, and I would find that proper.

{¶119} Further, I would find untrue the appellants' contention that, under the District's Charter, the only fees the District are allowed to charge are sewer fees.

{¶120} The Charter specifically provides that

> [a]ny projects not financed through the Ohio Water Development Authority, State of Ohio or Federal Government would be financed in such a manner as may be deemed appropriate by the Board of Trustees.

Exhibit A to 1975 Charter, at ¶ 5(e)(3).

{¶121} The District's Board of Trustees unanimously approved the storm water fee on January 7, 2010, and therefore, I believe the fee is proper under the Charter.

{¶122} The majority declines to address the application of *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, to this case, but I believe it is instructive. In *Drees*, the Ohio Supreme Court held that "impact fees" imposed by Hamilton Township, a limited-home-rule township, were a prohibited form of taxation.

{¶123} The township's board of trustees passed a resolution that set forth a schedule of fees to be charged to applicants for zoning certificates for new construction or development. Four categories of fees were included in the resolution: (1) a road-impact fee; (2) a fire-protection-impact fee; (3) a police-protection-impact fee; and (4) a park-impact fee. The purpose of the resolution was set forth as follows:

> The purpose of the impact fee is to benefit the property by providing the Township with adequate funds to provide the same level of service to that property that the Township currently affords previously developed properties.
>
> The Resolution assesses an impact fee to previously undeveloped property, and property undergoing redevelopment, to offset increased services and improvements because of the development.

Id. at ¶ 3.

{¶124} The amount of the fees varied based on the land use. The fees collected were to be deposited in impact fee accounts, rather than into a general fund. Each of the

four types of fees had its own account, and the funds in each of the four accounts were to be used only for the purpose of its accompanying category.

{¶125} The trial court and the Twelfth Appellate District upheld the imposition of the fees, finding, among other things, that they were not a prohibited form of taxation. The Ohio Supreme Court disagreed, however.

{¶126} The court relied on its analysis in *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St.3d 111, 579 N.E.2d 705 (1991), in determining whether the impact fees were a fee as opposed to a tax. At issue in *Withrow* were assessments imposed by the Petroleum Underground Storage Tank Release Compensation Board on owners and operators of underground storage tanks. The assessments helped fund the Petroleum Underground Storage Tank Financial Assurance Fund, whose purpose was to reimburse the owners and operators of the tanks for the costs of corrective actions taken when petroleum was released into the environment, and to compensate third parties for bodily injury or property damage, or both, resulting from such a release. The proceeds from the assessments were segregated from the general fund of the state treasury.

{¶127} The Ohio Supreme Court cited four reasons for finding that the assessments in *Withrow* were a fee rather than a tax. First, the court noted that the assessments were imposed to advance regulatory measures that addressed the environmental problems caused by the leaking underground storage tanks. Pursuant to statutory regulations, owners and operators of underground storage tanks were strictly

liable to take corrective measures when leaks occurred and to pay damages for the leaks. The fund into which the fees were paid ensured that owners and operators could meet those statutory requirements.

{¶128} Next, the court noted that the assessments were not placed in the general fund and were to be used only for "'narrow and specific purposes, all directly related to [underground storage tank] problems.'" *Drees* at ¶ 18, quoting *Withrow* at 116-117.

{¶129} Third, the court stated that a "'fee is a charge imposed by a government in return for a service it provides.'" *Drees* at ¶ 19, quoting *Withrow* at 117. In *Withrow*, the fund into which the fees were paid "operated essentially, as insurance coverage for catastrophic damage caused by leaking tanks." *Drees* at ¶ 23.

{¶130} And fourth, the court was "persuaded by the fact that when the unobligated balance in the fund exceeded a certain amount, there would be no assessment for that year." *Drees* at ¶ 20. Likewise, if the fund "dipped below a certain amount, the assessing authority was permitted to charge a supplemental assessment." *Id.* In light of this, the court noted that the "'assessment appears to function more as a fee than as a tax, because a specific charge in return for a service is involved.'" *Drees* at *id.*, quoting *Withrow* at *id.*

{¶131} Applying *Withrow* to the facts in *Drees*, the court found that the township's assessments were taxes. The court first noted that the assessments the township imposed were not in "furtherance of statutes designed to protect the public from harms associated with a specific industry," as compared to the fee imposed in *Withrow*. *Drees* at ¶ 21.

{¶132} Second, the court noted that although the funds collected by the township were segregated and not placed into the general fund, the funds were "spent on typical township expenses inuring to the benefit of the entire community." *Id.* at ¶ 22.

{¶133} Next noted by the court was that the fee imposed by the township did not provide the assessed party any "particular service above that provided to any other taxpayer * * *." *Id.* at ¶ 23. In other words, as taxpayers and residents of the township, the assessed parties were entitled to police and fire protection and use of the township's parks and roadways: "targets of the assessment receive no greater benefit than any other taxpayer despite the payment of the additional assessment." *Id.*

{¶134} In regard to the fourth and final *Withrow* factor, the court in *Drees* found that the spending of the funds collected through the township's assessment was based on the "whims of government," as opposed to the assessment in *Withrow*, which was "tied to events." *Id.* at ¶ 24.

{¶135} Considering this case in light of *Withrow* and *Drees*, I would find that the charge here is more like the assessment in *Withrow*, that the Ohio Supreme Court held was a fee and not a tax.

{¶136} First, the fee is being imposed by the District to advance regulatory measures. Specifically, the purpose of Title V is to "establish the Regional Stormwater Management Program through which the District and each Member Community served by the Regional Stormwater Management Program shall work in a cooperative manner to address stormwater management problems." Title V at Section 5.0303.

{¶137} A regional sewer district is an

> independent political subdivision created under R. C. Chapter 6119, and * * * everything related to it is governed by R. C. Chapter 6119. This includes its formation and operation. The cities, counties, townships and the courts are bound by the provisions of R. C. Chapter 6119, and both the formation of the district and its operation must be conducted within the confines of R. C. [C]hapter 6119.

Kucinich v. Cleveland Regional Sewer Dist., 64 Ohio App.2d 6, 15-16, 410 N.E.2d 795 (8th Dist.1979).

{¶138} Thus, Title V is regulatory in nature because it is "designed to address stormwater problems," aligned with the purpose of providing for the "collection, treatment, and disposal of waste water" under R.C. 6119.01(B).

{¶139} The second *Withrow* factor suggesting that the charge is truly a fee rather than a tax is present here. That is, the funds generated from the fees will be maintained in a separate account "dedicated to the implementation and administration of the Regional Stormwater Program * * *." Title V at Section 5.0701.

{¶140} Third, the charge imposed by the District is in return for the specific service of managing stormwater runoff, which suggests that it is a fee rather than a tax. And fourth, the final *Withrow* factor suggests that the District's charge is a fee rather than a tax. Specifically, the charge is based on the increased demand for stormwater services, and the fee that each property owner is required to pay under Title V is in return for the specific service of managing the stormwater runoff.

{¶141} In light of the above, I would hold that the charge imposed by the District is not a tax, but rather, a permissible "other charge" under R.C. 6119.09.

III. Title V and Constitutional Provisions

{¶142} Because the majority sustains the appellants' first, second, and third assignments of error, it does not address the constitutional challenges raised by appellants. Because I disagree with the majority, I would review their constitutional challenges and find them to be without merit for the reasons briefly discussed below.

A. Equal Protection

{¶143} The appellants contend that Title V violates the Equal Protection Clauses of the United States and Ohio Constitutions because it treats similarly-situated persons differently in that it: (1) is imposed only on property owners within the District's sanitary service area, as opposed to all property owners within the District's county-wide authority; (2) treats residential and non-residential property owners differently without a rational basis for doing so; (3) discriminates against small lot owners; (4) ignores the impact of stormwater runoff from non-impervious surfaces; (5) exempts certain properties without a rational basis; (6) offers credits without a rational basis; and (7) discriminates against some property owners who, for "remedial work benefitting the general public and others who do not pay," will be forced to "pay to fix runoff problems others create."

{¶144} "[A] statute that does not implicate a fundamental right or a suspect classification does not violate equal-protection principles if it is rationally related to a legitimate government interest." *State v. Williams*, 126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, ¶ 39, citing *Eppley v. Tri-Valley Loc. School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 15. Here, neither a

fundamental right nor a suspect classification are implicated; therefore, review of Title V should determine whether it is rationally related to a legitimate government interest.

{¶145} "Ohio courts grant substantial deference to the legislature when conducting an equal-protection rational-basis review." *Williams, supra* at ¶ 40, citing *State v. Williams*, 88 Ohio St.3d 513, 531, 2000-Ohio-428, 728 N.E.2d 342.

Application only to Property Owners in District's Sanitary Service Area

{¶146} The appellants first contend that the Program violates equal protection safeguards because, although the "original Charter gave the Sewer District authority throughout Cuyahoga County," the current Program "applies only to properties within the District's Service Area."

{¶147} Specifically, the appellants contend that "multiple arbitrary classifications among Sewer District properties" will be created because Cuyahoga County property owners in the non-member communities and excluded portions of member communities will not be required to pay the fee, while some property owners in member communities will be required to pay the fee, despite all the property owners being located in the same watersheds in the same county.

{¶148} The District's authority is limited to its member communities, who voluntarily joined the District in whole or part. Thus, I would find the appellants' argument is without merit.

Residential vs. Non-Residential Property Owners

{¶149} The appellants contend that the District's formulas for charging residential and non-residential properties "reveals their arbitrary, discriminatory effects." The trial court agreed, and ordered an adjustment. That adjustment is the part of the District's cross-appeal and will be addressed in my discussion there.

Small Lot Owners

{¶150} The appellants also contend that the District's fee schedule discriminates against small lot owners. They rely on the testimony of Michael Clar, their expert witness, who testified that the fee for small lot owners is inequitable because larger lots will produce proportionately more runoff-water than is accounted for in the District's formulary. The District presented the testimony of Hector Cyre, Andrew Reese, and Francis Greenland, however, that I would find demonstrated a rational basis for the difference.

{¶151} For example, Reese, a hydrologist who has worked primarily in the area of municipal stormwater engineering, testified that, in addition to being the most common way for a district to calculate the fee, the District considered the particular situation of the member communities and used the system it found most "equitable" and "accurate." Reese testified that other options were considered along with the impervious surface method, but based on the District's particular situation, the District concluded that the impervious surface measurement method would most fairly distribute the costs.

Exemptions

{¶152} Further, based on testimony of some of the District's witnesses, I would find a rational basis existed for the exemptions, which are for the following properties: public road rights-of-way; airport runways and taxiways; railroad rights-of-way; parcels with less than 400 square feet of impervious surface; and "[p]arcels whose use has been designated as a Non-Self Supporting Municipal Functions owned by Member Communities."

{¶153} Greenland, the director of watershed programs for the District, testified that public roads are exempt from the Program because they function as part of the storm drainage system, and are highly engineered and designed to deal with drainage issues and the proper conveyance of stormwater. Greenland also testified that public roadways, unlike private ones, are routinely maintained by local governments through allocation of public funds, thus, the reason for their exemption.

{¶154} Further Cyre, founder and owner of Water Resource Associates, testified about the tendency to exempt public roads. According to Cyre, public roads are often exempt because the municipality has been the "primary installer of the stormwater infrastructure," and has "borne a large proportion of the capital cost of putting storm sewers and inlets and catch basins in." Moreover, the street surface itself is sometimes a component of the stormwater system.

{¶155} Cyre also testified about the exemption for airport runways and taxiways. According to Cyre, "airports are among the most controlled sites around," meaning that they have runway areas, ramps, tarmacs, fueling stations, and de-icing pads, all of which

"get stormwater off of the surfaces and into a control facility" such as a detention facility or wetland.

{¶156} Greenland testified about the exemption for railroad rights-of-way as follows: "[r]ailroad rights-of-way essentially are large linear ribbons, with highly engineered ballasts. Any railroad is designed to really mimic an impervious surface. It gets the water up and out really, in their linear, ribbon-like nature."

{¶157} Greenland further testified about the exemption for "non-self-supporting municipal functions."[15] Greenland explained that the exemption was based on the exemption in the court order establishing the District.[16] Further, the exemption was a cost-cutting measure for the municipalities.

{¶158} In regard to the exemption for parcels with less than 400 square feet of impervious surface, Greenland testified that the District chose that cut-off because many of those properties did not even show on the aerial photographs, which is how the impervious surface measurements are taken.

