

IN THE SUPREME COURT OF OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	:	CASE NO. 2013-1770
	:	
Petitioner,	:	Appeal from Court of Appeals for the 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 Common Pleas,
Respondent.	:	CASE NO. CV-10-714945

BRIEF OF AMICUS CURIAE BROOK PARK, BROOKLYN, BROOKLYN HEIGHTS, CUYAHOGA HEIGHTS, HIGHLAND HILLS, MAYFIELD VILLAGE, MIDDLEBURG HEIGHTS, MORELAND HILLS, NEWBURGH HEIGHTS, OLMSTED TOWNSHIP, ORANGE, PARMA, PARMA HEIGHTS, SHAKER HEIGHTS, SEVEN HILLS, SOUTH EUCLID, VALLEY VIEW AND WARRENSVILLE HEIGHTS IN SUPPORT OF THE DISTRICT'S OPPOSITION TO RECONSIDERATION AND/OR REMAND

Yvette McGee Brown (0030642)
Counsel of Record
 Chad Readler (0068394)
JONES DAY
 325 John H. McConnell Boulevard, Suite 600
 P.O. Box 165017
 Columbus, Ohio 43216-5017
 Tel: (614) 469-3939
 Fax: (614) 461-4198
 Email: ymcgeebrown@jonesday.com
 careadler@jonesday.com

Attorney for Village of Cuyahoga Heights,
 Village of Moreland Hills, and Orange Village

Scott Claussen (0074465)
CITY OF BROOKLYN
 7619 Memphis Avenue
 Brooklyn, Ohio 44144
 Tel: (216) 635-4216
 Fax: (216) 351-2133
 Email: sclaussen@brooklynohio.gov

Attorney for City of Brooklyn

Neal M. Jamison (0005911)
CITY OF BROOK PARK
 6161 Engle Road
 Brook Park, Ohio 44142
 Tel: (216) 433-1300
 Fax: (216) 433-1630
 Email: njamison@cityofbrookpark.com

Attorney for City of Brook Park

FILED

OCT 02 2015

CLERK OF COURT
 SUPREME COURT OF OHIO

Jerome E. Dowling (0026035)
VILLAGE OF BROOKLYN HEIGHTS
 20800 Center Ridge Road, Suite 222
 Rocky River, Ohio 44116
 Tel: (440) 331-1010
 Fax: (440) 331-8812
 Email: jdlawdir@gmail.com

Attorney for Village of Brooklyn Heights

Thomas P. O'Donnell (0002462)
VILLAGE OF HIGHLAND HILLS
3700 Northfield Road, Suite 11
Highland Hills, Ohio 44122
Tel: (216) 283-3000
Fax: (216) 283-2516
Email: todonnell@todlaw.com

Attorney for Village of Highland Hills

Peter H. Hull (0003731)
CITY OF MIDDLEBURG HEIGHTS
15700 Bagley Road
Middleburg Heights, Ohio 44130
Tel: (440) 234-8811
Fax: (440) 234-8993
Email: peterhull@gmail.com

Attorney for City of Middleburg Heights

Dale F. Pelsozy (0020653)
CUYAHOGA COUNTY
PROSECUTOR'S OFFICE
1200 Ontario Street, Justice Center 8th Floor
Cleveland, Ohio 44113
Tel: (216) 443-7757
Fax: (216) 443-7601
Email: dpelsozy@prosecutor.cuyahogacounty.us

Attorney for Olmsted Township

Michael D. Pokorny (0024792)
CITY OF PARMA HEIGHTS
6281 Pearl Road
Parma Heights, Ohio 44130
Tel: (440) 884-9600
Fax: (440) 884-1802
Email: law@parmaheightsoh.gov

Attorney for City of Parma Heights

Joseph W. Diemert, Jr. (0011573)
JOSEPH W. DIEMERT AND
ASSOCIATES
1360 S.O.M. Center Road
Cleveland, Ohio 44124
Tel: (440) 442-6800
Fax: (440) 442-0825
Email: receptionist@diemertlaw.com

