

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF *AMICI CURIAE*
COALITION OF OHIO REGIONAL DISTRICTS,
DEERFIELD REGIONAL STORM WATER DISTRICT, AND
ABC WATER AND STORM WATER DISTRICT
IN SUPPORT OF APPELLANT NORTHEAST OHIO REGIONAL SEWER DISTRICT

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I. INTRODUCTION

The issues before the Court are relatively straightforward: are the components of the Appellant's (the "District") stormwater management program (the "Program") a "water resource project" under R.C. Chapter 6119 – either "waste water" or "water management"? If so, the District may collect a charge from anyone who uses the Program, or is serviced by the Program or benefits from the Program. The District and *amici* have exhaustively covered these issues in their respective briefs. Concurrently, if the District's petition and operations plan (collectively, the "Charter") generally authorize a storm water program, then the Charter presents no obstacle to the District implementing the details of the Program. Again, the District and *amici* have briefed these issues.

In its Merit Briefs, the Appellee "Joint Communities" and "Property Owners" have contorted these issues and R.C. Chapter 6119 into an impossible obstacle course for all of the 70-plus regional districts in Ohio. Over forty years ago, the General Assembly, in a sweeping reform of Chapter 6119, authorized exactly the type of water resource projects proposed by the Program. Rather than recognize the General Assembly's dynamic language for what it says, and acknowledge how it has been implemented by districts for the past forty years, Appellees instead propose the most illogical, impractical and absurd interpretations of the Chapter as self-serving means of obstructing a critically necessary public works program; a program which will address problems which Appellees and the Eighth District readily acknowledge. "There is also no doubt that there have been problems that must be addressed." *Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 2013-Ohio-4186, at ¶66.

What is the end game here? Would Appellees be happy if some other entity – a conservancy district – as they suggest, were created from scratch, at untold millions in cost, to

instead develop and implement some version of the Program and charge a larger fee? Is this debate really about who has the authority to implement the Program or is it a recurring theme of unwillingness to pay for a public works project that has been sorely needed for decades? Just as no one effectively managed the regional sanitary sewer problems before the creation of the District, now the same cost aversion is driving Appellees' opposition to the Program. After all, no one opposed or challenged the District's prior storm water planning activities and projects until the Program fee came along. Prior to and since 1979, no one, not the member communities or the property owners, objected to the storm water authority in the District's Charter that has existed for 35 years. In fact, the member communities, who voluntarily agreed to be included within the District, also agreed to the storm water authority in the 1979 Charter now in effect. Now, Appellees parade a series of theories that blatantly ignore plain statutory and Charter language precisely authorizing the Program and charges related to it.

A. The District's Program consists of water management and waste water projects, and is therefore authorized under Chapter 6119, which does NOT limit the District to waste water projects.

Appellees, rather than acknowledge the actual language of "water management facilities" and "waste water facilities" definitions in Chapter 6119, which authorize all aspects of the Program, instead call for an absurd definition of "waste water" which would render all sewer districts in Ohio outside of the law and simultaneously ignore "water management" authority. They further try to hide the ball by pointing away from applicable Chapter 6119 language and toward other, irrelevant R.C. Chapters governing other political subdivisions which are not in play here.

Appellees contrive their own version of Chapter 6119, suggesting that "sewer districts" may only undertake "waste water facilities" projects and water districts may only undertake

“water management facilities”, creating a fictitious separation which is non-existing in Chapter 6119. Appellees again contrive a statutory myth, put it forth as gospel, yet cite no language which supports them. They even suggest that storm water management is not a utility, despite its characterization as such throughout the country.

They fail to recognize the explicit purposes contained in the 1979 Charter - the one in effect now – and the fact that these purposes are carried out through BOTH water management projects and waste water projects. Nothing in R.C. Chapter 6119 limits a district to only “waste water” projects or only to “water management” projects. Indeed, the purposes of any district may be achieved with one or the other, or both types of projects. A plain reading of “water management facilities” reveals potential storm water, sanitary sewer and drinking water-related authorizations.

B. Member community municipalities voluntarily joined the District and thereby consented to the District’s operations within the municipal boundaries and the District’s Charter authorizes the Program.