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[15]"Non-self-supporting municipal functions" are defined as "[m]unicipal functions of Member Communities that are exempt from sewage charges as provided for in the judicial orders establishing the District. This exemption applies to municipal buildings which can be shown to house functions that are not proprietary in nature, including city halls, police and fire departments, service garages, and recreational facilities such as parks, playgrounds, indoor recreational facilities, swimming pools, and ice rinks." Title V, Section 5.0214.

[16]The original court order establishing the District provided: "All non-self supporting municipal functions of the City of Cleveland shall continue to receive sewage service free of charge and the Board of Trustees shall afford the same treatment to similar non-self supporting municipal functions of the suburban municipalities as soon as possible after it commences operation of the system."

Stormwater Runoff from Non-Impervious Surfaces

{¶159} According to the appellants, the District's program is also unconstitutional because it "ignores the significant stormwater runoff impact from non-impervious surfaces." The District presented testimony demonstrating why impervious surfaces are used. Through that testimony, it was explained that because the regional system consists mostly of natural watercourses, it was more fair and equitable to use impervious surfaces to calculate the fee. Prior to arriving at that determination, other funding mechanisms were evaluated. But it was determined that basing the fee solely on impervious surfaces would be the most equitable way to apportion the costs of the Program. I would hold that the District's determination was constitutionally sound and proper under both R.C. Chapter 6119 and the District's Charter.

Stormwater Education Credit

{¶160} The appellants contend that the stormwater education credit "lacks all trace of a connection to either the school's runoff impacts or to the Sewer District's purported * * * goals." I disagree. The credit was designed to educate youth about utilizing stormwater management practices, such as the use of rain barrels or rain gardens. With education about these practices, the District hopes that future demand on the stormwater system will be reduced, which is in line with the District's goals.

B. Substantive Due Process

{¶161} As with the equal protection review, the appellants' claims of substantive due process violations is under a rational basis standard because neither a fundamental right nor suspect classification is implicated. *Akron v. Rasdan*, 105 Ohio App.3d 164,172-173, 663 N.E.2d 947 (9th Dist.1995).

{¶162} The crux of the appellants' claim of due process violation is that the fees are not equitable and the "impervious surface calculation method" is arbitrary and unreasonable. I will discuss the extent to which the fees differ between residential and non-residential property owners in addressing the District's cross-appeal. On all other grounds, for the reason discussed herein, I would find the appellants' claim of due process violation meritless.

C. Home Rule Amendment and Utility Power

{¶163} Article XVIII, Section 3, of the Ohio Constitution is commonly referred to as the Home Rule Amendment, and authorizes municipalities

> to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

{¶164} Article XVIII, Section 4, of the Ohio Constitution grants municipalities utility power as follows:

> [a]ny municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service.

{¶165} The appellants contend that Title V violates the Home Rule Amendment and its right to power over their utilities. I disagree.

{¶166} Of significant importance to my resolution of these issues is the fact that the District's member communities *voluntarily* joined the District. *See Seven Hills v. Cleveland*, 1 Ohio App.3d 84, 90, 439 N.E.2d 895 (8th Dist.1980) (stating that R.C. Chapter 6119 "must necessarily be construed as not contemplating involuntary inclusion."). In joining the District, the communities agreed that the District "shall have regulatory authority over all local sewerage collection facilities and systems in the District, including both storm and sanitary sewer systems." Title V, ¶ 5(m)(1). Moreover, under Title V, the District seeks collaboration with its member communities.[17] From my view, the District does not seek to manage stormwater runoff in a vacuum. And, in fact, many of the 56 member communities did collaborate with the District in developing the Program under Title V, and only 11 member communities are appealing. The remaining 80% of the member communities have voiced no objection to the trial court's judgments.

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[17] *See, e.g.*, Title V, Section 5.0502, stating that the District's "services, programs, and initiatives shall be supportive of District and Member Community goals and objectives * * *"; Section 5.0504, stating that the District "shall establish Watershed Advisory Committees," the rules, policies and procedures for which "shall be available for Member Community review and comment"; Section 5.0504(b), stating that the Watershed Advisory Committee "shall * * * [a]ssist the District in determining Regional Stormwater Management Program activities and priorities in each watershed. The recommendations of Watershed Advisory Committees shall be considered during the preparation of each Stormwater Master Plan"; Section 5.0506, providing that construction projects "shall involve Member Community and Watershed Advisory input"; and Section 5.0508, requiring that member communities provide the district with plans for any stormwater management project and requiring that the District will review the plans and "provide and review comments * * *."

{¶167} By way of example of the District's collaboration with the member communities, and their response, in a chart summarizing "Round 1 Meetings" with city officials from the member communities, the support was overwhelmingly in favor of the District managing stormwater runoff issues, including support from some of the appealing communities. Under the comments from a February 2008 meeting with officials from one of the appealing communities, Bedford Heights, it was noted that the city was "[s]upportive, see[s] the need" and from an October 2007 meeting with officials from Brecksville, it was noted "[s]upportive. They see District can help them work with their neighboring communities, and with [the] Turnpike Commission."[18]

{¶168} Moreover, Section 5.0107 of Title V provides: "[n]othing in this Title shall be construed to infringe upon or supplant a Member Community's, or other local government's, power and responsibility, however derived, to plan, finance, construct, maintain, operate, and regulate the Local Stormwater System within their jurisdiction."

{¶169} In light of the above, I would overrule the fourth assignment of error.

IV. The District's Cross-Appeal

{¶170} I agree with the majority that an appeal from a judgment with which the appellant has voluntarily complied generally renders the appeal moot. *Sunkin v. Collision*

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[18]To be fair, the same chart noted that some of the appealing communities were opposed. For example, under the comments from a January 2008 meeting with Lyndhurst officials, it was noted: "We don't need this. No flooding problems except golf course, and we don't really care about them. You're 5 years too late." From a January 2008 meeting with Strongsville officials, it was noted, "[w]e'll be glad to help out in your 'study' but don't even think about charging a fee. It will drive commercial owners out of our city. We rely on them for taxes, and we're competing against Medina County."

Pro, Inc., 174 Ohio App.3d 56, 65-66, 2007-Ohio-6046, 880 N.E.2d 947 (9th Dist.), citing *Am. Book Co. v. Kansas*, 193 U.S. 49, 52, 24 S.Ct. 394, 48 L.Ed. 613 (1904). But I do not share the majority's concern about the trial court "overstepping" its boundaries to "draft legislative measures."

{¶171} As noted by the majority, the required process for implementing such a program as the one at issue here was for the District to file a petition with the common pleas court for amendment or modification of the plan of operation that originally created the District. *See* R.C. 6119.051. The District followed the process by filing this action. The trial court could accept the District's Program so long as the amendment or modification is in keeping with the purposes of R.C. 6119.01. *Id.*

{¶172} I believe, subject to the standard below, that after hearing and reviewing the voluminous testimony and exhibits presented during the bench trial, the trial court was within its authority to make amendments or modifications to the District's Program that were in line with the purposes of R.C. Chapter 6119.[19]

{¶173} I would review the trial court's modifications, therefore, like I would review any trial court judgment in a civil case; that is, to determine whether it is against the manifest weight of the evidence. *KeyBank Natl. Assn. v. Mazer Corp.*, 188 Ohio App.3d 278, 2010-Ohio-1508, 935 N.E.2d 428, ¶ 36 (2d Dist.). In the civil context, a judgment will not be reversed by a reviewing court as being against the manifest weight

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[19] *See Cleveland v. N.E. Ohio Regional Sewer Dist.*, 8th Dist. Cuyahoga No. 55709, 1989 Ohio App. LEXIS 3589 at * 10-*11 (Sept. 14, 1989), seeming to imply that a trial court does have authority under R.C. 6119.051 to make amendments or modifications of a sewer district's plan.

of the evidence if there is some competent, credible evidence going to all the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

Disparate Treatment of Residential and Non-Residential Property Owners

{¶174} In its first assignment of error, the District contends that the trial court erred in finding that there was no rational basis for distinguishing between residential property owners and non-residential property owners. I disagree.

{¶175} The District calculated the stormwater fee for each property using an "equivalent residential unit." Each unit represents 3,000 square feet of impervious surface. Under the District's initial plan, non-residential property owners were to be charged in multiples of the "equivalent residential unit," while residential property owners' "equivalent residential units" were established in three tiers.

{¶176} The District describes the fee as being based on "all impervious surfaces within the District's service area * * *" (Title V, Section 5.0223) "based on the incremental increase in the demand on the Regional Stormwater System caused by development on parcels of land." (District's Answer Brief, p. 11).

{¶177} I agree with the trial court that there was no rational basis for charging nonresidential property owners based on the exact amount of impervious surfaces on their property, while fluctuating the charge for residential property owners. The "incremental increase in demand" is not affected by whether the property owner uses the property for

residential or commercial purposes and, thus, there was no rational basis for treating the two groups differently.

{¶178} In light of the above, I would overrule the first assignment of error.

Stormwater Education Credit

{¶179} Under Title V, schools within the District that provide "*approved* stormwater pollution prevent curricula to their students that meet and maintain at least the minimum requirements of the Stormwater Fee Credit Policy Manual may receive a Stormwater Fee Credit * * *." (Italics added; underscore sic.) *Id.* at Section 5.0804(c).

{¶180} The trial court found that the credit was a "rational way to advance a legitimate governmental interest," but required the District to provide the curriculum. The District contends in its second assignment of error that the trial court had no legal basis for such an order. In light of the fact that the credit may only be earned by providing approved curricula that are compliant with the District's policy manual, I would find that the court's order was legally sound.

{¶181} I would overrule the District's second assignment of error.

Accrediting Costs for Licensed Engineers

{¶182} For its third assignment of error, the District contends that the trial court had no legal basis for requiring it to come up with a formula for accrediting the costs of licensed engineers for completing any applications for credit. According to the District, "reimbursing engineering costs was not factored into the District's plan for the Program and projected revenue requirements."

{¶183} I would find the trial court acted legally in requiring the accreditation, and limited it so that it would not be a financial burden to the District and thus counterproductive to its Program. Specifically, the trial court ordered that an engineer's credit cannot exceed 10 percent of the stormwater fee and the credit will only be available to nonresidential property owners, including school districts.

Increase in the Community Cost Share

{¶184} Under the "Community Cost-Share Program" in Title V, the District "shall form a financial account * * * that shall be for the aggregation and dissemination of funds derived from revenues collected from the Stormwater Fee and whose purpose is to provide funding to assist in Member-Community-requested and District-approved projects." Title V, Section 5.0901. The title initially required that at least 7.5 percent of the "total annual revenue collected in each Member Community shall be allocated to that Member Community * * *." *Id.* at Section 5.0903(a).

{¶185} In its February 2012 opinion, the trial court found that because "as much of 78 percent of the watershed may be outside of District control," the minimum 7.5 percent cost share was "unfair to member communities because many flooding problems are in areas that drain far less than 300 acres,[20] and the communities are in need of additional funds to deal with these local stormwater issues." The trial court ordered that

[20]"Regional Stormwater System" is defined under Title V, in part, to include "watercourses, stormwater conveyance structures, and stormwater control measures receiving drainage from three hundred (300) acres of land or more." *Id.* at Section 5.9218.

> [e]ither the meaning of 'regional' must be arrived at by means of a consensus of the District and its member communities or cost share must reflect an amount no less than 25 percent to member communities for local stormwater projects.

{¶186} I would find that the trial court's increase was legally sound. Sufficient evidence was presented demonstrating that the District's original 7.5 percent cost share was inadequate to address the problems that the District hopes to solve.

V. Conclusion

{¶187} I believe Title V was authorized under both the District's Charter and Ohio Law. As such, I respectfully dissent from the majority's decision to the contrary. Further, I also believe the trial court acted legally in making modifications to the Title. As such, I respectfully dissent from the majority's "concerns" in that regard.

{¶188} I concur with the majority's judgment affirming the denial of appellants' motion to dismiss based on failure to join all property owners. I also concur with the majority's judgment affirming the trial court's jurisdiction to make post-trial amendments.

{¶189} In light of the above, I would overrule all the assignments of errors presented in both the appellants' appeal and the appellees' cross-appeal and affirm the trial court's judgments in toto.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT	)	CASE NO. CV 10 714945
	)	
	)	JUDGE THOMAS J. POKORNY
Plaintiff	)	
	)	
vs.	)	
	)	
BATH TOWNSHIP, ET AL	)	
	)	JUDGMENT ENTRY
Defendants	)	(MOTION TO DISMISS)

This cause came on for hearing this 8th day of November, 2010 upon a Motion to Dismiss by Certain Opposition Defendants filed on June 25, 2010.

