

ORIGINAL

IN THE SUPREME COURT OF OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT,

Appellant,

v.

BATH TOWNSHIP, OHIO, *et al.*,

Appellees.

CASE NO. 2013-1770

Appeal from Court of Appeals for the Eighth Appellate District Case No. CA-12-098728 (Consolidated with Case Nos. CA-12-098729 & CA-12-098739)

Cuyahoga County Court of Common Pleas Case No. CV-10-714945

MERIT BRIEF OF APPELLEES CITY OF BEACHWOOD; CITY OF BEDFORD HEIGHTS; CITY OF BRECKSVILLE; CITY OF INDEPENDENCE; CITY OF LYNDBURST; CITY OF STRONGSVILLE; VILLAGE OF GLENWILLOW; AND VILLAGE OF OAKWOOD

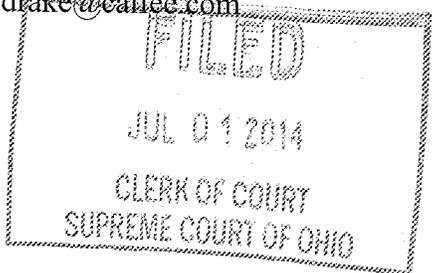
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INTRODUCTION

The Northeast Ohio Regional Sewer District and its amici spend much of their briefing touting the alleged benefits and alleged necessity of the stormwater management program (the “SMP”) proposed by the Sewer District and at issue in this case. But all of that is beside the point, the question here is not whether the SMP is a good idea in the abstract. It is about whether the Sewer District’s unelected board, whose composition is largely unknown to the public, may decide from its boardroom to redefine the Sewer District’s purpose and broadly expand its powers beyond those authorized by its enabling statutes in R.C. Chapter 6119 and its Petition and Plan of Operation (the “Charter”). Indeed, while local school districts and other public entities struggle to obtain public funding, the Sewer District imposed—by fiat—a so-called “impervious surface fee” or “stormwater management fee” that claims over \$40 million per year of the public’s funds. (Pl. Tr. Ex. 47, Supp. 909.)¹ The Sewer District imposed its new “impervious surface fee” even though (a) neither R.C. 6119.09 nor the Sewer District’s Charter authorize it to charge such a “fee,” and (b) the “fee” is in reality not a fee at all but an unauthorized tax.

R.C. 6119.01(B) permits the creation of regional sewer districts for the purpose of “provid[ing] for the collection, treatment, and disposal of wastewater.” The SMP, enacted as Title V of the Sewer District’s Code of Regulations, goes far beyond this permitted purpose. It extends the Sewer District’s reach to flooding control, erosion control, and watershed management, topics not within the control of regional sewer districts under R.C. Chapter 6119.

In addition, the Sewer District’s so-called regional stormwater management system is in fact just an arbitrary drawing on a map and a program with a wish list of projects it hopes to

¹ The Supplement to the Merit Brief of the Joint Communities continues the pagination from the Sewer District’s Supplement.

complete in the future at a cost of almost \$250 million over five years. (Pl. Tr. Ex. 47, Supp. 909.) And this is just the beginning; if this Court approves them, Title V and its impervious surface fee would continue ad infinitum, with the only limitation being the discretion of the Sewer District's Board. (Ciaaccia Tr.² 489, Supp. 877A.) Even so, when the Sewer District began collecting the impervious surface fee at the heart of Title V, there were no water resource projects within the SMP that the Sewer District owned, controlled, or managed that the Sewer District could offer to any user. R.C. 6119.09, however, permits a regional sewer district to collect a "charge" only in exchange for an agreed-upon service or benefit conferred by a water resource project. Because the Sewer District does not own or control any water resource projects to offer in exchange for the SMP's stormwater management fee, R.C. 6119.09 provides the Sewer District with no authority to collect that so-called fee.

Appellees City of Beachwood, City of Bedford Heights, City of Brecksville, City of Independence, City of Lyndhurst, City of Strongsville, Village of Glenwillow, and Village of Oakwood (the "Joint Communities"), along with the Appellee Property Owners, have sought to curb the Sewer District's attempt to illegally expand its authority and improperly charge or tax its property owners. To be clear, these are not the only communities that have indicated opposition to the Sewer District's stormwater management program. At the trial court's request, the parties divided into groups, 12 communities (including the 8 Joint Communities) actively opposed the SMP and another 31 communities indicated partial agreement and partial opposition to the SMP. Due to harsh economic conditions for local governments, many of those partial-agreement-partial-opposition communities opted not to actively fund litigation and instead

² Trial transcript testimony ("Tr.").

adopted a wait-and-see approach. So the Sewer District's suggestion that 46 of the 56 member communities do not object to the SMP is at best an overstatement not supported by the facts.

For these reasons and those set forth below, this Court should affirm the ruling of the Eighth District Court of Appeals.

STATEMENT OF THE FACTS

A. The Sewer District's Creation and the Establishment of Its Service Area.

Over forty years ago, the City of Cleveland's sanitary sewer facilities and others were discharging raw sewage into Lake Erie creating a serious health hazard that resulted in a building ban. *Ohio Water Pollution Control Bd. v. City of Cleveland*, Cuyahoga C.P. No. 886,594, p.5 (Apr. 4, 1972) (JC Appx.³ at 5). Under the astute oversight of the late Judge George J. McMonagle of the Cuyahoga County Court of Common Pleas, and after several years of active litigation and eventual compromise negotiated among the parties, a regional sewer district was established to specifically deal with the region's sanitary sewage disposal problems.

On September 3, 1970, the Ohio Water Pollution Control Board sued the City of Cleveland because Cleveland was inadequately and improperly treating and disposing of sewage and had advised the Water Pollution Control Board that the city had decided to disregard the Board's orders to remedy the matter. *Id.* p. 2 (JC Appx. at 2). Cleveland in turn complained that it did not have the funds to operate its sewage treatment and disposal facilities and filed a third-party complaint against the suburbs. *Id.* p. 3 (JC Appx. at 3). At the time, the waters of Lake Erie and its tributaries had become so polluted that Judge McMonagle called it "a fact that is so open and notorious that any Court would be warranted in taking judicial notice of it." *Id.* p. 5 (JC Appx. at 5). The court also noted that Cleveland and the suburbs had recognized the "necessity for the existence of a single governmental agency with authority to plan, control,

³ Appendix to the Joint Communities' Merit Brief.

operate, etc., *the sewage treatment facilities*,” but they had been unable to reach agreement on all terms for that agency. *Id.* (emphasis added). As a result, the court felt that it “ha[d] become obligated to fashion such orders as will bring about the establishment of a single agency with the authority to plan, manage, finance and control *sewage collection, treatment and disposal* on an area-wide basis.” *Id.* p. 7 (JC Appx. at 7) (emphasis added). The court therefore ordered that a petition for the establishment of a regional sewer district be filed. *Id.* p. 9 (JC Appx. at 9).

The Sewer District was organized and declared a political subdivision of the State of Ohio on June 15, 1972, by Judgment Entry of Judge McMonagle under Chapter 6119 of the Ohio Revised Code. (See the “1972 McMonagle Order,” Supp. 746-771.) That Judgment Entry, to which was attached the Sewer District’s Petition and Plan of Operation, was subsequently amended in 1975 (the “1975 McMonagle Order,” Supp. 772-787) and 1979 (the “1979 McMonagle Order,” Supp. 788-803) by judicial order of the Court. Collectively, these Judgment Entries are referred to herein as the “Charter.”

The plan approved by Judge McMonagle permitted the newly created Sewer District to acquire Cleveland’s sanitary sewage treatment facilities and to construct regional sanitary sewage collection, treatment, and disposal facilities. The District was permitted to charge a “sewer rate” based upon the water consumption of the residents in two sub districts – Cleveland and the suburbs – who had sanitary sewer accounts with Cleveland that were transferred to the District and who were directly connected into and serviced by the now District-owned sewage facilities and treatment plants.

The original Sewer District members were communities (*i.e.*, cities, villages, and townships) that used Cleveland's sewage disposal and treatment facilities, the ownership of which was transferred to the Sewer District. In simplest terms, the approved Charter charged the

new Sewer District with solving the sanitary sewage problem by acquiring and building defined and agreed upon regional sanitary sewage collection, treatment, and disposal facilities, and directed the consenting communities to connect their sanitary sewers and those of their residents and businesses to these Sewer-District-owned facilities. Neither the City of Cleveland's nor any other community's local sewers themselves were transferred under the Charter and they remained under local control.

In 1973, the Sewer District (then known as the Cleveland Regional Sewer District) requested an amendment to its Petition and Plan of Operation or "Charter" to allow it to assume ownership, planning, construction, operation and maintenance responsibilities for all local sewers both storm and sanitary in all of the communities within the District. In his Judgment Entry of August 28, 1975, Judge McMonagle denied the request. (*See* Supp. 780, Section 5(m) (prohibiting Sewer District from assuming ownership, responsibility, or liability for local sewerage collection facilities without written consent of the local community).)