Attorney for Mayfield Village

Luke McConville (0067222)
WALDHEGER COYNE CO., LPA
1991 Crocker Road, Suite 550
Westlake, Ohio 44145
Tel: (440) 835-0600
Fax: (440) 835-1511
Email: luke@healthlaw.com

Attorney for Village of Newburgh Heights

Timothy G. Dobeck (0034699)
PARMA CITY HALL
6611 Ridge Road
Parma, Ohio 44129
Tel: (440) 885-8132
Fax: (440) 885-8008
Email: law@cityofparma-oh.gov

Attorney for City of Parma

Richard A. Pignatiello (0041137)
CITY OF SEVEN HILLS
3479 Jasmine Drive
Seven Hills, Ohio 44131
Tel: (216) 525-6237
Fax: (216) 525-6256
Email: law@sevenhillsohio.org

Attorney for City of Seven Hills

William M. Ondrey Gruber (0005950)
CITY OF SHAKER HEIGHTS
3400 Lee Road
Shaker Heights, Ohio 44120
Tel: (216) 491-1445
Fax: (216) 491-1447
Email: william.gruber@shakeronline.com

Attorney for City of Shaker Heights

David A. Lambros (0008654)
VILLAGE OF VALLEY VIEW
One Berea Commons, Suite 216
Berea, Ohio 44017
Tel: (440) 816-1525
Fax: (440) 816-0604
Email: dalambros@yahoo.com

Attorney for Village of Valley View

Mark I. Wallach (0010949)
THACKER MARTINSEK LPA
2330 One Cleveland Center
1375 E. Ninth Street
Cleveland, Ohio 44114
Tel: (216) 456-3848
Fax: (216) 456-3850
Email: mwallach@tmlpa.com

James F. Lang (0059668)
Matthew J. Kucharson (0082388)
Molly A. Drake (0083556)
CALFEE, HALTER & GRISWOLD LLP
1405 East Sixth Street
Cleveland, Ohio 44114
Tel: (216) 622-8200
Fax: (216) 241-0816
Email: jlang@calfee.com
mkucharson@calfee.com

Michael P. Lograsso (0058557)
CITY OF SOUTH EUCLID
1349 South Green Road
South Euclid, Ohio 44121
Tel: (216) 381-0400
Fax: (216) 381-0364
Email: mlograsso@seuclid.com

Attorney for City of South Euclid

Teresa Metcalf Beasley (0061314)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building, 1405 East Sixth Street
Cleveland, Ohio 44128
Tel: (216) 587-6500
Fax: (216) 587-6594
Email: tmbeasley@calfee.com

Attorney for City of Warrensville Heights

John B. Nalbandian (0073033)
W. Stuart Dornette (0002955)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
Tel: (513) 381-2838
Fax: (513) 381-0205
nalbandian@taftlaw.com
dornette@taftlaw.com

Stephen M. O'Bryan (009512)
Gregory J. O'Brien (0063441)
Michael J. Zbiegien, Jr. (0078352)
TAFT STETTINIUS & HOLLISTER LLP
200 Public Square, Suite 3500
Cleveland, Ohio 44114
Tel: (216) 241-2838
Fax: (216) 241-3707
sobryan@taftlaw.com
gobrien@taftlaw.com
mzbiegien@taftlaw.com

Attorneys for City of Beachwood, City of
Bedford Heights, Village of Glenwillow, City of
Independence, City of Lyndhurst, Village of
Oakwood, City of Olmstead Falls

Marlene Sundheimer (0007150)
Chief Legal Officer & General Counsel
**NORTHEAST OHIO REGIONAL
SEWER DISTRICT**
3900 Euclid Avenue
Cleveland, Ohio 44115
Tel: (216) 881-6600
Fax: (216) 881-4407
Email: sundheimerm@neorsd.org

