IN THE SUPREME COURT OF OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	:	**CASE NO. 2013-1770**
Plaintiff-Appellant,	:	
v.	:	**Appeal from Court of Appeals for the Eighth Appellate District Case No. CA-12-098728 (Consolidated with Case Nos. CA-12-098729 & CA-12-098739)**
BATH TOWNSHIP, OHIO, *et al.*,	:	
Defendants-Appellees.	:	

BRIEF IN SUPPORT OF APPELLEES THE OHIO COUNCIL OF RETAIL MERCHANTS; THE GREATER CLEVELAND ASSOCIATION OF BUILDING OWNERS AND MANAGERS; THE CLEVELAND AUTOMOBILE DEALERS ASSOCIATION; CADA PROPERTIES, LLC; THE NORTHERN OHIO CHAPTER OF NAIOP, THE ASSOCIATION FOR COMMERCIAL REAL ESTATE; THE NORTHEAST OHIO APARTMENT ASSOCIATION; SNOWVILLE SERVICE ASSOCIATES LLC; BOARDWALK PARTNERS, LLC; CREEKVIEW COMMONS, LLC; FARGO WAREHOUSE LLC; HIGHLANDS BUSINESS PARK, LLC; JES DEVELOPMENT LTD.; LAKEPOINT OFFICE PARK, LLC; LANDERBROOK POINT, LLC; NEWPORT SQUARE, LTD.; PARK EAST OFFICE PARK LLC; PAVILION PROPERTIES, LLC; AND WGG DEVELOPMENT, LTD. ("APPELLEE PROPERTY OWNERS") OF *AMICUS CURIAE* 1851 CENTER FOR CONSTITUTIONAL LAW, JOINED BY THE OHIO REAL ESTATE INVESTORS ASSOCIATION

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TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE*

Formed to protect and advance Ohioans' constitutional liberties, individual rights, and prosperity through limiting state and local government to its constitutional confines, the **1851 Center for Constitutional Law** is dedicated to protecting Ohioans' control over their lives, their families, their property, and thus, ultimately, their destinies. In doing so, the 1851 Center has developed particular expertise in Ohio constitutional law, has authored numerous publications on this topic, and has achieved favorable results for Ohioans in numerous cases.

Formed to support public policies that advance liberty, individual rights, and a strong economy in Ohio, the **1851 Center for Constitutional Law** is dedicated to protecting Ohioans' control over their lives, their families, their

property, and thus, ultimately, their destinies. In doing so, the 1851 Center has developed particular expertise in Ohio constitutional law, has authored numerous publications on this topic, and has achieved favorable results for Ohioans in numerous state constitutional law cases.

More pointedly, the 1851 Center has an interest in ensuring that the rights enshrined in the Ohio Constitution are robustly enforced and carefully protected by courts. Among these constitutional rights is the right of Ohio's citizens to be free from unconstitutional taxes and fees. The Center also demands that bodies of constitutionally-limited and delegated powers, such as the Ohio Legislature, not exceed the scope of their authority under the Ohio Constitution.

Amicus Curiae **Ohio Real Estate Investors Association ("OREIA")** represents and speaks for thousands of Ohio property owners who own investment, rental, and other properties. OREIA is a non-profit business league dedicated to uniting and supporting real estate investors, landlords, and entrepreneurs. Its mission is to make Ohio a better, more investor-friendly, more profitable place for Ohioans to buy, sell, and hold real estate. To that end, OREIA maintains a strong interest in defending Ohio property owners from unconstitutional and otherwise unlawful property taxes and fees, particularly when such assessments are imposed on property owners administratively and without a vote.

INTRODUCTION

Sewage and rain are not the same. Legislative authority to deal with sewage, and perhaps impose assessments to abet doing so, does not imply authority to impose regulations and assessments on Ohioans in response to rainy days.

This matter turns on whether a regional administrative agency may impose regulations neither authorized nor even contemplated by the legislature that created it, and even further, levy, without voter approval or any other form of public accountability, a property assessment amounting to a tax on development. Because such an entity may do neither, the Northeast Ohio Regional Sewer District ("NORSD") - - an entity created to treat sewage - - exceeds the constitutional boundaries of its authority through its attempted creation of a "regional stormwater management program" and attendant "fees" on area property owners. And even if the NORSD

maintained statutory authority to regulate stormwater, it lacks the authority to impose the assessments on property owners that it seeks to impose here, because those assessments are impermissible property taxes, rather than permissible "rents," "fees," or "assessments." For each and either of these reasons, the Appellate Court must be affirmed.

