#8

STATE OF OHIO)		IN THE COURT OF COMMON PLEAS
) SS:		
COUNTY OF CUYAHOGA)		CASE NO. 82-039984
THE CITY OF PARMA, OHIO, et al.	)	
	)	
Plaintiffs	)	
	)	
-vs-	)	MEMORANDUM OF OPINION
	)	
THE CITY OF CLEVELAND, OHIO, et al.	)	
	)	
	)	
Defendants	)	

George J. McMonagle, J.:

Proceedings to procure the requested relief were duly commenced in this court on February 26, 1982. A TRO was entered on that date. The matter was then duly transferred from Case S.D. 69411 and 886594 and 982711 (consolidated) in which said proceedings were commended to the within Case #39984. The original TRO was extended to March 24, 1982 and a preliminary injunction was duly entered on March 23, 1982; all of which appears of record.

The Northeast Ohio Regional Sewer District (NORSD) was duly created in accordance with Chapter 6119. Said chapter was utilized, rather than Chapter 6117, because it authorized a district which was not confined to one county.

The following is the issue which precipitated this lawsuit:

> "Which appointing authority, the Mayor of Cleveland or the Suburban Council of Governments, has the authority to appoint a member to the Board of Trustees for a term commencing March 2, 1982, which appointment is to be made by the appointing authority for the Subdistrict having the greatest population on the basis of the 1980 U.S. Decennial census."

However, the following issues have been injected herein:

1. Does the NORSD have the authority to exercise within the entire area of Cuyahoga County all the rights and powers granted by R.C. Chapter 6119, such as the right of eminent domain, etc.?

2. Could and can the NORSD validly construct interceptor sewers and sewage disposal facilities serving and to serve the entire area constituting Cuyahoga County?

3. Is the NORSD restricted to constructing interceptor sewers and sewage disposal facilities and to serve only the areas of those political subdivisions itemized in Exhibit A(1) in the original petition, whose sewage is now being treated by it?

4. Have the areas of Saginaw Hills, Northfield and the City of Macedonia in Summit County legally become a part of the NORSD?

Prior to 1972, the City of Cleveland owned and operated the sewage disposal plants and interceptors which treated and disposed of sewage from practically all of the areas in Cuyahoga County that were sewered. There were some exceptions, such as Lakewood and Euclid, etc., who had their own plants and who had no plans or intentions, abilities or resources, to ever serve areas other than those generally within their own boundaries, as well as some other suburbs who had contracted with Cuyahoga County for the handling of sewage. Cleveland had prepared some plans to repair, extend and improve those facilities so that this could be properly done for the existing areas and areas of Cuyahoga County to be sewered in the future.

Lake Erie and the rivers, creeks and other areas of Metropolitan Cleveland had become polluted -- a hazard to the health and welfare of millions of inhabitants of Metropolitan Cleveland -- the political subdivisions of Cuyahoga, Lake, Lorain and Summit Counties. This had chiefly resulted from the admitted inability of Cleveland alone to handle the problems involved with sewage disposal.

On September 3, 1970, the State of Ohio, by the Ohio Water Pollution Board, filed Case #886594 herein, reciting the said shocking conditions, Cleveland's inability to act, and asked the court to mandate all steps necessary and proper to alleviate the conditions. In that lawsuit, Cleveland filed a third-party complaint naming thirty-five defendants, chiefly suburbs of Cleveland, whose sewage Cleveland had contracted to treat and dispose of.

On March 8, 1971, the City of Beachwood and twenty-one other municipalities filed Case #892711 asking relief by the Court from the said conditions the State of Ohio and others complained of.

Extensive hearings were conducted. Suggestions for a regional sewage system were presented to the court by the City of Cleveland, Cuyahoga County, the suburban communities, the State of Ohio, by the Governor and the Attorney General, and by civic, political and labor organizations, etc., all as appear of record in consolidated cases #886594 and 892711.