Attorneys for NEORSD

Sheldon Berns (0000140)
Paul M. Greenberger (0030736)
Benjamin J. Ockner (0034404)
Jordan Berns (0047404)
Gary F. Werner (0070591)
Timothy J. Duff (0046764)
**BERNS, OCKNER &
GREENBERGER, LLC**
3733 Park East Drive, Suite 200
Beachwood, Ohio 44122
Tel: (216) 831-8838
Fax: (216) 464-4489
Email: sberns@bernssockner.com
bockner@bernssockner.com
jberns@bernssockner.com
gwerner@bernssockner.com
tduff@bernssockner.com

Attorneys for Northeast Ohio Apartment
Association, Ohio Council of Retail Merchants,
Greater Cleveland Association of Building
Owners and Manager, Boardwalk Partners, LLC,
Cleveland Automobile Dealers Association,
Creekview Commons, LLC, CADA Properties,
LLC, Fargo Warehouse LLC, Highlands Business
Park, LLC, Northern Ohio Chapter of NAIOP,
JES Development Ltd., Lakepoint Office Park,
LLC, Association for Commercial Real Estate,
Landerbrook Point, LLC, Newport Square, Ltd.,
Park East Office Park LLC, Pavilion Properties,
LLC, WGG Development, Ltd., Snowville
Service Associates LLC

David J. Matty (0012335)
Shana A. Samson (0072871)
Justin W. Whelan (0088085)
MATTY, HENRIKSON & GREVE LLC
55 Public Square, Suite 1775
Cleveland, Ohio 44113
Tel: (216) 621-6570
Fax: (216) 621-1127
Email: dmatty@mhglegal.com
ssamson@mhglegal.com

Attorneys for City of Brecksville

Michael DeWine (0009181)
Attorney General of Ohio

Eric E. Murphy (0083284)
State Solicitor
Michael J. Hendershot (0081842)
Chief Deputy Solicitor
Jeffrey P. Jarosch (0091250)
Deputy Solicitor
Aaron S. Farmer (0080251)
Assistant Attorney General
OHIO ATTORNEY GENERAL'S OFFICE
30 East Broad Street, 17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
Fax: (614) 466-5087
Email: eric.murphy@ohioattorneygeneral.gov

Attorneys for the State of Ohio

Eugene P. Holmes (Pro Se)
23507 Royalton Road
Columbia Station, Ohio 44028

Michael J. Jogna (Pro Se)
31440 Cannon Road
Solon, Ohio 44139

Kenneth A. Kraus (0000812)
Law Director
CITY OF STRONGSVILLE
Daniel J. Kolick (0002631)
Assistant Law Director, City of Strongsville
16099 Foltz Parkway
Strongsville, Ohio 44149
Tel: (440) 580-3145
Fax: (440) 846-1639
Email ken.kraus@strongsville.org
dkolick@kolick-kondzer.com

Attorneys for City of Strongsville

Maurice Aaron Thompson (0078548)
1851 CENTER FOR CONSTITUTIONAL LAW
208 E. State Street
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
Email: MThompson@OhioConstitution.org

Attorneys for 1851 Center for Constitutional
Law, The Ohio Real Estate Investors Association

Penny Sisson (Pro Se)
Box 266
Spencer, Ohio 44275

Motions for reconsideration are highly disfavored by this Court to discourage the exact practice that Appellees seek here—relitigation of issues already resolved. This Court has already deliberated for over a year since oral argument, written three separate opinions, and reviewed hundreds of pages of briefing, ultimately concluding that the Northeast Ohio Regional Sewer District (the “District”) does have the authority under R.C. Chapter 6119 and its Charter to proceed with the Regional Stormwater Management Program (the “Program”) and to charge fees under the attendant fee structure to implement the Program. Now five cities—without support from the fifty-one other District member communities—ask the Court to reopen the door. They claim there are remaining issues that must be decided by the Court of Appeals (and then, likely, this Court). At base, however, they are merely the same issues couched in new terms. Accordingly, in response to Appellees’ invitation to revisit this case, this Court should respectfully decline.

Amici Curiae are eighteen communities in Northeast Ohio that continue to suffer the devastating effects of stormwater-related problems, which have increased significantly over the past several decades. They have waited over five years during the pendency of this litigation to implement needed stormwater projects promised by the Program. Reconsideration or remand to the Court of Appeals only delays such needed projects even longer, and undermines the finality of this Court’s judgment.