STATEMENT OF THE CASE AND FACTS

Amici hereby incorporate the statement of the case and facts rendered by Counsel of Record, the trial court, and the Court of Appeals.

ARGUMENT

Proposition of Law No. I: Legislative delegation of administrative authority to address sewage does not vest an agency with authority to address rain and snow, and further impose taxes on past and future development to do so.

The Appellate Court must be affirmed because the Northeast Ohio Regional Sewer District lacks authority to "manage" rainwater. And because it lacks authority to manage such water, it further lacks authority to assess property owners to carry out this management of rainwater.

It must be remembered that the NORSD is not an autonomous local government, operating with direct accountability to its residents, akin to a municipality. Rather, the NORSD is a creature of the state, created by the Ohio General Assembly and endowed with only the authority that body has provided.

The need for strictly construing that delegation of authority arises from the most basic requirements of our state Constitution. Section 2, Article I of the Ohio Constitution provides that "all political power is inherent in the people." Through the Ohio Constitution, the people have delegated this political power only to the Ohio General Assembly. This is made clear through Section 1, Article II of the Ohio Constitution, which plainly states "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.*** " This is further emphasized by Section 26 of Article II, which states: "All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public

schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution."

This Court must be particularly scrutinizing with respect to politically-unaccountable boards, commissions, and agencies, since the constitution "divides power among sovereigns and branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crises of the day."[1] Deterring politically expedient solutions serves to "reduce the risk of tyranny and abuse," and "secure to citizens the liberties that derive from the diffusion of sovereign power."[2] Accordingly, "[i]t is an accepted doctrine in our constitutional law that the lawmaking prerogative is a sovereign power conferred by the people upon the legislative branch of the government," and therefore "cannot be delegated to other officers, board or commission, or branch of government."[3] Rather, the General Assembly can only "confer administrative power on an executive, a board or commission."[4] And for over a century the limits on such bodies have been consistent: in *Cincinnati, Wilmington & Zanesville R. Co. v. Com'rs of Clinton County*, this Court clarified that "[t]he true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done.'"[5]

Thus, the unfettered delegation of policymaking power to such a body is not the constitutional prerogative of the General Assembly."[6] Therefore because the General Assembly cannot delegate its legislative authority, an administrative agency cannot make policy.[7]

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1 See *New York v. United States* (1992), 505 U.S. 144, at 181, 187-188.

2 Id., at 181, 182, citing to Federalist No. 51. See also *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114 ("the doctrine was a deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches.")

3 *Matz v. J.L Curtis Cartage Co.* 132 Ohio St. 271, 7 N.E.2d 220 (1937).

4 Id.

5 1 Ohio St. 77, 88.

6 *State ex rel. Meshel v. Keip* (1980), 66 Ohio St.2d 379, citing *Matz v. J. L. Curtis Cartage Co.* (1937), 132 Ohio St. 271, at pages 280-281.

7 Id.

In other words, administrative "districts" cannot contravene the legislative intent of the Ohio General Assembly; and likewise, the Ohio Constitution permits the existence of these boards, districts , and agencies *only* because their discretion is confined to making decisions that the Ohio General Assembly authorized - - the NORSD is and must be a *proxy* for the General Assembly. Thus, stringent policing of the limits of that legislative delegation is critical to our entire constitutional order.

Otherwise, "[i]f such general rule-making power could be conferred indiscriminately, the Legislature could meet, create commissions, pass on to them the duties of legislation, and then adjourn *sine die*. * * * The result would be that statutory law would lose its significance and legal rights would be grounded in great measure upon the readily alterable rules and regulations of boards and commissions. Thus the constitutional right of referendum would be denied, government would be given over to the despotic rule of administrative authorities, and bureaucracy would run wild."[8] Moreover, state senators and representatives would join the bureaucrats as unnacountable to their constituents for the acts of government, leaving Ohio voters with no method of control.

The General Assembly sets public policy, and administrative agencies, when granted rulemaking power, may only "develop and administer" those policies.[9] They may not alter the substance of those polices to effectuate a policy that differs from what the General Assembly has decreed.

