

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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INTRODUCTION

The two issues involved in this appeal are: (a) whether 6119 Districts¹ have the statutory authority to manage storm water that is not combined with sewage or industrial waste, and to impose a charge for that purpose; and (b) whether the Petition and Plan for Operation of the District authorize the District to implement a regional stormwater management program, and to impose appropriate charges to operate that program.

The Merit Brief filed by the District relies directly on the extensive factual record in this case. After a three-week-long bench trial, the trial court made numerous factual findings in the District's favor in the course of determining that the District may legally implement its Regional Stormwater Management Program (the "Program") set forth in Title V of its Code of Regulations ("Title V"). A divided Eighth District Court of Appeals reversed the trial court's determination based, in large part, upon a flawed interpretation of the term "waste water" set forth in R.C. 6119.011(K), which interpretation prevents the District from managing storm water unless it is *combined* with sewage.

The State of Ohio itself *outright rejects* this novel interpretation of its *own* statute. (*See generally* State of Ohio Amicus Br.) The State fully agrees with the decades-old interpretation relied upon by the District, the other more than ninety 6119 Districts in Ohio, and the large majority of the District's Member Communities that actively support the District's Program, which is that 6119 Districts have statutory authority over *both* (a) storm water and (b) water containing sewage and other pollutants. (*See generally id.*; District's Br.; Coalition of Ohio Regional Districts' Amicus Br.; City of Cleveland's Amicus Br.; Supporting Member Communities' Amicus Br.)

¹ All capitalized terms used herein without definition shall have the meanings ascribed to such terms in the District's Merit Brief.

Both the Community Appellees and the Property Owner Appellees (collectively, “Appellees”) recognize that the primary basis for the court of appeals’ decision is unsupportable—they now openly concede that the District may manage storm water to “reduc[e] the amount of stormwater being mixed with sanitary sewage” and “to reduce the flow of stormwater into its combined sanitary and storm sewers,” *i.e.*, that the District may manage storm water prior to it being mixed with any sewage or pollutants, albeit for this “limited” purpose. (Community Appellees’ Br., at 26; Property Owners’ Br., at 8, fn 6.) Appellees’ new position cannot be reconciled with the court of appeals’ statutory interpretation of “waste water.”

Because of the gravity of the error committed by the court of appeals, Appellees attempt to raise a slew of issues that are not germane to this appeal, including whether the District’s stormwater charge is a “fee” or a “tax”—an issue this Court has made clear it will not entertain by declining to accept jurisdiction over the District’s Proposition of Law No. III. In so doing, Appellees ignore the factual record and never challenge the well-supported factual findings of the trial court, which are entitled to a high degree of deference. *In re Ormet Primary Aluminum Corp.*, 2011-Ohio-2377, ¶ 14, 129 Ohio St. 3d 9, 949 N.E.2d 991. Instead, they rely upon rhetoric and unsupported statements and conclusions that cannot be found in, or are directly contradicted by, the factual record. They treat the lengthy bench trial on these issues as if it never even occurred.

Appellees continue to assert that the District does not have authority under its court-approved Petition and Plan for Operation to implement its Program. However, this argument is entirely dependent upon the court of appeals’ erroneous interpretation of the term “waste water,” and thus fails. Appellees also never *once* mention in either of their Briefs the stormwater *mandate* in the District’s Plan for Operation primarily relied upon by the trial court in validating

the Program. They simply cannot explain how it did not directly require the District to develop its Program. (NEORSD Appx. 87.)

Therefore, based upon the facts and arguments set forth in the District's Brief and the points addressed in this Reply, the District respectfully requests that this Court reverse the erroneous decision of the court of appeals and reinstate the trial court's findings in favor of the District and its Program.

ARGUMENT

I. Undisputed evidence demonstrates that the District's Program was openly developed over more than three decades with the cooperation of and input from all Member Communities, and not imposed by "fiat" as Appellees suggest.

In their Briefs, Appellees attempt to paint the picture that the District secretly developed its Program without any oversight and then, to everyone's surprise, implemented it by "fiat." (Community Appellees' Br., at 1; Property Owner Appellees' Br., at 10.) These assertions ignore all of the record evidence, and could not be further from the truth.

