

**IN THE SUPREME COURT OF OHIO**

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	:	CASE NO. 13-1770
	:	
	:	Appeal from Court of Appeals for the
Appellant,	:	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
Appellees.	:	of Common Pleas
	:	CASE NO. CV-10-714945

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**APPELLANT NORTHEAST OHIO REGIONAL SEWER DISTRICT'S  
OMNIBUS MEMORANDUM IN RESPONSE TO APPELLEES'  
MOTIONS FOR RECONSIDERATION AND/OR REMAND**

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## INTRODUCTION

Pursuant to S. Ct. Prac. R. 18.03(A), Appellant, the Northeast Ohio Regional Sewer District (the “District”), respectfully submits this omnibus memorandum in response to the: (a) Joint Motion for Reconsideration and/or Motion for Remand filed by Appellees City of Brecksville, City of Strongsville, City of Independence, City of Lyndhurst, and City of Beachwood (the “Community Appellees,” and “Community Appellees’ Motion”); and (b) Motion for Reconsideration filed by the intervening property owner Appellees<sup>1</sup> (the “Property Owner Appellees,” and “Property Owner Appellees’ Motion”) (collectively, “Movants”).

Movants, their ranks now reduced to just *five* of the District’s *fifty-six* Member Communities involved in this litigation plus a small group of property owners, claim to want their “full day in court.” *See* Community Appellees’ Motion, at 5. But Movants have had much more than a day in court—they have had more than five and a half years in court to make all of their arguments. For half a decade now, the residents of Northeast Ohio have been left vulnerable to the severe flooding, erosion, and water quality problems caused by unmanaged stormwater.

In this Court’s Opinion, the only relevant issues presented by this case were decided. First, “is the Sewer District’s regional stormwater management program authorized by statute and by its charter?” *Northeast Ohio Reg’l Sewer Dist. v. Bath Twp.*, 2015-Ohio-3705, ¶ 7. This

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<sup>1</sup> The Property Owner Appellees consist of: The Greater Cleveland Association of Building Owners and Managers; Cleveland Automobile Dealers Association; The Northern Ohio Chapter of NAIOP; The Association for Commercial Real Estate; CADA Properties, LLC; The Ohio Council of Retail Merchants; Snowville Service Associates LLC; Boardwalk Partners, LLC; Creekview Commons, LLC; Fargo Warehouse LLC; Greens of Lyndhurst, Ltd.; Highlands Business Park, LLC; JES Development Ltd.; Lakepoint Office Park, LLC; Landerbrook Point, LLC; Newport Square, Ltd.; Park East Office Park LLC; Shaker Plaza, Ltd.; Pavilion Properties, LLC; and WGG Development, Ltd.

Court has decided that it is. Second, “is the attendant fee structure authorized by statute and by the charter?” *Id.* This Court has decided that it is.

These rulings have completely mooted the other issues which Movants have asked this Court to remand to the Eighth District Court of Appeals. With respect to Movants’ “fee” vs. “tax” argument, *i.e.*, that the proposed stormwater fee should be characterized as a “tax,” the District has argued consistently throughout this multi-year engagement that the question is not germane. If the stormwater fee is determined to be authorized by the applicable statutes, and the legality of those statutes has not been challenged (as they have not been in this case), then the stormwater fee is within the power of the District to impose, whatever label Movants want to assign to it. In declining to decide this issue as irrelevant, the Eighth District majority agreed with the District’s analysis.

The “constitutional” attacks that Movants have made on the District’s Regional Stormwater Management Program (the “Program”) and stormwater fee run directly into the same insurmountable barrier—to attack the constitutionality of a program and fee determined to be expressly authorized by Ohio statutes, the constitutionality of those statutes must be challenged. Movants have not been willing to challenge the underlying statutes at any level of the judiciary. All of these attacks are now moot.