Thus, Ohio precedent is clear that (1) "[a]n agency exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute;"[10] (2) when agencies do in fact pursue policies that are beyond or different from what is articulated in legislation, "they go beyond their administrative powers and exercise a legislative function which, under our Constitution, belongs exclusively to the General Assembly;"[11] (3) "[a] rule which is unreasonable, arbitrary, discriminatory, or in conflict with law is invalid and unconstitutional because it surpasses administrative power and constitutes a legislative function;"[12] and (4) "[i]f an administrative rule, whether written or not, exceeds the statutory authority established by the General Assembly, the agency has

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8 Id., at 281.

9 *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 773 N.E.2d 536, ¶ 41.

10 *State v. Bodyke* (2010), 126 Ohio St.3d 266, 933 N.E.2d 753, 2010 -Ohio- 2424.

11 *City of Cincinnati v. Cook* (1923), 107 Ohio St. 223, 140 N.E. 655.

12 *Weber v. Bd. of Health* (1947), 148 Ohio St. 389, 396, 74 N.E.2d 331, 335-36.

usurped the legislative function, thereby violating the separation of powers established in the Ohio Constitution."[13]

Here, there may be wise reasons behind why NORSD believes that it should control the flow of rainwater and tax property owners for the privilege. However, these reasons are immaterial. Instead, this Court must simply examine and compare (1) the delegation from the Ohio General Assembly to the NORSD; and (2) the objectionable conduct of the NORSD. These two do not match.

First the delegation. Pursuant to R.C. 6119.01(A) and (B), the purpose of a regional water and sewer district is for "either or both" of the following purposes: "(A) [t]o supply water to users within and without the district"; and "(B) [t]o provide for the collection, treatment, and disposal of waste water within and without the district." "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." R.C. 6119.011(K). Essentially, the statutory terms authorize the Sewer District to collect, treat, and dispose of waste water entering the sewer system.Under R.C. 6119.011(K), "waste water means" "*any storm water containing sewage or other pollutants.*" The District's own "waste water" definition in Titles I, II, and IV of its code of regulations recognizes it as a "combination of water-carried waste * * * together with such ground, surface or storm water as may be present."

The General Assembly created regional sewer districts to "collect, treat, and dispose" of "waste water," i.e. sewage. This is implied in the names of the organization themselves: they are not called "environmental protection agencies," "natural resource preservation agencies," or "economic development agencies." Accordingly, the Appellate Court correctly determined that "the definition of waste water cannot be read to authorize the Sewer District to unilaterally exercise control over a broad range of stormwater-related issues that are not mentioned under and bear no resemblance to the powers conferred through R.C. Chapter 6119."

Here, the NORSD seeks to manage stormwater - - rain, essentially. The legislature, however, fully aware that it rains and snows in Cleveland, gave the Sewer District no such authority. R.C. Chapter 6119 does not authorize the District to implement a "stormwater management" program to address flooding, erosion, and other stormwater issues or to claim control over a "Regional Stormwater System." Such terms appear nowhere in R.C.

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[13] *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 384-385, 329 N.E.2d 693.

Chapter 6119. Nevertheless, in January 2010, the Sewer District's Board of Trustees amended the District's Code of Regulations by enacting Title V, "Stormwater Management Code," which created a "Regional Stormwater Management Program" ("the RSM Program"). Under Title V, the Board defined the scope of its RSM Program, which included "planning, financing, design, improvement, construction, inspection, monitoring, maintenance, operation and regulation" of its own defined "Regional Stormwater System." Title V, Section 5.0501.

Title V funds these activities by taxing development. Jack Kemp once famously summed up a seminal principle of economics by simply explaining "When you tax something you get less of it, and when you reward something you get more of it." The decision to curb development in Ohio in response to the reality that it rains and snows is not a decision that should be made by unaccountable administrators of the Northeast Ohio Regional Sewer District. Such policymaking must be reserved to the legislature, and if the matter is a close call this Court must find there has been no delegation, and the agency may not act. This reflects that reality that the damage of the agency's actions cannot be undone, but it is relatively simple for the General Assembly to provide the agency with authorization to accomplish the tasks at issue, should it intend for the agency to do so. This is particularly so here: the Sewer District has no mandate to balance economic interest, such as jobs, against this goal. It is as though the Sewer District aspires to be an miniature version of the United States Environmental Protection Agency, achieving its environmental goals at any and all costs, without accountability for jobs lost or taxpayers or businesses crippled.