While, early in its history, the District's initial focus was on addressing the pressing sanitary sewage issues, as extensively described by Appellees, the District was always tasked with managing storm water pursuant to the unambiguous stormwater authority granted to it under Chapter 6119 and its Petition and Plan for Operation (discussed below). (Community Appellees' Br., at 3-5; Property Owner Appellees' Br., at 4-8; NEORSD Supp. 218-19.) In its Brief, the District cites voluminous record evidence demonstrating its extensive stormwater management activities over the past four decades. (*See, e.g.*, NEORSD Supp. 148, 221-42, 249-51, 259-68, 332-34, 501-617 (summarized in District's Br., at 8-10, 41).)

A. The District has managed storm water since the 1970s.

Leading up to the adoption of its Program, and *beginning in the 1970s*, the District, among other things: (a) participated in the funding and construction of numerous stormwater projects, including the construction of the Lakeview Cemetery Dam—the largest dam in Cuyahoga County; (b) invested millions of dollars in a series of stormwater studies to identify the backbone of the regional stormwater system and stormwater problem areas, which had *more than doubled* since 1978; and (c) held *hundreds* of meetings with officials from all of its Member Communities regarding stormwater problems and community construction needs. (NEORS D Supp. 121, 147-48, 220-242, 249-51, 258-68, 332-334, 501-656.) The development of the District’s Program was highly publicized and no secret to anyone in Northeast Ohio, including to the Community Appellees, and involved the expert oversight of Andrew Reese of AMEC, one of the country’s top experts on stormwater utilities. (*Id.* at 121, 258, 260-269, 415-41, 618-56.)

B. The current structure of the District’s Board of Trustees has not changed since the inception of the District.

The District’s Board of Trustees, whose structure was set by the Cuyahoga County Common Pleas Court with Member Community input *over four decades ago* (despite Appellees’ unsupported criticisms regarding it being “unelected”), took the next logical step in adopting the Program on January 7, 2010. (NEORS D Supp. 782; Community Appellees’ Br., at 1; Property Owner Appellees’ Br., at 13; District’s Br., at 22.) On that same day, in light of threatened litigation, the District filed its Complaint for Declaratory Judgment to commence the process of obtaining court approval of its Program, and named all Member Communities as parties so that they could openly voice any objections they may have to the Program. (NEORS D Supp. 1-31.)

Based upon this *undisputed* evidence ignored by Appellees, it can hardly be said that the District sought to implement its Program without any “oversight,” or by “fiat” to the shock of its Member Communities.

II. Specific points in reply.

A. Chapter 6119 authorizes the District to manage storm water.

1. “Waste water” includes storm water regardless of whether it is combined with sewage or other pollutants.

The central issue in this case is the meaning of the term “waste water” under Chapter 6119. The trial court correctly found that the term “waste water” includes storm water, regardless of whether it is combined with sewage or other pollutants. (District’s Appx. 87.) Under R.C. 6119.011(K), the term “waste water” is defined as “any storm water and any water containing sewage or industrial waste or other pollutants or contaminants derived from the prior use of the water.” ((Emphasis added) (R.C. 6119.011(K) (NEORS D Appx. 114).) The definition repeats the word “water,” making clear that 6119 Districts have authority over two types of water: (1) water from storms; and, also, (2) water containing sewage and other pollutants. The State of Ohio has confirmed this interpretation of its own statute. (State of Ohio Amicus Br., at 5.)

2. Appellees’ interpretation of “waste water” runs afoul of legislative history, the realities of storm water, and Appellees’ own argument.

Appellees’ response to this straightforward and unambiguous reading of the statute is inherently hypocritical and made in a vacuum. Appellees argue that waste water is “(i) two possible liquid media (‘any stormwater and any water’) and (ii) the additives that convert either of them into waste water.” (Community Appellees Br., at 21.) Appellees further state that the District “attempts to redefine the straightforward ‘waste water’ to mean *pure* ‘stormwater,’ *i.e.*, rain water fallen to the ground.” ((Emphasis added) (*Id.* at 20).)

a. Appellees' reading of the statute is contrary to legislative history.