A history of the proceedings is contained in the memorandum of opinion filed by this court on April 4, 1972.

It was conceded that such district should be created including all of the area of Cuyahoga County, with the ability to expand into adjoining counties.

Under the law (R.C. 6119.02), proceedings for organization of a regional sewer district could only be initiated by a petition signed by one or more counties or municipal corporations, etc., and thereby incorporating their areas in it, after having been authorized by its or their legislative authority. The County of Cuyahoga was the only political subdivision whose areas included all of Cuyahoga County and the areas of all the political subdivisions whose sewage was being treated by the City of Cleveland, and those whose sewage treatment was planned and intended to be so treated.

The Board of County Commissioners, namely, Hugh J. Corrigan, Frank Pokorny and Seth Taft, unanimously passed the required legislation and John T. Corrigan, Cuyahoga County Prosecutor, by A. M. Braun, his assistant, filed the petition, S.D. 69411, which, upon its final approval by the court, became the charter of this new political subdivision, namely now the NORSD.

The petition included, in accordance with R.C. 6119(E), a general description of the territory to be included in the district.

This was in accordance with the said memo, etc., by the court of April 4, 1972 (Journal 172-448), which stated:

> Every political subdivison in Cuyahoga County, Ohio whose sewage is treated and disposed of by the City of Cleveland is a party herein and has either appeared herein or filed a pleading or is in default hereof. Those political subdivisions [in Cuyahoga County] not parties hereto and presently served or

capable of being served by sewers leading to the three wastewater treatment plants, will be included in the regional district herein provided for.

All of the proceedings required by law were complied with so that the area of the district included all of Cuyahoga County. The procedure and the conditions and requirements carried out in S.D. 69411, wherein the district was created, were in accordance with the journal entry entered in said adversary cases 886594 and 892711, which were consolidated on February 1, 1972. Those subdivisions which were then being served by Cleveland were parties to said actions and were privy to all proceedings.

Every person in every political subdivision lying in the area affected, to wit, Cuyahoga County, received notice by publication of the proceedings.

R.C. 6119.04:

> Any person or any political subdivision residing or lying within an area affected by the organization on or before the date set for the cause to be heard may file an objection to the granting of the requests made in the prayer of the petition.

Cleveland and some suburbs filed objections. These were heard and granted in part. The ultimate petition which has become the Charter of the District was thereupon journalized. No appeal was taken from the court's decree. The proceedings which brought about the creation of the district were reviewed and approved by the Eighth District Court of Appeals in the case of Kucinich, Mayor v. Sewer District, 64 O.A. 6, opinion by Krenzler, P.J., concurred in by Stillman and Krupansky.

The following is the purpose of the District as adopted:

* * *

> 4. The purpose of the District shall be the establishment of a total wastewater control system for the collection, treatment and disposal of wastewater within and without the District:
>
> (a) Serving the Metropolitan Cleveland Area;
>
> (b) With uniform metropolitan rates;
>
> (c) With control, administration and financing by a Board of Trustees;
>
> (d) Capable of being expanded in the future to include additional areas;
>
> (e) With regulatory authority over all wastewater collection facilities and systems within the District.

* * *

6. GENERAL DESCRIPTION OF THE TERRITORIES TO BE INCLUDED.

(a) The District will initially include all political subdivisions in Cuyahoga County, Ohio, presently served by Cleveland's wastewater treatment facilities and those presently planned to be served, i.e., the municipalities to be served by the Cuyahoga Valley interceptor and the branch of the Heights Express Interceptor to serve Richmond Heights and Highland Heights. A more detailed description of such area is attached hereto and made a part hereof and marked Exhibit "A"(1).

(b) The district will initially be composed of two subdistricts, one consisting of the City of Cleveland (Subdistrict No. 1), and the other consisting of the areas outside of the City of Cleveland in Cuyahoga County, Ohio (Subdistrict No. 2). Other subdistricts may be created at the Board's discretion.