<u>Proposition of Law No. II</u>: Even if NORSD maintained authority to "manage" rainwater, it may not impose, without public vote, a property assessment amounting to a property tax on past and future development.

The Sewer District's proposed "stormwater management fee" is a property tax. And because it is a property tax that violates Article 12 of the Ohio Constitution, as well as R.C. 6119, it cannot stand.

The question of whether this assessment is a tax or a fee if a legal issue. As the Ohio Supreme Court has observed, "[w]e must examine the substance of the assessments and not merely their form."[14] This placement of substance over form is critical: rubber-stamping the Sewer District's own findings and characterization of this tax

[14] *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St.3d 111, 579 N.E.2d 705.

as a "fee" would effectively invite every administrative governmental district in Ohio to levy unconstitutional taxes against the residents by merely labeling the taxes "fees." The Court must instead lend NORSD's unconstitutional tax the scrutiny it deserves. Upon doing so, it should conclude that the "stormwater fee" levies a tax, and an unconstitutional one at that.

A. The "stormwater fee" is, by definition, a tax.

Ohio law is clear on this matter. Although Defendants' label their tax a "fee," a fee is "a charge imposed by a government in return for a service."[15] "Taxation," meanwhile, "refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people."[16] In *Drees Co. v. Hamilton Twp.*, this Court reiterated that "Taxation refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people."[17]

Federal precedent on the tax-fee distinction supplies equivalent guideposts this Court, and is helpfully summarized by tax experts as follows:

> The paramount difference between a tax and a fee is based upon the purpose of the charge. A charge that covers the cost of providing a service to the payer or regulates the payer's conduct is a fee. A charge that raises revenue for general spending without conferring any exclusive benefit to the payer is a tax… Examples of charges accurately described as fees include filing fees paid to a court, tolls paid to drive on a government-operated road, user charges paid to a government-operated utility, or licensing fees paid to engage in a regulated occupation. These examples share two features: (1) provision of a service to a particular user, independent of society at large; and (2) the revenue is used to cover costs of that program, not transferred to other governmental programs.[18]

Here, the "stormwater fee" meets the definition of a tax because the Sewer District seeks to advance broad environmental goals that, if they confer any benefit at all, confer that benefit diffusely, amongst the masses, rather

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15 Id.

16 *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 153-54.

17 132 Ohio St.3d 186 (2012), 2012-Ohio-2370; *Cincinnati v. Roettinger*, 105 Ohio St. 145, 153–154, 137 N.E. 6 (1922).

18 Joseph D. Henchman and Travis Greaves, "Charging Taxpayers for Tax Collection Is a Tax: Weisblat v. City of San Diego", *Fiscal Fact No. 160, Tax Foundation, available at* http://www.taxfoundation.org/research/show/24309.html, citing *inter alia, San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992), and its progey.

than acutely, amongst those assessed. The purposes of the charges are outlined in Sections 5.0219, 5.0301 and 5.0210 of the proposed stormwater management program, and include the following:

> (1) "to facilitate and integrate activities that benefit and improve watershed conditions across the Sewer District's service area";
>
> (2) to reduce "flooding" on "public and private property";
>
> (3) to prevent "streambank erosion," and advance "water quality, wildlife, and aquatic and terrestrial habitats";
>
> (4) to protect "the water resources of Northeast Ohio," and "ecological and aquatic systems";
>
> (5) to "efficiently plan, design, construct, and maintain long-term solutions to stormwater problems";
>
> *and*
>
> (6) to advance "a watershed-based approach to stormwater management".

Improvement of, across nearly all of Northeast Ohio, watershead conditions, erosion conditions, water quality, wildlife, aquatic and terrestrial habitats, and the protection of ecological and aquatic systems are broad public goals that seek to benefit all people of Northeast Ohio, rather than the class of property owners who is forced to pay the assessment. Put another way, the "benefits" of this "general spending" are not "exclusive" to the property owner that pays the assessment.

However, the fund collected by NORSD will be spent to advance these goals. Accordingly, the collection of such funds is taxation rather than the proper assessment of a "fee."