This reading of R.C. 6119.011(K) flies directly in the face of the statute's legislative history. The current definition of "waste water" was added by the Ohio Legislature when Chapter 6119 was amended in 1971 for the stated purpose of "expand[ing] regional water and sewer district powers, chiefly to permit a district to undertake water resource development projects such as *river-bank stabilization works, flow-augmentation projects, and underground water recharge systems. . . .*" all stormwater projects that do not involve sewage. (City of Cleveland Amicus Br., at 6 (citing July 6, 1971 Legis. Srvs. Comm'n Report, at 1).) As discussed below, it was not by mistake that the 1972 Petition closely tracked the statutory language of R.C. 6119.01(B), specifically giving the District authority over storm water. (See section II(B)(1), *supra*.)

b. Appellees' reading of the statute is contrary to the realities of storm water.

In any case, the folly of Appellees' argument is that stormwater is never "pure." Rainwater becomes contaminated upon hitting the earth's surface, and in its journey over land. (NEORSD Supp. 209-10.) Hector Cyre, one of the District's experts who has helped to establish at least 150 stormwater utilities, testified that residue and pollutants collect on impervious surfaces and then wash off of those surfaces into the regional waterways during the next wet-weather event in what's called a "first flush phenomenon." (*Id.*) Thus, storm water *always* contains pollutants or contaminants, satisfying Appellees' and the court of appeals' erroneous definition of waste water.

c. Appellees' reading of the statute is contrary to their own admissions.

Regardless, Appellees effectively concede that the District has authority to manage storm water. The Community Appellees state that the District “has always been empowered to make expenditures from its sewage rates to reduce the amount of stormwater affecting its system so as to not create overflows or otherwise interfere with the efficient operation of its treatment plants.” (Community Appellees Br., at 26.) Similarly, the Property Owner Appellees state that “the Sewer District has always had the authority to reduce the flow of stormwater into its combined sanitary and storm sewers.” (Property Owners’ Br., at 8, fn 6.) Managing storm water from the outset to “reduce the amount of stormwater being mixed with sanitary sewage” will *always* reduce the load on the District’s treatment plants and ensure their “efficient operation.” Thus, by acknowledging this power of the District, Appellees effectively concede that the District is authorized to manage storm water as set forth in the very Program they are currently opposing.

Finally, the Community Appellees’ unsupported argument that, because the District does not “supply water” as one of its purposes, it cannot undertake “water resource projects” for or relating to, for example, “stream flow improvement,” “dams,” and “the stabilization of stream and river banks” set forth in R.C. 6119.011(M) makes no sense. (Community Appellees’ Br., at 23-24.) A district whose sole purpose is to “supply water” would not be engaged in such activities (*e.g.*, it generally would not be concerned with stabilizing erosion on streams and river banks). These projects, *i.e.*, “water management facilities,” are for the “development, use, and protection of water resources,” which means “all *waters of the state* . . . that are available or may be made available to agricultural, commercial, recreational, public, and domestic users.” (NEORS D Appx. 113-14). The Petition’s stated “[n]ecessity” for the District is the *protection* of the waters of the state, namely “Lake Erie and the waters tributary to it.” (NEORS D Supp. 750.)

B. The court-approved Petition and Plan for Operation authorize the District to manage storm water.

In their Brief, the Community Appellees assert that the District's Petition and Plan for Operation do not contain any "stormwater-utility authority." This argument fails because, among other things, it: (1) is entirely dependent on the Community Appellees' interpretation of the term "waste water" in R.C. 6119.011(K), which, as explained above, is flawed; (2) fails to even mention the District's key stormwater *mandate*; and (3) mischaracterizes the local and regional stormwater systems, and the District's intent with respect to each.

1. The Community Appellees' argument regarding the Petition and Plan for Operation only works if the Court adopts their definition of "waste water."

The Community Appellees acknowledge that the purpose of the District set forth in its Petition is "the establishment of a total *wastewater* control system for the collection, treatment and disposal of *wastewater* within and without the District," which expressly includes "regulatory authority over all *wastewater* collection facilities and systems within the district." (Community Appellees' Br., at 37; NEORSD Supp. 790-91.) The first clause closely tracks the statutory language of R.C. 6119.01(B) regarding the purpose of 6119 Districts, which makes clear that the definition of the term "wastewater" used therein was intended to have the same meaning as that set forth in R.C. 6119.011(K). (R.C. 6119.01(B) (NEORSD Appx. 112), 6119.011(K) (NEORSD Appx. 114).)