R.C. 6119.06(G) permits the District to construct water resource projects “within and without the district”. R.C. 6119.06(Z) verifies that the District may “[E]xercise the powers of the district without obtaining the consent of any other political subdivision...” Instead of acknowledging that all of the member municipalities voluntarily joined the District, thereby accepting the functions of the District within the municipalities, Appellees instead make hollow Home Rule arguments and suggest that the District may not construct anything within municipal boundaries. Such is normally true, but not where a municipality has petitioned to include its territory with a district. As Judge Jones explained in the dissent below, “[O]f significant importance to my resolution of these issues is the fact that the member communities within the District territory *voluntarily joined* the District. *See Seven Hills v. Cleveland*, 1 Ohio App.3d 84,

90, 1 Ohio B. 386, 439 N.E.2d 895 (8th Dist. 1980) (stating that R.C. Chapter 6119 ‘must necessarily be construed as not contemplating involuntary inclusion.’).” *Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 2013-Ohio-4186, at ¶166. These same communities which now object were among the original petitioners to establish the District; they helped to determine the scope of the District’s functions and, in so doing, agreed that the District would manage certain utility functions within those municipalities. Their respective city councils requested inclusion in the District, and the court of common pleas agreed. Thus, the District Program “is specifically authorized under the governing statutory authority, both procedurally and...substantively.” *Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 2013-Ohio-4186, at ¶ 89, Jones, P.J., dissenting.

Appellees also ignore the District’s court-approved 1979 Charter and its clear grant of storm water authority:

- “The District will plan, finance, construct, operate and control wastewater treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, *storm water handling facilities*, and *all other water pollution control facilities* of the District.” (Charter, §5.(c)(1) (emphasis added).)
- “The District shall have authority pursuant to Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate local sewage collection facilities and systems within the District, including *both storm* and *sanitary sewer systems*.” (Charter, §5.(m) (emphasis added).)
- “The District shall have *regulatory authority* over all local sewerage collection facilities and systems in the District, including *both storm* and *sanitary sewer systems*.” (Charter, §5.(m)(1) (emphasis added).)
- “The District shall develop a detailed integrated capital improvement plan for regional management of wastewater collection *and storm drainage* designed to identify a capital improvement program for the solution of all intercommunity drainage problems (both *storm* and *sanitary*) in the District.” (Charter, §5.(m)(3) (emphasis added).)

Instead, Appellees, for convenience sake, simply omit from their briefs the above “storm” language – as if it doesn’t exist. They further extensively quote from an irrelevant 1972 Court entry, and a 1975 entry, rather than the 1979 Court-approved Charter which has been in effect for 35 years and supplanted any 1972 or 1975 entry.

C. Appellees continue to argue a tax vs. fee issue that both the Court of Appeals and this Court declined to address.

Rather than recognizing the specific language of R.C. 6119.09, which authorizes the collection of charges for the use, services or benefit of the District’s Program, they try to wedge this case into a line of tax vs. fee cases which specifically do not involve the authorizing language of R.C. 6119.09 actually applicable and controlling in THIS case.

Instead of respecting this Court’s refusal to accept the proposition of law on whether the District charge is a tax or a fee, Appellees nevertheless spend considerable time trying to bring the issue before the court, based on cases which do not involve the fee authorization language in R.C. 6119.09.

D. Summary

Instead of recognizing clear statutory authority; and instead of understanding the functional realities of operating public utilities and the 40 year course of performance by Ohio’s regional districts, Appellees put forth an impossible and unrecognizable version of Chapter 6119 which would require written contracts to collect charges, thereby crippling virtually every one of the 70-plus regional districts in Ohio.

Appellee “Property Owners” have adopted the Merit Brief of Appellee “Joint Communities”. As such, *amici curiae* are replying to both of Appellees’ merit briefs and will address both, collectively, as “Appellees”. However, to avoid duplication, *amici* adopt the Reply

of Appellant NEORSO but add the following with respect to Appellees' erroneous claim that regional districts may only collect fees from property owners "desiring" services pursuant to written contract. Such requirements, which are nowhere to be found in Chapter 6119, would impose insurmountable barriers before every regional district, not just Appellant NEORSO, trying to perform critical public health, safety and welfare functions.

II. NOTHING IN R.C. CHAPTER 6119 REQUIRES A VOLUNTARY CONNECTION OR A CONTRACT AS A CONDITION TO REGIONAL DISTRICTS COLLECTING A CHARGE.