The NORSD essentially submits that property owners with developed property - - any pavement or even rooftops, patios, or gravel - - must pay the fee because their properties cause flooding when it rains, along with problems for erosion and aquatic life: Sections 5.0301(f) and (g) of the Program claim "Impervious surface on a given parcel relates to the volume, rate, and/or pollutant loading of stormwater runoff discharged from that parcel;" and "The measurement of impervious surface that causes stormwater runoff provides an equitable and adequate basis for a system of fees for funding a watershed-based approach to stormwater management."

For these reasons, The Sewer District seeks to fund its stormwater management program through the imposition of a stormwater fee based on the square feet of a property's impervious surfaces, which it define as follows: "Developed surfaces that either prevent or significantly slow the infiltration of water into the ground

compared to the manner that such water entered the ground prior to development, or which cause water to run off in greater quantities or at an increased rate of flow than that present prior to development. Impervious surfaces shall include, without limitation, rooftops, traveled gravel areas, asphalt or concrete paved areas, private access roads, driveways and parking lots, and patio areas."[19] The assessment is supposedly to be driven by the square feet of "impervious surface" on a property.[20]

B. This "stormwater fee" is, pursuant to factors identified by this Court, a tax.

Just two years ago, in *Drees v. Hamilton Township*, this Court identified relevant factors that may be applied in determining whether an assessment is a "tax." Application of those factors here similarly demonstrates the "stormwater fee" to be a tax.

In *Drees*, this Court found Hamilton Township's "impact fee" to be a tax because (1) "First, the township's assessment lacks the regulatory aspect of the fee charged in *Withrow*. Unlike the fee in *Withrow*, the assessment at issue is not imposed in furtherance of statutes designed to protect the public from harms associated with a specific industry. Rather, it is a revenue generator with the stated purpose of guaranteeing a consistent level of services to all members of the community;" (2) "Second, unlike the fee collected in *Withrow*, the revenue generated by the assessment in this case is spent on typical township expenses inuring to the benefit of the entire community;" and (3) "Here, assessed parties get no particular service above that provided to any other taxpayer for the fee that they pay. As taxpayers and residents of Hamilton Township, they are entitled to police and fire protection and to use township parks and roadways. They already pay taxes for those services; in fact, when they improve their property, they pay higher taxes than they did when the property was undeveloped. But targets of

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[19] Proposed Stormwater Management Program, Section 5.0210.

[20] See Appellate Court's Decision, at Paragraphs 18 and 19: For calculating the fee for residentialproperties, the Sewer District structured a three-tiered scale based on the size of the residential parcel. *Id.* at Section 5.0707. Residential parcels with less than 2,000 square feet of impervious surface will be classified as equal to 0.6 of an ERU and will be charged $3.03 per month in 2013. *Id.* Residential parcels with 2,000 to 3,999 square feet of impervious surface will be classified as equal to 1.0 ERU and will be charged $5.05 per month in 2013. And residential parcels with 4,000 or more square feet of impervious surface will be classified as equal to 1.8 ERUs and charged $9.09 per month in 2013.

{¶ 19} For nonresidential property owners, the Sewer District will individually determine their fees by measuring impervious surfaces on their parcels, and then multiplying (1) the total number of ERUs for a given parcel (which will be derived from calculating the total square feet of impervious surface divided by 3,000), by (2) the fee established per ERU, which is $5.05 per month in 2013. *Id.* at Section 5.0708.

the assessment receive no greater benefit than any other taxpayer despite the payment of the additional assessment."[21]

Likewise here, the stormwater fee is not targeted at any specific industry. Rather, it is essentially targeted at the public at large: anyone with a roof, patio, or driveway. And the purpose of the fee is to generate revenue to make certain ecological improvements that seek to benefit Northeast Ohio at large - - "all members of the community," rather than just those paying the "fee." Secondly, the objects of NORSD's expenditures, environmental and ecological advancement and reduction of flooding, are prototypical government expenditures that seek to better the entire community.

Finally, and most importantly, just as in *Drees*, the assessed parties "get no particular service above that provided to any other taxpayer for the fee that they pay." The assessment does not give rise to a contractual or quazi-contractual obligation on the part of the Sewer District to reduce flooding on the properties of those who pay the fee, and the District is not liable to these property owners if it fails to reduce the flooding.