The Court has reviewed the Motion and Opposition which was filed on August 5, 2010.

In the first instance the Defendants argue that the Complaint should be dismissed for lack of subject matter jurisdiction, Civil Rule 12 (b) 1. The Defendants argue that the failure of the Plaintiff to join interested and necessary parties, (district property owners), renders the Court without subject matter jurisdiction. The Plaintiff maintains that such a finding would require it to serve hundreds of thousands of individuals with process. Plaintiff further argues that all district property owners are currently represented by elected public officials who are named as Defendants, herein.

In the same realm, Defendants have additionally argued the Complaint should be dismissed for failure to join governmental entities, (to wit: Cuyahoga County, County Engineer), who they claim have a legal interest in the outcome of the litigation.

The Plaintiff counters that neither entity has petitioned the Court to intervene.

In their second argument for dismissal Defendants maintain that the inclusion of the Petition for Amendment (ORC 6119.051) is procedurally improper, premature, impermissible, and will lead to confusion. They maintain it should therefore be dismissed at this time. Plaintiff argues that Defendants have failed to cite any legal authority to support their position. Further, Plaintiff offered a stipulation that the Defendants are not required to file an Answer to the Petition for Amendment.

Finally, Defendants argue that the Plaintiff's Petition cannot be combined with the Complaint because they each must be heard by different tribunals. The Plaintiff asserts that the Court has previously reserved judgment on this issue until disposition of the Complaint for Declaratory Judgment.

The Court makes the following findings with regard to the Motion to Dismiss:

1. The Member Communities are properly named as Defendants in the within Complaint for Declaratory Judgment and there is no necessity to name individual property owners as parties.
2. The Court has previously allowed the intervention of parties who have claimed a legal interest in the outcome of this litigation.
3. All property owners within the district are properly represented by Member Communities' elected officials.
4. The Petition for Amendment is neither a proper pleading nor complaint. The filing of the Petition is governed by ORC 6119.051. The Court will only consider issues relating to the Petition in the event the Complaint for Declaratory Judgment decision requires such consideration.

Based on the foregoing findings, the Motion to Dismiss is overruled.

IT IS SO ORDERED.

Thomas J. Pokorny

JUDGE THOMAS J. POKORNY

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GERALD E. FUERST, CLERK

BY _____ DEP.

STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
CUYAHOGA COUNTY	)	CASE NO. CV-10-714945

Northeast Ohio Regional Sewer District,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	JOURNAL ENTRY AND OPINION
	)	
Bath Township, Ohio, et al.,	)	
	)	
Defendants.	)	

Thomas J. Pokorny, Judge:

Procedural History:

This matter came for hearing on March 15, 2011, regarding the Motion for Partial Summary Judgment of Plaintiff, Northeast Ohio Regional Sewer District, (the District) filed January 31, 2011. On February 22, 2011, Certain Defendants filed a Consolidated Motion for Summary Judgment. Intervening-Defendants filed a Cross-Motion for Summary Judgment and an Opposition to Plaintiff's Motion for Summary Judgment on February 17, 2011. The Intervenor-Defendant, Cleveland Municipal School District, filed a Motion for Summary Judgment and Opposition on February 17, 2011. The City of Richmond Heights filed a separate Cross-Motion for Summary Judgment on February 22, 2011. The Summit County Defendants filed a Cross-Motion for Summary Judgment on February 22, 2011. The Diocese of Cleveland filed an Opposition to Plaintiff's Motion for Summary Judgment on February 22, 2011.

The Litigation:

The District brought this claim, a declaratory judgment action, to determine its authority to implement a Regional Stormwater Management Program (Title V), pursuant to Ohio Revised Code Chapter 6119 – Regional Water and Sewer Districts. In the event the Court finds that the District does not have the authority to implement Title V, the District requests that the Court permit an amendment to the District's Petition and Initial Plan for Operation. See R.C. §6119.051.

The District has named various member communities as party Defendants, and the Court has included other private entities to participate in the litigation through Permissive Joinder.

There is agreement among some of the parties that the issue of whether the District is empowered by Chapter 6119 and previous Court orders to implement Title V is appropriate for summary judgment (excepting the Summit County Defendants).

The standard of proof governing a Motion for Summary Judgment is set forth in Ohio Rules of Civil Procedure 56(C), which provides in pertinent part:

> Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence and written stipulations of fact...show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A Summary Judgment shall not be rendered unless it appears from the evidence...that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the Motion for Summary Judgment is made, that party being entitled to have the evidence...construed most strongly in the party's favor.

Civ. R. Rule 56 (C).

The Court finds that the matters addressed in the Motions and Cross-Motions for Partial Summary Judgment, herein, deal with interpretation and application of Chapter 6119 and previous orders of this Court, and that the issues presented by the parties relative to the District's authority are appropriate for disposition by summary judgment. The Court has applied the above criteria of Civ. R. Rule 56 (C) in rendering the following decisions.

The District's Position:

The District was created pursuant to R.C. § 6119.02. As such, the District possesses only those powers that can be traced to specific and express regulations under Ohio law. The District's stated purpose is to "implement a program to provide a total wastewater control system for the collection, treatment and disposal of wastewater within and without the District."

The District's proposed Title V, Regional Stormwater Management Program, is aimed at addressing "intercommunity flooding, erosion and stormwater-related water quality issues." The District claims it is authorized to implement the Title V through its stated purpose arguing that the term "wastewater" includes "stormwater." Plaintiff further asserts that a previous Court order of 1975 (See Court Order; August 28, 1975; Exh. A. Vol. 292, pg. 106; 3. Planning) directed the District to "develop a detailed integrated capital improvement plan for regional management of wastewater collection and storm

drainage..." Thus it is clear, the Plaintiff asserts, that stormwater drainage issues were contemplated even so far back as 1975.

Plaintiff contends it will not implement a stormwater project in any community without the member's permission. Nor does the District wish to interfere with the operation of local stormwater programs, but asserts that it will only require notice of ongoing projects. The District says it has expended millions of dollars over two decades studying intercommunity stormwater problems. The District's Title V, Sec. 5.0107, provides that nothing therein "shall be construed to infringe upon or supplant a member community's, or other local government's power and responsibility, however derived, to plan, finance, construct, maintain, operate and regulate the local stormwater system within their jurisdiction."

Defendants' Position:

As a creature of statute, the District's authority is limited to those powers expressly granted to it by Chapter 6119 and subsequent judicial orders. The Defendants argue that Chapter 6119 does not authorize the District to implement a separate utility or program to control flooding, erosion and watershed management. Defendants argue that previous Court orders require a local community's consent before the District could assume ownership or management of local sewerage collection facilities. Hence, the Defendants assert, without their consent, the District is without authority to implement its stormwater program.

These Defendants further argue that Title V violates the Ohio Constitution, Art. XVIII §3, Powers of Local Self-Government, the so-called Home Rule Amendment, giving municipalities the authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations..." The Defendants, likewise, argue that Title V substantially interferes with each municipality's operation of its utilities. Finally, the Defendants urge the Court to deny Plaintiff's Motion for Partial Summary Judgment because the issue of authority is inextricably intertwined with the imposition of a fee to fund the program.

Defendant, City of Richmond Heights, says Title V imposes mandatory obligations on the city with the threat of fines, and Defendant cites four provisions of Title V it says are beyond the authority of the District.

The Summit County Defendants have raised arguments regarding membership issues of six communities who have paid fees to the District through Summit County, which is not a party to this litigation.

In addition to arguing for the dismissal of these parties, the Summit County Defendants maintain the fee issue of Title V is impossible to separate from the issues relating to authority under Chapter 6119 and the previous orders of this Court. On those grounds they urge the Court to overrule the Plaintiff's Motion for Partial Summary Judgment.

Finally, the Summit County Defendants argue that the 1976 Agreement between eleven Summit County entities to enter the District was done to handle wastewater and not stormwater. The Summit County Defendants claim they already operate a separate system for stormwater management, and thus, involvement by the District is unnecessary and duplicative.

Discussion:

Does Chapter 6119 grant the District the authority to implement Title V "to address intercommunity flooding, erosion and stormwater- related water quality issues?" The District's stated purpose is to implement a program to provide a total wastewater control system for the collection, treatment and disposal of wastewater within and without the district.

"Wastewater" is defined as "any stormwater and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water." R.C. §6119.011 (k). Wastewater is defined as a combination of stormwater and sewage, waste, pollutants or contaminates, the result of prior use. Defendants contend that stormwater, which has not been combined with these contaminants, cannot properly be the subject matter of the District's program. But one cannot separate stormwater and wastewater treatment and disposal so easily under the systems in existence within the District. In fact, historically many of the sewer programs were originally constructed as "combined systems."

The Court is not inclined to find the legislature's purpose while enacting Chapter 6119 was to establish separate political subdivisions (bureaucracies) to address wastewater issues and separate political subdivisions to address stormwater issues that would result in duplicative and redundant government services. The issues relating to stormwater drainage and sewage treatments are inter-related and require a coordinated approach.

In this Court's previous order in 1975, the District was obligated to 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 inter-community drainage problems (both storm and sanitary) in the District. While this order may not be a grant of authority to the District, it is a mandate from the Court to begin the development of a plan to study stormwater issues. To a great extent the integrated capital improvement plan is the proposed Title V.

For the foregoing reasons, the Court finds that Chapter 6119 authorizes the District to address intercommunity flooding, erosion and stormwater-related water quality issues. The Plaintiff's Motion for Partial Summary Judgment (to the extent articulated in this opinion) is Granted. The Court finds as a matter of law that the term "wastewater" includes stormwater, and as such, authorizes the District to generally implement a program to deal with regional stormwater management. This is not to say that all provisions of the Plaintiff's Title V are authorized by statute or prior Court order.

Consent of Member Communities:

Does the creation of a regional stormwater system require the further consent of communities who are already members?

The Defendants argue additional consent is required because of a previous Court order requiring municipal consent before the District could exercise management over local stormwater systems. The Defendants allege that in Title V, the District has simply declared that parts of local systems are now part of the District's newly conceived "Regional Stormwater System" to circumvent the consent requirement in violation of member communities' due process rights.

The District says it has no intention to take ownership or responsibility of local sewerage collection facilities. The District says it will only do so if provided for in a written agreement between the District and a member community. The District further maintains that the original orders of this Court still require the District to obtain consent prior to managing any facility or system owned and/or operated by a local community or any other property owner.

The Court finds that the portions of Title V relating to the definition of "Regional Stormwater System," "Local Stormwater System," "Stormwater Management" and other related sections do not, on their face, violate previously issued Court orders, because they must be read in conjunction with the so-called McMonagle Order, setting forth the written agreement and consent requirements. Further consent of member communities is not required; however, Title V does not in any manner expand or amend the requirements of the previous Court order dated August 28, 1975.

The Court further finds that the objections raised to Title V relative to violations of the Ohio Constitution Art. XVIII, Sec. 3 and 4, are not compelling. The Court finds that while Title V may impact member communities' operations of local stormwater management programs, it does not unlawfully interfere with a municipality's home rule power or rights to the operation of a public utility.

Portions of Title V are without Express Statutory Authority:

The Court does find, however, the Certain Defendants' objections with regard to pertinent sections of Title V are sustainable on the basis of lack of express statutory authority.

Title V, Section 5.0508, requires notice to the District of any project within the District's service area. It does not speak to enforcement and is not otherwise unreasonable or objectionable.

Title V, Section 5.0602, provides for the elimination of inappropriate connections and empowers the District to take corrective actions, then charge back costs of such corrective action. This section exceeds the authority afforded the District under previous

Court order (consent). Likewise, Title V, Section 5.1005, which empowers the Executive Director to impose discretionary fines, is beyond the authority of the statute. The District's recourse in the event of non-compliance by a member community is limited to legal remedies.

Similarly, Title V, Section 5.1006, is beyond the District's authority, not having provided a proper hearing or notice process prior to taking unilateral action to remove a violation.

The Certain Defendants/City of Richmond Heights Cross-Motion for Partial Summary Judgment is, therefore, Granted with respect to Sections 5.0602, 5.1005 and 5.1006 of Title V, and are stricken. Certain Defendants/City of Richmond Heights Cross-Motion for Partial Summary Judgments are Granted as pertains to these sections.