The Community Appellees likewise acknowledge that the District's court-approved Plan for Operation gives the District authority over "*wastewater* treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, *storm water handling facilities*, and all other water pollution control facilities." ((Emphasis added) Community Appellees' Br., at 37.) Only if the term "waste water" does not include storm water

can the Community Appellees argue that the District was not granted authority to manage storm water.

As discussed above, and as now emphasized by the State of Ohio, the term “waste water” in R.C. 6119.011(K) means “stormwater *and* any water containing contaminants—that is, the definition includes *both* types of water, and either type of water alone constitutes waste water.” ((Emphasis in Original) State of Ohio Amicus Br., at 5.). The Community Appellees’ argument fails, as the District has authority to establish a total stormwater control system for all storm water within and without the District, as well as regulatory authority over all stormwater collection facilities and systems within the District.²

2. Appellees fail to address the District’s key stormwater *mandate* as set forth in the court-approved Plan for Operation.

In their Briefs, Appellees fail to address or even mention the key stormwater *mandate* in the District’s Plan for Operation, which states:

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

((Emphasis added) (NEORS D Supp. 797.) Appellees have no explanation whatsoever as to how this is not a *direct order* for the District to develop and implement its Program, so they ignore it.

However, the trial court certainly did not. The trial court correctly found as follows:

² In its Complaint for Declaratory Judgment, the District not only requested a declaration that it has the authority under its current Petition and Plan for Operation to implement its Program, but also made an *alternative* request for amendment to that Petition and Plan for Operation in the event that the trial court determined such authority was lacking. (NEORS D Supp. 28-29.) The Community Appellees assert that this *alternative* request, which never needed to be ruled upon, demonstrates that the District does not currently have authority to implement its Program. (Community Appellees’ Brief, at 15.) This unsupported argument is contrary to the well-established practice of *alternative* pleading. See Ohio Civ. R. 8(a).

In this Court's previous order in 1975, the District was obligated to develop a detailed, integrated capital improvement plan for regional management of wastewater collection and *storm drainage* designed to identify a *capital improvement program for the solution of all inter-community drainage problems (both storm and sanitary) in the District. . . .* To a great extent the integrated capital improvement plan is the proposed Title V.

((Emphasis added) (NEORS D Appx. 87) (citing Plan for Operation, NEORS D Supp. 797).)

The dissent in the court of appeals acknowledged and agreed with this finding, determining that the District was "charged . . . with developing a plan for regional stormwater management," and that this charge "'shares kinship' with Title V." (NEORS D Appx. 59-60.) The District did *exactly* what it was ordered to do in developing and attempting to implement its Program.

3. Community Appellees mischaracterize the local and regional stormwater systems, as well as the District's intent with respect to each.

a. The Program respects local systems.

The Community Appellees spend much of their Brief asserting that they own and operate, and have primary responsibility for, all the storm drainage in their communities. The Community Appellees state that "[m]unicipalities in Ohio have constitutional, statutory, and exclusive home rule powers to own and operate local stormwater sewers and systems as utilities." (Community Appellees' Br., at 7.) The District neither disputes this, nor suggests that the Program will interfere with these *local* systems. As fully explained in the District's Merit Brief, Title V makes no effort, either directly or indirectly, to take ownership of or responsibility for the *local* sewerage collection facilities and systems *owned and/or operated* by Member Communities, who remain responsible for those facilities and systems. (District's Br., at 42-47.) In fact, the District has gone so far as to stipulate on the record that it would not even undertake any construction projects on the Regional Stormwater System without the consent of the Member Community in which such project would be undertaken. (NEORS D Appx. 86, 101.)

b. Local systems spill into neighboring systems.