Moreover, these property owners not only pay general property taxes dedicated to environmental improvement and flooding reduction, but they pay *more* taxes because their properties are improved through development. In other words, properties with driveways, roofs, patios, and parking lots already pay higher taxes than properties without these things, since land value is the primary determinant of one's property tax liability, and that liability increases when owners improve their properties. Yet the improvements NORSD seeks to make provide no targeted benefit to towards those that are assessed: it seeks to provide direct and indirect tangible and intangible benefits to everyone. And while it first blush it may appear that property owners with impervious surfaces would disproportionately benefit from flood protection, one only need to summon his or her common sense: (1) the assessment is owed whether it rains or not; (2) the assessment is one whether one lives on the top of a hill or not; and (3) farm fields and yards flood frequently as well.

In sum, this case is entirely analogous to *Drees.* There, the Resolution assessed an impact fee on a square footage basis, to previously undeveloped property, and property undergoing redevelopment, to offset increased services and improvements needed because of the development. Identically, NORSD is essentially seeking to

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[21] *Drees*, supra

levy "impact fees" on properties on a square footage basis to offset the impact of impervious surfaces. Thus, *Drees and Withrow* factors suggest that the "stormwater fee" is a tax.

Meanwhile, the assessment also fails *Am. Landfill* Analysis. The court in *Am. Landfill* applied a three-factor analysis to determine whether the assessment was a fee or tax, considering "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed."[22]

Under this test, "[a]n assessment imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class."[23] And here, the "stormwater fee" is imposed upon nearly all property owners, since nearly all have roofs, driveways, patios, and other features that are assessed. The class to which this assessment applies is actually much broader than the class in *Drees.* In effect, the assessment operates as a shadow property tax: one enacted without a vote which does not show up on one's property tax duplicate (unless *unpaid,* in which case Title V of the Program mandates that the assessment actually *does* appear on one's property tax bill, thereby revealing the true nature of this tax).

With the second factor favoring a finding that the assessment here is a tax, the final factor is critical. And as chronicled above, the revenue generated from the assessment seeks to benefit the general public rather than property owners with impervious surfaces on their property. Indeed, in *Drees,* this Court quoted the following explanation: "[T]he fee is based on the cost of building the neighborhood parks, an expense representing the general benefit to the community at large. Therefore, the parks fee is not based on special benefits conferred on the property owners so as to fall outside the definition of a tax."[24] Local parks are akin to environmental and ecological improvements in certain Northeast Ohio waterways - - each is "a general benefit to the community at large," rather than targeted.

C. Courts beyond Ohio have persuasively determined "stormwater fees" to be impermissible taxes.

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22 *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgt. Dist.,* 166 F.3d 835 (6th Cir.1999)

23 *Bidart,* 73 F.3d at 931, citing *San Juan,* 967 F.2d at 685.

24 Id.

Since the Appellate Court rendered its decision in this case, both the Seventh Circuit Court of Appeals and the Missouri Supreme Court have struck down stormwater "fees" on the grounds that they were not "fees" at all, but were instead impermissible "taxes." Just months ago, in *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.,* the Seventh Circuit Court of Appeals held as folows: "the **stormwater** runoff assessment is a **tax** rather than a **fee**. It is designed to generate revenue to pay for a governmental project. It is not a fee for a service provided to a particular landowner."[25] There, the Court explained its decision by distinguishing taxes from fees in the following manner: "the only material distinction [between taxes and fees] is between exactions designed to generate revenue—taxes, whatever the state calls them ...—and exactions designed either to punish (fines, in a broad sense) rather than to generate revenue (the hope being that the punishment will deter, though deterrence is never perfect and therefore fines generate some state revenues), or to compensate for a service that the state provides to the persons or firms on whom or on which the exaction falls (or, what is similar, to compensate the state for costs imposed on it by those persons or firms, other than costs of providing a service to them): in other words, a fee."[26]

Here, as there, "the assessment scheme does not assign causal responsibility for particular pollution to particular landowners." Furthermore, here, as there "unpaid stormwater runoff assessments become liens on the property subject to the assessments, and are enforceable in the same manner as real property taxes."[27]

Also, just months ago, the Supreme Court of Missouri provided a thorough analysis on this exact issue in ***Zweig v. Metropolitan St. Louis Sewer Dist.***[28] It explained that "a Ratepayer pays the same stormwater charge every month regardless of the amount of rainfall or the amount of stormwater it discharges into MSD's drainage system, and that Ratepayers still must pay fifty percent of the charge even if they never use the drainage system. Meanwhile, MSD admits there are thousands of landowners who pay no part of the stormwater charge even

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25 732 F.3d 837 (7th Cir. 2013).