Thus, the Sewer District's *raison d'etre* has always been to provide sewage disposal and treatment facilities to its member communities.⁴ And Sewer District membership—and its Service Area's geographic scope—arose based upon the consenting communities' connection to those sewage treatment facilities. After the original transfer, additional communities (including some from Summit, Lorain, and Lake Counties) joined or contracted with the Sewer District to use those facilities. However, the Sewer District's service area was formed by a sanitary sewer

⁴ Exhibit A to the Charter provides in part that "[t]he territory to be included in the Northeast Ohio Regional Sewer District shall include all the territory located within the boundaries on the attached map, which territory is 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." (Supp. 785.)

connection network that includes only portions of many communities, and excludes much of Cuyahoga County. (*See Court Orders.*)

Several Cuyahoga County communities (the "Non-Members")—including Bay Village, Bentleyville, Chagrin Falls, Chagrin Falls Township, Fairview Park, Hunting Valley, North Olmsted, Rocky River, Westlake, and Woodmere—are not Sewer District members because they either have their own sewage disposal and treatment facilities or have access to other non-Sewer-District facilities. Moreover, large swaths of certain communities (the "Partial Members")—e.g., Bedford, Bedford Heights, Euclid, Lakewood, North Royalton, Olmsted Falls, Olmsted Township, Orange Village, Pepper Pike, and Strongsville—are not within the Sewer District's Service Area because portions of those communities (in some cases a majority of the community) are serviced by non-Sewer-District sewage disposal and treatment facilities, while other portions of those communities are tied to the Sewer District's facilities. For example, about two-thirds of Strongsville is in the Sewer District and about one-third is not. So under Title V, those Strongsville residents serviced by the Sewer District would be charged the impervious surface fee, and the remaining residents would not, even though all Strongsville residents are part of the city's local stormwater utility and pay uniform rates to the City for its operation and maintenance. (Tr. 2594-2595, Supp. 896.)

In reality, the Sewer District's proposed Regional Stormwater System and its proposed regional Program to manage it are not even county-wide, much less truly regional. It is also not an actual or effective watershed-based proposal, as 78% of the three main watersheds in this area are outside of the District's Service Area and control. (Tr. Ct. Opinion SD Appx.⁵ 107.)

⁵ Appendix to the Sewer District's Merit Brief.

B. The Joint Communities Own or Operate, and Have Primary Responsibility For All of The Storm Drainage in Their Communities Both Man-Made and Natural.

Like all Sewer District member communities, the Joint Communities own and operate local municipal stormwater systems and utilities within their boundaries as well as local sanitary sewers. These are multi-million dollar assets that have been constructed over many years and that are owned, operated, controlled, and in some cases maintained by the local governments through taxation, assessment, and fees paid by their residents and customers. (Tr. 1909, 1912-1922, 1977, 1979-1999, 2595-2601, 2604-2606, 2608-2610, Supp. 881-892, 896-900.) The local stormwater systems carry out the very important governmental function of conveying the flow of stormwater safely and efficiently for the health, safety, and welfare of each municipality, their inhabitants, and all of the residents and inhabitants in surrounding communities. *See November Properties, Inc. v. City of Mayfield Heights*, 8th Dist. Cuyahoga No. 39626, 1979 WL 210535, at *10 (Dec. 6, 1979).

Municipalities in Ohio have constitutional, statutory, and exclusive Home Rule powers to own and operate local stormwater sewers and systems as utilities. *See, e.g.*, Article XVIII, Section 4, Ohio Constitution; *November Properties* at *10. (“[e]very municipality has a responsibility and duty to design, construct and maintain an adequate local sewer system for the uninterrupted flow of storm and sanitary effluent.”); *Dravo-Doyle Co. v. Village of Orrville*, 93 Ohio St. 236, 112 N.E. 508 (1915); *State ex rel. Toledo Edison Co. v. City of Clyde*, 76 Ohio St.3d 508, 668 N.E.2d 498 (1996); *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 671 N.E.2d 241 (1996). Judge McMonagle’s Order reinforced and followed this clear law.

This Court has ruled that a community’s local stormwater system consists of man-made storm sewers and pipes, drains, and culverts located within municipal right-of-ways and easements that municipalities clearly own and control of record, together with natural swales,

brooks, creeks, streams and in some cases rivers which flow through a municipality, and which are operated together as their system pursuant to law. All such stormwater conduits are therefore owned and/or operated together as a unit by the local municipality and comprise its local stormwater system, which is funded by the municipality as a utility under Article XVIII, Section 4 of the Ohio Constitution. *City of Wooster v. Graines*, 52 Ohio St.3d 180, 556 N.E.2d 1163 (1990); *Britt v. City of Columbus*, 38 Ohio St.2d 1, 309 N.E.2d 412 (1974).

By law, the stormwater conveyances which comprise a city's stormwater system are either owned and/or operated by the municipality which has the primary responsibility for their operation. *See November Properties*, at fn. 1 (“... the ownership and/or primary responsibility [over local sewage collection systems, both storm and sanitary], remains in the local communities,” after establishment of the Cleveland Regional Sewer District.) (emphasis added); *see also* R.C. 735.02 (city director of public service “shall supervise . . . sewers, drains, ditches, culverts . . . streams and watercourses . . .”); R.C. 729.46 (legislative authority of a municipal corporation may provide for the repair or reconstruction of any sewer, ditch, or drain). Indeed, the Federal and Ohio Environmental Protection Agencies under the NPDES Phase II Program require municipalities to enact ordinances that provide this operational oversight and control over all stormwater conveyance facilities within their respective boundaries, including rivers and streams. (*See, e.g.,* City of Brecksville Codified Ordinances Chapter 1331, entitled Stormwater Management (SWM) Plan Requirements, Exhibit No. 155.2, Supp. 910-933.) In addition, this Court has indicated that local communities have mandatory duties and operational responsibilities over their local systems including natural watercourses and streams so as to keep them free flowing and nuisance free. *See, e.g., State ex. rel. Levin v. Schremp*, 73 Ohio St.3d

733, 654 N.E.2d 1258 (1995) (Sheffield Lake could be ordered by mandamus to carry out its duty to require a property owner to remove an obstruction from a natural watercourse.)

These stormwater management requirements apply to stormwater conveyances within each municipality, no matter how many acres the conveyance may accept drainage from—including those areas in a local stormwater system that drain more than 300 acres. The member communities have spent millions of dollars fulfilling these obligations. For example, Jerry Hruby, Mayor of the City of Brecksville, testified that beyond the more than \$250,000 Brecksville spends annually to maintain its system, it has invested more than \$7.5 million in stormwater projects since 2006. (Tr. 1909-22, 47, Supp. 881-885.) Joseph Cicero, Jr. and Frederick Glady III, respectively Mayor and Service Director of the City of Lyndhurst, similarly testified that Lyndhurst has spent approximately \$10 million on its stormwater system since 1999. (Tr. 1977, 1979-2004, and 2050 – 51 Supp 886-895.) And Thomas Perciak, Mayor of the City of Strongsville, testified that Strongsville has spent approximately \$9.5 million over the past ten years on its stormwater system. (Tr. 2595-96, 2599-2601, 2604-06, 2609-10, Supp. 896-900.) Thus, contrary to the Sewer District's assertions (Merit Br. p. 10), there is no mystery to the member communities regarding where any of the stormwater goes—it is conveyed in manmade and natural components of their local stormwater systems, which systems they have built and continue to pay to maintain.

C. The Sewer District's Regional Stormwater Management Program.

Despite this backdrop of local and municipal management of stormwater in Ohio, on January 7, 2010, the Sewer District's unelected Board of Trustees amended the Sewer District's Code of Regulations by enacting Title V, "Stormwater Management Code" ("Title V"). (Supp. 415-441.) Title V purports to create a stormwater utility within the Sewer District's territory and a stormwater management program ("SMP") contemplating no less than the "planning,

financing, design, improvement, construction, inspection, monitoring, maintenance, operation and regulation” of such portions of Northeast Ohio as the Sewer District identifies as its “Regional Stormwater System.” (Title V, Section 5.0501, Supp. 426.)

1. The District's ambitious vision for its SMP.

The ambitious SMP far surpasses the Sewer District's decades-old Charter mandate to treat and dispose of sewage. In breathtakingly broad terms, the SMP claims to consist of:

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

[Title V, Section 5.0219, Supp. 421.]

Title V created by fiat a new Regional Stormwater System to be managed through the SMP that is broadly defined as:

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

[Title V, Section 5.0218, Supp. 421.]

The Sewer District's map of the proposed Regional Stormwater System depicts “over four hundred and fifty miles of streams, pipes, and culverts over the District's service area” that drain over 300 acres or more. (Compl. at ¶ 41, Supp. 25; *see also* Regional Stormwater System map, at Plaintiff's Trial Ex. 28, Supp. 657.) By default, therefore, according to the Sewer District's definition of the "Local Stormwater System" in Title V, the local systems are just the remainder of watercourses, stormwater conveyances, and structures that the Sewer District

unilaterally decided not to subsume into its Regional Stormwater System or for which it has not obtained consent or agreement to own or control. (Title V, Section 5.0212, Supp. 420.)

The SMP outlines an alarming breadth of unauthorized activities. For example, under the SMP, the Sewer District now deems itself a "stream system manager" and a "regional watershed integrator." (Tr. 142, Supp. 206.) In addition, the Sewer District's map of its proposed Regional Stormwater System blatantly overlaps stormwater conveyances under the jurisdiction of member communities' stormwater systems.