ARGUMENT

Appellees contend that this Court must remand the case to the Court of Appeals to consider whether the stormwater fee constitutes an “illegal tax,” as defined in *Drees Co. v. Hamilton Township*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916. That is simply a

request to revisit issues already resolved by this Court.¹ Quite simply, a monetary exaction—regardless of whether it is deemed a “tax” or a “fee”—is not “illegal” under this Court’s decision in *Drees* if it is authorized by the Ohio Revised Code. *See id.* at ¶ 14. And this Court decided that the stormwater fee was authorized by R.C. 6119. Thus it had no need to determine whether that “stormwater fee” was best characterized as a fee or a tax—either way it was authorized by the statute. This Court properly avoided such superfluous discussion in its opinion. And it properly realized how senseless it would be to remand that same question back to the Court of Appeals to be litigated all over again. Appellees are unhappy with the result. But Appellees’ “attempted reargument of this contention is not authorized by [the] Rules of Practice.” *State ex rel. Shemo v. Mayfield Hts.*, 2002-Ohio-4905, 96 Ohio St.3d 379, 775 N.E.2d 493, ¶ 9.

As the Court implicitly recognized, the decision in *Drees* is inapposite to the legality of the stormwater fee. In *Drees*, this Court considered whether a local township had the statutory authority to impose a so-called “impact fee,” given the limited taxing power of townships under the Ohio Revised Code. *Drees* at ¶ 14 (citing R.C. 504.04). Ohio townships, by statute, only have the power to impose particular types of taxes. *Id.* Therefore, the Court in *Drees* had to determine whether the impact fee was actually a tax—it was—to determine if it ran afoul of the township’s authority under R.C. 504.04. *Id.* The *Drees* Court held that the township was not authorized to impose the impact fees because the fees operated as taxes and such taxes were not authorized by R.C. 504.04. *Id.* at ¶ 41.

¹ As to Appellees’ contention that the matter must be remanded to the Court of Appeals for consideration of constitutional questions, Amici adopt the District’s argument that no remand is warranted because Appellees strategically decided not to place such constitutional issues before this Court. It would be unfair to the District’s member communities to remand the case to consider issues that Appellees decided not to place before this Court in hopes of avoiding this Court’s jurisdiction.

Unlike *Drees*, in the instant matter there is no reason for the Court of Appeals to decide whether the “stormwater fee” is better characterized as a fee or tax. Regardless, this Court already decided that the “stormwater fee” falls within the authority of the District under R.C. 6119. Remanding this question to the Court of Appeals would prompt only an empty exercise in semantics without practical import.

This Court’s cases demonstrate that the dispositive question when determining the legality of a fee or tax is whether it falls within the imposing entity’s statutory authority. *See, e.g., Cook Rd. Invests., L.L.C. v. Cuyahoga Cty. Bd. of Commrs.*, 2011-Ohio-2151, 194 Ohio App. 3d 562, 957 N.E.2d 330, ¶ 17 (“[T]est . . . for assessing the constitutionality of impact fees authorized by local ordinance does not apply to sewer-connection fees [because] R.C. Chapter 6117 authorizes counties to allocate the cost of a sewer system among all residents of the district even if some of those residents do not directly benefit from the system.”); *City of Wooster v. Graines*, 52 Ohio St. 3d 180, 181, 556 N.E.2d 1163, 1164 (1990) (“Wooster, as a municipality, had the authority to establish and maintain the sewer utility as long as the rates to be charged and the revenue collected therefrom complied with the mandates of R.C. 729.49 and 729.52.”). In these sewer district cases, as here, the Court did not concern itself with the fee versus tax distinction because it was unnecessary for the determination as to whether the exaction fell within the statute.