Summit County Defendants:

The Summit County Defendants' assertion that this Court lacks jurisdiction has been previously addressed by the Court in it's ruling on Summit County Defendants' Motion to Dismiss. On that basis, the Summit County Defendants' Motion for Summary Judgment as to jurisdiction is Overruled.

The Court further finds that the issues relating to a proposed fee are not inextricably linked to the subject matter of the parties' Motions for Summary Judgment. The Court will proceed with this litigation in the manner stipulated to by the remaining parties who have agreed to proceed in this fashion.

The Court finds that the communities of Sagamore Hills Township, Macedonia, Village of Richfield and Northfield Village have territory within the District service area and are "Members" through agreements they entered into with Plaintiff. Unlike their neighbors within the Summit County area, the "Members" are subject to the Code of Regulations of the District. The Summit County Defendants' Motion for Summary Judgment is, therefore, Overruled in Part as it pertains to these Defendants.

However, regarding the remaining communities of Bath Township, Boston Heights, Hudson, Northfield Center Township, Richfield Township, Twinsburg and Twinsburg Township, these communities have never entered into written agreements with the District. They have contracted with Summit County for NEORSD services, but they, as a matter of law, are not "Member Communities" and cannot, therefore, be subjected to the District's authority, without a written agreement evidencing their consent. Defendants' Summary Judgment Motion is Granted as to these seven Summit County Defendants.

IT IS SO ORDERED.

Thomas J. Pokorny

THOMAS J. POKORNY, JUDGE

5-5-11

DATE

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MAY 11 2011

GERALD E. FUERST, CLERK

BY _____ DEP.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	)	CASE NO. 714945
Plaintiff,	)	JUDGE THOMAS J. POKORNY
vs.	)	
BATH TOWNSHIP, OHIO, et al.,	)	OPINION
Defendants.	)	

INTRODUCTION

In this declaratory judgment action brought by the Northeast Ohio Regional Sewer District ("the District") in which it has joined all of its member communities, the Court is to determine whether a proposed stormwater management fee (Title V) is authorized and otherwise complies with all requirements under Ohio law. The Court will examine authority under R.C. Chapter 6119, prior orders of this Court, as well as constitutional issues the Defendants have raised, in "declaring the rights, status and other legal relations" of the parties. R.C. 2721.02(A).

The Court has previously found, in its ruling on the Motions for Summary Judgment of April 12, 2011, that R.C. Chapter 6119 authorizes the District to address intercommunity flooding, erosion and stormwater-related water quality issues. The Court further found as a matter of law that the term "wastewater," as used under Chapter

6119, includes stormwater, and as such authorizes the District to implement a program to deal with regional stormwater problems.

Title 6119 and the Plan for Operation

R.C. Chapter 6119 governs Regional Water and Sewer Districts. 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 of services of any water resource project . . . and fix the terms, conditions, rentals or other charges . . . for such use or services."

Plaintiff maintains that this section, [in addition to R.C. 6119.06 (W)], empowers the District to impose its stormwater management fee upon its members. It is the District's position that its Stormwater Management Program ("SMP") does not "increase or add to its purposes" under its charter, nor is there a request thereunder to "amend any provision of the petition" under R.C. 6119.051, Petition for Change. Defendants maintain that the District's SMP increases the purposes of the District and therefore necessitates a proceeding under Petition for Change, R.C. 6119.051.

The Defendants argue that neither R.C. Chapter 6119 nor the District's Plan for Operation (referred to as the Charter) authorize the imposition of a separate stormwater fee. Under the District's Plan of Operation in subsection 5(f), the Charter sets forth that "[t]he rates for sewage treatment and disposal shall be determined by the Board of Trustees . . . ." The Defendants maintain that "sewage treatment and disposal" do not include "stormwater." The Defendants therefore conclude, under statutory construction, "the express inclusion of one thing, means the exclusion of others" and that as a result, the Plan of Operation does not authorize the District to charge property owners a fee for the management of stormwater. As previously stated, the Defendants maintain an

amendment of the Plan of Operation under R.C. 6119.051 Petition of Change is required to authorize such a fee.

R.C. 6119.09 empowers regional sewer districts to charge, alter and collect rentals for the use or services of any water resource project. Plaintiff argues the definition of "water resource project" under R.C. 6119.011(M) includes "water management facility" which is defined as:

> facilities for the purpose of the development, use and protection of water resources including, without limiting the generality of the foregoing, facilities for water supply, facilities for stream flow improvements, dams, reservoirs, and other impoundments, water transmission lines, water wells and well fields, pumping stations and works for underground water recharge, stream monitoring systems, facilities for the stabilization of stream and river banks, and facilities for the treatment of streams and rivers, including, without limiting the generality of the foregoing, facilities for the removal of oil, debris, and other solid waste from the waters of the state and stream and river aeration facilities.

Plaintiff's position is that the District's lists of proposed projects to be instituted under Title V comprise "water resource projects" under the statute.

In addition, Plaintiff argues that the District is further authorized to charge the stormwater fee under its Plan of Operation, 5(e) – Other Financing of District projects:

> Any projects not financed through the Ohio Water Development Authority, State of Ohio or Federal Government would be financed in such a manner as may be deemed appropriate by the Board of Trustees.

Section 5.0218 under the Plaintiff's proposed SMP defines the Regional Stormwater System as "any watercourse, stormwater conveyance structures and stormwater control measures receiving drainage from 300 acres of land or more." And under the Charter, at Section 5(m) the District is authorized through R.C. Chapter 6119, "to plan, finance, construct, maintain . . . local sewerage collection facilities . . . within the District." But under the District's Plan for Operations Section 5(m) the District is

prohibited from assuming ownership of any local sewerage collection facilities or assuming responsibility or incurring any liability for the planning, financing, construction, operation, maintenance or repair of any sewerage collection facilities . . . unless specifically provided for in a written agreement between the District and the respective local community. The Defendants argue that without the consent of member communities the District is powerless to impose the fee. Furthermore, the opposition argues that since no Regional Stormwater System has ever been defined or consented to, none exists. It is the consent requirement articulated in the District's Charter at Section 5(m) that led the defense to this conclusion.

The District maintains that Title V is not created to plan, construct, operate, maintain and repair local sewerage collection facilities owned by member communities. Rather it is created to manage a regional Stormwater System and, therefore, the consent of local communities is not required. The Plaintiff has further stipulated that no District project will be undertaken without the respective local community's consent.

The District further responds that the ditches, streams, culverts and rivers of the watershed comprise the Regional Stormwater System that does exist – but has not yet been managed as a system.

Plaintiff contends that under R.C. 6119.06(W) and 6119.09 the District is authorized to charge for the use of services of any water resource project or any benefit conferred by the project, without supervision or regulation by other commissions, boards or agencies. Plaintiff's contention is that property owners will use the system, or be provided a service or benefit under it. Plaintiff's evidence on this issue is summarized as follows: Plaintiff's expert, Hector Cyre testified that the District's planning of the SMP

was exhaustive, exceeding the norm in the industry. He articulated that regional flooding issues in the area are not getting solved and have been on the rise over a 30 plus year period.

He stated the use of impervious surface as a rate methodology is appropriate in Northeast Ohio because:

1) it does not discriminate among rate payers,.
2) similar properties are treated similarly, and
3) the proportionality of who pays "does not need to be perfect."

In Mr. Cyre's opinion, the amount of the fee is reasonable and the community will receive a valuable return on the investment in addressing flood, erosion, pollution and other stormwater related problems. He stated the service is the capture and control of stormwater; "being protected from it." Cyre stated that no regional authority has complete control of its watershed, save perhaps an island.

Other witnesses called by the District testified that:

1) Property owners "use" the regional stormwater system where stormwater runs off impervious surfaces. (Francis Greenland)
2) Areas that drain in excess of 300 acres commonly impact several municipalities; therefore, storm flows will increase with development requiring a regional approach to solve water flow problems. (Erwin Odeal)
3) The SMP will result in the improved transportation of stormwater through the system, thus providing service and benefit to property owners residing within the member communities. (Hector Cyre)

4) The SMP will result in ecological and environmental benefits to the region. (David Beach)

5) The District sent teams out into the community, held rounds of meetings, met with mayors individually to discuss stormwater problems and the Stormwater Management Program. (Julius Ciaccia)

6) The District's Board of Trustees passed Title V unanimously.

7) Impervious surfaces (development) have the greatest impact on increased runoff. (Andrew Reese)

8) The 300-acre drainage area which defines what is regional was based upon what the experts felt local communities could handle, the costs associated to each political subdivision and at what point the runoff became a stream. The 300-acre cutoff was discussed publicly and accommodated "disparate voices." (Andrew Reese)

9) The first five years of projects have been identified and exceed the $38 million to be raised by the fee in year one. *See* Plaintiff's Ex. 44. (Francis Greenland)

The Defendants counter that the stormwater fee is not a "rental or other charge," nor is it imposed for "use or services." Further, the Defendants argue that there is no identifiable or specific "use or benefit" derived from the payment of the fee.

The defense's evidence on this issue is summarized as follows:

1) The proposed stormwater fee is unfair because it fails to take into account land use, i.e. pervious area. The fee structure discriminates against non-

residential property owners because there is no cap as provided for with residential parcels. (Phillip DeGroot)

2) Lot size is directly related to runoff volume and must be considered in fairly determining a stormwater fee. (Phillip DeGroot)

3) The fee formula does not take into account lot size, soil composition and land use. The result is unfair apportionment of fees. (Phillip DeGroot)

4) The fee structure is inequitable and penalizes owners of small lots. The District's plan for stormwater management is "end of the pipe" control. It will result in sediment overcoming district projects. Furthermore the project will have no effect on 80% of the watershed.

Other municipality representatives testified that stormwater issues are being handled effectively in their community and that District involvement is unnecessary.

The Cleveland Municipal School System projects a $66 million deficit for next year due to declining property tax collection rates. Title V, they argue, provides no direct benefit to the system in exchange for a cost of $300,000.00 estimated per year. (Nicholas Jackson)

The Court has carefully considered the evidence, exhibits and arguments of counsel relative to the issue of statutory authority to impose the stormwater fee.

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

The Court finds that property owners "use" the unmanaged Regional Stormwater System as rainfall creates runoff from each parcel. The District provides the service of effective transportation of stormwater decreasing the flooding of homes, businesses and preventing excessive erosion and sedimentation. The benefits include the improvements listed above, as well as improvements in water quality, habitat for wildlife and reduction of future costs relating to stormwater management. *See City of Cleveland v. Northeast Ohio Regional Sewer Dist.*, 8th Dist. No. 55709, 1989 WL 107162 (Sept. 14, 1989); *Huber v. Denger*, 38 Ohio St.3d 162, 527 N.E.2d 802 (1988).

The District's authority under Title 6119 may also be restricted by its charter. *See* Petition to Amend 10-30-81. Therefore, the question becomes, does the District's Plan for Operation, Section 5(m), limit and restrict the District's statutory authority to charge a stormwater fee? The Charter itself is silent as to a specific grant of authority to charge a stormwater fee but grants authority to finance local sewerage facilities with local municipality consent. Moreover, Section 5(e) provides for financing of District projects "in such a manner as may be deemed appropriate by the Board of Trustees." It appears the Board's authority here is comprehensive and exhaustive.

When Sections 5(m) and 5(e) are read together, the clear intent is not to restrict the authority of the Board regarding financing. Section 5(m) refers to a limit on the District's authority to finance *local* sewerage facilities, requiring a municipality's consent. When read with Section 5(e) it is not meant to include *regional* projects because if it did, no regional project could be undertaken without local consent. This is clearly contrary to the intent of R.C. Chapter 6119. *See also Huber supra.*

Based upon the foregoing analysis, the Court finds the District is authorized by Chapter 6119, and not otherwise restricted by its charter, to charge property owners of member communities a stormwater fee to finance Title V.

Tax/Fee Argument

Finally the Defendants argue that the fee is actually a tax since there is no correlation between the service provided and the amount charged (as with other utilities). Additionally, they argue the charges planned under the SMP exceed the cost of the service provided since the Regional Stormwater System is not yet in existence. *See City of Cincinnati v. United States*, 39 Fed.Cl. 271 (U.S. Ct. Cl. 1997). *But see City of Wooster v. Graines*, 52 Ohio St. 3d 180, 556 N.E.2d 1163 (1990).