The Sewer District's Charter, however, specifically prohibits it from assuming any responsibility or liability over local storm sewer systems without municipal consent—a point lost and ignored when Title V and its map were drafted. This prohibition is clear in the Charter:

The District shall not assume ownership of any local sewerage collection facilities and systems, nor shall the District assume responsibility or incur any liability for the planning, financing, construction, operation, maintenance or repair of any local sewerage collection facilities and systems unless the assumption of such ownership, responsibility or liability is specifically provided for in a written agreement between the District and the respective local community.

[1975 McMonagle Order, subsection(5) (m), Supp. 780.]

The Charter does not mention a so-called "regional stormwater system" based on how many acres a local stormwater facility might drain, whether it be 300 acres, 600 acres or otherwise. In fact, the Charter prevents the District from designating on a map, or transforming by mere District Board resolution, any portion of any community's local storm sewer system into its alleged Regional System or SMP, without the respective community's consent. (*See, e.g.*, Section 5(m) and 5(m)(2)(4) and (5) of Exhibit A to the 1975 McMonagle Order, Supp. 780-781.)

The District claims that Title V did not violate the Charter's consent requirements because Title V's definition of Regional Stormwater System found at Section 5.0218 only

included stormwater conveyances draining 300 acres or more “that are owned and/or operated by the District or over which the District has a right of use.” But as of January 1, 2010, when the District enacted Title V and imposed 5 years of fees totaling almost \$250 million on property owners, it did not own or control any physical property or asset it had a right to manage under its actual definition of the Regional Stormwater System.

Title V, at Section 5.0503, requires the District, in addition to maintaining a map of the Regional Stormwater System, to maintain “. . . an inventory of Stormwater Control Measures that it owns or for which it has operational responsibility”. (emphasis added.) It then requires:

The Regional Stormwater System map and inventory shall be available for public review. The map and inventory shall define the description of the District’s responsibility area and assets over which it has ownership or operational responsibility.

[Title V, Section 5.0503, Supp. 426.]

As of May 27, 2011—more than one year after passing Title V—the Sewer District had no such inventory of what it owns or claims to have operational responsibility for as part of its Regional Stormwater System for public review. (*See* Tr. 458-459, Supp. 877B-877C.) And at trial in the fall of 2011, the Sewer District introduced no such inventory of what it owns or has obtained agreement to manage or control as part of its SMP. (Tr. 457-459, Supp. 877B-877C.)

In fact, the evidence at trial showed the contrary. The Sewer District’s Executive Director Julius Ciaccia testified that he was not aware of any public record inventory of Regional Stormwater System assets that the Sewer District owned or controlled, despite such an inventory being expressly required to be kept for public inspection by Title V. (*Id.*) He also confirmed that no stormwater projects had been vetted by any watershed committee or approved by the Ohio Department of Natural Resources; that the District has entered into no agreements with any Member Community regarding the scope or funding for any water resource project; and that the

District has not entered into any formal agreements with any member community nor obtained any easements from private property owners for any specific watercourse or stormwater conveyance to be included within its formally defined Regional Stormwater System (Tr. 450-51, 470-74, 485, 563, 570-73, Supp. 873-880.)

Thus, while there is a map of the proposed Regional Stormwater System in evidence, there is no evidence of record that an actual Regional Stormwater System, as defined in Section 5.0218 of Title V, that the District owns, controls and has a right to manage, and charge a fee for its use, exists.

2. *The Sewer District's ambitious plan to fund its SMP.*

The Sewer District has created a \$228 million "wish list" of projects for its SMP, but it is not content to stop there as it "believes that other projects have yet to be identified and that the need for new projects will continue in the future." (Merit Br. p. 16.) The plan is to fund the SMP with a so-called impervious surface fee to be paid by some, but not all, property owners in the Sewer District's Service Area, which will generate approximately \$40 million per year to start. (Pl. Tr. Ex. 47 Supp. 909.) The Stormwater Fee is scaled based on the square feet of a property's impervious surfaces, such as rooftops, parking lots, access roads, patios, etc. Note that SMP expenditures from this Fee will not be like those the Sewer District incurs to fulfill its wastewater treatment duties, namely computed rates for the hard operation and facility costs of treating or processing waste water. Rather, SMP expenditures are slated to be used in the future to establish its SMP and to fulfill the Sewer District's wish list of projects, which are contingent and speculative, especially since, as of the time of trial, the Sewer District had no written consent from any property owner to construct anything on their property and no written consent from any municipality to construct a facility within its boundaries.

In 2013, the Sewer District issued \$40 million in fee bills (again, in addition to the sewage rates it charges for its traditional operations), approximately \$20 million of which it collected. Those fee bills were calculated for residential property owners predicated on a three-tiered system based on the residence's size: those less than 2,000 sq. ft. were charged \$3.03/month; those between 2,001 and 3,999 sq. ft., \$5.05/month; and those 4,000 sq. ft or more, \$9.09 per month. For non-residential properties, the Stormwater Fee is calculated by multiplying a set rate (\$5.05) by each 3,000 square feet of impervious surface on the property (including buildings and parking lots). For example, under Title V's formula, a commercial facility with ten acres of impervious surface would have to pay \$8,847.60 annually.

Some owners of impervious surfaces, however, will pay no Stormwater Fee. Title V, Section 5.0705 exempts public road rights-of-way, airport runways and airport taxiways, and railroad rights-of-way. (Supp. 432.) During the trial court's post-trial amendment process, the Sewer District further amended Section 5.0705 to exempt "[c]emetaries that are owned and operated by the State of Ohio, a County, a Member Community, or not for profit entity." Although Title V provides a credit system to offset part of a property owner's Stormwater Fee (Title V, Chap. 8, Supp. 436-438), property owners have no way to "shut off" the alleged stormwater utility or to avoid the Stormwater Fee. (Title V, Section 5.0712, Supp. 434.) And Title V's "Community Cost Share Program" directs the return to the Sewer District's Member Communities a percentage of the Stormwater Fee revenues collected for local projects that must be approved by the Sewer District. (Supp. 439-440.)

Moreover, the Sewer District's stipulation that it will not build any projects in local communities who do not consent to them or manage a watercourse without consent does not save its unauthorized program or fee. Title V imposes the impervious surface fee on all 56 member

communities and their property owners, but the stipulation would limit the portion of the service area where the general funds received from the fee would be expended. This would be contrary to Title V's General Funding Policy which states:

Stormwater fees shall be structured so as to be fair and reasonable, and shall bear a substantial relationship to the cost of providing the Regional Stormwater Management Program throughout the District's service area. * * * Similarly situated properties shall be charged similar Stormwater Fees. Stormwater Fees shall be structured to be consistent in their application. * * *

[Title V, Section 5.0702, Supp. 431.]

A fee imposed on all properties in the Sewer District even though funds will not be expended in all of the communities in the District—only consenting ones—is not fair, reasonable, or consistent in its application.

If there need be further proof that Title V, with its general encroachments into local stormwater systems and its clearly unauthorized fee, violates the Charter, this Court need only look at the District's alternate pleading in this case. (*See* Comp. ¶¶ 56-60 Supp. 28-29; Comp. Ex. 8 Proposed Amendments to Petition and Plan for Operation, Supp. 843-868.) There, the District filed a proposed amendment to both its Petition and its Plan of Operation. That proposed amendment directly contradicts the Sewer District's suggestion in its Merit Brief that it does not need court approval to amend its Plan of Operation because its board of trustees may do so unilaterally. (Merit Br. p. 5.) And the Sewer District's suggestion that it does not need court approval directly contradicts the Eighth District's previous ruling that "[t]he established procedure for amending either the petition or the plan is by filing a petition with the court requesting an amendment or modification of either the petition or the plan." *Kucinich v. Cleveland Regional Sewer District*, 64 Ohio App.2d 6, 16, 410 N.E.2d 795 (8th Dist. 1979).

In its proposed amendment, which was drafted pursuant to previously provided expert advice, the Sewer District includes the revisions that would be necessary to authorize Title V.

There, one can find proposed language amending the existing Charter to provide for the creation of a Regional Stormwater System and management thereof; specific authority to construct stormwater control measures, in addition to waste water treatment and disposal facilities. In the financing section one can find a specific reference that allows the District to charge a specific stormwater fee to manage its Regional Stormwater Management Program, in addition to the existing authority to charge only for “sewer rates”.

Moreover, Title V’s text suggests that the Sewer District’s Board drafted Title V itself with the assumption or understanding that the proposed Charter amendment had been or would be agreed to and adopted:

The purpose of this Title 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 (emphasis added), Supp. 424.]

Only with a Charter amendment in place could the District legitimately proclaim that Title V’s purpose was a mandate to the District and each Member Community that they “shall work in a cooperative manner to address stormwater management problems.” Instead, that proclamation is absurd. The Sewer District adopted Title V by fiat, and then sued the member communities creating vexation and burden, not cooperation.

It would seem that if the District’s program is as laudable and necessary as it and the amici trumpet, the District should be able to obtain the appropriate legislative authority, together with a vote of the electors to impose a tax to fund the program, followed by the adoption of the proposed Charter amendments, which have already been drafted, and filed of record. These are the steps that the District improperly seeks to avoid. As it has suggested, it has waited 40 years to exercise its alleged authority here, surely it has time to proceed properly now.