However, the issue in this case is not the Member Communities' local stormwater systems. The District is not attempting to take over the Member Communities' *intracommunity* drainage system, but rather intends to address the *intercommunity* drainage issues plaguing Northeast Ohio. For instance, while the Community Appellees repeatedly state that their local stormwater systems "convey" the flow of stormwater (Community Appellees Br., at 7-9), they fail to identify where the water is conveyed *to*. The answer is found in the record: it flows into neighboring communities through the intercommunity water courses (NEORS Supp. 657, 270-73, 297, 406), and then into Lake Erie. *Storm water follows no man-made or municipal boundaries*. This is what the District's Program seeks to address—problems impacting the regional system, which includes watercourses draining more than 300 acres and typically affecting more than one community. (Supp. 797, 271-73, 583.) Indeed, the record supports the District's approach.

c. The factual testimony at trial supports a regional approach.

After conducting a four-year-long stormwater study, and in accordance with section 5(m)(3) of the District's Plan for Operation, one of the District's consultants, Camp, Dresser & McKee, recommended focusing on *drainage areas larger than 300 acres because this represented the "backbone" of the intercommunity drainage system*. (*Id.*) Further, the District's experts on stormwater management programs, Mr. Cyre and Mr. Reese, testified that the District's 300-acre cutoff is reasonable given the geomorphology of the District's service area, and also that other stormwater programs utilize similar cut-offs. (*Id.* at 213-14, 256-57.)

The definition therefore generally excludes from the Program's scope any watercourse, stormwater conveyance structure, or Stormwater Control Measure that does not receive drainage

from 300 acres or more unless the District has entered into an agreement with the Member Community providing otherwise. Thus, the District has no intent to take over, or interfere with, the Member Communities' local stormwater systems. Accordingly, the Community Appellees' statements regarding their local systems (which do not address intercommunity drainage), the regional system (which does), and the District's intent with respect to both, are misleading.

C. Appellees make numerous misstatements with respect to the record.

1. The Community Appellees are the *only* Member Communities still opposing the District's Program.

Citing no support in the record whatsoever, the *eight* Community Appellees suggest that they are not the only communities out of the District's *fifty-six* Member Communities still opposing its Program. (Member Communities' Br., at 2-3.) However, the record demonstrates that *nineteen* Member Communities actively support the Program (*See* City of Cleveland Amicus Br.; Supporting Member Communities' Amicus Br.), and the remaining *twenty-nine* Member Communities either passively support or do not oppose the Program as they have not signed on to the Community Appellees' Brief or filed their own briefs in this action. Thus, the Community Appellees' quest to invalidate the District's Program represents the small minority position among the Member Communities in Northeast Ohio.

2. The Community Appellees do not have jurisdiction over the regional watercourses within their geographic boundaries.

In several different places within their Brief, the Community Appellees suggest to this Court that they have exclusive "jurisdiction" or "control" over the rivers, streams, brooks, creeks, and other natural watercourses flowing through their communities, and that the District's Program would interfere with this jurisdiction. (*See, e.g.*, Community Appellees' Br., at 29, 41.) As explained in the District's Brief, this is false as a matter of settled Ohio constitutional

law—private property owners own these watercourses to the extent that they flow through their property (which is predominantly the case). (District’s Br., at 43.) Even the officials who testified on behalf of the Community Appellants admitted that, like the District under its Program, the Community Appellants cannot perform work on watercourses flowing through privately-owned property without first obtaining permission or an easement from the property owner. (NEORSD Supp. 407, 413, 414.) Appellees’ have once again ignored the evidence, as well as the findings of the trial court.³ (*See, e.g.*, NEORSD Appx. 88.)

3. There is no legal requirement that a stormwater charge under Chapter 6119.09 must arise from contracts between the District and the property owners, nor that the property owners must be able to “turn off” the service.

The Community Appellees, in a section of their Brief almost completely devoid of any citations to the record and full of rhetoric, offer their unsupported opinion that charges under R.C. 6119.09 must arise from “‘voluntary’ subscriptions by property owners, pursuant to ‘contracts,’ for the ‘use’ or benefits from ‘water resource projects.’” (Community Appellees’ Br., at 31-32.) They assert that property owners must be able to “turn off” and reject the service, and liken this to sanitary sewer services. (*Id.* at 31.) These arguments propose requirements that

³ The Community Appellees misleadingly cite *State ex rel. Levin v. Schremp*, 73 Ohio St. 3d 733, 654 N.E.2d 1258 (1995), for the proposition that “mandamus relief could be granted against cities requiring them to maintain natural watercourses.” Community Appellees’ Brief, at 41. That case involved a local *ditch* owned by the City of Sheffield Lake as part of its storm sewer system, not a regional watercourse running through multiple communities as will be managed under the District’s Program (which are not owned by any one city). *Id.* at 733.