The Defendants, Catholic Diocese of Cleveland and Northeast Ohio Apartment Association, et al., argue that the charges proposed by the District are nothing more than disguised taxes and not a "rental" or "other charge" under R.C. 6119.09.

The Plaintiff maintains that a "tax or fee" analysis is unnecessary because the stormwater fee is independently and specifically authorized by R.C. 6119.09, and that the analysis pertains only to the imposition of such a charge by a municipality or township ordinance or resolution. The Court has examined the relevant case law and finds there is no precedent for this position.

Taxes are involuntary general burdens imposed for the purpose of supporting the government for the benefit of all. Fees are voluntary payments made in exchange for a specific service or benefit. The Defendants position is that the stormwater charge is actually a tax because it:

1) confers a benefit on the general public (not a specific benefit),

2) is blanket-billed,

3) is not dependent upon the level of goods or services provided,

4) is not voluntary; property owners have no choice whether to use the service or not,

5) is not imposed as a result of EPA mandate, and

6) exceeds the "cost and expense" to government of providing the service.

The Plaintiff's position is that the stormwater fee is a charge imposed in exchange for services the District will be providing to property owners; it will not exceed the cost of providing the services; and, funds will be segregated in a separate account, only expended for stormwater related projects and not diverted for general District expenses.

The Defense has cited a plethora of cases wherein charges have been found to be in reality, taxes. Also worth noting is *Zweig v. Metropolitan St. Louis Sewer District*, St. Louis County Circuit Court, Case No. 08SIL-CC03051, 2010 WL 7765902, a case interpreting the Missouri Hancock Amendment finding that the district's stormwater "user charge" is in reality an unlawful tax. The Hancock Amendment is a constitutional amendment prohibiting Missouri counties and other political subdivisions from levying any new or increased taxes without voter approval.

The Court is hesitant to adopt or find instructive the "Keller Factor analysis" of the *Zweig* decision because it is mainly interpretive of the Hancock Amendment in Missouri. *See Keller v. Marion County Ambulance District* (1991) 820 S.W. 2d 301, 302.

The Court makes the following findings with regard to the proposed fee:

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

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

3) The charges will not exceed the cost of the SMP because there is a backlog of projects totaling in excess of $200 million within the District's plan. *See* Plaintiff's Ex. 44.

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

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

The Court, based upon the foregoing finds that the charges proposed in Title V are charges authorized by R.C. 6119.09 and not an unlawful imposition of a tax by the Regional Sewer District.

Constitutional Issues

The Defendants argue that the proposed stormwater fee impermissibly interferes with a municipality's right to own and operate a utility under Section 4 Article XVIII of the Ohio Constitution. Absent a local community's consent, the defense argues, the District is without authority to charge residents for maintenance of its local stormwater system, including portions that drain 300 or more acres. (The Court has previously found

in its April 21, 2011 Journal Entry that the Stormwater Management Program does not unlawfully interfere with a municipality's home rule power. The Court will consider, however, the District's decision to include watercourses receiving drainage of 300 acres or more in its Regional Stormwater System here.)

The District has essentially defined "regional" as portions of stormwater system watercourse that drain 300 or more acres. The District has attempted to draw the proverbial local/regional line in the sand. The Plaintiff's witnesses here opined that the 300 acreage cutoff represents a reasonable parameter per industry standards and was the area focused upon by the District's consultants who prepared the Regional Intercommunity Drainage Evaluation ("RIDE") Study believing this area represented the backbone of the Regional Stormwater System. Finally, the Plaintiff's experts have opined that watercourses draining over 300 acres typically affect more than one community, therefore require a regional approach.

The Defendants believe the proposed 300-acre rule would "unmistakably constitute a material interference with member communities' constitutional rights to own and operate their own local utility systems" as a result of either 1) imposing the fee for projects that drain over 300 acres, or 2) managing any portion of a local stormwater system that drains over 300 acres, without the local community's consent. But the Plaintiff has stipulated it will not undertake such a regional project without consent of the local member.

The Northeast Ohio Regional Sewer District has operated for decades without a defined line setting forth what is regional and what is local. The essence of the unified

regional district is articulated in *Huber, supra* at 164-165 (interpreting ORC Chapter 6117 analogous).

> [R]ates assessed for the sewer works of a district are not dependent upon the fact that the ratepayer be physically attached to the particular facility for which the debt servicing is required.
>
> * * *
>
> This approach appears to be imminently sensible. To hold otherwise would result in the Balkanization of financial support for treatment plants by constricting the base upon which the cost of the facility would be spread. It would defeat the purpose of a unified sewer district..."
>
> * * *
>
> Accordingly we hold R.C. 6117 authorizes a board of county commissioners to allocate the costs of a facility serving a portion of a sewer district among all residents of the district.

The Court therefore finds that the 300-acre cutoff is a rational way for the District to advance a legitimate government interest, and that it is not arbitrary [per the Plaintiff's experts and RIDE Study], capricious or unreasonable.

Defendants further articulate that the stormwater fee violates the Equal Protection Clauses of the U.S. and Ohio Constitutions by improperly treating similarly situated persons differently as follows:

1. By imposing the fee only on member communities even though the District has countywide authority granted in its charter.
2. Through the disparate treatment of residential/commercial property owners in its fee formula without any rational basis.
3. By discriminating against small lot owners.
4. By failing to consider other factors in runoff calculation such as slope, land use and soil type.

The Court finds in the first instance that the District's jurisdiction is limited to member communities. The fact that the District may have authority countywide and has not exercised its authority over all communities within Cuyahoga County does not result in a violation of equal protection rights to those member communities who may be required to pay the fee.

The Court will address the final three constitutional arguments together, given they all concern the imposition of the fee based upon impervious surfaces of lands.

Chapter 7 of Title V pertains to stormwater fees. The fee is based upon area of impervious surfaces on parcels within the District service area. An impervious area of 3000 square feet is designated as one Equivalent Residential Unit ("ERU"). Parcels are divided into 3 tiers: small, less than 2,000 square feet (1.8 ERU), medium, 2,000 to 3,999 square feet (1.0 ERU), and large, 4,000 or more square feet (1.8 ERU). The base rate for 2012 is $4.95 per month. (See Section 5.0708) Those property owners qualifying for "Homestead" are afforded a reduced rate. Non-residential fees are calculated by multiplying the total number of ERU by the monthly fee amount. There is no ceiling as with residential tiers.

The Defendants argue that the fee is not rationally related to a legitimate government interest and amounts to an arbitrary and capricious government action. Specifically, they maintain that there is no rational relationship between the fee charged and the amount of burden placed on the regional stormwater system by the property owner being charged.

The Defendants are critical of the disparate treatment between residential and commercial property owners without any rational basis for same.

The Summit Defendants are particularly critical of the fee because it is based solely on imperviousness and fails to account for other factors contributing to runoff volume such as lot size, slope, land use and soil type.

The Plaintiff maintains that its fee basis, impervious surface, is appropriate and the most widely accepted means of calculating stormwater fees throughout the country. Plaintiff's expert, Andrew Reese, testified that 35 of 40 Ohio stormwater management programs use impervious surface as a basis for charging a fee. He opined that impervious surfaces as a result of development have the greatest impact on increased volume and rate of runoff. He recommended to the District, as its consultant, that impervious surface be used to determine fee rate. He further stated that the process used by the District in deciding the basis for the fee met or exceeded industry standards. Plaintiff further maintains that attempting to measure actual volume and rate of runoff would be unreasonable and cost-prohibitive.

Michael Clar, defense expert water resource engineer, opined that the sole use of imperviousness is fatally flawed. Soil types, slope, and land use all have significant impact on runoff. The proposed impervious surface fee is therefore inequitable. Also, small lots are discriminated against because the calculation does not take into account lot size. Summit Defendants argue the impervious surface fee discriminates against lot owners in forested areas by not taking into account reduction in runoff by presence of trees.

The question then becomes, is the sole use of impervious surface to calculate a stormwater fee a rational way to advance the District's legitimate government interest and not arbitrary, capricious or unreasonable?

The impervious surface method is not aimed at measuring total runoff from each property, but rather the goal is to measure increase in flow due to development, or urbanizing. The rational method is one well recognized in the profession but not as a tool to calculate a stormwater fee for thousands of properties. The problems of increased erosion, flooding and pollution have their origin in the construction of impervious surfaces. The Court is satisfied the calculation of impervious surface is a widely accepted method of calculating increased use of the stormwater system caused by development. It is by no means precise, but it bears a rational relationship to the purpose of addressing stormwater problems. The District concluded an exhaustive process in deciding to use impervious surfaces to calculate the fee. The Court finds that the fee is a rational way to advance the District's legitimate governmental interest in the regional management of stormwater. With the exception of the non-residential fee schedule, the Court finds the fee is not arbitrary, capricious or unreasonable. However, the Court finds no rational basis for the disparate treatment of non-residential property owners. The District must re-work this portion of the fee schedule providing either a cap or a reasonable declining block scale to non-residential property owners.

Credits and Exemptions

The District's SMP Credit Manual provides for certain "credits" or fee reductions by percentages, which are available to individuals, condominium associations, commercial and industrial land owners. Public and private schools may also qualify for the reduction through an educational credit wherein a continuing program curriculum is taught on stewardship of our water resources. The total credit available to each is

between 25 – 100%. The credits are afforded to landowners who use stormwater control measures that reduce the transporting of pollutants and limit the volume and /or rate of runoff. In certain instances the services of a professional engineer may be required to complete the application process. Credits are available to applicants who have constructed stormwater control measures before the effective date of the SMP.

The defendants have objected to the fee credit on the basis that:

1) The cost of obtaining a credit may far exceed the benefit realized. (Requirement of a licensed engineer to complete a fee credit application/measure.)
2) Other than installing a rain barrel, additional means of obtaining further credits are not financially realistic for individual property owners.

The Stormwater fee credit system provides users with an opportunity to offset fees while advancing the overall purposes of the SMP, i.e. the reduction of volume and rate of stormwater runoff.

With a few exceptions, the fee credit system is a rational way to advance a legitimate governmental interest and is not otherwise arbitrary, capricious or unreasonable.

However, the District shall provide the school systems with appropriate curriculum for each of grades 1-12 to achieve the stated purposes of the credit.

The District shall submit a plan or formula providing for the accrediting of costs of licensed engineer in completing any applications for credits under the stormwater Fee Credit Manual. Such credit shall not exceed 10% of the stormwater fee. This cost/credit shall only be available to non-residential property owners, including school districts.

Community Cost Share

The SMP sets forth a community cost share of 7.5% to be returned to the local municipalities for stormwater-related projects. The Court has previously found that the District's definition of "regional" (drainage area in excess of 300 acres) is supported by competent evidence and not otherwise unreasonable. The Court further finds that as much as 78% of the watershed may be outside of District control. The Court finds, as a result, that the 7.5% cost share is unfair to member communities because many flooding problems are in areas that drain far less than 300 acres, and the communities are in need of additional funds to deal with these local stormwater issues. Either the meaning of "regional" must be arrived at by means of a consensus of the District and its member communities or cost share must reflect an amount no less than 25% to member communities for local stormwater projects.

Exemptions

In the stormwater fee manual, the District has generally followed the exemption on non-self supporting government functions it uses with sewer fees. The exception is the exemption of municipal and county airport runways and taxiways. The Plaintiff has argued that this exemption is similar to the exemption afforded public roads. Public schools are not exempt. They are likewise non-exempt from sewer fees. Approximately 13% of utilities exempt schools from user fees nationally, according to Francis Greenland, Director of Watershed Programs of the District.

The Defendants maintain there is no authority granted the District to exempt certain property owners (with the exemption of the homestead exemption). The

exemptions, without proper authorizations are therefore arbitrary, unreasonable and inequitable, they argue.

The Plaintiff contends that the authority to exempt certain properties is founded in R.C. 6119.09, "a regional water and sewer district may charge, alter and collect rentals . . . ." (Emphasis added.)

The Court finds that the District's exemptions are reasonable, that there is a rational basis for exempting public roads, and airport runways and taxiways as they serve the public generally and provide drainage themselves. Only a small minority of utilities exempt schools, the Court on this account, cannot say the inclusion of schools is therefore unreasonable.

With regard to the remaining exemptions the Court finds they are a rational way of advancing a legitimate government interest and not otherwise arbitrary, capricious or unreasonable.