Consistent with these cases, the Court of Appeals recognized that it did not need to decide the fee versus tax question. Contrary to Appellees’ characterization, the Court of Appeals did not dismiss this issue as moot given its (erroneous) decision that the District lacked statutory authority for the Program. *See Mot. for Reconsideration of Appellees The Ohio Council of Retail Merchants, et al.*, at 1. Rather, the Court of Appeals recognized that it “need not decide”

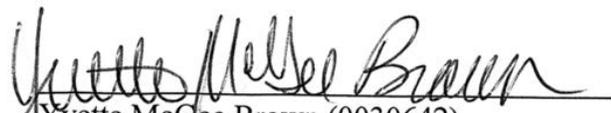
whether it was a fee or a tax because the proper “focus is on whether the Sewer District possesses the authority under [R.C. 6119]” to implement the Program “and the associated fee.” *NEORS v. Bath Twp.*, 2013-Ohio-4186, 999 N.E.2d 181, ¶ 48 (8th Dist.). So, whether called a fee or a tax, the relevant question was whether the Program and attendant exaction was within the District’s statutory authority. This Court subsequently concluded that it is. Accordingly, this Court’s decision that R.C. 6119 authorizes the Program and attendant fee spells the end to this prolonged litigation. As this Court aptly recognized, it was unnecessary to accept jurisdiction over the fee versus tax question in order to resolve this case. Similarly, it correctly recognized that no remand was necessary. *NEORS v. Bath Twp.*, Slip Op. No. 2015-Ohio-3705, ¶ 22.

The interests of finality and judicial economy necessitate denying Appellees’ motion. By recasting the issue in new terms, Appellees seek a proverbial second bite at the apple. But a remand would only prompt circuitous relitigation of questions already resolved. After over five years of litigation, this case has finally been put to rest. Reconsideration and/or remand only delays relief to the District’s member communities.

CONCLUSION

For the above-stated reasons, Amici Curiae respectfully request that the Court deny the motion for reconsideration and/or remand.

Respectfully submitted,



Yvette McGee Brown (0030642)

(with authority to sign on behalf of all amici)

Counsel of Record

Chad Readler (0068394)

JONES DAY

325 John H. McConnell Boulevard, Suite 600

P.O. Box 165017

Columbus, Ohio 43216-5017

Tel: (614) 469-3939

Fax: (614) 461-4198

Email: ymcgeebrown@jonesday.com

careadler@jonesday.com

Attorney for Village of Cuyahoga Heights,
Village of Moreland Hills, and Orange Village

Scott Claussen (0074465)

CITY OF BROOKLYN

7619 Memphis Avenue

Brooklyn, Ohio 44144

Tel: (216) 635-4216

Fax: (216) 351-2133

Email: sclausen@brooklynohio.gov

Attorney for City of Brooklyn

Thomas P. O'Donnell (0002462)

VILLAGE OF HIGHLAND HILLS

3700 Northfield Road, Suite 11

Highland Hills, Ohio 44122

Tel: (216) 283-3000

Fax: (216) 283-2516

Email: todonnell@todlaw.com

Attorney for Village of Highland Hills

Neal M. Jamison (0005911)

CITY OF BROOK PARK

6161 Engle Road

Brook Park, Ohio 44142

Tel: (216) 433-1300

Fax: (216) 433-1630

Email: njamison@cityofbrookpark.com

Attorney for City of Brook Park

Jerome E. Dowling (0026035)

VILLAGE OF BROOKLYN HEIGHTS

20800 Center Ridge Road, Suite 222

Rocky River, Ohio 44116

Tel: (440) 331-1010

Fax: (440) 331-8812

Email: jdlawdir@gmail.com

Attorney for Village of Brooklyn Heights

Joseph W. Diemert, Jr. (0011573)

JOSEPH W. DIEMERT AND

ASSOCIATES

1360 S.O.M. Center Road

Cleveland, Ohio 44124

Tel: (440) 442-6800

Fax: (440) 442-0825

Email: receptionist@diemertlaw.com

Attorney for Mayfield Village

Peter H. Hull (0003731)
CITY OF MIDDLEBURG HEIGHTS
15700 Bagley Road
Middleburg Heights, Ohio 44130
Tel: (440) 234-8811
Fax: (440) 234-8993
Email: peterhull@gmail.com