Finally, if Movants truly believed that any or all of these issues were not encompassed within the two dispositive issues discussed above, they could have asked this Court to separately decide them by cross-appealing. Movants failed to do so, waiving any right to seek remand from this Court.

Therefore, the District respectfully requests that this Court deny the Community Appellees' and the Property Owner Appellees' Motions in their entirety and enable the District's long-awaited Program to finally move forward.

### ARGUMENT

**I. The two issues ruled upon by this Court subsume, and moot, the other issues which Movants have asked this Court to remand.**

As further discussed below, the determinations by this Court that the District's Program and attendant fee structure are authorized by R.C. Chapter 6119 and the District's Petition and Plan for Operation (the "Charter") are dispositive of this case, and render the "fee" vs. "tax" issue and all other constitutional issues raised by Movants moot. Any remand under these circumstances would be futile, unproductive, and prejudicial to the many communities and residents in Northeast Ohio who have been anxiously awaiting the implementation of the Program.

**A. Because this Court determined that the District's stormwater fee is authorized by R.C. Chapter 6119, Movants' "fee" vs. "tax" argument is moot.**

When fees imposed pursuant to Ohio statutes are argued to constitute unlawful taxes, and in particular water and sewer fees, this Court has primarily focused its analysis on whether such fees comply with the statutory requirements to determine their validity absent a challenge to the authorizing statutes themselves. *See, e.g., City of Wooster v. Graines*, 52 Ohio St.3d 180, 556 N.E.2d 1163 (1990) (upholding validity of storm drainage fee argued to be a tax based upon the city's compliance with authorizing Ohio statutes); *Himebaugh v. Canton*, 145 Ohio St. 237, 61 N.E.2d 483 (1945) ("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.”).<sup>2</sup>

Consistent with this analysis, and throughout this litigation, the District has correctly argued that, if its stormwater fee is fully authorized by R.C. Chapter 6119, it cannot constitute an unlawful tax unless the statutes themselves are unlawful. Movants have never challenged the legality of the statutes. Regardless, Movants have waived this argument because any party challenging the constitutionality of an Ohio statute is required to serve the Ohio Attorney General with a copy of the lawsuit, and Movants failed to ever do so. *Cicco v. Stockmaster*, 89 Ohio St. 3d 95, 99, 728 N.E.2d 1066 (2000).

Further, the Eighth District majority opinion did *not* state that the “fee” vs. “tax” issue was independently relevant but rendered moot by its other rulings as suggested by the Community Appellees. *See* Community Appellees’ Motion, at 2-3. The majority determined that *they did not need to decide this issue*, not because it was moot, but because the relevant inquiry was whether the District’s Program and stormwater fee are authorized by R.C. Chapter 6119:

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

*Northeast Ohio Reg’l Sewer Dist. v. Bath Twp.*, 8th Dist. Cuyahoga No. 98728, 2013-Ohio-4186, ¶ 48, 999 N.E.2d 181 (emphasis added). If Movants wished to challenge this determination, they should have cross-appealed to this Court. Movants chose not to do so.

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<sup>2</sup> The issue in *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916, referenced in the Community Appellees’ Motion, was the validity of impact fees imposed by a township pursuant to its *limited police powers*, not a stormwater fee imposed by a regional water and sewer district pursuant to *Ohio statutes*. *See* Community Appellees’ Motion, at 4.

Finally, the Community Appellees themselves conceded in their Merit Brief that the “fee” vs. “tax” issue is subsumed by this Court’s determination as to whether the stormwater fee is authorized by R.C. Chapter 6119 by devoting an entire section to this argument in response to the District’s Proposition of Law No. 1.<sup>3</sup> (See Community Appellees’ Merit Brief, at 32-36.) The Property Owner Appellees likewise made this concession in their Merit Brief by expressly adopting all of the arguments in response to Proposition of Law No. 1 set forth in the Community Appellees’ Merit Brief. (See Property Owner Appellees’ Merit Brief, at 15.) Movants cannot now argue that this is a completely separate and unrelated issue that is not resolved by this Court’s Opinion.