Hudson's Membership in NEORSD

Hudson maintains it is not a "member community" of the NEORSD. The City's Assistant Director of Public Works, Don Schroyer, testified that the District has not performed any projects within the City. Further, after the 2003 flood in Hudson, he stated that the city received assistance from FEMA and Summit County but not from the District. Residents of Hudson are billed from Summit County; the District has never billed the city. Hudson is connected to the Summit County sewer, which is connected to the District's southerly plant in Cleveland.

Hudson's mayor attends District committee meetings and has voted in the past. Hudson entered into an agreement with Summit County in order to route its wastewater

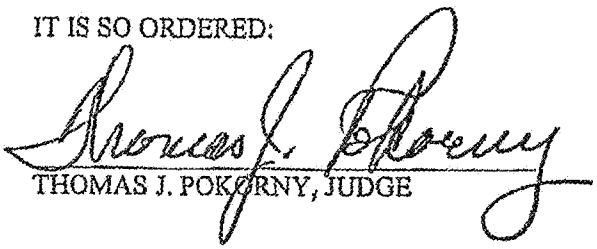
to the District's interceptor sewers via a Summit County trunk. Hudson's council authorized the City to become a member of the District in a resolution passed June 3, 1997. Plaintiff's Ex. 17

The Court finds that the City of Hudson is a member of the District. The order of this Court shall pertain to portions of Hudson which are within the service area of the NEORSD.

Conclusion

Defendants' Motion for Permanent Injunction is Overrruled. The Court will set a conference within 30 days and hear proposed changes to Title V regarding: 1) the creation of a non-residential cap or sliding scale; 2) the creation of a plan or formula to establish an engineering costs credit; and 3) an alternative cost share formula. Upon its conclusion, Plaintiff shall submit a proposed journal entry not inconsistent with this opinion.

IT IS SO ORDERED:



THOMAS J. POKORNY, JUDGE

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	)	CASE NO. CV – 714945
Plaintiff	)	JUDGE THOMAS J. POKORNY
v.	)	
BATH TOWNSHIP, OHIO, et al.,	)	**SUPPLEMENTAL JOURNAL ENTRY** (Final Order, No Just Cause for Delay)
Defendants	)	

This matter came before the Court upon a Post Trial Hearing held on the 30th day of May, 2012. Pursuant to the Court's prior order of February 15, 2012, the Court adopts the following language of Title V, Section 5.0804(c):

"The District shall develop and provide stormwater-related curricula for grades 3, 5, 7 and 10. Delivering these curricula across these grades shall meet the requirements of the Stormwater Education Credit. The District shall also develop and provide student workbooks and teacher manuals for grades 3, 5, 7, and 10 to interested applicants. The successful completion of these workbooks by the students of interested applicants shall also meet the requirements of the Stormwater Education Credit."

The Court further adopts the following language regarding crediting costs relating to credit applications:

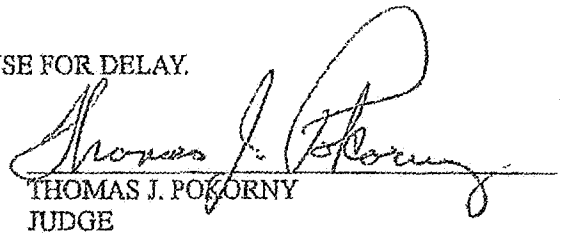
"An applicant's stormwater fee shall be reduced by the cost of engaging a licensed engineer to complete approved applications for Stormwater Fee Credits. The adjustment may be claimed one time only and shall be applicable only for the year the application is submitted. The reduction shall not exceed 10% of the annual pre-credit Stormwater Fee Adjustment. This reduction shall only be available to non-residential account holders."

The Court further finds that the Plaintiff's Proposal IV providing for a declining block rate for non-residential property owners would satisfy equal protection requirements and eliminate disparate treatment of property owners. The Court does not, however, adopt the proposal at this time without further argument.

All other portions of the Court's Opinion shall remain.

All claims involving Richard G. Lennon, Bishop of the Diocese of Cleveland, the Catholic Cemeteries Association of the Diocese of Cleveland and the Cleveland Municipal School District Board of Education are settled and dismissed.

IT IS SO ORDERED. FINAL. NO JUST CAUSE FOR DELAY.



THOMAS J. POKORNY
JUDGE

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ORC Ann. 6119.01

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Page's Ohio Revised Code Annotated > *TITLE 61. WATER SUPPLY -- SANITATION -- DITCHES* > *CHAPTER 6119. REGIONAL WATER AND SEWER DISTRICTS*

§ 6119.01. Organization of district; purpose

Any area situated in any unincorporated part of one or more contiguous counties or in one or more municipal corporations, or both, may be organized as a regional water and sewer district in the manner and subject to the conditions provided in Chapter 6119. of the Revised Code, for either or both of the following purposes:

(A) To supply water to users within and without the district;

(B) To provide for the collection, treatment, and disposal of waste water within and without the district.

History

GC § 6781; 123 v 413; Bureau of Code Revision, 10-1-53; 134 v S 166. Eff 11-19-71.

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Page's Ohio Revised Code Annotated > *TITLE 61. WATER SUPPLY -- SANITATION -- DITCHES* > *CHAPTER 6119. REGIONAL WATER AND SEWER DISTRICTS*

§ 6119.011. Definitions

As used in this chapter:

(A) "Court of common pleas" or "court" means, unless the context indicates a different meaning or intent, the court of common pleas in which the petition for the organization of a regional water and sewer district is filed.

(B) "Political subdivision" includes departments, divisions, authorities, or other units of state governments, watershed districts, soil and water conservation districts, park districts, municipal corporations, counties, townships, and other political subdivisions, special water districts, including county and regional water and sewer districts, conservancy districts, sanitary districts, sewer districts or any other public corporation or agency having the authority to acquire, construct, or operate waste water or water management facilities, and all other governmental agencies now or hereafter granted the power of levying taxes or special assessments, the United States or any agency thereof, and any agency, commission, or authority established pursuant to an interestate compact or agreement.

(C) "Person" means any natural person, firm, partnership, association, or corporation other than a political subdivision.

(D) "Beneficial use" means a use of water, including the method of diversion, storage, transportation, treatment, and application, that is reasonable and consistent with the public interest in the proper utilization of water resources, including, but not limited to, domestic, agricultural, industrial, power, municipal, navigational, fish and wildlife, and recreational uses.

(E) "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters.

(F) "Water resources" means all waters of the state occurring on the surface in natural or artificial channels, lakes, reservoirs, or impoundments, and in subsurface aquifers, that are available or may be made available to agricultural, commercial, recreational, public, and domestic users.

(G) "Project" or "water resource project" means any waste water facility or water management facility acquired, constructed, or operated by or leased to a regional water and sewer district or to be acquired, constructed, or operated by or leased to a regional water and sewer district under this chapter, or acquired or constructed or to be acquired or constructed by a political subdivision with a portion of the cost thereof being paid from a loan or grant from the district under this chapter, including all buildings and facilities that the district considers necessary for the operation of the project, together with all property, rights, easements, and interest that may be required for the operation of the project. Any water resource project shall be determined by the board of trustees of the district to be consistent with any applicable comprehensive plan of water management approved by the director of natural resources or in the process of preparation by the director and to be not inconsistent with the standards set for the waters of the state affected thereby by the environmental protection agency. Any resolution of the board of trustees of the district providing for acquiring, operating, leasing, or constructing such projects or for making a loan or grant for such projects shall include a finding by the board of trustees of the district that those determinations have been made.

(H) "Pollution" means the placing of any noxious or deleterious substances in any waters of the state or affecting the properties of any waters of the state in a manner that renders those waters harmful or inimical to the public health, or to animal or aquatic life, or to the use of the waters for domestic water supply, industrial or agricultural purposes, or recreation.

(I) "Sewage" means any substance that contains any of the waste products or excrementitious or other

discharge from the bodies of human beings or animals, that pollutes the waters of the state.

(J) "Industrial waste" means any liquid, gaseous, or solid waste substance resulting from any process of industry, manufacture, trade, or business, or from the development, processing, or recovery of any natural resource, together with such sewage as is present, that pollutes the waters of the state.

(K) "Waste water" means any storm water and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water.

(L) "Waste water facilities" means facilities for the purpose of treating, neutralizing, disposing of, stabilizing, cooling, segregating, or holding waste water, including, without limiting the generality of the foregoing, facilities for the treatment and disposal of sewage or industrial waste and the residue thereof, facilities for the temporary or permanent impoundment of waste water, both surface and underground, and storm and sanitary sewers and other systems, whether on the surface or underground, designed to transport waste water, together with the equipment and furnishings thereof and their appurtenances and systems, whether on the surface or underground, including force mains and pumping facilities therefor when necessary.

(M) "Water management facilities" means facilities for the purpose of the development, use, and protection of water resources, including, without limiting the generality of the foregoing, facilities for water supply, facilities for stream flow improvement, dams, reservoirs, and other impoundments, water transmission lines, water wells and well fields, pumping stations and works for underground water recharge, stream monitoring systems, facilities for the stabilization of stream and river banks, and facilities for the treatment of streams and rivers, including, without limiting the generality of the foregoing, facilities for the removal of oil, debris, and other solid waste from the waters of the state and stream and river aeration facilities.

(N) "Cost" as applied to water resource projects means the cost of acquisition and construction, the cost of acquisition of all land, rights-of-way, property rights, easements, franchise rights, and interests required by the district for such acquisition and construction, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of acquiring or constructing and equipping a principal office and sub-offices of the district, the cost of diverting highways, interchange of highways, and access roads to private property, including the cost of land or easements therefor, the cost of all machinery, furnishings, and equipment, financing charges, interest prior to and during construction and for no more than eighteen months after completion of acquisition or construction, engineering, expenses of research and development with respect to waste water or water management facilities, legal expenses, plans, specifications, surveys, estimates of cost and revenues, working capital, other expenses necessary or incident to determining the feasibility or practicability of acquiring or constructing any such project, administrative expense, and such other expense as may be necessary or incident to the acquisition or construction of the project, the financing of the acquisition or construction, including the amount authorized in the resolution of the district providing for the issuance of water resource revenue bonds to be paid into any special funds from the proceeds of those bonds and the financing of the placing of any such project in operation. Any obligation or expense incurred by any political subdivision, and approved by the district, for surveys, borings, preparation of plans and specifications, and other engineering services in connection with the acquisition or construction of a project shall be regarded as a part of the cost of the project and may be reimbursed by the district.

(O) "Owner" includes all individuals, partnerships, associations, corporations, or political subdivisions having any title or interest in any property rights, easements, and interests authorized to be acquired by this chapter.

(P) "Revenues" means all rentals and other charges received by a district for the use or services of any project, all special assessments levied by the district pursuant to this chapter, any gift or grant received with respect thereto, and moneys received in repayment of and for interest on any loan made by the district to a political subdivision, whether from the United States or a department, administration, or agency thereof, or otherwise.

(Q) "Public roads" includes all public highways, roads, and streets in the state, whether maintained by the state, county, city, township, or other political subdivision.

(R) "Public utility facilities" includes tracks, pipes, mains, conduits, cables, wires, towers, poles, and other equipment and appliances of any public utility.

(S) "Construction," unless the context indicates a different meaning or intent, includes reconstruction, enlargement, improvement, or providing furnishings or equipment.

(T) "Water resources bonds," unless the context indicates a different meaning or intent, includes water resource notes and water resource refunding bonds.

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

(V) "Homestead exemption" means the reduction of taxes allowed under division (A) of *section 323.152 of the Revised Code*.

(W) "Low- and moderate-income person" has the same meaning as in *section 175.01 of the Revised Code*.

History

134 v S 166. Eff 11-19-71; *153 v H 1*, § 101.01, eff. 10-16-09.

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§ 6119.02. Organization procedure; public meeting before filing petition

(A) Proceedings for the organization of a regional water and sewer district shall be initiated only by a petition filed in the office of the clerk of the court of common pleas of one of the counties all or part of which lies within the proposed district. The petition shall be signed by one or more municipal corporations, one or more counties, or one or more townships, or by any combination of them, after having been authorized by the legislative authority of the political subdivision. The legislative authority of any municipal corporation, the board of county commissioners of any county, and the board of trustees of any township may act in behalf of any part of their respective political subdivisions. The petition shall specify all of the following:

(1) The proposed name of the district;

(2) The place in which its principal office is to be located;

(3) The necessity for the proposed district and that it will be conducive to the public health, safety, convenience, or welfare;

(4) A general description of the purpose of the proposed district;

(5) A general description of the territory to be included in the district, which need not be given by metes and bounds or by legal subdivisions, but is sufficient if an accurate description is given of the territory to be organized as a district. The territory need not be contiguous, provided that it is so situated that the public health, safety, convenience, or welfare will be promoted by the organization as a single district of the territory described.

