

STATE OF OHIO)
COUNTY OF CUYAHOGA)
CITY OF CLEVELAND)

RECEIVED

IN THE COURT OF COMMON PLEAS

SS:

APR 06 1988

CASE NO. 127712

Legal Department

N. E. O.

Plaintiff)

vs.)

MEMORANDUM TO COUNSEL

NORTHEAST OHIO REGIONAL SEWER)
DISTRICT (NEORSO))

Defendant)

George J. McMonagle, J:

This is an action in which the City of Cleveland is asking the Court to invalidate or void NEORSO Resolution No. 83-87 (Joint Exhibit No. 1 herein).

This Resolution required all users in the District to share in the expense of the planning and construction of the Intercommunity Relief Sewer Program (IRSP) that has been mandated by the United States Environmental Protection Agency and the Ohio State Environmental Protection Agency.

Both parties hereto are political subdivisions of the State of Ohio. The City of Cleveland together with 39 other area communities make up the district. Cleveland has standing to bring this action.

Count One of the Complaint herein alleges that the said resolution is in contraventions of the plan of operations; is therefore null and void and asks the Court to so declare an order.

Count Two alleges that the IRSP relates to previous planned interceptor sewers whose expense is chargeable solely to subdivision No. 2 users, that is the suburbs; that no part of it may be charged to the users of the entire district. This Count was not pursued by the plaintiff

in the trial and apparently it concedes that the provisions of said Count are not applicable. The Court itself holds that the IRSP is not a part of or related to the provisions with respect to the interceptor sewers.

Count Three asks that its staff and employees be restrained from implementing or carrying out the provisions of said Resolution 83-87.

The trial at which testimony was presented in behalf of both parties proceeded under Count One. The decision of the Court as to Count One therefore disposes of this lawsuit.

In accordance with a request by the defendant, the Court is filing concurrently herewith Findings of Fact and Conclusions of Law.

The Sewer District was duly established in 1972 in accordance with provisions of Chapter 6119 of the Revised Code of the State of Ohio. Said Chapter 6119 provided for jurisdiction in various parts of the State of Ohio and for expansion beyond Cuyahoga County.

It was established in order to alleviate dangerous, polluted conditions constituting hazards to millions of people about Northeast Ohio.

The necessity for the creation of a sewer district had been universally recognized.

Its purpose and necessity is recited in the Petition filed in the office of the Clerk of the Cuyahoga County Ohio Common Pleas Court. This initiated the proceedings for the organization of the district and by which at the final hearing by the Court it declared the district finally and completely organized as a political subdivision of the State of Ohio.

This included the following:

3. NECESSITY FOR THE PROPOSED DISTRICT - The increase in the amount of wastewater in the Metropolitan Cleveland area resulting from the increase in population and the expansion of industry in the many political subdivisions outside of the City of Cleveland without the existence of a single governmental agency with authority to control, plan, finance, establish rates, maintain, operate, adopt, establish and enforce rules and regulations for the purpose of uniform construction procedure, materials, inspection and controls of discharge into the system, has caused recurring litigation, has caused, in part, the necessity for the issuance of injunctive orders which have had the effect of practically eliminating new construction in Cleveland and most of Cuyahoga County, Ohio, has contributed to the polluted state of Lake Erie and the waters tributary to it and has endangered the public health and safety.

The establishment of a Regional Sewer District under the provisions of Chapter 6119 of the Ohio Revised Code is necessary and the establishment of said District will be conducive to the public health, safety, convenience and welfare.

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.

5. Plan for Operation of the District

(a) The District shall be operated by the Board of Trustees; it shall appoint a general manager who will administer the District and employ the personnel required to implement the District's program; the operation of the District shall be in accordance with Chapter 6119 of the Ohio Revised Code and subject to and in accordance with the terms and conditions hereinafter contained.

(c) Construction of Facilities

1. The District will plan, finance, construct, operate and control wastewater treatment and disposal facilities, major interceptor sewers, all sewer regulator systems and devices, weirs, retaining basins, storm water handling facilities, and all other water pollution control facilities of the District. All construction and expansion of sewage treatment facilities, not including presently planned interceptors, after May 1, 1972, will be the responsibility of the District and the costs shall be borne by all users of the District.

The plaintiff's claim herein is based upon the following portions of the plan of operations of NEORS:

3. Except as otherwise provided in Chapter 6119 and paragraph 5(m) hereof, the construction and financing of local sewerage collection systems will be the responsibility of the individual municipalities or political subdivisions; provided, however, that the District may participate in the financing of trunk sewers constituting a part of such collection systems through a rotary fund which would be reimbursed from tap-in charges and/or sewer surcharges collected from users in the subdistrict served by such trunk sewers.

(e) Financing

2. It is contemplated that the major interceptor sewer, wastewater treatment facilities and the other water pollution control facilities will be eligible for financing under the programs of the Ohio Water Development Authority, the State of Ohio or the Federal Government. The District shall endeavor to utilize said programs to the fullest extent feasible, particularly where local contributions can be thereby minimized.

3. Other financing of District projects. Any projects not financed through the Ohio Water Development Authority, the State of Ohio or Federal Government would be financed in such a manner as may be deemed appropriate by the Board of Trustees.

(f) Sewer Rates

The rates for sewage treatment and disposal shall be determined by the Board of Trustees and shall be in accordance with the following:

1. Regional Sewer Rate - The Regional Sewer Rate will include increments for the following factors:

(a) Planning expenses for the Regional Sewer District facilities to the extent such expenses are not included in construction costs.