Therefore, because this Court determined that the District’s stormwater fee is authorized by R.C. Chapter 6119, Movants’ “fee” vs. “tax” argument is moot and their request for remand on this issue should be denied.

**B. Because this Court determined that the District’s Program and stormwater fee are authorized by R.C. Chapter 6119 and the District’s Charter, Movants’ other constitutional challenges are moot.**

Similarly, the determination by this Court that the District’s Program and stormwater fee are authorized by R.C. Chapter 6119 and the District’s Charter subsumes all of Movants’ other constitutional challenges, rendering them moot. The Program and stormwater fee cannot be unconstitutional if they are specifically authorized by R.C. Chapter 6119 unless those statutes, themselves, are unconstitutional. As discussed above, Movants never challenged the constitutionality of the statutes, nor did they notify the Ohio Attorney General of any such challenge.

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<sup>3</sup> The District’s Proposition of Law No. I states: “A district formed pursuant to R.C. Chapter 6119 is authorized to manage stormwater 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.’”

Also, it is undisputed that all of the District's Member Communities, on their own behalf and on behalf of their residents, agreed to the District's Charter decades ago, including the Community Appellees. This Court's determination that the District's Program and stormwater fee are authorized by the District's Charter subsumes the Community Appellees' constitutional arguments because the Community Appellees cannot argue (and have not argued) that the Charter they approved is itself unconstitutional.

Therefore, because this Court determined that the District's Program and stormwater fee are authorized by R.C. Chapter 6119 and the District's Charter, Movants' other constitutional arguments are all moot and their request for remand on these issues should be denied.

**II. Movants should have asked this Court to separately decide the "fee" vs. "tax" issue and the other constitutional issues if they believed that these issues were not encompassed within the District's Propositions of Law I and II, and their failure to do so constitutes a waiver.**

This Court has the authority to conduct a de novo review of assignments of error determined by an appellate court to be moot. *See, e.g., Univ. Hosps. of Cleveland v. Lynch*, 96 Ohio St.3d 118, 128, 772 N.E.2d 105 (2002) (stating same, and ruling upon assignments of error deemed moot); *Apel v. Katz*, 83 Ohio St.3d 11, 18, 697 N.E.2d 600 (1998) (ruling upon assignments of error deemed moot). Presumably for their own strategic reasons, Movants decided not to file a cross-appeal with this Court on *any* issues in the case, including issues deemed moot by the Eighth District. In making this choice, Movants waived any right to seek remand and must now live with their decision.

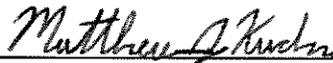
If Movants truly believed that the "fee" vs. "tax" argument deemed irrelevant by the Eighth District majority, or any of the other constitutional arguments set forth in assignments of error deemed moot by the Eighth District, were not encompassed within and subsumed by the District's Propositions of Law I and II, Movants could and should have raised the issues with this

Court and urged this Court to separately decide them. *Apel*, 83 Ohio St.3d at 18 (“The parties to this appeal agree that the trespass issues are unrelated to the roadway issue, and contend that the court of appeals erred in not addressing them.”). Instead, as part of their strategy to further delay the implementation of the District’s Program, Movants waited until they received an unfavorable ruling to raise them in the form of a request for remand. Movants’ delay constitutes a waiver, and their Motions should be denied in their entirety.

**CONCLUSION**

For the above-stated reasons and the reasons set forth in any memoranda filed by amici curiae in support of the District’s position, the District respectfully request that this Court deny the Community Appellees’ and the Property Owner Appellees’ Motions seeking to remand this half-a-decade-old case back to the Eighth District Court of Appeals.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a duplicate of the foregoing was served this 2nd day of October, 2015, by first class U.S. mail, postage pre-paid upon the following:

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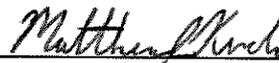
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