(6) The manner of selection, the number, the term, and the compensation of the members of the governing body of the district, which shall be called a board of trustees. The petition may set forth procedures for subsequent changes in the composition of and other provisions relating to the board of trustees. The original or properly amended petition may prohibit elected officials from serving on the board and may permit one or more elected officials from any appointing authority to serve on the board. However, elected officials from the same political subdivision shall not comprise a majority of the members of the board. Notwithstanding the foregoing, a board appointed prior to the effective date of this amendment may continue as prescribed in the petition and rules and regulations of the district that were in effect prior to the effective date of this amendment, and, if not prohibited in the petition or rules and regulations, the board may include elected officials. As used in this division, "elected official" means an official elected to an office of municipal, township, or county government, or a person appointed to fill a vacancy in such an office.

(7) The plan for financing the cost of the operations of the district until it is in receipt of revenue from its operations or proceeds from the sale of bonds;

(8) A prayer for the organization of the district by the name proposed, either before or after a preliminary hearing as provided in *section 6119.04 of the Revised Code*.

(B) Prior to filing a petition under division (A) of this section, a municipal corporation, county, or township shall hold a public meeting for the purpose of receiving comments on the proposed establishment of a regional water and sewer district. If a combination of municipal corporations, counties, or townships signed the petition, the signers jointly shall hold the public meeting. At the meeting, a representative of the signer or signers of the petition shall present a preliminary study of the reasons for the proposed establishment of the district.

The signer or signers of the petition shall provide notice of the public meeting by publication once per week for two consecutive weeks in a newspaper of general circulation in each of the counties that will comprise the proposed district in whole or in part or as provided in *section 7.16 of the Revised Code*.

(C) Upon the filing of the petition, the judge of the court of common pleas of the county in which the petition

is filed or, in the case of a county having more than one such judge, a judge of that court assigned by its presiding judge shall determine if the petition complies with the requirements of this section as to form and content. No petition shall be declared void by the judge on account of alleged defects. The court in subsequent proceedings at any time may permit the petition to be amended in form and substance to conform to the facts by correcting any errors in the description of the territory or in any other particular.

History

GC § 6782; 123 v 413, § 2; Bureau of Code Revision, 10-1-53; 127 v 766 (Eff 9-17-57); 130 v 1408 (Eff 10-10-63); 134 v S 166 (Eff 11-19-71); *147 v S 201, Eff 12-21-98; 2012 HB 509, § 1, eff. Sept. 28, 2012.*

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§ 6119.04. Hearing on petition; procedure

(A) The court of common pleas constituted as provided in *section 6119.03 of the Revised Code*, at its first meeting, shall fix the time and place of a hearing on the petition for the establishment of the proposed regional water and sewer district. The hearing shall be either preliminary or final as the petition may request and shall be held not later than sixty days thereafter. The clerk of the court shall give notice of the hearing by publication once each week for four consecutive weeks in a newspaper having a general circulation in each of the counties, in whole or in part, within the district. The clerk shall send a notice of the hearing by certified mail to the director of environmental protection.

Any person or any political subdivision residing or lying within an area affected by the organization of the district, on or before the date set for the cause to be heard, may file an objection to the granting of the requests made in the prayer of the petition.

(B) Upon a preliminary hearing, if it appears that the proposed district probably is necessary and that it probably will be conducive to the public health, safety, convenience, or welfare, the court, after disposing of all objections as justice and equity require and by its findings, entered of record, shall issue a preliminary order declaring the district to be organized and an independent political subdivision of the state with a corporate name designated in the order for the purpose of all of the following:

(1) The election or appointment of the board of trustees in the manner provided in the petition;

(2) The election, appointment, or employment of officers, employees, accounting experts, engineers, attorneys, financial consultants, architects, other consultants, and independent contractors or other persons that may be necessary to prepare a plan for the operation of the district;

(3) The collection of the funds in the manner provided in the petition to be used and disbursed by the district;

(4) The preparation of a plan for the operation of the district.

The district shall possess powers that may be necessary to carry out those purposes.

The preliminary order shall direct the district to file a plan for the operation of the district within six months from the date of the preliminary order or within the further time or times that the court from time to time may order.

Upon the filing by the district of a plan for the operation of the district, the court shall fix the time and place for a final hearing on the petition for the establishment of the proposed district and the plan for the operation of the district as filed in the proceeding. The hearing shall be held not later than sixty days thereafter, and the clerk of the court of common pleas again shall give notice of the hearing as required in division (A) of this section.

Any person or any political subdivision residing or lying within the area affected by the organization of the district or by the plan for the operation of the district, on or before the date set for the cause to be heard, may file any objections to the final organization of the district or the plan for the operation of the district.

(C) If, prior to granting a final order, the court determines that additional study is needed of the feasibility of establishing the district, the court shall order the signers of the petition to conduct an additional feasibility study. If the court has ordered such a study, the court shall not grant a final order prior to receiving the results of the study. Nothing in division (C) of this section precludes the awarding of a contract for a project or improvement undertaken under this chapter to an entity that conducts a feasibility study pursuant to division (C) of this section.

The court, upon good cause shown at any time before the granting of a final order, may do any or all of the following:

(1) Grant a right to any municipal corporation or county acting in behalf of a sewer district within the county to become a party to the proceeding if the intervening party requests to have some part or all of its territory included within the district;

(2) Grant in part or in toto an intervening petition of a municipal corporation or a county acting in behalf of a sewer district within the county, which is not wholly included within territory described in the petition, to have some part or all of its territory included within the district;

(3) Grant a request filed by any party to the petition or intervening party to modify any request set forth in the petition, including any or all of the following:

(a) A reduction in the territory to be included within the district;

(b) Addition to or deletion of a purpose or purposes of the proposed district as set forth in the petition so long as the purposes that remain are those included within *section 6119.01 of the Revised Code*;

(c) The manner of selection, the number, the term, and the compensation of the members of the board of trustees.

After the filing of any intervening petition or request to modify, the court shall fix a time and place for a hearing thereof, which shall be held not less than sixty days after the filing thereof. The clerk of the court of common pleas shall give notice of the hearing as required in division (A) of this section.

(D) Upon final hearing, whether or not a preliminary hearing is requested in the petition, if it appears that the proposed district is necessary, that it and the plan for the operation of the district are conducive to the public health, safety, convenience, and welfare, and that the plan for the operation of the district is economical, feasible, fair, and reasonable, the court, after disposing of all objections as justice and equity require and by its findings, entered of record, shall declare the district finally and completely organized and to be, or to be empowered to continue as, a political subdivision. Thereupon the district shall have power to sue and be sued; to incur debts, liabilities, and obligations; to exercise the right of eminent domain and of taxation and assessment as provided in this chapter; to issue bonds; and to perform all acts authorized in this chapter and to execute and carry out the plan for the operation of the district and to amend, modify, change, or alter the plan for its operation as the board of trustees from time to time may determine necessary.

(E) If the court finds that the organization of the district is not necessary or will not be conducive to the public health, safety, convenience, or welfare, or that the plan for the operation of the district is not economical, feasible, fair, or reasonable, or if the district fails to file a plan for the operation of the district within the time prescribed by the court, it shall dismiss the proceedings and adjudge the costs against the petitioners. If a preliminary order has been made organizing the district, the court shall declare the district dissolved and enter its order for the distribution of any and all assets that may be owned by the district after the payment of its liabilities.

(F) Any municipal corporation, board of county commissioners, or board of township trustees may advance to the district sums of money that the legislative authority of the municipal corporation, the board of county commissioners, or the board of township trustees determines will not be in excess of the benefits that can be anticipated to be derived by the municipal corporation, county, or township from the establishment of the district at times that are requested by the district and authorized by the legislative authority or board and pursuant to an agreement between the district and the municipal corporation, county, or township setting forth whether and when the sums shall be repaid. The sums when paid to the district at any time after the preliminary order of the court shall be used by the district for its purposes in the preparation of a plan for the operation of the district and for other purposes of the district. The district shall keep proper records showing the amount so advanced and disbursed. If the court orders the district dissolved as permitted in this section, the interest any municipal corporation, board of county commissioners, or board of township trustees has in the assets of the district shall be limited to those assets remaining after the payment of all other liabilities of the district.

History

GC § 6784; 123 v 413, § 4; Bureau of Code Revision, 10-1-53; 127 v 766 (Eff 9-17-57); 129 v 582(984) (Eff 1-10-61); 134 v S 166 (Eff 11-19-71); 134 v S 397 (Eff 10-23-72); *144 v S 19 (Eff 3-14-91); 147 v S 201. Eff 12-21-98.*

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§ 6119.051. Petition for change

At any time after the creation of a water and sewer district, the district, after action by its board of trustees, may file a petition in the court of common pleas requesting the order of such court permitting the district to:

(A) Increase or add to its purposes heretofore approved by the court so long only as its purposes are those described in *section 6119.01 of the Revised Code*, or

(B) Abandon or surrender any purpose heretofore approved by the court, or

(C) Amend any provision of the petition filed pursuant to *section 6119.02 of the Revised Code*.

Upon the filing of petition pursuant to this section the court shall set a date for hearing and the clerk of the court shall give notice thereof by publication once each week for four consecutive weeks in a newspaper having a general circulation in each of the counties, in whole or in part, within the district. Any person or any political subdivision residing or lying within an area affected by the operation of the district, on or before the date set for hearing, may file an objection to the granting of the petition. Upon hearing, if it appears that the request of the petition is conducive to the public health, safety, convenience or welfare and will not if granted adversely affect the continued operation of the district, the court shall grant the prayer of the petition. Otherwise, it shall dismiss the petition.

History

127 v 766 (Eff 9-17-57); 134 v S 166. Eff 11-19-71.

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§ 6119.06. Rights, powers, and duties

Upon the declaration of the court of common pleas organizing the regional water and sewer district pursuant to *section 6119.04 of the Revised Code* and upon the qualifying of its board of trustees and the election of a president and a secretary, said district shall exercise in its own name all the rights, powers, and duties vested in it by Chapter 6119. of the Revised Code, and, subject to such reservations, limitations and qualifications as are set forth in this chapter, such district may:

(A) Adopt bylaws for the regulation of its affairs, the conduct of its business, and notice of its actions;

(B) Adopt an official seal;

(C) Maintain a principal office and suboffices at such places within the district as it designates;

(D) Sue and plead in its own name; be sued and impleaded in its own name with respect to its contracts or torts of its members, employees, or agents acting within the scope of their employment, or to enforce its obligations and covenants made under *sections 6119.09*, *6119.12*, and *6119.14 of the Revised Code*. Any such actions against the district shall be brought in the court of common pleas of the county in which the principal office of the district is located, or in the court of common pleas of the county in which the cause of action arose, and all summonses, exceptions, and notices of every kind shall be served on the district by leaving a copy thereof at the principal office with the person in charge thereof or with the secretary of the district.