(b) Operation and maintenance expenses for the Regional Sewer District facilities.

(c) Payment of new capital costs incurred by the District, including debt service charges on bonds and payments to the Ohio Water Development Authority, for the three wastewater treatment plants and other water pollution control facilities of the Regional Sewer District handling wastewaters of Cleveland and the suburbs, and for facilities of the Regional Sewer District beyond those presently planned.

(m) Local Sewerage Collection Facilities and Systems

The District shall have authority pursuant to Chapter 6119 of the Ohio Revised Code to plan, finance, construct, maintain, operate, and regulate local sewerage collection facilities and systems within the District, including both storm and sanitary sewer systems.

1. Regulation

The District shall have regulatory authority over all local sewerage collection facilities and systems in the District, including both storm and sanitary sewer systems. This authority shall be exercised by the District through rules and regulations adopted by the Board of Trustees pursuant to Chapter 6119 of the Ohio Revised Code. ...All rules and regulations shall be implemented and enforced by the District in accordance with Chapter 6119 of the Ohio Revised Code. Whenever the Board of Trustees shall propose to adopt or amend any such rule or regulation, it shall first notify all communities within the District of the nature and content of the proposed rule, regulation, or amendment.

In accordance with the purpose for which it was created the district commenced two new programs for the planning and construction of relief sewers within the district. The first is the Community Relief Sewer Program. This is expected to eliminate discharges to the environment

which are generated in one particular community, -- that is, a separate municipality within the district which is listed and identified in a permit duly issued by NEORSD.

The second is the ^{inter}Community Relief Sewer Program. That is, IRSP -- these constitute separate sewers which are to collect sanitary flow prior to overflow from local sewers or community relief sewers and redirect it into intercommunity relief sewers and empty into interceptors for transmission to a disposal plant.

Cleveland contends in this action that NEORSD does not have authority to charge a part of its costs against Cleveland; -- that the plan of operations actually prohibits the Board of Trustees from requiring users in Subdistrict No. 1 (Cleveland) from being obligated to share in the cost of the intercommunity relief sewer program. (IRSP)

The Board of Trustees prior to its adoption of Resolution No. 83-87 fully complied with all legal requirements and it was duly adopted by the affirmative vote of a majority of its members.

The sole issue for the Court to decide is:

"Did the Board of Trustees have the authority, that is, have the power and jurisdiction to allocate a part of the cost of the IRSP which was mandated by the United States Environmental Protection Agency and the Ohio Environmental Protection Agency for the protection of this area to the users of Subdistrict No. 1 (The City of Cleveland).

The cost of such a project is estimated at \$83 million.

There is no dispute about the necessity for such program nor the obligation of NEORSD to construct it.

The issue may be further delineated as follows:

"May Cleveland users be obligated to pay for some sewer facilities which are not located in Cleveland; that will not directly transport any substantial Cleveland sewage and may not directly benefit Cleveland users by abating flooding in Cleveland homes or on its streets?

The testimony in the trial of this case was to some extent focused on questions as to whether or not this program constituted a local program or that it was regional in nature.

As part of its procedures since its creation, the NEORSD adopted a Code of Regulations--after due notice and hearing. In this Code, local sewers are defined.

Cleveland participated in the proceedings that were part of its adoption. It concurred in the adoption of said definition by the unanimous vote of all members of the Board that were present. One member was absent. The IRSP and the community relief sewer program are governed by Title III of the Sewer District Code of Regulations. It includes the following: Section 3.0216:

"Local sewers shall mean any sewer built or to be built within the service area of NEORSD by one of the several communities within the same, for the purpose of connection with intercepting or main sewers as branches thereof.

By its contentions herein, Cleveland now wants this Court to disapprove or nullify that definition. The Court approves of that definition and holds that it is binding on all communities and users of the district and upon the issues herein.

A function of the Board of Trustees is to decide disputed matters that may arise within the District. The Board decided that the IRSP program

was a regional program. The Court concurs in that holding.

Testimony at the trial included some by experts as to whether this program directly benefited Cleveland. The nature of sewage collection and disposal is not always such that there be some identifiable direct benefit before a community or its users should be required to participate in some costs of a relief program. Certainly a project that stopped a sewage flow that was pouring down upon an individual or abated the sewage flow into one person's basement or into one neighborhood would provide a direct benefit to those affected.

A very small percentage of the District's Regional Project may be found to directly benefit one user or one community.

However a benefit, even what may be referred to as an indirect benefit, which contributes to the elimination of hazards of infection from pollution in the District is a function and purpose of the District.

The Court finds as a matter of fact that the IRSP will benefit the entire District and all users, communities and individuals in it.

The Court also finds that the IRSP is a regional program; that it is a regional facility, that it is not in the category of those "presently planned ^{where} the District was ^{located} ~~located~~.

The Court further finds that the NEORS Board of Trustees had the authority to adopt said Resolution 83-87; that it did validly do so and that its provisions are legally binding upon all users and communities in the district, including Cleveland.

Counsel for the NEORS will prepare an entry in accordance with this Memorandum and submit it to counsel for Cleveland and the Court. The costs hereof will be adjudicated against the Plaintiff.

GEORGE J. McMONAGLE, JUDGE

4/10/88
DATE

NOTICE OF SERVICE

Copies of the within Memorandum to Counsel were sent by regular United States Mail on the 4 day of April, 1988 to:

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GEORGE J. McMONAGLE, JUDGE