Further, R.C. 735.02, also misleadingly relied upon by the Community Appellants, states only that a director of public service must *supervise* the improvement of, among other things, “streams” and “watercourses” in a city’s boundaries. The District has stipulated on the record that it would not undertake any construction projects on the Regional Stormwater System without the consent of the Member Community in which such project would be undertaken. (Appx. 86, 101.) The Member Communities’ directors of public service will provide their input and consent prior to projects being undertaken

can be found nowhere in the language of the statute, ignore the factual record and findings of the trial court, and demonstrate a lack of understanding of how sanitary sewer service works.

R.C. 6119.09 states, in pertinent part:

A regional water and sewer district may charge, alter, and collect rentals or other charges, including penalties for late payment, for *the use or services of any water resource project or any benefit conferred thereby* and contract in the manner provided by this section with one or more persons, one or more political subdivisions, or any combination thereof, desiring the use or services thereof. . . .

((Emphasis added) (R.C. 6119.09 (NEORS D Appx. 126).) This means *exactly* what it says—the District may *both*: (a) impose charges for the use or services of any water resource project or any benefit conferred thereby upon property owners with its Member Communities; and (b) contract with an individual or political subdivision for the use or services of any water resource project. (*Id.*) Thus, the District may set charges to be paid by property owners without contracting with each of them.

Contrary to the Community Appellees’ belief, the District does not have sanitary sewer contracts or “subscriptions” with each of the hundreds of thousands of property owners paying sewer treatment charges under R.C. 6119.09. All or part of these property owners’ Member Communities are within the District’s service area, and they must therefore pay the charges set by the District. Further, while property owners may be able to reduce their sanitary sewer bills by reducing water consumption, they can be required, by municipal ordinance or otherwise, to be connected to sewer service, which is not “voluntary” as stated by the Community Appellees. (*See, e.g.*, R.C. 729.06; Community Appellees’ Br., at 31.)

The District’s proposed Stormwater Fee is no different. The District need not individually contract with each property owner to set this charge under R.C. 6119.09 if it is for

the use or services of any stormwater project or any benefit conferred thereby.⁴ (R.C. 6119.09 (NEORSD Appx. 126.)) Also, as correctly found by the trial court, *property owners can obtain up to a 100% credit against their stormwater charges under the Program* by implementing certain stormwater control measures on their properties to reduce the rate and/or volume of stormwater runoff. (NEORSD Appx. 105-06.) The evidence and findings ignored by the Community Appellees demonstrate that the Stormwater Fee is at least in part voluntary, although voluntariness is not a requirement under R.C. 6119.09 for either sewage or stormwater charges.⁵

4. The District is statutorily authorized to charge its Stormwater Fee for water resources projects not yet acquired, constructed, or operated by the District.

The Community Appellees assert in their Brief that the District's Stormwater Fee is unlawful because the District has not yet acquired or constructed, or is not yet operating, water resource projects under its Program. This argument is incompatible with a simple reading of Chapter 6119.

R.C. 6119.09 expressly permits the District to “collect rentals or other charges . . . for the use or services of any *water resource project* or any benefit conferred thereby. . . .” ((Emphasis added) R.C. 6119.09.) R.C. 6119.011(G) defines the term *water resource project*, in relevant

⁴ This is consistent with the holding in *City of Cleveland v. N.E. Ohio Regional Sewer Dist.*, 8th Dist. No. 55709, 1989 WL 107162, *1, 3 (Sept. 14, 1989), in which the court of appeals held that the total cost of designing and implementing the District's Intercommunity Relief Sewer Program (“IRSP”), *i.e.*, a “water resource project,” must also be borne by users within the City of Cleveland, regardless of the City's desire to not have its residents pay for those costs. The City's residents did not each sign a contract for this service agreeing to the charge, which is why the City was disputing it on their behalf. *Id.*

⁵ The Community Appellees also argue in a footnote that, because 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” under R.C. 6119.06(W), the District *must* be able to refuse to provide stormwater services if the Stormwater Fee is not paid by a property owner. (Community Appellees' Brief, at 32.). The Community Appellees once again ignore and misconstrue the plain language of the statute, which says *may*.