(E) Assume any liability or obligation of any person or political subdivision, including a right on the part of such district to indemnify and save harmless the other contracting party from any loss, cost, or liability by reason of the failure, refusal, neglect, or omission of such district to perform any agreement assumed by it or to act or discharge any such obligation;

(F) Make loans and grants to political subdivisions for the acquisition or construction of water resource projects by such political subdivisions and adopt rules, regulations, and procedures for making such loans and grants;

(G) Acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent to or from, or contract for operation by or for, a political subdivision or person, water resource projects within or without the district;

(H) Make available the use or service of any water resource project to one or more persons, one or more political subdivisions, or any combination thereof;

(I) Levy and collect taxes and special assessments;

(J) Issue bonds and notes and refunding bonds and notes as provided in Chapter 6119. of the Revised Code;

(K) Acquire by gift or purchase, hold, and dispose of real and personal property in the exercise of its powers and the performance of its duties under Chapter 6119. of the Revised Code;

(L) Dispose of, by public or private sale, or lease any real or personal property determined by the board of trustees to be no longer necessary or needed for the operation or purposes of the district;

(M) Acquire, in the name of the district, by purchase or otherwise, on such terms and in such manner as it considers proper, or by the exercise of the right of condemnation in the manner provided by *section 6119.11 of the Revised Code*, such public or private lands, including public parks, playgrounds, or reservations, or parts thereof or rights therein, rights-of-way, property, rights, easements, and interests as it considers necessary for carrying out Chapter 6119. of the Revised Code, but excluding the acquisition by the exercise of the right of condemnation of any waste water facility or water management facility owned by any person or political subdivision, and compensation shall be paid for public or private lands so taken;

(N) Adopt rules and regulations to protect augmented flow by the district in waters of the state, to the extent augmented by a water resource project, from depletion so it will be available for beneficial use, to provide standards for the withdrawal from waters of the state of the augmented flow created by a water resource project which is not returned to the waters of the state so augmented, and to establish reasonable charges therefor, if considered necessary by the district;

(O) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6119. of the Revised Code;

(P) Enter into contracts with any person or any political subdivision to render services to such contracting party for any service the district is authorized to provide;

(Q) Enter into agreements for grants or the receipt and repayment of loans from a board of township trustees under *section 505.705 of the Revised Code*;

(R) Make provision for, contract for, or sell any of its by-products or waste;

(S) Exercise the power of eminent domain in the manner provided in Chapter 6119. of the Revised Code;

(T) Remove or change the location of any fence, building, railroad, canal, or other structure or improvement located in or out of the district, and in case it is not feasible or economical to move any such building, structure, or improvement situated in or upon lands required, and if the cost is determined by the board to be less than that of purchase or condemnation, to acquire land and construct, acquire, or install therein or thereon buildings, structures, or improvements similar in purpose, to be exchanged for such buildings, structures, or improvements under contracts entered into between the owner thereof and the district;

(U) Receive and accept, from any federal or state agency, grants for or in aid of the construction of any water resource project, and receive and accept aid or contributions from any source of money, property, labor, or other things of value, to be held, used, and applied only for the purposes for which such grants and contributions are made;

(V) Purchase fire and extended coverage and liability insurance for any water resource project and for the principal office and suboffices of the district, insurance protecting the district and its officers and employees against liability for damage to property or injury to or death of persons arising from its operations, and any other insurance the district may agree to provide under any resolution authorizing its water resource revenue bonds or in any trust agreement securing the same;

(W) Charge, alter, and collect rentals and other charges for the use of services of any water resource project as provided in *section 6119.09 of the Revised Code*. Such district may refuse the services of any of its projects if any of such rentals or other charges, including penalties for late payment, are not paid by the user thereof, and, if such rentals or other charges are not paid when due and upon certification of nonpayment to the county auditor, such rentals or other charges constitute a lien upon the property so served, shall be placed by the auditor upon the real property tax list and duplicate, and shall be collected in the same manner as other taxes.

(X) Provide coverage for its employees under Chapters 145., 4123., and 4141. of the Revised Code;

(Y) Merge or combine with any other regional water and sewer district into a single district, which shall be one of the constituent districts, on terms so that the surviving district shall be possessed of all rights, capacity, privileges, powers, franchises, and authority of the constituent districts and shall be subject to all the liabilities, obligations, and duties of each of the constituent districts and all rights of creditors of such constituent districts shall be preserved unimpaired, limited in lien to the property affected by such liens immediately prior to the time of the merger and all debts, liabilities, and duties of the respective constituent districts shall thereafter attach to the surviving district and may be enforced against it, and such other terms as are agreed upon, provided two-thirds of the members of each of the boards consent to such merger or combination. Such merger or combination shall become legally effective unless, prior to the ninetieth day following the later of the consents, qualified electors residing in either district equal in number to a majority of the qualified electors voting at the last general election in such district file with the secretary of the board of trustees of their regional water and sewer district a petition of remonstrance against such merger or combination. The secretary shall cause the board of elections of the proper

county or counties to check the sufficiency of the signatures on such petition;

(Z) Exercise the powers of the district without obtaining the consent of any other political subdivision, provided that all public or private property damaged or destroyed in carrying out the powers of the district shall be restored or repaired and placed in its original condition as nearly as practicable or adequate compensation made therefor by the district;

(AA) Require the owner of any premises located within the district to connect the owner's premises to a water resource project determined to be accessible to such premises and found to require such connection so as to prevent or abate pollution or protect the health and property of persons in the district. Such connection shall be made in accordance with procedures established by the board of trustees of such district and pursuant to such orders as the board may find necessary to ensure and enforce compliance with such procedures.

(BB) Do all acts necessary or proper to carry out the powers granted in Chapter 6119. of the Revised Code.

History

134 v S 166. Eff 11-19-71; *152 v H 119*, § 101.01, eff. 9-29-07.

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ORC Ann. 6119.08

Current through Legislation passed by the 130th General Assemblyand filed with the Secretary of State through File 94 Annotations current through April 14, 2014

Page's Ohio Revised Code Annotated > *TITLE 61. WATER SUPPLY -- SANITATION -- DITCHES* > *CHAPTER 6119. REGIONAL WATER AND SEWER DISTRICTS*

§ 6119.08. Rules and regulations

In order to accomplish the purposes of a regional water and sewer district, to protect its projects, to secure the best results from the construction, operation, and maintenance thereof, and to prevent damage by the misuse of any such projects or by the pollution or misuse of the waters of the state within the district or without the district and served or affected by a project or projects of the district, the board of trustees may make and enforce such rules and regulations as are necessary and advisable:

(A) To protect and preserve the projects of such district, prescribe the manner of their use by any person or political subdivision and preserve order within and adjacent thereto;

(B) To prescribe the manner in which ditches, sewers, pipelines, or other works shall be adjusted to or connected with the projects of the district and the manner in which waste is disposed of within the district;

(C) To prescribe the permissible uses of the water supply and the manner of its distribution and to prevent the pollution or unnecessary waste of such water supply;

(D) To prohibit or regulate the discharge into the waste water facilities of the district of any liquid or solid waste detrimental to its works and improvements.

Such rules and regulations shall not be inconsistent with the laws of the state or the rules and regulations or requirements of the environmental protection agency.

The board may enforce by mandamus, injunction, or other legal remedy rules and regulations made by it pursuant to this section, and may remove any harmful or improper construction or obstruction or may close any opening or connection made improperly or in violation of such rules and regulations. The board may bring such suit in mandamus in the court of appeals in the first instance, if it deems it advisable. Any person or political subdivision which willfully fails to comply with such rules and regulations shall be liable for damage caused by such failure and for the cost of restoring or replacing any construction damaged or destroyed.

History

GC § 6788; 123 v 413, § 8; Bureau of Code Revision, 10-1-53; 134 v S 166 (Eff 11-19-71); 134 v S 397. Eff 10-23-72.

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Page's Ohio Revised Code Annotated > *TITLE 61. WATER SUPPLY -- SANITATION -- DITCHES* > *CHAPTER 6119. REGIONAL WATER AND SEWER DISTRICTS*

§ 6119.09. Service agreements; rentals; bonds

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. Such rentals or other charges shall not be subject to supervision or regulation by any authority, commission, board, bureau, or agency of the state or any political subdivision, and such contract may provide for acquisition by such political subdivision of all or any part of such water resource project for such consideration payable over the period of the contract or otherwise as the district in its sole discretion determines to be appropriate, but subject to the provisions of any resolution authorizing the issuance of water resource revenue bonds or notes or water resource revenue refunding bonds of the district or any trust agreement securing the same. Any political subdivision, which has power to construct, operate, and maintain waste water facilities or water management facilities may enter into a contract or lease with the district whereby the use or services of any water resource project of the district will be made available to such political subdivision and pay for such use or services such rentals or other charges as may be agreed to by the district and such political subdivision.

Any political subdivision or combination thereof may cooperate with the district in the acquisition or construction of a water resource project and shall enter into such agreements with the district as are necessary, with a view to effective cooperative action and safeguarding of the respective interests of the parties thereto, which agreements shall provide for such contributions by the parties thereto in such proportion as may be agreed upon and such other terms as may be mutually satisfactory to the parties, including without limitation the authorization of the construction of the project by one of the parties acting as agent for all of the parties and the ownership and control of the project by the district or one or more of the other parties or any combination thereof to the extent determined necessary or appropriate. Any political subdivision may provide the funds for the payment of such contribution as is required under such agreements by the levy of taxes, assessments, or rentals and other charges for the use of the system of which the water resource project is a part or to which it is connected, if otherwise authorized by the laws governing such political subdivision in the construction of the type of water resource project provided for in the agreements, and may pay the proceeds from the collection of such taxes, assessments, rentals, or other charges to the district pursuant to such agreements; or the political subdivision may issue bonds or notes, if authorized by such laws, in anticipation of the collection of such taxes, assessments, rentals or other charges and may pay the proceeds of such bonds or notes to the district pursuant to such agreements. In addition, any political subdivision may provide the funds for the payment of such contribution by the appropriation of money or, if otherwise authorized by law, by the issuance of bonds or notes and may pay such appropriated money or the proceeds of such bonds or notes to the district pursuant to such agreements. The agreement by the political subdivision to provide such contribution, whether from appropriated money or from the proceeds of such taxes, assessments, rentals, or other charges, or such bonds or notes, or any combination thereof, is not subject to Chapter 133. of the Revised Code. The proceeds from the collection of such taxes or assessments, and any interest earned thereon, shall be paid into a special fund immediately upon the collection thereof by the political subdivision for the purpose of providing such contribution at the times required under such agreements.

When the contribution of any political subdivision is to be made over a period of time from the proceeds of the collection of special assessments, the interest accrued and to accrue before the first installment of such assessments is collected, which is payable by such political subdivision on such contribution under the terms of such an agreement, shall be treated as part of the cost of the improvement for which such assessments are levied, and that portion of such assessments as is collected in installments shall bear interest at the same rate as such political subdivision is obligated to pay on such contribution under the terms and provisions of such agreement and for the same period of time as the contribution is to be made under such agreement. If the assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as such contribution and the county auditor shall annually place on the tax list and duplicate the interest applicable to such assessment and the penalty and any additional interest thereon as otherwise authorized by law.

ORC Ann. 6119.09

Any political subdivision, pursuant to a favorable vote of the electors in an election held before or after November 19, 1971, for the purpose of issuing bonds to provide funds to acquire, construct, or equip, or provide real estate and interests in real estate for, a waste water facility or a water management facility, whether or not the political subdivision, at the time of such election, had the authority to pay the proceeds from such bonds or notes issued in anticipation thereof to a regional water and sewer district as provided in this section, may issue such bonds or notes in anticipation of the issuance thereof and pay the proceeds thereof to the district in accordance with its agreement with the district; provided, that the legislative authority of the political subdivision determines that the water resource project to be acquired or constructed by the district in cooperation with such political subdivision will serve the same public purpose and meet substantially the same public need as the facility otherwise proposed to be acquired or constructed by the political subdivision with the proceeds of such bonds or notes.

History

134 v S 166 (Eff 11-19-71); 139 v H 379, Eff 9-21-82.

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Oh. Const. Art. I, § 19b

Current through Legislation passed by the 130th General Assemblyand filed with the Secretary of State through File 94 Annotations current through April 14, 2014

Ohio Constitution > *CONSTITUTION OF THE STATE OF OHIO* > *ARTICLE I. BILL OF RIGHTS*

§ 19b. Private property rights in ground water, lakes and other watercourses

(A) The protection of the rights of Ohio's property owners, the protection of Ohio's natural resources, and the maintenance of the stability of Ohio's economy require the recognition and protection of property interests in ground water, lakes, and watercourses.

(B) The preservation of private property interests recognized under divisions (C) and (D) of this section shall be held inviolate, but subservient to the public welfare as provided in Section 19 of Article I of the Constitution.

(C) A property owner has a property interest in the reasonable use of the ground water underlying the property owner's land.

(D) An owner of riparian land has a property interest in the reasonable use of the water in a lake or watercourse located on or flowing through the owner's riparian land.

(E) Ground water underlying privately owned land and nonnavigable waters located on or flowing through privately owned land shall not be held in trust by any governmental body. The state, and a political subdivision to the extent authorized by state law, may provide for the regulation of such waters. An owner of land voluntarily may convey to a governmental body the owner's property interest held in the ground water underlying the land or nonnavigable waters located on or flowing through the land.

(F) Nothing in this section affects the application of the public trust doctrine as it applies to Lake Erie or the navigable waters of the state.

(G) Nothing in Section 1e of Article II, Section 36 of Article II, Article VIII, Section 1 of Article X, Section 3 of Article XVIII, or Section 7 of Article XVIII of the Constitution shall impair or limit the rights established in this section.

History

(Adopted November 4, 2008, effective December 1, 2008.)

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