STATEMENT OF THE CASE

On January 7, 2010, the same day its Board enacted Title V, the Sewer District sued each of its 56 member communities seeking a declaratory judgment on the validity of the SMP and, alternatively, the amendment of its Charter to authorize Title V. (The trial court later struck the Sewer District's amendment request as an improper pleading.) Several groups intervened, including the Appellee property owners, opposing the SMP. Both the Joint Communities and the Property Owners counterclaimed, seeking to permanently enjoin the Sewer District from implementing the SMP and its stormwater fee.

The parties filed cross-motions for partial summary judgment concerning the SMP's validity, and the trial court granted the Sewer District's motions and denied the motions filed by the Cities and the Property Owners. After a bench trial, the trial court declared that the stormwater fee was not a tax, was authorized under R.C. Charter 6119, and was "not otherwise restricted" by the Charter. The trial court also declared, however, that certain aspects of Title V were illegal or otherwise invalid:

- (i) The court found "no rational basis for the disparate treatment of non-residential property owners" and required the Sewer District to "re-work this portion of the fee schedule providing either a cap or a reasonable declining block scale to non-residential property owners." [SD Appx.000105.]
- (ii) The court required the Sewer District "to submit a plan or formula for the accrediting of costs of [a] licensed engineer" in completing applications for Stormwater Fee credits." [SD Appx. 000106.]
- (iii) The Court found 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 * * * ." As a result, the court required the Sewer District to either agree with all member communities on a new definition of "regional" (as opposed to something with a drainage area in excess of 300 acres) or revise the cost share to "reflect an amount no less than 25% to member communities for local stormwater projects." [SD Appx. 000107.]

Subject to the identified defects, the trial court found the SMP constitutional, and denied the Appellee Joint Communities' and Appellee Property Owners' claims for permanent injunctive relief.

The Eight District Court of Appeals reversed both the trial court's entry of partial summary judgment for the Sewer District and its denial of Appellees' request for permanent injunctive relief. *Northeast Ohio Regl. Sewer District v. Bath Twp.*, 2013-Ohio-4186, 999 N.E.2d 181, ¶ 82 (8th Dist.) (“*NEORSD*”). The Court of Appeals found that neither R.C. Chapter 6119 nor the Sewer District's Charter authorized its sweeping SMP and novel stormwater fee. *Id.* Among other things, the Court of Appeals held that:

- “R.C. Chapter 6119 does not authorize the District to implement a “stormwater management” program to address flooding, erosion, and other stormwater issues or to claim control over a “Regional Stormwater System.” *Id.* ¶ 46.
- The Stormwater Fee “was not for the ‘use or service’ of a ‘water resource project.’ Accordingly, * * * the stormwater fee is not a legitimate “rental or other charge” under R.C. 6119.09. *Id.* ¶ 56.
- “The expansive scope of the ‘regional stormwater system’ goes far beyond the scope of sewage treatment and waste water handling facilities under the Charter.” *Id.* ¶ 61.
- “[W]hile the Sewer District my charge for ‘sewage treatment and disposal,’ the Charter does not authorize the District to impose a fee for a stormwater management program.” *Id.* ¶ 62.

As a result, the Court of Appeals enjoined the Sewer District from implementing Title V and the SMP and from implementing, levying, and collecting the stormwater fee. *Id.*

LAW AND ARGUMENT

The Sewer District’s Proposition of Law No. 1: A district formed pursuant to R.C. Chapter 6119 is authorized to manage storm water which is not combined with sewage and to impose a charge for that purpose. Such a charge is one “for the use or service of a water resource project or any benefit conferred thereby.”

Tied up in Proposition of Law No. 1 are two independent bases for holding that there is no statutory authority for the Sewer District’s Stormwater Management Program, i.e., Title V. For one, R.C. Chapter 6119 does not grant regional sewer districts the authority to create a separate stormwater utility for flooding and erosion control. And two, Title V’s impervious-surface fee or “Stormwater Management Fee” is not a “charge” permitted by R.C. 6119.09 and is therefore invalid.

A. No statutory authority for stormwater management.

As the Court of Appeals correctly held, R.C. Chapter 6119 does not authorize the District to create and implement a separate utility or program to control flooding and erosion or to perform watershed management. The Sewer District was created under R.C. Chapter 6119. Creatures of statute like the Sewer District “have no more authority than that conferred upon them by the statute, or what is clearly implied therefrom.” *Hall v. Lakeview Loc. Sch. Dist. Bd. of Edn.*, 63 Ohio St.3d 380, 383, 588 N.E.2d 785 (1992). An agency cannot extend any authority that the General Assembly has conferred upon it, and “if there be no express grant [of authority], it follows, as a matter of course that there can be no implied grant.” *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, ¶¶ 38 -39 (internal quotations omitted), quoting *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St.44, 47, 117 N.E. 6 (1917). And doubt about the grant of power “is to be resolved not in favor of the grant but against it.” *A. Bentley & Sons*, at 47, quoted in *D.A.B.E.* at ¶ 40.

Chapter 6119 does not provide the Sewer District with authority to implement its stormwater management program. Chapter 6119 permits the creation of a “regional water and sewer district” for either or both of two express purposes: (A) “To supply water to users” and (B) “To provide for the collection, treatment, and disposal of waste water.” R.C. 6119.01. If the district is organized or operating for only one of these purposes, it “may be designated as either a regional water district or regional sewer district as the case may be.” R.C. 6119.011(U). As its name indicates, the Sewer District has been organized as a regional sewer district only. As such, its purpose is limited to providing for the collection, treatment, and disposal of waste water. R.C. 6119.01(B).

According to the Sewer District, the Program is aimed at managing regional “flooding” and “erosion.” But flooding and erosion management are not among the stated purposes of a regional sewer district. In fact, the terms “flooding” and “erosion” do not appear anywhere in Chapter 6119.

In an attempt to contrive or imply statutory support for Title V’s “*flooding*” and “*erosion*” program and projects, the Sewer District claims this support from a singular definition. It attempts to redefine the straightforward “waste water” to mean pure “stormwater,” i.e., rain water fallen to the ground. But stormwater uncontaminated by waste (such as sewage or other pollutants) is not waste water.

The word “waste water” joins two nouns: “waste” and “water.” As the Court of Appeals noted, “[t]he term waste water necessarily means water containing waste.” *NEORS*, ¶44. The statutory definition of waste water in R.C. 6119.011(K) reflects this twofold sense of the word:

“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.

This definition identifies (i) two possible liquid media ("any stormwater and any water") and (ii) the additives that convert either of them into "waste water" ("containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water"). Thus, as the Court of Appeals held, under R.C. 6119.011(K)'s unambiguous definition, stormwater becomes "waste water" only if it contains sewage or other waste.

The Sewer District and numerous amici argue that the Court of Appeals' ruling leads to absurdity by "limit[ing] the District to managing only storm and sanitary water that is mixed together." (Merit Br. p. 30.) But the Court of Appeals' ruling contains no such limitation. Rather, the ruling simply requires that for stormwater to constitute "waste water" it must contain sewage or other pollutants, i.e., waste. *NEORS*D, ¶ 44. "Stormwater," however, is not the exclusive statutory medium for carrying waste. The sewage and other pollutant additives identified in R.C. 6119.011(K) produce "waste water" when they are added to "*any water*" too. The absence of precipitation inside a public restroom does not convert its effluent into anything other than "waste water." Thus, the alleged absurdity that the District has trumpeted throughout this case, and again at page 30 of its Merit Brief, is a red herring.⁶

Indeed, construing "waste water" as requiring stormwater to contain waste in order to fall within the definition is the only construction consistent with the General Assembly's expressed purpose for "regional sewer districts"—to "collect[], treat[], and dispos[e] of waste water." R.C.

⁶ The dissent's discussion regarding whether the definition of "waste water" uses "and" conjunctively or disjunctively presents a similar red herring. *NEORS*D ¶ 92. That discussion is premised upon the dissent's mistaken conclusion that the majority opinion requires storm water and contaminated or polluted water to be mixed together to constitute "waste water." *Id.* ¶ 94. In fact, under the majority opinion, either "storm water" or "any water" may be mixed with sewage or other waste to constitute "waste water." *Id.* ¶ 45. It may be that it was not strictly necessary for the legislature to specify "storm water" when it used the seemingly more general "any water." But legislation often includes specific examples and general terms – this section is no different.

6119.01(B). Under this expressed purpose, “waste water” is something that is "collected" *and* "treated" *and* "disposed of" conjunctively. Pure stormwater (rain water without sewage or waste) is not treated (the Sewer District has never contended otherwise) and therefore cannot constitute the “waste water” regional sewer districts were created to address. This conflict—between the express purpose of regional sewer districts and the fact that pure stormwater is not treated—in and of itself necessarily raises a doubt that should be construed against the grant of power. *A. Bentley & Sons*, at 47, quoted in *D.A.B.E.* at ¶ 40.

In addition, the Eighth District’s decision here that stormwater must contain waste to constitute “waste water” is consistent with the First District’s holding that “waste water means any storm water containing sewage or other pollutants” in *Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App.3d 709, 2005-Ohio-4852, 840 N.E.2d 226, ¶ 29 (1st Dist.), citing R.C. 6119.011(K). And contrary to the Sewer District’s assertions, *Reith*’s interpretation of the definition of waste water is not “dicta from an irrelevant case.”