R.C. 6119.06(W) states that a regional district *may* collect charges pursuant to R.C. Chapter 6119.09, which states that:

"A regional water and sewer district *may* charge, alter, and collect rentals or other charges, including penalties for late payment, for the use or services of any water resource project or any benefit conferred thereby and contract in the manner provided by this section with one or more persons, one or more political subdivisions, or any combination thereof, desiring the use or services thereof, and fix the terms, conditions, rentals, or other charges, including penalties for late payment, for such use or services. Such rentals or other charges shall not be subject to supervision or regulation by any authority, commission, board, bureau, or agency of the state or any political subdivision, ..." (R.C. 6119.09).

As with Appellees' interpretation of the definition of "waste water", they conjoin two independent grants of authority – (a) the collection of charges for the use, services or benefit of a water resource project, and (b) contractual arrangements for services - to make one conceptual authority which is illogical and produces absurd results. R.C. 6119 authorizes charges and it authorizes service contracts. It does not require the latter in order to collect the former and *amici* are unaware of any regional districts which have operated as suggested by Appellees. As Judge Jones stated in his dissent below, "(B)ut the conjunctive "and" and the disjunctive "or" are sometimes used interchangeably. See *Skiba v Mayfield*, 61 Ohio App.3d 373, 378, 572 N.E.2d

808 (11th Dist.1989). ‘We are not empowered to read into the law that which is not there, and it is our duty to give effect to the plain meaning of the statute’s language. Id. Statutes should not be construed to produce unreasonable or absurd results. *State ex rel. Dispatch Printing Co, v. Wells*, 18 Ohio St.3d 382, 384, 481 N.E.2d 632 (1985).” *Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 2013-Ohio-4186, at ¶92

A. The charges authorized in R.C. 6119.09 are permissive; there is no requirement that a physical connection, much less a voluntary connection is required, and no requirement that a written contract be executed.

A regional district may collect charges for either the (i) use of a district water resource project, or (ii) the services of a district water resource project, or (iii) any benefit conferred by a water resource project. Contrary to Appellee’s assertions, there is no requirement in R.C. 6119.09 or elsewhere in Chapter 6119 that requires a property be connected to a water resource project in order to collect a charge from that property. A charge may be collected if there is a use of the water resource project or for the service of the project or if there is a benefit conferred by the project. There are countless examples of district water resource projects that benefit customers but to which they are not directly connected. In the context of public utility services (water, sanitary sewer, storm water) charges are routinely collected and used to construct and maintain the entire system, not just the portion to which a customer is connected. Customers on “Elm Street” help pay for the costs of the “Oak Street” water line. And customers served by one treatment plant pay fees which may help construct a separate treatment plant. Customers benefit from the *system* (a large water resource project consisting of smaller water resource projects) and from the availability of the system. Customers also benefit from projects which allow more customers to join the system and thereby achieve greater economies of scale and rate stability. Most political subdivisions including cities, counties and districts, have implemented monthly

billing methodologies for water and sewer systems which include availability charges, regardless of whether the property is connected to the system or using the system, because the project services and benefits the property. Property owners want the choice of connecting to the utility system on their own time frame and terms. Some owners reside elsewhere for portions of the year and their property is disconnected from the water system while they are away. Yet those owners routinely are required to pay a minimum fee. Providing the benefit and service convenience of a constantly available utility requires money and thus, the General Assembly has empowered regional districts and, indeed, other political subdivisions, to collect charges not only for the use of the utility, but also to cover the cost and benefit of making the utility available on-demand.

As a matter of fact, demonstrable through real estate appraisal, properties and their values benefit significantly from the mere availability of water resource projects, regardless of whether they are connected. Thus, under R.C. 6119.09, a charge is permissible, regardless of connection. Nevertheless, Appellees' arguments also fall flat because owners who choose to develop their properties to include impervious surface make a conscious decision to do so and thereby voluntarily connect their property to the storm water utility system. There is, in fact, a voluntary connection which is made when the property is developed. While the property owners have a choice to develop the property and produce storm water run-off, the District has no choice but to manage that stormwater. In its brief in support of Appellant, *amici* provided many other examples illustrating the use, services and benefits of the District's Program and water resource projects.

The obvious intent of R.C. 6119.09, borne out by decades of practice by districts across the state, is that a district *may* (1) charge for the use, service or benefits of its water resource

projects, and (2) it may also contract with “persons”¹ or political subdivisions. Typically, in practice, individual customers pay standard rates. When a district sells the services of its water resource projects to another political subdivision or large or bulk user, typically a large company, a special contract rate is applied. When drafting R.C. 6119.09, the General Assembly recognized common utility practice and ensured that special contract rates for large or bulk sales were authorized for such situations where the standard utility rates are not practical.