It is to be seen that the total district consisted of the entire area of Cuyahoga County with one subdistrict (No. 1) being the area of the City of Cleveland and with the balance of Cuyahoga County, consisting of all the areas therein outside of the City of Cleveland, Ohio, being Subdistrict No. 2.

It has been contended that some uncertainty exists with reference to the overall area included in the district. Apparently this grows out of the last sentence of 6(a) above with reference to Exhibit A(1), and also to the content of said Exhibit A(1). Political subdivisions then being served by Cleveland are itemized in said Exhibit A(1). It has been further contended that where reference is made at other points in the judgment, the district will initially include all political subdivisions in Cuyahoga County then served by Cleveland's wastewater treatment facilities, and those then planned to be served, that an ambiguity is created as to what areas are actually included in the district without such planned areas being specifically described.

Papers filed by parties hereto identify Exhibit A(1) as "forming" the district. There is no statement anywhere in the petition or in said Exhibit A(1) that the political subdivisions mentioned in said Exhibit A(1) "formed the district", nor that they constitute the district, compose it, nor that the district consists only of such subdivisions, nor was it ever so intended. The court's judgment, item 6(b), specifically states that the district will initially be composed of . . . the City of Cleveland (Subdistrict No. 1) and . . . the areas outside of the City of Cleveland in Cuyahoga County, Ohio (Subdistrict No. 2). Said Exhibit A(1) merely provides that, "The Territory

. . . shall include all the territory located within the boundaries outlined in the attached map, which territory is that portion of Cuyahoga County presently served, or mainly capable of being served, by gravity, by sewers leading to the three wastewater treatment plants of the City of Cleveland, plus the territory in Cuyahoga County to be served initially by the proposed Cuyahoga Valley interceptor sewer.

"It further provides that political subdivisions to be included in whole or in part in the Northeast Ohio Regional Sewer District are the following:" [Those itemized in Exhibit A(1).]

The areas so delineated and specified were the areas that were then being served by Cleveland, and it was the sewer users in said areas whose accounts were to be almost immediately transferred from the City of Cleveland to the NORSD. It was felt that specific mention should be made of those particular areas so as to eliminate any question as to the responsibilities of the users therein being transferred from Cleveland to the NORSD. Further, Cleveland had sewer service contracts with certain suburban municipalities, all of which were parties to the litigation. The validity of some of these contracts was questioned and in some instances, it was contended that some contracts had been proposed but never officially executed. Since under the judgment the responsibility with respect to sewage disposal would be that of NORSD and all existing contracts were being assigned to the district (see (g) of the petition), it was also felt advisable to make specific mention of such political subdivisions and to specifically identify them.

It also served to recognize and delineate those areas that had their own sewage disposal facilities. It was not expected or intended that these would be physically taken over by the district. R.C. 6119.06(M) excludes from a district the power of "acquisition by the exercise of the right of eminent domain of any wastewater facilities or water management facilities owned by any person or political subdivision."

The itemization contained in said Exhibit A(1) specifies and itemizes political subdivisions that the district shall include. It was not intended

to nor does it include all the territory within the district nor does it restrict the territory to the political subdivisions listed in Exhibit A(1).

It was never contemplated or intended that the areas constituting the district should not include the entire areas of Cuyahoga County, although its functions do not include the utilization of its sewage disposal facilities in every square foot of Cuyahoga County, particularly where a municipality has its own sewage disposal facilities. However, the NORSD does have regulatory authority over all wastewater facilities and systems within the district. (See M(1) Regulation.)

Much of the testimony herein pertained to what areas it was that were planned for sewage treatment because of reference to them in the judgment under (c) Construction of Facilities, (e) Financing, and (f) Sewer Rates. These all bear upon the allocation of some costs. It will be observed from the judgment that the determination of and the allocation of costs of some of the projects were very involved. None of these provisions were intended to, nor did they, affect, expand or restrict the boundaries of the district nor a subdistrict. They chiefly bore upon the allocation of costs of interceptors, etc. All of the areas then planned to be served were within Cuyahoga County, Ohio. Since the areas of the district included all of Cuyahoga County, it obviously was unnecessary to specify the areas planned to be served. The fact of the matter is that hundreds of millions of dollars have already been expended on plans and projects for sewage treatment of areas outside of those mentioned in Exhibit A(1).

