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STATE OF OHIO :  
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CUYAHOGA COUNTY :

IN THE COURT OF COMMON PLEAS

CASE NO. SD 69411  
Case Numbers 886,594 and  
892,711 Consolidated

IN RE: ESTABLISHMENT OF THE :  
NORTHEAST OHIO REGIONAL :  
SEWER DISTRICT :

MEMORANDUM OF OPINION

GEORGE J. McMONAGLE, J.:

This matter came on to be heard on October 30, 1981 on the  
petition of Northeast Ohio Regional Sewer District to amend the plan of  
operations of the district. Due notice of the filing of the said petition  
and hearing thereon was given to all interested parties which service is  
hereby approved and confirmed. A copy of the said notice is attached  
hereto and marked Exhibit A.

The only objections filed to the said petition were by the City  
of Cleveland. The petition to amend was filed pursuant to Resolution 284-81  
adopted by the board of trustees of the district. A copy of the said  
resolution is attached hereto as Exhibit B.

The petition requests the order of the Court amending Paragraph 1  
of Section 5 of the plan of operations of the district as included in the  
Judgment Entry of this Court on June 15, 1972 as stated in Exhibit A hereof.

Paragraph 1 Section 5 of the plan, which is the subject of this  
petition now reads as follows:

"All non-self supporting municipal functions of the  
City of Cleveland shall continue to receive sewage  
service free of charge and the Board of Trustees shall  
afford the same treatment to similar non-self supporting  
municipal functions of the suburban municipalities  
as soon as possible after it commences operation of the  
system."

Obviously, this section does not specifically itemize those accounts which are not exempted from sewage charges. There are changes being made from time to time. Some functions are added and some are discontinued. It was intended that proprietary functions be not exempted.

By the adoption of Resolution 155.74, Exhibit C attached hereto, the district, on November 19, 1974, determined that the exclusion from sewage service charges should only be extended to police stations, fire stations and city halls. While Cleveland originally went along with this determination, it ultimately disagreed.

By contract, the billing and collection of district sewage charges is handled by Cleveland for the district. The billing under Resolution 155.74 was followed for the first quarter of 1975 and continued through most of 1978. Cleveland then apparently contended that accounts other than the police stations, fire stations and city halls were actually non-self-supporting, and Cleveland ceased to bill itself for numerous accounts. Cleveland, thereupon, merely failed to bill and pay for city accounts that it contended under the plan of operations (Paragraph 1, Section 5) it was not obligated to pay.

The District contends that it is a recipient of hundreds of millions of dollars in grants from the government under the Federal Water Pollution Control Act of 1972 (Public Law 92-500); that 33 U.S.C.S. Section 1284 provides that such grants "shall not be approved unless the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services, within the applicant's jurisdiction, as determined by the administrator will pay its proportionate share of the cost of operation and maintenance...".

The District contends therefor that the Federal statutes mandate charges against every user.

The USEPA has been advised of the procedures for charges made by the District and has not heretofore objected to said procedure, nor has the failure of the District to insure that each recipient of waste treatment service will pay its proportionate share of the cost deterred the issuance of grants.

The District has filed a petition alleging that its current user charge is in violation of federal law and as such jeopardizes the past, present and future of federal grant funds.

Obviously, the City of Cleveland will be most seriously affected by the requirement that it make payments for all its sewage system users. The City was not billed from 1972 to 1974 for any sewage treatment charges and was then billed for all city accounts except police, fire and city hall charges in accordance with Resolution No. 155.74 and did bill them from 1975 through the third quarter of 1978. In the third quarter of 1978, Cleveland unilaterally placed approximately 213 accounts on a free sewage status and asked the District to refund the charges billed from 1975 through the third quarter of 1978. A review of the accounts by the District indicated that some were no longer active but that there were 74 active accounts which the City contended should receive free sewage treatment apparently exclusive of the police, fire and city hall accounts. The District contends these accounts require payment by the City. Although inactive, a minimum charge is assessed against each account.

The City opposes the granting of the petition chiefly upon its contention that the said Paragraph 1 of Section 5 acutally was the result of what may be considered a contractual agreement between Cleveland and ultimately the district whereby, in accordance with the Revised Code Section 6119.111, it voluntarily and by the required legislative action joined in the transferring of its sewage disposal facilities to the District. Its arguments are:

"1. The proposed amendment with respect to Cleveland would deprive Cleveland of bargained for consideration which was fundamental to Cleveland's agreement to transfer its sewage treatment facilities to the District in 1972 and cannot be granted without Cleveland's consent.