Attorney for City of Middleburg Heights

Dale F. Pelsozy (0020653)
CUYAHOGA COUNTY
PROSECUTOR'S OFFICE
1200 Ontario Street, Justice Center 8th Floor
Cleveland, Ohio 44113
Tel: (216) 443-7757
Fax: (216) 443-7601
Email: dpelsozy@prosecutor.cuyahogacounty.us

Attorney for Olmsted Township

Michael D. Pokorny (0024792)
CITY OF PARMA HEIGHTS
6281 Pearl Road
Parma Heights, Ohio 44130
Tel: (440) 884-9600
Fax: (440) 884-1802
Email: law@parmaheightsoh.gov

Attorney for City of Parma Heights

William M. Ondrey Gruber (0005950)
CITY OF SHAKER HEIGHTS
3400 Lee Road
Shaker Heights, Ohio 44120
Tel: (216) 491-1445
Fax: (216) 491-1447
Email: william.gruber@shakeronline.com

Attorney for City of Shaker Heights

Luke McConville (0067222)
WALDHEGER COYNE CO., LPA
1991 Crocker Road, Suite 550
Westlake, Ohio 44145
Tel: (440) 835-0600
Fax: (440) 835-1511
Email: luke@healthlaw.com

Attorney for Village of Newburgh Heights

Timothy G. Dobeck (0034699)
PARMA CITY HALL
6611 Ridge Road
Parma, Ohio 44129
Tel: (440) 885-8132
Fax: (440) 885-8008
Email: law@cityofparma-oh.gov

Attorney for City of Parma

Richard A. Pignatiello (0041137)
CITY OF SEVEN HILLS
3479 Jasmine Drive
Seven Hills, Ohio 44131
Tel: (216) 525-6237
Fax: (216) 525-6256
Email: law@sevenhillsohio.org

Attorney for City of Seven Hills

Michael P. Lograsso (0058557)
CITY OF SOUTH EUCLID
1349 South Green Road
South Euclid, Ohio 44121
Tel: (216) 381-0400
Fax: (216) 381-0364
Email: mlograsso@seuclid.com

Attorney for City of South Euclid

David A. Lambros (0008654)
VILLAGE OF VALLEY VIEW
One Berea Commons, Suite 216
Berea, Ohio 44017
Tel: (440) 816-1525
Fax: (440) 816-0604
Email: dalambros@yahoo.com

Attorney for Village of Valley View

Teresa Metcalf Beasley (0061314)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building, 1405 East Sixth Street
Cleveland, Ohio 44128
Tel: (216) 587-6500
Fax: (216) 587-6594
Email: tmbeasley@calfee.com

Attorney for City of Warrensville Heights

CERTIFICATE OF SERVICE

I hereby certify that on this second day of October, 2015, a true copy of the foregoing amicus brief was served by regular, U.S. Mail, postage prepaid, upon the following:

Mark I. Wallach
Thacker Martinsek LPA
2330 One Cleveland Center
1375 E. Ninth Street
Cleveland, OH 44114

John B. Nalbandian
W. Stuart Dornette
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202

James F. Lang
Matthew J. Kucharson
Molly A. Drake
Calfee, Halter & Griswold LLP
1405 East Sixth Street
Cleveland, OH 44114

Stephen M. O'Bryan
Gregory J. O'Brien
Michael J. Zbiegien, Jr.
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114

Marlene Sundheimer
Northeast Ohio Regional Sewer District
3900 Euclid Avenue
Cleveland, OH 44115

Kenneth A. Kraus
Daniel J. Kolick
City of Strongsville
16099 Foltz Parkway
Strongsville, OH 44149

Sheldon Berns
Paul M. Greenberger
Benjamin J. Ockner
Jordan Berns
Gary F. Werner
Timothy J. Duff
Berns, Ockner & Greenberger, LLC
3733 Park East Drive, Suite 200
Beachwood, OH 44122

David J. Matty
Shana A. Samson
Justin Whelan
Matty, Henrikson & Greve
55 Public Square, Suite 1775
Cleveland, OH 44113



One of the Attorneys for Amici Curiae