The central issue in *Reith* was whether earlier flooding caused by surface stormwater runoff started the statute-of-limitations clock thereby preventing a claim based on later flooding caused by underground sewered stormwater. To resolve this issue, the court first needed to determine whether “there is a legal distinction between stormwater when it is above the ground and stormwater when it is channeled through underground pipes.” In holding that there is no such distinction, the court rejected the plaintiffs’ attempt to argue based on the R.C. 6119.011 definitions of “sewage” and “waste water” that stormwater became sewage if it passed underground. After stating that “waste water means any stormwater containing sewage or other pollutants,” the court went on to explain that “[t]he difference between stormwater and sewage lies in what the water contains, not in whether it

is above ground or below ground.” *Id.* ¶¶ 29-30. This is precisely what the Eighth District held here: the difference between “waste water” and non “waste water” lies in what the water contains.

Further contrary to the Sewer District’s contentions, other definitions in R.C. 6119 do not suggest that regional sewer districts have carte blanche authority over stormwater. For instance, the Sewer District points to the reference to storm sewers in R.C. 6119.011(L)’s definition of “waste water facilities.” But the storm sewers referred to in R.C. 6119.011(L) are limited to “those designed to transport waste water”:

“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.

[Emphasis added.]

Because “waste water” must contain sewage or other pollutants under R.C. 6119.011(K), the storm sewers referred to in R.C. 6119.011(L) are necessarily those designed to transport stormwater containing sewage or other pollutants like combined sewers—not pure stormwater.

The Sewer District’s argument that R.C. 6119.011(M), which states that “water management facilities” include “stream flow improvements, dams, reservoirs * * * stream monitoring systems,” etc., supplies it with broad stormwater management authority is similarly wrong. “Water management facilities” are those for the use or protection of “water resources,” which, in R.C. 6119.011(F), means water in streams or reservoirs to be made

available for domestic users. As such, the “water management facilities” the Sewer District points to are within the purview of regional water districts, whose purpose is “[t]o supply water to users,” not regional sewer districts. R.C. 6119.01(A). As a regional sewer district only, the Sewer District therefore cannot claim authority for Title V from R.C. 6119.011(M) water management facilities, which apply to water districts only—not sewer districts. The Sewer District’s citation to this inapposite section twice in its Merit Brief (*see* pp. 27, 34) underscores the weakness of its position.

When the General Assembly wanted to grant authority over pure stormwater, it knew how to do so. For example, R.C. Chapter 6117 clearly and expressly applies to both sanitary facilities and stormwater, including “flows from rainfall or otherwise produced by * * * stormwater discharges,” “flows and runoffs,” and “flooding and threats of flooding”:

- (1) “Sanitary facilities” means sanitary sewers, force mains, lift or pumping stations, and facilities for the treatment, disposal, impoundment, or storage of wastes; equipment and furnishings; and all required appurtenances and necessary real estate and interests in real estate.
- (2) “Drainage” or “waters” means *flows from rainfall or otherwise* produced by, or resulting from, the elements, *storm water discharges* and releases or migrations of waters from properties, accumulations, flows and overflows of water, including *accelerated flows and runoffs, flooding and threats of flooding* of properties and structures, and other surface and subsurface drainage.
- (3) “Drainage facilities” means storm sewers, force mains, pumping stations, and facilities for the treatment, disposal, impoundment, retention, control, or storage of waters; improvements of or for any channel, ditch, drain, floodway, or watercourse, including location, construction, reconstruction, reconditioning, widening, deepening, cleaning, removal of obstructions, straightening, boxing, culverting, tiling, filling, walling, arching, or change in course, location, or terminus; improvements of or for a river, creek, or run, including reinforcement of banks, enclosing, deepening, widening, straightening, removal of obstructions, or change in course, location, or terminus; facilities for the protection of lands from the overflow of water, including a levee, wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, retention or holding basin, control gate or breakwater, facilities for controlled drainage, regulation of stream flow,

and protection of an outlet; the vacation of a ditch or drain; equipment and furnishings; and all required appurtenances and necessary real estate and interests in real estate.

[R.C. 6117.01(A).]

The Court of Appeals also noted that “[u]nlike the authority granted to the Sewer District, the General Assembly gave specific stormwater-related authority to watershed districts and conservancy districts.” *NEORS*, ¶ 46. For example:

- **Watershed Districts** (R.C. 6105.12, which are granted express statutory authority to "review and recommend plans for the development of the water resources," and "issue permits authorizing the construction, change, or alteration of a structure or obstruction in a restricted channel or relocation, alteration, restriction, deposit, or encroachment into or change of grade of a restricted channel or floodway * * *"; and
- **Conservancy Districts** (R.C. 6101.04, includes express statutory authority to "prevent floods," and "regulating stream channels," "irrigation," "diverting * * * watercourses," and "Arresting erosion".)

The doctrine of *expressio unius est exclusio alterius* requires a court to interpret statutes and infer from the intentional inclusion of express terms and the intentional exclusion of terms omitted, their meaning. Here Chapter 6119 contains no such express or like authority for flooding and erosion control, as the Court of Appeals determined.

Finally, until this case, the Sewer District itself believed that "waste water" means exactly what the Court of Appeals said it does. The District concedes that Titles I, II, and IV of its Code of Regulations defined "wastewater" to mean "a combination of water-carried waste * * * together with such ground, surface, or storm water as may be present." (Merit Br. p. 31) With feigned nonchalance, the District adds that "[i]t would be surprising if Title IV contained *any other* definition of wastewater." (Merit Br. p. 32) (emphasis original). Appellants could not agree more, because Chapter 6119 contains no other definition of "waste water." And the Chapter 6119

enabling provisions creating the District's powers have not changed since 1972, a fact which the District has acknowledged. (*See* Sewer District's Ct. of Appeals Answer Br. 25, n.18.)

The District's current *ex post facto* twisting of its Code, claiming that it previously implemented "only one aspect" of the District's statutory authority, is pure historical revisionism. (Merit Br. 31.) Indeed, this assertion traps the District. It cannot claim both that it has legitimately been building "storm water-related projects since 1970" and "invested" more than \$12.9 million over that period "in a series of storm water-related studies and construction efforts" (Merit Br. p. 8) and at the same time contend that "waste water" as its Code defined it since 1972 excluded "storm water" as a stand-alone regulatory object (Merit Br. pp. 2-3). Title V draws not a scrap of authority from R.C. 6119.011(K)'s definition of "waste water."

Further, the Sewer District has always been empowered to make expenditures from its sewage rates to reduce the amount of stormwater affecting its system so as not to create overflows or otherwise interfere with the efficient operation of its treatment plants. It has done so through its combined-sewer-overflow program (reducing the stormwater affecting the older sewers designed to collect both sanitary sewage and storm drainage in one pipe), its infiltration-and-inflow initiatives (addressing instances where a sanitary sewer and storm sewer are built in the same trench and over time infiltrate, or where stormwater facilities such as gutters or downspouts are illegally connected to sanitary sewers and create inflow), and other regulations. (See Titles I, II, IV, Supp. 937-1072.) None of these traditional functions of the Sewer District, which entail reducing the amount of stormwater being mixed with sanitary sewage, are threatened by the Court of Appeals opinion. That opinion did not question the Sewer District's authority in Titles I to IV. It found only that the Sewer District lacked express statutory authority to attempt to manage rainwater or stormwater in rivers and streams flowing directly to the Lake

and otherwise (without involving the sanitary sewage treatment system) for the regulatory purposes of attempting to reduce flooding and erosion.

Because the Court of Appeals' opinion does not affect the Sewer District's ability to reduce the effect of stormwater on its sanitary sewer systems, the ruling—contrary to the suggestions by the State of Ohio—does not jeopardize the consent decree with United States EPA. The consent decree requires the Sewer District to collect or otherwise manage stormwater ***“in order to prevent its release to the combined sewer overflows.”*** (Ohio Br. p. 7.) This reduction in the release to the combined sewer overflows is being addressed and is distinct from Title V's erosion and flooding control programs. In fact, the Sewer District is going to pay the \$3 billion cost of the consent decree through increases in District property owners' sewer rates—increases of around 18% per year that it has already begun imposing and that are wholly unrelated to Title V's impervious surface fee.⁷ Michael Scott, *Cleveland, Northeast Ohio sewer rates would more than double under deal with federal government*, http://blog.cleveland.com/metro/2010/10/sewer_rates_in_cleveland_north.html (accessed Dec. 9, 2013).

Through Title V, the Sewer District attempts to greatly expand its power to include management of pure stormwater that will not directly affect its sanitary sewage collection and treatment systems. The General Assembly did not grant this broad power to regional sewer districts in R.C. Chapter 6119. The Court of Appeals therefore correctly held that Chapter 6119 does not authorize such a stormwater management program aimed at flooding and erosion control and that Title V is, accordingly, invalid.

⁷ Notably, the State does not dispute the Court of Appeals' determination that Title V's impervious surface fee is invalid.

B. The “Stormwater Fee” fails even threshold compliance with R.C. Chapter 6119's conditions for creating legitimate "rentals and other charges for use of water resource projects.”