2. The proposed amendment is not conducive to the public health, safety, convenience, and welfare as required by Ohio Revised Code Section 6119.051. "

Cleveland argues that the granting of this motion would place a substantial burden on the taxpayers of Cleveland and others throughout Cuyahoga County as distinguished from the burden being placed on the sewage user members of the Northeast Ohio Regional Sewer District. The District is self-supporting by income procured from its charges for sewage treatment plus substantial grants made by the U.S. Government. The cost of sewage treatment of exempted municipal functions must either be borne by the sewage users or by the taxpayers through their municipal taxes. The payers, whether taxpayers or sewage users, are essentially the same.

From the time that Cleveland was organized there have been issues involving charges for sewer and water services and who should pay and/or who should be exempt. Generally a municipality has nothing to sell except possibly water or sewage services. There are some municipalities such as Cleveland who also sell electricity as a public utility. For many years, no charges were made by Cleveland on its citizens or others for providing sewage treatment. This was changed some years ago. Water was metered and charged for almost from about the time of the installation of the water works. At times, different organizations were exempted from payment. The City of Cleveland owned and managed the water system and, therefore, felt that it could provide free water to some of its own institutions and also to various others, such as hospitals, etc. The same applied to sewage treatment.

The writer is uncertain as to which of the municipal functions Cleveland did or did not charge for sewage treatment before its functions were transferred to the District.

The District pays Cleveland for the water it uses.

In order to abate the pollution of Lake Erie, etc. the cost of sewage disposal has become very expensive. The City of Cleveland no longer owns or operates the sewage disposal system. This is the function of the Regional Sewer District. The sewer district does not argue with Cleveland's right, when it was the owner of the sewage disposal system, to except certain functions from charges but it argues that it should not be so burdened particularly in view of the conditions pertaining to federal grants.

Cleveland contends that part of the consideration for the transfer of its assets to the District was the receipt of some free sewage treatment.

On April 4, 1972, this Court decreed the Cleveland Regional Sewage District duly organized under Revised Code, Chapter 6119 and included in its judgment a plan of operation as required by law. What afterwards became Paragraph 1, Section 5 was not in the original decree. Cleveland, timely filed its Motion to Reconsider, Modify, and make definite and certain said judgment and it also filed an "Objection to the Petition." Further hearings were held and the Court sustained some of the motions and objections of Cleveland and, on June 15, 1972, entered its supplemental judgment entry, which became the Charter for the District and which includes the following:

" This cause came on for hearing on May 16, 1972 on the motion of the City of Cleveland for reconsideration of the order entered herein on April 4, 1972.

The Court being fully advised in the premises and upon consideration of the pleadings, briefs, arguments of counsel and the evidence adduced at said hearing, finds that the motion of the City of Cleveland should be granted in part and that the Judgment Entry filed in this case, April 4, 1972, shall be modified and supplemented as set out herein.

It is therefore, found, ordered, declared, adjudged and decreed as follows:

\* \* \* \* \*

All non-self supporting municipal functions of the City of Cleveland shall continue to receive sewage service free of charge and the board of trustees shall afford the same treatment to similar non-self supporting municipal functions of suburban municipalities as soon as possible after it commenced operation of the system." (Paragraph 1 of Section 5).

It is a fact that insertion of said item in the plan of operations as amended was in accordance with proceedings initiated by Cleveland and as part of Cleveland adopting its transfer ordinance in accordance with Revised Code Section 6911.111. The actual creation of the District may never have been concluded because of the Cleveland right to appeal. The Court does consider that the granting to Cleveland of the right to some sewage treatment free of charge was a part of a contractual arrangement involving the District and the City of Cleveland. The question arises as to whether 33 USCS 1284 actually mandates the requirement that all Northern Ohio Sewer District users pay the proportionate share of the costs in view of the fact the said section includes the words "within the applicant's jurisdiction." Exhibit F is a communication from the Regional Council of the USEPA reviewing requirements with respect to user charges and it discusses 33 USCS 1284 reference to applicant's jurisdiction. The first paragraph of page 3 of said Exhibit F states as follows:

" It is our determination that the jurisdiction of an applicant is to be established by reference to its political and legal authority as actually exercised with a view to assuring full compliance with the statutory and regulatory requirements..."