26 Id.

27 Id.

28 412 S.W.3d 223 (Missouri, 2013).

though they discharge stormwater into MSD's drainage system every time it rains."[29] The Court further reasoned, in more elaborate fashion than space permit here, that there is "no way of knowing how much stormwater any particular landowner is discharging into that system at any particular time. MSD does not even claim that the stormwater charge is based on an estimate of such usage, using the amount of impervious area on a property as a proxy for the amount of actual runoff from that property," and "MSD admits that the amount of impervious area on a particular property has nothing to do with the total amount of stormwater runoff from that property into MSD's drainage system. Accordingly, the stormwater charge is not—and MSD does not claim that it is—a user fee charged for a landowner's actual use of MSD's drainage system."[30]

The Court there also explained why the NORSD "stormwater fee" fails in its classification of property owners, and is therefore a tax: "MSD believes it is fair for owners of property with impervious area to pay the stormwater user charge while owners of property with no impervious area do not. But MSD's arguments have nothing to do with whether the stormwater charge is a user fee because they say nothing about who uses MSD's stormwater services. In other words, MSD contends that: (a) because the owners of property with impervious area are responsible, collectively, for creating all of the need for stormwater services, those owners, collectively, must pay for them; and (b) because these owners pay for all of MSD's stormwater services, they must be the only users of those services. The Court rejects this tautology."[31] In sum, the Court concluded that because property owners pay based on their identity rather than their usage, they pay regularly rather than in response to use, and payment is in a fixed amount irrespective of use, such a "stormwater fee" is actually a tax. The NORSD stormwater fee shares each of these attributes, and is therefore also a tax.

Finally, around the same time as the Appellate Court's decision here, in *DeKalb County, Georgia v. United States*, the Federal Court of Claims determined a "stormwater fee" similarly to the NORSD fee here to be an impermissible tax.[32] Much as with the NORSD "stormwater fee" here, the stormwater ordinance there describes the purpose of the utility, noting that the "provision of stormwater management services and facilities in

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29 Id.

30 Id., at 235-239.

31 Id.

32 108 Fed.Cl. 681, Fed.Cl., 2013.

DeKalb County promotes an essential regulatory purpose by controlling where stormwater runoff flows and how it is disposed, and thereby reducing flooding, erosion and water pollution caused by stormwater runoff."[33]

Because the system at issue there is seemingly identical to that here, and because the Court directly spoke to it, the Court's reasoning warrants expansive and verbatim quotation. The Court explained that (1) "Here, the County's stormwater management charge is not assessed against a narrow group of residents or businesses; instead, the assessment is levied against every single owner of developed property in the unincorporated portions of the county; * * * The stormwater charge is assessed against every dwelling in the county . . . with impervious surfaces;"[34] and (2) "Here, the court concludes that the stormwater management charges are used to finance benefits that inure primarily to the benefit of the general public;"[35] and (3) "The purposes of the stormwater ordinance, and of the stormwater system— *i.e.*,flood prevention and the abatement of water pollution—are benefits that are enjoyed by the general public. For that reason, the charge is more properly viewed as a tax than as a fee. * * * In short, flood control is a public benefit, and charges to pay for that benefit are typically viewed as taxes;"[36] (4) "[t]he abatement of water pollution is also an important benefit of the system, and it is likewise a public benefit that is shared with the rest of the community. The owners of developed property, who pay the stormwater management charges, receive no special benefit from clean rivers, streams, and lakes that is not also enjoyed by the general public;[37] (5) "The stormwater system is a local infrastructure improvement that provides benefits— *i.e.*, drainage, flood protection, and water pollution abatement—not only to the owners of developed property who pay stormwater utility charges, but also to the owners of undeveloped property, who do not pay the charge, and to other members of the general public who may not own any property in the county at all;"[38] and (6) "[w]hile user fees are generally based on the quantum of services that are provided, the assessments in this case

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33 Id.