The Court of Appeals also correctly invalidated Title V because the Sewer District lacks any authority under R.C. Chapter 6119 to impose the impervious surface fee that is at the heart of Title V. Under R.C. 6119.09, a regional sewer district may collect rentals or other charges for the use or benefit of its projects through contracts with persons desiring those services:

[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 * * * with one or more persons * * * desiring the use or services* thereof, *and fix* the terms, conditions, *rentals, or other charges * * * for such use* or services.

[Emphasis added.]

To be a valid charge under R.C. 6119.09, a fee must be both (i) for the use of, services of, or other benefit conferred by a water resource project and (ii) contracted for with persons desiring the use or services of the project. Title V’s impervious surface fee meets neither of these prerequisites. In fact, under this Court’s decision in *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, it is actually an invalid and unauthorized tax.

1. *The Stormwater Fee cannot be an R.C. 6119.09 charge because the Sewer District has no water resource projects that it can charge anyone to use.*

R.C. 6119.09 permits regional sewer districts to charge a fee in a quid-pro-quo sense: A “rental or other charge” may be collected “for the use or services of” (or “benefit conferred” by) any “water resource project.” R.C. 6119.06 similarly limits a sewer district to collecting fees in exchange for the use or services of a water resource project:

(W) Charge, alter, and collect rentals and other charges for the use or 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 * * * are not paid by the user thereof * * *. (emphasis added.) R.C. 6119.06(W)

And a "water resource project" is "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...." R.C. 6119.011(G) (emphasis added).

From the moment it began extracting its Stormwater Fee from property owners—to the tune of over \$40 million per year—the Sewer District did not have any “water resource projects” the “use” of which it could offer to anyone. (Ciaccia, Tr. 467-70, 474-75, 479, Supp. 870-872, 875.) Moreover, it had no “Regional Stormwater System” over which the Sewer District has taken or can unilaterally take control, much less one it can “charge” others to use.⁸ There is a proposed “System,” which is actually just a drawing on a map identifying a patchwork of man-made and natural features, the virtual entirety of which the Sewer District does not own or control, did not build or buy, does not maintain, and has no right to access. Those man-made and natural features are entirely comprised of natural watercourses and culverts under the jurisdiction of the local communities.

The Sewer District’s suggestion that “[t]he stormwater fee is thus based upon the incremental increase in the demand on the Regional Stormwater System caused by development” (Merit Brief, p. 18) and its citation to the trial court’s finding that “the District provides the service of effective transportation of stormwater . . .” as “property owners use the unmanaged Regional Stormwater System” (Merit Br., p. 34) are pure pretense. The Sewer District never

⁸ As set forth in R.C. 6119.06(M), a 6119 district may “[a]cquire, 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 * * * such public or private lands * * * it considers necessary for carrying out Chapter 6119 of the Revised Code, **but excluding the acquisition by condemnation of any waste water facility or water management facility** owned by any person or political subdivision * * *.” (Emphasis added.)

explains how it can legally charge anyone to use something it does not own or control, such as an existing entire Regional Stormwater System, per its own definition.

Aware that it has no existing water resource project, or even any that had been appropriately vetted and specifically agreed to, the Sewer District offers a bait and switch. The Sewer District now suggests that the fee is for the use and services from a future plan or the “Program” – not from an existing “water resource project” – as the statutes require. (Merit Br. pp. 16-17.) It also claims the fee is justified by illusory future indirect benefits upon each property owner by the “Program” – not by existing service agreements entered into voluntarily for the “specific” benefits” from existing water resource projects – as even the trial court stated was required by the statute. And while “water resource projects” include projects “to be acquired,” that does not mean a regional sewer district can collect an R.C. 6119.09 charge for a speculative list of “to be acquired” projects before and without any assurance that any project will confer a future service or other benefit. Again, R.C. 6119.09 authorizes “charges” only for the “use or benefit” of “water resource projects”; thus, no “use or benefit,” no “charge.” Underscoring this point, R.C. 6119.011(P) defines “revenues” as including “charges received by a district for the use or services of any project,” not for a plan to hopefully build projects, five or more years out, which the Sewer District has no unilateral authority to construct.

In sum, there are no existing water resource projects, or any under construction, that the District owns and operates that are providing any service or benefit to anyone. Moreover, there is no actual regional system of storm sewers, streams, or creeks that the District has purchased, leased or has obtained the right of use over by consent or otherwise, much less the right to charge for the use thereof. Thus, given the clear and un rebutted evidence, the impervious surface fee is not an authorized R.C. 6119.09 charge, as the Court of Appeals found. (*NEORS*, ¶ 56.)

2. ***The Stormwater Fee does not arise from voluntary agreements for service between the District and the property owners who are forced to pay it.***

The language of R.C. 6119.09 clearly denotes that authorized "charges" thereunder arise from "voluntary" subscriptions by property owners, pursuant to "contracts," for the "use" or benefits from "water resource projects." This statutory authority to impose "rentals or other charges" in exchange for "the use or services of any water resource project or any benefit conferred thereby" clearly contemplates paying customers who have the choice of contracting with a utility and thereby accepting, rejecting, or limiting their *use* of the *service*, or *benefit* being provided. Indeed, the District's existing sanitary sewer contractees have such a choice regarding the District's provision of sewage treatment services and they agree by contract to receive them (*i.e.*, they can also restrict their water consumption or even turn off or reject water and sewer service—as do most of the vacant properties in the District or property owners who go elsewhere for long periods of time.)

Everything about the Sewer District's Stormwater Fee, however, involves involuntary exactions from select Sewer District property owners, without their consent, in exchange for no discernible, tangible, specific or direct benefit from any specific asset. The Sewer District exacts its Stormwater Fee not from persons it contracts with, rather from persons the Sewer District selects, without their consent and regardless of the payor's desire for any District services.

Moreover, these "customers" are charged a fixed rate scaled only to the amount of impervious surface on their property; they must pay it each and every quarter, regardless of how much or little it rains or snows; and they can never reject or turn off the "service." The trial court even found as much. (Tr. Ct. Op., SD Appx. 100.) Absent resort to illegal or impractical measures (for example, tearing out a driveway or removing a rooftop), the select property owners within the District's Service Area have no choice and are forced to pay the Stormwater Fee.

In addition, R.C. 6119.06(W) provides that the "district may refuse the services of any of its projects if any of such rentals or other charges * * * are not paid by the user thereof." This permission to refuse service in the event of a failure to pay highlights that a proper R.C. 6119.09 charge arises from consensual, contractual service agreements with customers. But it is impossible for the Sewer District to "refuse the services" it purports to be providing under the SMP to any property owner, regardless of whether the property owner fails to pay the Stormwater Fee. The Sewer District's SMP provides no utility service whatsoever to its customers. And because it is impossible for the Sewer District to refuse any purported services provided by the SMP, Title V's involuntary Stormwater Fee is plainly not a "charge" that R.C. 6119.09 contemplates.

3. *The Stormwater Fee is actually an unauthorized tax that the Sewer District is using to avoid other required R. C. Chapter 6119 revenue-generating procedures.*

In reality, the Sewer District's "Stormwater Fee" is not a "fee" at all, but a tax under this Court's decision in *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916. And because this tax did not meet any of the statutorily imposed requirements for assessment, including the fact that it was not approved by the electorate, it is invalid for this reason in addition to the ones given above. Under *Drees*, one of the major indices of a tax is its imposition upon a broad category of residents and the general benefit of the proposed use of the funds. "When the ultimate use is to provide a general public benefit, the assessment is likely a tax, while an assessment that provides a more narrow benefit to the requested companies is likely a fee." *Drees*, at ¶11.⁹

⁹ The Court of Appeals did not reach the issue of whether the "Stormwater Fee" constitutes a tax, but this issue provides additional grounds for affirmance. Moreover, the *Drees* analysis shows that the "Stormwater Fee" is not a "charge" contemplated by R.C. 6119.09.

Here, the trial testimony demonstrated that the District's "Stormwater Fee" tax will be imposed upon all property owners throughout the District whose property has impervious surface, that is, essentially all developed property in the District. The District's trial witnesses repeatedly extolled the Stormwater Program's general benefits for both those residing in and outside of the District's territory, and for even visitors regardless whether they paid the "Stormwater Fee". In *Drees*, this Court clearly stated **"It is difficult to imagine that an ordinance designed to protect and promote the public health, safety and welfare of an entire community could be characterized as anything but a tax."** *Drees* at ¶16.

Also, a critical component of any "fee" under *Drees* is that it is regulatory in nature. The District, however, did not identify below a single stormwater regulation it has the legal authority to impose upon a property owner. Stormwater regulation is the function of the EPA and municipalities under the Clean Water Act Phase II. (*See Wells*, Tr. 1531-34, Supp. 391-394.)

Additionally, *Drees* requires that to be a fee, the funds must be sufficiently earmarked. By "earmarked" the *Drees* Court meant that the funds generated must be spent to improve the particular fee payor's property or specific property around it. *Drees* held that the township's failure to establish geographic subaccounts for the expenditure of its proposed fee revealed that the alleged fee was, in fact, a tax. The District does not earmark its "Stormwater Fee" proceeds for project locations near each payor's property, or even within specific watersheds where the payee resides.