The City contends that the legal authority of the District is contained in the Judgment Entry of the Court creating the District and the provisions of Ohio Revised Code Section Chapter 6119.

In view of said Paragraph 1, Section 5, does the District have jurisdiction to make charges beyond those authorized or restricted by its Charter? The answer is obviously no. Does Paragraph 1, Section 5, affect or limit its jurisdiction? The answer is yes. The Court agrees with the contentions of the City in this respect. Therefore, since the judgment of this Court, as constituting the Charter of the District, restricts the jurisdiction in that respect, it is obvious that this is within the contemplation of the Federal statute, since it does not require the District to make charges beyond those within its jurisdiction. It is not within its jurisdiction to make charges that are restricted by the judgment and its' Charter.

The dismissing of the petition of the District herein, which constitutes the refusal to make the requested amendment, leaves said Paragraph 1, Section 5 of the plan of operation unchanged.

Acknowledging that the said provision does not spell out any specifics, this opinion should resolve some of the problems that have arisen. Certainly, the operation of city halls and police and fire departments constitute non-self supporting municipal functions. What would normally be considered as being self supporting municipal functions are those which are of a proprietary nature. With respect to Cleveland, these would include the Convention Center, the Stadium, the Division of Light and Power, Burke Airport, Hopkins Airport, Water Department, dog kennels, golf courses (Highland and Seneca), the skating rinks (Halloran and Woodland Hills), the Cleveland Aquarium, cemeteries, and others.

It was expected at the time the questioned provision was inserted in the judgment that the parties themselves would be able to specify the non-self supporting municipal functions as well as the self supporting municipal functions. The probabilities are that a review, by Cleveland and the District, of the 74 disputed accounts should resolve those questions. In view of this opinion, if the accounts serve a proprietary function of a municipality, the sewer charges should be paid; otherwise not.

The petition of the Northeast Ohio Regional Sewer District will be dismissed. Counsel for Cleveland shall prepare a Journal Entry. The Sewer District shall serve a copy of it upon all political subdivisions in the District.

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JUDGE GEORGE J. McMONAGLE

DATED: December \_\_\_\_\_, 1981.

NOTICE OF SERVICE

A copy of the foregoing Memorandum of Opinion was forwarded via Regular First Class United States Mail this \_\_\_\_ day of December, 1981, to William B. Schatz, Esq., counsel for the Northeast Ohio Regional Sewer District, at 1127 Euclid Avenue, Cleveland, Ohio 44114, and to Richard F. Horvath, Esq. and June Wiener, Esq., Law Department, City of Cleveland, 601 Lakeside Avenue, Cleveland, Ohio 44114.

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JUDGE GEORGE J. McMONAGLE

NORTHEAST OHIO REGIONAL  
SEWER DISTRICT  
PETITION FOR  
CHANGE IN THE PLAN OF OPERATION

Notice is hereby given that a hearing will be held in accordance with Section 6119.051 of the Ohio Revised Code on October 30, 1981, at 1:00 P.M. in the Court of Common Pleas of Cuyahoga County, Courtroom 20B, Courts Tower, Justice Center, Cleveland, Ohio, for the purpose of hearing a Petition to Amend the Plan of Operation of the Northeast Ohio Regional Sewer District, 1127 Euclid Avenue, Cleveland, Ohio as follows:

1. Amending Paragraph 1 of Section Five (5) of the Plan of Operations of the District dated June 15, 1972, as amended on August 11, 1975 and April 27, 1979, to read as follows:

Each recipient of waste treatment service will pay its proportionate share of the costs of operation and maintenance (including replacement) of the waste treatment services provided by the District in order to insure a uniform rate within each Subdistrict. Effective with the first full billing period following the date of the Journal Entry amending this Section of the Plan, this paragraph shall apply to all functions of every municipality served by the District, regardless of whether said functions are self-supporting or non-self-supporting.