Appellees, perhaps naively, have suggested that regional districts may only collect a charge from those individuals who “desire” to connect to the district’s system and voluntarily do so pursuant to a written contract. Such requirements would be unprecedented for any governmental-owned utilities in Ohio, not just districts, and result in, at best, extraordinary compliance costs, and, at worst, financial collapse. Not only are contracts not required under Chapter 6119, they are highly impractical in the case of individual customers, particularly so for regional Districts the size of NEORSD with several hundreds of thousands of customers that are constantly in a state of transition. The vast majority of governmental utility providers have never, as a practical course of business, obtained contracts from individual customers. If the Court imposes such a requirement, it will be declaring virtually every regional district in the state to be in violation of the law. Indeed, the NEORSD does not currently contract with its individual sanitary sewer customers. Why haven’t the Appellees sued the District for not having voluntary contracts with its sanitary sewer customers?

If this Court adopts Appellees interpretation, all regional districts in Ohio, not just the NEORSD, will then be forced to seek contracts from individual customers, many of whom will

¹ In this context, a “person” is not limited to an individual. R.C. 6119.011(C) states, “‘Person’ means any natural person, firm, partnership, association, or corporation other than a political subdivision.”

welcome the opportunity to try to negotiate rates or disconnect. In the case of sanitary sewer, we know that many individuals will claim they no longer “desire” to connect to the sewer and want to opt out of connection. There are many who detest the concept of sanitary sewage systems and the associated fees. Under Appellees’ concept of public utilities, those individuals could gladly declare their opposition to district sewer projects, claim they have no “desire” to receive sewer services, refuse to pay bills, and initiate the financial disintegration of districts which will no longer be able to make their loan payments – usually to other governmental agencies – because they cannot collect charges.

Appellees would probably suggest that regional districts may just refuse its services to customers unwilling to sign the service contract. How could this possibly work in reality? If this Court adopts Appellees’ position, districts would need to shut off water service to every customer until they received a service contract because there would be no legal authority to charge for the services unless they have a written declaration that each customer “desires” service and agrees to pay the then-current rates. Will a new contract need to be signed every time rates must be adjusted? This would be unworkable and completely unprecedented among government utility providers. And if utility rates aren’t really negotiable, and customers are given a take it or leave it contract, what is the point of the contract? Wouldn’t Appellee Property Owners just argue that these are really contracts of adhesion anyway?

In the case of sewer districts that do not control the water service, such as NEORS, there is no mechanism, like water shut-off valves, to terminate or refuse sewer services. The pipes must be dug up and physically disconnected, at great cost. This is completely impractical and highly unsanitary. While properties are connected to the sewer system, even if the water is shut off, the sewer service remains functional with a supplemental water source. Pour a bucket of

water down the toilet and it will flush and the District must treat the waste. Thus, under Appellees' theory, thousands of district sewer customers across Ohio could simply say that they do not "desire" services and refuse to sign service contracts. They would thereby avoid any obligation to pay the districts' charges but the district would have no practical means to stop the flow of sewage or refuse its services. It would have to treat sewage and could not collect a fee for the service. This would result in anarchy; an absolutely absurd result and contrary to the common practice of regional districts across the state, which have not obtained "contracts" from "desirous" customers, for the last 40+ years. This was clearly not the intent of the General Assembly. Likewise, property owners who have chosen to develop their property with impervious surface, which contributes storm water run-off to the storm water system, will continue to do so, regardless of whether they "desire" the District's services. The District cannot stop the flow of run-off but someone must manage it. The District stands ready, willing and able to do so. While the District has no choice to manage the run-off, property owners could implement control measures which would eliminate the storm water charge. Quite contrary to Appellees' assertions, the property owners do have a choice but the District does not. Under 6119.09, owners could certainly reduce storm water run-off and receive an appropriate credit for the same.

B. R.C. 6119.06(AA) authorizes districts to compel unwilling property owners to connect to water resource projects, contrary to Appellees' theory that only desirous property owners may be charged.