Further, the *Drees* case requires that fees be "tied to events, not the spending whims of government." *Drees*, at ¶ 9. The District argued below that the Stormwater Fee will not exceed the costs of its future proposed stormwater projects and activities. But that is a thoroughly false limit. In reality, the projects and activities are no more than an ever-expanding "wish list," the

"hard costs" of which are not associated with established stormwater treatment, facility operation objectives, or watershed plumbing. (See "First Out" proposed project list, Pl. Trial Ex. 44, Supp. 907.) A "fee" is a "tax" under *Drees* the more that the use of the funds it generates are tied only to the governmental entity's conjuring up of enough projects to use those funds up. Indeed, the District's Executive Director confessed that the District's Board of Trustee's "self-limit[ing]" discretion was the only control on District spending. (Ciaccia, Tr. 489, Supp. 877A.) Under the *Drees* test, the District's "Stormwater Fee" is therefore a tax.

The Sewer District ignores this Court's *Drees* decision and instead relies on a court of appeals case that did not address the "fee" / "charge" issue, *City of Cleveland v. N.E. Ohio Reg'l Sewer Dist.*, 8th Dist. Cuyahoga No. 55709, 1989 WL 107162 (Sept. 14, 1989). In *Cleveland*, the city argued that district-wide financing for the intercommunity relief sewers was improper because they were local sewers, and local communities are to fund the construction of local sewers under the Sewer District's Plan of Operation. *Id.* at *3. The court did not consider the validity of the charges for the intercommunity relief sewers under R.C. 6119.09; that issue was not raised. "The issue [wa]s not one of benefits but rather of judicial interpretation of the NEORS D Plan of Operation and its regulations." *Id.* Because *Cleveland* involved a challenge to district-wide financing of the intercommunity relief sewers under the Charter, the case focused on whether those sewers serviced more than one community. The court's statement that the relief sewers would confer a general benefit on "all users of the district including city residents" must be read in this context as indicating the non-local nature of the sewers, not some

direct benefit to each property owner. In short, *Cleveland* does not change the fact that Title V's stormwater fee is not a valid "charge" under R.C. 6119.09, but is instead an unauthorized tax.¹⁰

The Sewer District dubbed its stormwater tax a "fee" in an attempt to circumvent statutory procedures established for the protection of tax payers and property owners. For example, R.C. 6119.18 authorizes the Sewer District to levy property-tax millage "for the purpose of providing funds to pay" the "current expenses of the district," "any portion of the cost of one or more water resource projects," or both. But an R.C. 6119.18 tax requires voter approval, which the Sewer District did not seek here.

Other statutorily authorized methods for the Sewer District to raise funds provide similar protections:

- R.C. 6119.17 authorizes the Sewer District to levy property tax millage "to pay the interest on and to retire" any "bonds." The bonds, (*i.e.*, borrowing), which this section also authorizes, may be issued "to pay" for "any portion of the cost of one or more water resource projects or parts thereof" and "may include any portion of the cost of water resource projects to be specially assessed." *This tax and the associated bond issue both require voter approval.*
- R.C. 6119.42 authorizes the Sewer District to specially assess properties to pay for "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 * * *" and for times listed in R.C. 6119.43. *These special assessments may be allocated in only three ways: (i) by percentage of the property's tax value, (ii) by the foot frontage of property abutting the project, and (iii) in proportion to the projects' benefits to the property. In addition, these assessments would be subject to the **public inspection of the projects, and requirements for notice and opportunity for owner objections to the assessments as well as hearing on those objections.** R.C. 6119.46 – R.C. 6119.49.*

¹⁰ Furthermore, to the extent the Sewer District relies on *Cleveland* to suggest that R.C. 6119.09 does not require an "agreed upon service connection to a water resource project," that reliance is misplaced. In *Cleveland*, all of the property owners in both the City of Cleveland and the suburbs had agreed-upon accounts and service connections to the sanitary sewer "water resource projects" existing throughout the Sewer District as R.C. 6119.09 requires. Here on the other hand, the Sewer District seeks to impose Title V's impervious surface fee on those without any service connections or any other agreements with the Sewer District.

- R.C. 6119.58 authorizes the Sewer District to impose special assessments "for planning purposes" that are subject to *the same allocation restrictions as R.C. 6119.42 assessments and similar public notice and comment procedures.*

The District is attempting to utilize its Stormwater Fee to short-circuit all of these statutory procedures which are imposed for the protection of taxpayers and property owners. In so doing, the District cavalierly disenfranchises all electors in its Service Area and denies them their legitimate, statutory oversight and control over the District's operations, which the General Assembly conferred on those electors, as the Court of Appeals noted. *NEORS* ¶¶ 57-58.

The General Assembly did not—in R.C. 6119.09 or anywhere else—authorize the Sewer District's small group of unelected board members to impose \$250 million in taxes on the citizens of this State simply by naming it a "fee." Because Title V's Stormwater "Fee" is actually a tax (and was never submitted for voter approval under R.C. 6119.18) and not a fee, the Court of Appeals correctly held that it was invalid.

The Sewer District's Proposition of Law No. 2: When a Petition and Plan for Operation grant a Chapter 6119 district the authority to operate storm water handling facilities, that District is authorized to create and implement a regional stormwater management program, including imposing appropriate charges to operate that program.

Irrespective of whether the District had statutory authority to implement Title V and impose its fee, Title V is also invalid for the independent reason that it exceeds the District's authority under the Charter, as the Court of Appeals correctly determined. *NEORS* ¶¶ 59-68. Although the Charter cannot contravene Chapter 6119, it can and does limit the Sewer District's powers. Here, the Charter does not provide the Sewer District with powers to establish a stormwater utility independent of its sanitary-sewage-treatment-system responsibilities. The Charter also limits the Sewer District to charging "sewer rates" for the treatment and disposal of sewage. Title V's impervious-surface "fee" to manage pure stormwater is therefore not permitted by the Charter.

A. The District's Charter contains no stormwater-utility authority.

In this case, the Court of Appeals properly found that there is no express authority set forth in the Charter providing the District with expansive powers to establish a separate utility to manage stormwater for the purpose of attempting to mitigate flooding and erosion, independent of its sanitary sewage treatment system responsibilities.

The Sewer District's Charter does not in anyway contemplate a "regional stormwater system." As set forth in the Charter, the Sewer District's purpose was "the establishment of a total wastewater control system for the collection, treatment and disposal of waste-water within and without the District." (1975 Judgment Ex. A ¶ 4, Supp. 774.) The Charter grants the Sewer District authority over only "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.* ¶ 5(c), Supp. 775 (emphasis added).)

Reading the Charter as a whole, the Court of Appeals held that the Charter authorized only sewage collection, treatment, and disposal, and lacked any express authority for the Sewer District to separately manage flooding and erosion in creeks, rivers, streams or flood plains. The Sewer District points to Charter Paragraph 5(c)'s mention of "stormwater handling facilities" as support for its Program. But "stormwater handling facilities" must be read in context with the other items in Paragraph 5(c), including the immediately following item "all other water pollution control facilities" and the very first item "wastewater treatment and disposal facilities." The use of the term "stormwater handling facilities" in the Charter must be read as facilities utilized in sewage treatment, and not providing independent stormwater management authority for flooding and erosion, as the Sewer District contends.

This is consistent with a memorandum prepared in 2009 by Paul T. Murphy in his capacity as Director of Law for the City of Lyndhurst, who was the Sewer District's First Assistant General Counsel from 1974 – 1990. (Trial Ex. 159.10, Supp. 901-906.) Murphy explains that in 1979, Judge McMonagle decided not to provide the Sewer District with broad powers to implement a regional stormwater program and instead granted the Sewer District only limited power to reduce the instances of combined sewer overflows in Cleveland and to initiate the intercommunity relief sewer program in the suburbs to reduce stormwater flow into the combined sewers. (*Id.* Supp. 903.) In addition, in 1998, the Sewer District obtained a legal opinion from its then outside counsel questioning the Sewer District's power to implement a regional stormwater program like Title V without either amending the Charter or obtaining the consent of the member communities. (*Id.* Supp. 904-905.)

Under the Charter, the sewage pipes owned, operated, and managed by the local political subdivisions remained theirs, while the City of Cleveland transferred to the Sewer District by recorded deed, title and ownership of certain facilities (e.g., pipes, major interceptor sewers, and treatment plants) for the collection, treatment, and disposal of the sewage. Local communities retained control of their local systems. As a result, the Charter characterizes the sewerage collection facilities and systems in terms of what is owned or operated by the Sewer District on the one hand, and all other facilities and systems, which the Charter refers to as the "local" facilities and systems, on the other. A "regional stormwater system" is an entirely new concept created solely by the Sewer District in Title V.

The Charter places very specific restrictions on the Sewer District's authority and activities that Title V violates. The Charter specifically forbids the Sewer District from assuming

responsibility for the “planning, financing, construction, operation, maintenance or repair” of any local collection system except through a written agreement with the local community:

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 collection facilities and systems within the Sewer District, including both storm and sanitary systems. The Sewer District shall *not* assume ownership of any local sewerage collection facilities and systems, *nor* shall the Sewer District assume responsibility or incur any liability *for the planning, financing, construction, operation, maintenance or repair of any local sewerage collection facilities and systems unless* the assumption of such ownership, responsibility or liability is specifically provided for in *a written agreement between the Sewer District and the respective local community.*

[Exhibit A to 1975 Order, at page 7, Section 5(m), Supp. 780 (emphasis added).]