part, as “any waste water facility or water management facility acquired, constructed, or operated by or leased to a regional water and sewer district *or to be acquired, constructed, or operated by or leased to a regional water and sewer district.* . . . ((Emphasis added) R.C. 6119.011(G).) Under the unambiguous language of R.C. 6119.09 and 6119.011(G), the issue of whether the District’s facilities have already been acquired or constructed, or are already being operated, has no bearing upon the legality of the Stormwater Fee, which the District may collect for facilities “to be acquired, constructed, or operated by or leased to” the District.

Further, it would make little sense for the District to acquire, construct, and operate the stormwater facilities contemplated under its Program prior to receiving the funds to do so. The District has been prudently awaiting a full and final judicial determination on the validity of its Program prior to investing in these facilities. This is no different than when the District collected tens of millions of dollars for the construction of intercommunity relief sewers under R.C. 6119.09 prior to this massive project being completed—the District did not finance the project, and then seek to recover the funds afterwards. *City of Cleveland v. N.E. Ohio Reg’l Sewer Dist.*, 8th Dist. No. 55709, 1989 WL 107162 (Sept. 14, 1989).

Finally, the Community Appellees again cite to no record evidence in support of their assertion that the District’s future water resource projects are part of a “wish list” and speculative. (Community Appellees’ Br., at 1, 30.) In reality, the evidence demonstrates that the District would begin constructing, owning, and/or operating a laundry list of *specific* facilities and projects at the commencement of the Program. (NEORSO Supp. 280-90, 321-27, 423-24, 427-28, 658, 673-95, 710, 736-44.) The trial court considered this evidence in making its factual findings in favor of the District, which findings have not been challenged by the Community Appellees. (NEORSO Appx. 95, 100).

5. The District has always maintained, and the record evidence and trial court findings demonstrate, that the Program will benefit each property owner, not just the region as a whole.

Appellees assert, without any citation to the record, that the District and the various amici curiae direct their focus on how the Program will benefit the region as a whole. (Property Owner Appellees' Br., at 1; Community Appellees' Br., at 31.) While the Program will greatly benefit the region as a whole, this was not the focus of the District's case. As summarized in the District's Brief, the mounds of expert and other evidence presented by the District demonstrated to the trial court exactly how the Program will provide a service to, and benefit, *each property owner*, which is fully expressed in the trial court findings. (NEORSD Supp. 205, 211-12, 221-43, 339-44, 346-56, 359-60, 368-82, 387-88, 391-96; NEORSD Appx. 94-95, 97, 100.) Appellees have neither challenged nor contradicted these findings, and are thus bound by them.

6. The trial court made factual findings in the District's favor regarding Program exemptions.

In their Brief, the Property Owner Appellees take issue with the various exemptions to the Stormwater Fee set forth in the District's Program. All of these exemptions were fully considered by the trial court and, based upon the extensive evidence presented by the District, all determined to be rational and legal. (NEORSD Supp. 432, 215-17, 247-48, 335-36, 345; NEORSD Appx. 107-08.) The trial court's factual findings are entitled to deference.

7. The trial court determined that the District may still legally and effectively implement its Program even though it does not control the entire watershed.

Appellees, through unsupported statements, take issue with the fact that the District's stormwater service area does not encompass the entirety of certain watersheds. (Community Appellees' Br., at 6; Property Owner Appellees' Br., at 11.) This issue was fully addressed by the trial court based upon the evidence presented at trial, including the testimony of one of the

District's experts, Hector Cyre, that, in his *decades* of experience with stormwater programs, no regional authority such as the District has had complete control of a watershed, "save perhaps an *island*." (NEORSD Appx. 94.) The trial court's factual findings are entitled to deference.

D. Appellees argue issues not before the Court.

1. The Court declined to decide whether the Stormwater Fee is a tax.

Appellees spend many pages arguing that the Stormwater Fee is actually an unauthorized tax. This question is not before the Court. The Court expressly chose not to accept for review the District's Proposition of Law No. III, which provided:

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

(District's Mem. in Supp. of Juris, at 13; Feb. 19, 2014 Entry.)