Orders in the said consolidated case numbers 886594 and 892711 required the transfer from Cleveland to the district of all Cleveland sewage disposal facilities. The district thereupon became the sole owner. The judgment further provides that in order to bring about an equitable equalization of the cost of the facilities that the suburbs <u>should and did pay</u> to Cleveland the sum of <u>$29,869,250.00</u>. Cleveland concurred in the said orders of the court and duly passed an ordinance to that effect, which was signed by the Mayor, and the said payment was accepted by Cleveland. See Cleveland Ordinance No. 1139-72.

Cleveland contended that only the population of those political sub-

divisions mentioned in Exhibit A(1) should be calculated in determining the population of the district, less those residents having ceptic tanks and outhouses; that where a portion of a municipality is described in said exhibit, only that portion and not the entire subdivision should be counted. It also contended that only those itemized in said exhibit who are being actually served by the district, as distinguished from those planned to be served, should be counted; that nine subdivisions specially itemized in the exhibit should not be counted; and also that municipalities added to the district subsequent to its creation should be excluded in making such calculations. The representatives of Subdistrict No. 2 violently disagreed and called attention to the fact that hundreds of millions of dollars have been expended for the benefit of residents of communities which Cleveland contended should not be counted.

To sustain the contentions of Cleveland would be to hold that the NORSD did not have the authority they have been exercising; that the expenditure of funds for the sewage plants that are being expanded and constructed to handle sewage from many areas not listed on said Exhibit A(1) is illegal; that interceptor sewers which are being built of a size to handle sewage from said areas not specifically itemized in said exhibit is beyond its authority even though within the purposes of the district which are hereinbefore stated.

R.C. 6119.02(F) specifies that the petition for the organization of a district shall specify the manner of appointing trustees, and it may set forth procedures for subsequent changes in the composition or other provisions relating to such board of trustees. Subsequent procedures are provided for in the said judgment with respect to trustees being appointed on the basis of population and sewage flow. It was provided that the board shall consist of seven members: two appointed by the Mayor of Cleveland (Subdistrict No. 1); two by the Suburban Council of Governments (Subdistrict No. 2); one by the Cuyahoga County Board of Commissioners; one appointed on the basis of sewage flow; and one, after the initial appointment, shall be made by the appointing authority of the Subdistrict having the greatest population as determined on the basis of the decennial census next preceeding

the end of a five-year term. Cleveland was to make the two original appointments based on sewage flow and population. The actual population was not a factor as to these original appointments.

All parties concedethat Subdistrict No. 1 (Cleveland) had the greatest sewage flow at the time of the original appointment and now. Whether Subdistrict No. 1 or No. 2 had the greatest population at the time of the original appointments was not then controlling. The overwhelming evidence persuaded the court that Cleveland should have four original appointments including the one based on sewage flow and the one based on population, but subject to change in the future. Cleveland had owned the facilities and was operating them, and it was felt that for the period of transition, this representation would be equitable, but that it would not be forever, in view of the population trends and the fact Cleveland was being reimbursed for its investment. The issue as to which district was to make subsequent appointments on the basis of population was not expected to arise until after the 1980 Census. It had not been raised until now--after the 1980 Census--and at the end of a five-year appointment. The 1980 Census, Exhibit 2 herein, shows that the population of Subdistrict No. 2 (the area of Cuyahoga County outside Cleveland) exceeds the population of Subdistrict No. 1 (Cleveland).

The defendants have asserted several separate defenses. They have each been considered by the court and the rulings on them follow.