William B. Schatz  
General Counsel  
Northeast Ohio Regional Sewer District  
1127 Euclid Avenue  
Cleveland, Ohio 44115

Resolution No. 284-81  
p.d. and a.b.j. October 1, 1981  
October 8, 1981  
October 15, 1981  
October 22, 1981

(A)

NORTHEAST OHIO REGIONAL SEWER DISTRICT  
RESOLUTION NO. 234-71

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Authorizing and directing the General Counsel pursuant to Section 6119.051 of the Ohio Revised Code to file a petition in the Court of Common Pleas amending the Petition and Plan of Operation of the Northeast Ohio Regional Sewer District.  
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WHEREAS, The Court of Common Pleas of Cuyahoga County created the Northeast Ohio Regional Sewer District pursuant to orders issued in Case No. 886,594 (Consolidated) and Case No. SD 69411; and

WHEREAS, the Board of Trustees of the Northeast Ohio Regional Sewer District has determined certain amendments to the Plan of Operation of the District would be appropriate, including amendments to Section 5 (1) pertaining to free sewage service;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE NORTHEAST OHIO REGIONAL SEWER DISTRICT:

Section 1. That the General Counsel be and he is hereby authorized and directed to file a petition in the Court of Common Pleas to amend the Petition and Plan of Operation of the Northeast Ohio Regional Sewer District in respect to those matters cited in the preamble hereof.

Section 2. That this Board declares that all formal actions of the Board concerning and relating to the adoption of this resolution and that all deliberations of the Board and any of its committees that resulted in said formal action were conducted in meetings open to the public and in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

On Motion of Mayor Petruska, Seconded by Mayor Bacci, the foregoing resolution was unanimously adopted on July 16, 1981.

I, ANTHONY C. AMATO, SECRETARY OF THE BOARD OF TRUSTEES OF THE NORTHEAST OHIO REGIONAL SEWER DISTRICT, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, CORRECT AND EXACT COPY OF THE ORIGINAL OF A RESOLUTION DULY ADOPTED BY SAID BOARD ON THE 16 DAY OF July 1981.

Anthony C. Amato  
ANTHONY C. AMATO  
SECRETARY, BOARD OF TRUSTEES  
NORTHEAST OHIO REGIONAL SEWER DISTRICT

Anthony C. Amato  
Anthony C. Amato, Secretary  
Board of Trustees  
Northeast Ohio Regional Sewer  
District

B  
EXHIBIT 1

CLEVELAND REGIONAL SEWER DISTRICT  
RESOLUTION NO. 155-74

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Establishing the policy of the Board of Trustees of the Cleveland Regional Sewer District relating to free sewage treatment for municipal functions of communities in the District as provided for in the Court Orders establishing the District.  
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WHEREAS, the order of the Cuyahoga County Court of Common Pleas in Case No. SD 69411 which established the Cleveland Regional Sewer District provided in part that,

"All non-self supporting municipal functions of the City of Cleveland shall continue to receive sewage service free of charge and the Board of Trustees shall afford the same treatment to similar non-self supporting municipal functions of the suburban municipalities as soon as possible after it commences operation of the system."

WHEREAS, it has been determined by the Board of Trustees of the Cleveland Regional Sewer District that the only municipal functions which shall qualify for such free treatment shall be police stations, fire stations, and City Halls:

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE CLEVELAND REGIONAL SEWER DISTRICT that it is hereby established as the policy of the Board of Trustees of the Cleveland Regional Sewer District that free sewage treatment for municipal functions of the communities within the District as provided for in the Court Orders establishing the District shall be extended only to police stations, fire stations, and City Halls and for those purposes only in those communities within the District where the District provides services to such facilities.

BE IT FURTHER RESOLVED that the Director be and he hereby is directed to disseminate and implement this policy wherever applicable, and to provide for the proper status of such facilities with the billing department of the City of Cleveland Water Department.

On Motion of Mr. Bailey, seconded by Mr. DeVito, the foregoing resolution was unanimously adopted.

I, Mary J. Coleman, Secretary of the Board of Trustees of the Cleveland Regional Sewer District, do hereby certify that the foregoing is a true, correct and exact copy of the original of a resolution duly adopted by said Board on the 19th day of November, 1974.

Mary J. Coleman  
(Mrs.) Mary J. Coleman, Secretary  
Board of Trustees, Cleveland Regional  
Sewer District