Moreover, not only is such a question not before the Court, it does not even need to be decided. When fees imposed pursuant to *Ohio statutes* are challenged, and in particular water and sewer fees, the Supreme Court of Ohio, as well as other Ohio courts, focus their analysis on whether such fees comply with the statutory requirements to determine their validity. *See City of Wooster v. Graines*, 52 Ohio St.3d 180, 556 N.E.2d 1163 (1990) (holding that "water rates or charges or 'rents' collected by a municipality cannot be classed as taxes so long as their use is limited to the waterworks purposes enumerated in Section 3939, General Code"); *see also Himebaugh v. Canton*, 145 Ohio St. 237, 61 N.E.2d 483 (1945); *Huber v. Denger*, 38 Ohio St.3d 162, 164, 527 N.E.2d 802 (1988).

If the Stormwater Fee is a charge authorized by Chapter 6119, as the trial court found, and if Chapter 6119 is constitutional, which is uncontested here, then the Stormwater Fee is an authorized and constitutional charge. Although they have not challenged the constitutionality of

Chapter 6119, Appellees are, in reality, asking this Court to *invalidate R.C. 6119.09* because they believe that a regional water and sewer district should not have the power to collect a charge “for the use or services of any water resource project or any benefit conferred thereby,” and should have to satisfy a more stringent requirement. (R.C. 6119.09 (NEORSD Appx. 126.))

The issue in *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, on which Appellees rely so heavily, was *not* the validity or interpretation of an Ohio statute. Rather, the analysis conducted by this Court was to determine the validity of the impact fees imposed by a township pursuant to its *limited police powers*. *Id.* at ¶ 10. Regardless, Appellees have waived this argument because any party challenging the constitutionality of an Ohio statute is required to join the Ohio Attorney General to the action, and they failed to do so. *See, e.g., State ex rel. Republic Servs. of Ohio v. Pike Twp. Bd. of Trustees*, 5th Dist. Nos. 2006 CA 00153, 2006 CA 00172, 2007-Ohio-2086, ¶ 73-76 (refusing to entertain new argument regarding constitutionality of Ohio statute where no attempt was made to join Attorney General).

Accordingly, the issue of whether the Stormwater Fee is a tax is not presently before the Court, and need not be addressed in any event because the Stormwater Fee is a charge authorized by a constitutional statute.

2. The Court declined to decide whether the Program violates the Community Appellees’ home rule powers.

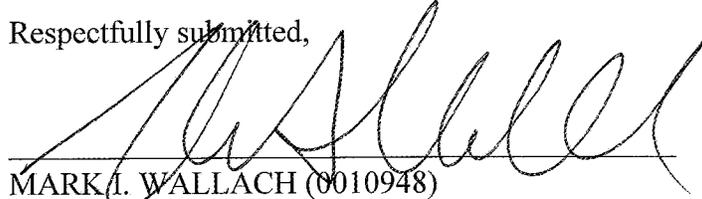
Community Appellees also continuously assert that Title V violates Article XVIII of the Ohio Constitution, specifically Sections 3 (their “home rule” powers) and Section 4 (their “municipal utility” power) because it allegedly: (a) imposes regulations upon them; and (b) restricts their right to operate stormwater utilities within their municipal boundaries. (Community Appellees’ Br., at 7-8.) Again, this issue is currently not before the Court. As with the tax issue, this Court expressly chose not to hear any arguments relating to the

constitutionality of Title V (as set forth in the District's Proposition of Law No. III). Regardless, these arguments lack merit, and both the trial court and the dissenting opinion in the court of appeals correctly found that, while Title V may impact Member Communities' operations of local stormwater management programs, it does not unlawfully interfere with their home rule powers or any right they may have to operate a municipal utility. (NEORSD Appx. 75-75, 88.)

CONCLUSION

Based upon the analysis set forth in the District's Brief, the amicus briefs filed in support of the District, and this Reply, the court of appeals erred in holding that: (a) Title V exceeds the express statutory authority granted to the District under Chapter 6119 and the authority conferred under the Petition and Plan for Operation; and (b) the Stormwater Fee is an unauthorized charge. Therefore, this Court should reverse those holdings and reinstate the trial court's findings.

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