Without question, *amici* and the NEORSB are respectful of property owners' rights. However, it is undisputed that some people are, for whatever reason, opposed to all types of public works utility projects, regardless of their benefit. *Amici* are acutely aware of water resource projects, including sanitary sewer, drinking water, or storm water management projects, which have been vigorously opposed by property owners. Thankfully, the General Assembly has

granted public bodies, including regional districts under Chapter 6119, authority to exercise their judgment in the name of the public health, safety and welfare. If every water resource project required 100% of the property owners to “desire” connection and sign a contract, our communities would resemble undeveloped countries with pollution, disease and deplorable conditions. Sometimes, particularly in the case of public health, safety and welfare, decisions must be made for the greater good, despite their periodic unpopularity. In the case of the District, its Program, from the benefits to Lake Erie and all of the residents who enjoy its resources, to the flood control measures, is absolutely critical to the public health, safety and welfare.

Appellees suggest that a fee may only be collected from customers who desire to voluntarily connect pursuant to a contract. Yet R.C. 6119.06(AA) authorizes regional districts to, “Require the owner of any premises located within the district to connect the owner's premises to a water resource project determined to be accessible to such premises and found to require such connection so as to prevent or abate pollution or protect the health and property of persons in the district.” Why would the General Assembly, in 6119.06(AA), authorize regional districts to compel connection, presumably where the owner is not agreeable to the connection and unwilling to sign a contract, but then preclude the district from collecting a fee from that unwilling owner? That makes no sense. Not only is the District authorized to collect a storm water charge from *any* property owner, voluntary or involuntary, for the use, services or benefit of its projects, it has the authority, like municipalities and counties, to compel the connection of properties to its systems in order to abate pollution and protect the health and property of persons in the district.

As discussed extensively in the *amici* brief in support of Appellants, the District’s entire Program is a water resource project, consisting of several smaller water resource projects, all of

which are designed to abate pollution and protect the health and property of persons within the district. Residents and properties within the District will receive countless benefits from the Program as discussed in the briefs. Those properties with impervious surface are, in fact, connected to the system and property owners could choose to reduce or eliminate the charge by adopting various stormwater control measures, such as detention ponds, rain gardens, disconnecting downspouts, etc. through the Program's extensive credit system.

In sum, the District may compel connection under R.C. 6119.06(AA) and collect a charge. Thus, Appellee's suggestion that voluntary connection is required cannot be supported when reading Chapter 6119 *In Pari Materia*.

C. The District is not charging a fee for something it does not own; it is collecting a charge for the use, services and benefits of its water resource projects.

Appellees claim that the District cannot collect a charge for something it does not own or control. This argument misses the point. There is no requirement in Chapter 6119 that the District to own or control every aspect of the storm water system in order to collect a charge. For example, many districts receive water or sanitary sewage treatment services from other political subdivisions. The districts do not own those treatment systems, but districts typically collect a charge from their customers which covers the district's costs while the entity providing treatment collects its fees. The total charge to a customer is thus divided among different entities, commensurate with the service provided. District fees only cover the scope of the district services while other fees go to the treating entity.

Here, the District and *amici* have extensively described examples of the use, services and benefits of the Program. The amount of the charge is commensurate with the scope of the Program. It is not necessary that the District own, manage and maintain every aspect of the storm

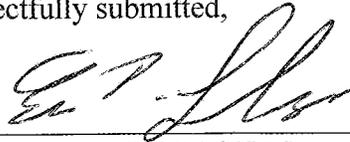
system throughout the District. If it did, the District's charge would likely be higher. The District is only collecting a charge for the use, services and benefits of its Program, which it is clearly authorized to do, not for other aspects of storm water management beyond its scope. Just as the entities providing water or sewer treatment collect charges for their part in the process, the same applies to the District and its services in the storm water process.

Appellees also claim that the District may not collect charges for future projects. This argument is stunningly shallow. Governmental utility providers are not able to neatly segregate their fees into current, future and unexpected projects. Every single governmental utility provider in Ohio collects charges from customers today and uses some of those funds for future projects and unexpected projects. To suggest otherwise, as argued by Appellees, would render districts unable to pay for any future project without borrowing money to do so. Such is not realistic or financially sound and it was certainly not required by the General Assembly.

CONCLUSION

For the above-stated reasons, *amici curiae* respectfully requests that the Court reverse the Eighth District

Respectfully submitted,



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CERTIFICATE OF SERVICE

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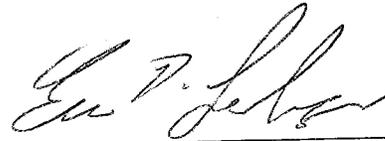
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