Here, however, the Sewer District created an alleged Regional Stormwater System through Title V on a map which includes over 450 miles of storm sewers, both man-made and natural, all of which are either owned or operated by all of the Member Communities and whose ownership, operation, and rights to manage these systems are all protected by the above provisions of the Charter, and Constitutional Home Rule and statutory law.

As the Court of Appeals ruled, the District has violated the Charter by this unilateral expansive mapping and simultaneous declaration of responsibility and liability over the mapped area, all without written consent of any community, or a Charter amendment. The express breadth of Section 5.0501 of Title V supports this ruling:

Management of the Regional Stormwater System – The District shall provide overall Stormwater Management of the Regional Stormwater System, including planning, financing, design, improvement, construction, inspection, monitoring, maintenance, operation and regulation for the proper handling of stormwater runoff and the development and provision of technical support information and services to Member Communities.

[Supp. 426.]

This provision violates, almost word for word, Section 5(m)’s requirement that the Sewer District obtain consent for any planning, financing, construction, operation, maintenance or

repair of the local systems. In Title V the District assumes responsibility to develop and implement a stormwater construction plan for the Regional Stormwater System and Sewer District owned or operated Stormwater Control Measures. (See Title V, Section 5.0506, Supp. 427-428.) Again, in Section 5.0507 the District assumes responsibility and liability for operation and maintenance of the Regional Stormwater System and District owned or operated Stormwater Control Measures. (Title V, Section 5.0507, Supp. 428-429.) The District also assumes responsibility and planning of local systems as it “shall develop Stormwater Master Plans” in the major watersheds within the District. (See Title V, Section 5.0505, Supp. 427.) It also unilaterally creates a Community Cost Share liability to each community from the funds collected from the Stormwater Fee (originally at 7.5% and now 25%) and strictly manages how that money can be spent by a community in its local system. (Title V, Section 5.0901 – 5.0906, Supp. 439-440.)¹¹

Note that all of the above assumption of responsibility and liability is not just for areas that the Sewer District owns or operates as part of its defined Regional Stormwater System or pursuant to its stipulation, it is for the entire mapped area, which includes over 450 miles of local system sewers. All of this assumption of responsibility and liability is created in Title V without a Charter amendment or unanimous consent of all the member communities in the District. This incurring of responsibility and liability by financing and providing the above-mentioned planning, operation, maintenance and review responsibility in its mapped Regional Stormwater

¹¹ Title V also requires local communities, whether they consent or not, to submit to the District copies of storm management plans for any city projects or developments, and requires the District to assume the responsibility of reviewing them, i.e. the District “shall review submissions for potential impact to the Regional Stormwater System and, or District owned or operated stormwater control measures.” This is another assumption of responsibility for planning in local systems in violation of the Charter.

System, without the consent of all members or a Charter amendment, is on its face, a clear violation of the Charter.

The Sewer District argues that “local communities do not own or operate rivers, streams, brooks, creeks, or other natural watercourses within their geographic boundaries, which primarily flow through privately-owned property.” (Merit Br. p. 43.) But R.C. 735.02 requires a city’s director of public service to supervise the improvement of “streams, and watercourses” within the city’s boundaries, and this Court has held that mandamus relief could be granted against cities requiring them to maintain natural watercourses. *Levin*, 73 Ohio St.3d at 735, 654 N.E.2d 1258. Further, the Sewer District’s argument ignores communities such as Lyndhurst, which, through actual ownership or easements, control nearly all of the natural watercourses within its boundaries that would be part of the Sewer District’s “stormwater system.” (Tr. pp. 1980-1983 Supp. 887-888; *also compare* Tr. Ex. 159.4 with Tr. Ex. 159.11, Supp. 934-936.)

Moreover, this Court has confirmed that Section 4, Article XVIII of the Ohio Constitution authorizes a municipality to own and operate a utility—including the “local storm sewer system” located within the geographic boundaries of the municipality—without interference by other governmental entities. *City of Wooster*, 52 Ohio St.3d at 184, 556 N.E.2d 1163, *see also* cases cited at pp.6-8 *supra*. That case also confirms that the local storm sewer system includes both man-made storm sewers and natural drainage systems such as creeks, streams, rivers, natural swales, and brooks. *Id.* at 184. The Sewer District contends that Article I, Section 19b(G) of the Ohio Constitution “through reference to Article XVIII, Section 3 and 7, makes clear that municipal home rule powers cannot be used to ‘impair or limit’ any of the rights recognized by this constitutional provision, including private property rights in Ohio’s rivers and streams and the District’s regulation of storm water as authorized by Ohio law.” (Merit Br. p.

44.) But although Article I, Section 19b(G) expressly sets forth various sections of the Ohio Constitution that shall not impair or limit the rights of that section, Division G does not list the provision of the Ohio Constitution most relevant to these proceedings, namely, Section 4 of Article XVIII. Again, Section 4 of Article XVIII expressly authorizes a local storm system utility composed of the manmade and natural drainage within the community. *Wooster* at 184; *State ex rel. McCann v. City of Defiance*, 167 Ohio St. 313, 148 N.E.2d 221 (1958); *Priest v. City of Wapakoneta*, 24 Ohio Law Abs. 214, 32 N.E.2d 869, 879 (3d Dist. 1937) (recognizing that the grant of power under Section 4, Article XVIII of the Ohio Constitution is self-executing, and no action by the state legislature is necessary to make it available to the municipality.)

The Sewer District's stipulation that it will not build any projects in local communities who do not consent to them, or that it will not "manage" any area as part of its actual Regional Stormwater System without consent or agreements from cities and property owners (Merit Br. pp. 44-46), is not sufficient to allow it to evade the consent requirements of the Charter. As is clear from the above, Title V's Program, on its face, assumes responsibility and liability for the entire proposed mapped Regional Stormwater System, as well as "facilities and integration of activities that benefit and improve watershed conditions across the Sewer District's service area." (Title V, Section 5.0219, Supp. 421.) Thus, the SMP on its face purports to manage local stormwater systems, watercourses, and other appurtenances both where the Sewer District may have consent and where it does not have the required consent. This general assumption of responsibility and liability is a violation of the Charter, which invalidates Title V.

B. Title V directly conflicts with specific Charter provisions limiting the District to charging for "sewer" fees.

In addition, Judge McMonagle made very clear that the Sewer District does not have "jurisdiction to impose fees or charges beyond those authorized or restricted by its Charter."

(12/21/81 Mem. of Op., at 6, (App. 40 hereto).) It is also very apparent that the Charter limits the Sewer District to charging for "sewer rates" for "sewage treatment and disposal". (See Charter, Section 5(f), "Sewer Rates," Supp. 754.) While the Charter is very detailed in prescribing the nature and components of the rate that the District may charge for "sewage treatment and disposal," it makes no provision for charging an impervious surface fee to manage pure stormwater. Sewage treatment and disposal do not equate to stormwater management. Thus, under the doctrine of *expressio unius est exclusio alterius*, there is no authority in the Charter authorizing the Sewer District to impose a completely different type of fee, based on impervious surfaces, for a completely new program not related to sewage treatment and disposal.

The Court of Appeals therefore properly ruled that the Charter does not authorize Title V's stormwater management fee:

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.

[NEORSD ¶ 62.]

The Sewer District contends that it may impose any fee it wants because the Charter at Section 5(c)(3) "states 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.'" (Merit Br. p. 47.) The Sewer District overstates its case. For starters, as stated earlier, the Charter authorizes only sewage treatment and other water pollution control projects. (1975 Judgment Ex. A ¶ 5(c) Supp. 775.) In addition, the quoted provision relates to financing for specific projects, but approximately one-half of the impervious surface fee was imposed to fund other aspects of Title V's Program, which are

unrelated to financing projects, including stream monitoring, master planning, stormwater project review, watershed coordination and planning, and a wide range of administrative duties not related to financing specific “projects.” (Pl. Ex. 44, Supp. 907.)

The Sewer District also ignores the Charter’s limitation on financing projects, which requires the Sewer District to obtain agreement on financing from the local communities when the project is undertaken:

The method of financing particular projects *shall be agreed to* between the District and the respective local communities *at the time the project is undertaken* by the District.

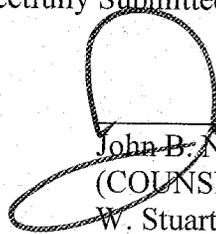
[Charter at 5(m)(5), Supp. 797 (emphasis added.)]

Title V improperly attempts to impose its regional impervious surface fee on respective local communities without proof that any agreement exists between the local communities and the Sewer District regarding particular projects, much less the overall impervious surface fee method for financing them. Further, the District’s impervious surface fee was imposed long before any particular projects were being undertaken. Title V’s financing of future, proposed projects by reason of the District’s “fee” is expressly prohibited by the Charter, as well as by R.C. 6119.09. The Court of Appeals therefore correctly held that Title V’s impervious surface fee was invalid under the Charter.

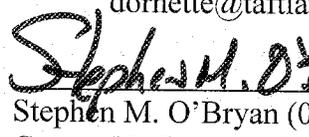
CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

A copy of this **Merit Briefs of Appellees City Of Beachwood; City Of Bedford Heights; City Of Brecksville; City Of Independence; City Of Lyndhurst; City Of Strongsville; Village Of Glenwillow; and the Village Of Oakwood** has been served this 1st day of July 2014, by e-mail and Regular U.S. mail, postage prepaid, upon:

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