First:	This asserts the complaint fails to state a claim upon which relief can be granted. A valid cause of action is stated. Overruled.
Second:	This asserts this court does not have subject matter jurisdiction. The court does have such jurisdiction. Overruled.

Third: This asserts plaintiff has failed to join necessary parties. All necessary parties are before the court. The issue is whether the Mayor possesses the power and authority to make the appointment which is the subject of this lawsuit. Not having any such power and authority to make an appointment, any attempted appointment is null and void and no one can thereby claim any right in such office, nor is necessary to be a party hereto.

Fourth: This charges plaintiffs with laches. The evidence does not sustain such a claim.

Fifth: This charges plaintiffs with unclean hands. Such is not the fact.

Sixth: This asserts that the action of the Mayor in making a void appointment can only be challenged in an action in quo warranto. The within action is the proper type of action to procure the requested relief.

Seventh: This questions the validity of the inclusion in the district subsequent to its original number of the areas of Northfield, Sagamore Hills and Macedonia, Summit County. These areas were duly included in accordance with the provisions of R.C. 6119.

Eighth: This asserts there is no case or controversy ripe for adjudication. If any case were ever ripe for adjudication, it is the within action.

Ninth: This asserts that only the population of areas whose sewage is now flowing through the facilities of the Northeast Ohio Regional Sewer District should be considered. This is to even assert that those areas where construction is in process should not be considered. Overruled.

Parma and any other resident of the district has standing to bring the within action. Under the provisions in Chapter 6119, in the notice requirements to be given by it which were complied with, any person, corporation, or municipality has the required standing to request the relief prayed for in the complaint.

The Court finds, adjudges, decrees and declares that, (1) the areas occupied by Northfield, Macedonia, and the Township of Saginaw Hills, all in Summit County, have become duly included in the NORSD; (2) the area of NORSD consists of the entire area of Cuyahoga County and the said area of Northfield, Macedonia, and the Township of Saginaw Hills in Summit County; (3) NORSD has the authority to exercise within the entire area of Cuyahoga County, Ohio and those areas of Summit County, Ohio stated in #2 hereof, all of the rights and powers granted by ORC Chapter 6119, including the right of eminent domain, as specified in said chapter and as provided for in the judgment creating the

said NORSD; (4) according to the 1980 Census, the population of Subdistrict No. 1 was 573,822 and the population of Subdistrict No. 2 was 942,146; (5) the appointing authority of a member of the board of trustees for the term commencing March 2, 1982 on the basis of population is the Suburban Council of Governments of Northeast Ohio Regional Sewer District and not the Mayor of Cleveland; (6) that all defendants herein are permanently enjoined from appointing or causing to be appointed or recognizing the appointment of any individual to the seat on the district board of trustees based on population for the said term commencing March 2, 1982, other than an appointment made by the said Suburban Council of Government; (7) any appointment heretofore attempted to be made other than in accordance herewith is null and void. The preliminary injunction heretofore issued herein is dissolved.

Judgment for costs will be entered in favor of the plaintiffs. A journal entry in accordance with this memorandum by counsel for the plaintiffs shall be submitted to the court after being submitted to counsel for all other parties.

GEORGE J. McMONAGLE, Judge

April 14, 1982
(DATE)

SERVICE

A copy of the foregoing Memorandum of Opinion was sent by ordinary U.S. mail this 14th day of April, 1982 to: Andrew Boyko, Law Director, and Stephen P. Bond, Chief Assistant Law Director, Parma City Hall, 6611 Ridge Road, Parma, Ohio 44129; Richard C. Horvath, Assistant Director of Law, John D. Maddox and Donald Black, Assistant Directors of Law, City Hall, Room 196, 601 Lakeside Avenue, Cleveland, Ohio 44114; William B. Schatz and Paul T. Murphy, counsel for NORSD, 1127 Euclid Avenue, Cleveland, Ohio 44114.

GEORGE J. McMONAGLE, Judge