34 Id., at 701.

35 Id., at 701-702.

36 Id., citing, *e.g., United States v. City of Huntington, W.V.*, 999 F.2d 71, 73 (4th Cir.1993) (explaining that because flood control and fire prevention are both "core government services," assessments to pay for those services are taxes).

37 Id., *Cf. Mildenberger v. United States,* 91 Fed.Cl. 217, 245–47 (2010) (noting that water pollution is a harm that is experienced not only by riparian landowners, but by the public as a whole), *aff'd,* 643 F.3d 938 (Fed.Cir.2011).

38 Id.

are not necessarily based on the benefits provided to each owner of developed property. First, the stormwater charges in this case are based not on the *benefits* derived by the payor, but by the anticipated *burden* that its property imposes on the stormwater system. However, the burden imposed on the system by the runoff from the property, and the benefits conferred upon that property by the system are not the same thing. There may be properties, for example, that impose significant burdens on the stormwater system while deriving no substantial benefit from that system (*e.g.*, a property with extensive impervious coverage that is located on the top of a hill). Similarly, there may be properties that have little impact on the stormwater system that receive substantial benefits from that system (*e.g.*, a small home on a large, otherwise undeveloped lot that is located downhill from extensive development). Second, even if the benefits conferred on specific properties and the burdens those properties impose on the system were treated as if they were the same, the amount of the charge does not depend upon the burden actually imposed on the system by a particular property. Regardless of how much rain falls on a property, and how much of that rain actually leaves the property and flows into the system, the charge remains the same."[39]

Though not binding Court should apply the highly persuasive reasoning of the Seventh Circuit, Federal Court of Claims, and Missouri Supreme Court, all who have very recently determined "stormwater fees" similar to those submitted by NORSD to be impermissible taxes, and therefore unlawful.

D. As a "tax," the "stormwater fee" is unconstitutional and otherwise unlawful.

In Ohio, the levying of an additional property tax requires voter approval. To that end, R.C. 6119 delegates to the Sewer District the authority to levy special assessments and fees without voter approval, but prohibits the levying of a tax without such approval.

As the Appellate Court aptly indicates, only a few provisions of law permit the Sewer District to levy a tax. However, in each case where a tax is permitted, a vote of the public is first required. For instance, R.C. 6119.18 indicates "the question of such tax levy shall be submitted to the electors of the district at a general or

[39] Id., citing *Cincinnati v. United States*, 39 Fed.Cl. 271, 276 (1997) ("Under the system enacted by the City of Cincinnati, during a month of drought or a month of flooding, the federal government would be assessed the same amount of storm drainage charges.").

primary election," and a tax shall only be levied "If a majority of the electors voting on the question vote in favor thereof." R.C. 6119.17, .19, .31,.32, and .32 contain similar limits.

These legislative limits on taxation cannot be bent: if the Sewer District levies a property tax without a public vote, it transgresses Section 2, Article XII of the Ohio Constitution, which demands that "no property, taxed according to true value, shall be taxed in excess of one percent of its true value [unless] * * * approved by a majority of the electors in the taxing district voting on the proposition."

Further yet, the assessment, as a tax, would also violate the requirements of uniformity in property taxation. State and federal constitutional provisions, *viz.* Section 2 of Article XII of the Ohio Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution, require uniformity in the mode of assessment. Pursuant to these provisions, real property must be assessed on the basis of the same uniform percentage of actual value.[40] On their face, the "stormwater fees" are not applied uniformly to all citizens.

Accordingly, absent an affirmative vote of the public, these fees, which are in fact taxes, are unconstitutional taxes. Accordingly, even if the Northeast Ohio Regional Sewer District maintains authority to manage stormwater, these fees may not be imposed.

CONCLUSION

Based on the foregoing analysis, the Appellate Court must be affirmed. The Northeast Ohio Regional Sewer District lacks authority to manage stormwater, and even if it maintained such authority, it may not lawfully impose the stormwater fee at issue here without a vote of the taxpaying public.

Respectfully submitted,

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[40] *Black v. Bd. Of Revision of Cuyahoga Cty.* (1985), 16 Ohio St.3d 11.

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon all counsel captioned on the cover page to this Brief this 1st day of July, 2014.

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