IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	)	CASE NO. 714945
Plaintiff,	)	**JUDGE THOMAS J. POKORNY**
vs.	)	**OPINION**
BATH TOWNSHIP, OHIO, et al.,	)	
Defendants.	)	

INTRODUCTION

In this declaratory judgment action brought by the Northeast Ohio Regional Sewer District ("the District") in which it has joined all of its member communities, the Court is to determine whether a proposed stormwater management fee (Title V) is authorized and otherwise complies with all requirements under Ohio law. The Court will examine authority under R.C. Chapter 6119, prior orders of this Court, as well as constitutional issues the Defendants have raised, in "declaring the rights, status and other legal relations" of the parties. R.C. 2721.02(A).

The Court has previously found, in its ruling on the Motions for Summary Judgment of April 12, 2011, that R.C. Chapter 6119 authorizes the District to address intercommunity flooding, erosion and stormwater–related water quality issues. The Court further found as a matter of law that the term "wastewater," as used under Chapter

6119, includes stormwater, and as such authorizes the District to implement a program to deal with regional stormwater problems.

Title 6119 and the Plan for Operation

R.C. Chapter 6119 governs Regional Water and Sewer Districts. R.C. 6119.09 provides:

> "A regional water and sewer district may charge, alter and collect rentals or other charges, including penalties for late payment, for the use of services of any water resource project . . . and fix the terms, conditions, rentals or other charges . . . for such use or services."

Plaintiff maintains that this section, [in addition to R.C. 6119.06 (W)], empowers the District to impose its stormwater management fee upon its members. It is the District's position that its Stormwater Management Program ("SMP") does not "increase or add to its purposes" under its charter, nor is there a request thereunder to "amend any provision of the petition" under R.C. 6119.051, Petition for Change. Defendants maintain that the District's SMP increases the purposes of the District and therefore necessitates a proceeding under Petition for Change, R.C. 6119.051.

The Defendants argue that neither R.C. Chapter 6119 nor the District's Plan for Operation (referred to as the Charter) authorize the imposition of a separate stormwater fee. Under the District's Plan of Operation in subsection 5(f), the Charter sets forth that "[t]he rates for sewage treatment and disposal shall be determined by the Board of Trustees . . . ." The Defendants maintain that "sewage treatment and disposal" do not include "stormwater." The Defendants therefore conclude, under statutory construction, "the express inclusion of one thing, means the exclusion of others" and that as a result, the Plan of Operation does not authorize the District to charge property owners a fee for the management of stormwater. As previously stated, the Defendants maintain an

amendment of the Plan of Operation under R.C. 6119.051 Petition of Change is required to authorize such a fee.

R.C. 6119.09 empowers regional sewer districts to charge, alter and collect rentals for the use or services of any water resource project. Plaintiff argues the definition of "water resource project" under R.C. 6119.011(M) includes "water management facility" which is defined as:

> facilities for the purpose of the development, use and protection of water resources including, without limiting the generality of the foregoing, facilities for water supply, facilities for stream flow improvements, dams, reservoirs, and other impoundments, water transmission lines, water wells and well fields, pumping stations and works for underground water recharge, stream monitoring systems, facilities for the stabilization of stream and river banks, and facilities for the treatment of streams and rivers, including, without limiting the generality of the foregoing, facilities for the removal of oil, debris, and other solid waste from the waters of the state and stream and river aeration facilities.

Plaintiff's position is that the District's lists of proposed projects to be instituted under Title V comprise "water resource projects" under the statute.

In addition, Plaintiff argues that the District is further authorized to charge the stormwater fee under its Plan of Operation, 5(e) – Other Financing of District projects:

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

Section 5.0218 under the Plaintiff's proposed SMP defines the Regional Stormwater System as "any watercourse, stormwater conveyance structures and stormwater control measures receiving drainage from 300 acres of land or more." And under the Charter, at Section 5(m) the District is authorized through R.C. Chapter 6119, "to plan, finance, construct, maintain . . . local sewerage collection facilities . . . within the District." But under the District's Plan for Operations Section 5(m) the District is

prohibited from assuming ownership of any local sewerage collection facilities or assuming responsibility or incurring any liability for the planning, financing, construction, operation, maintenance or repair of any sewerage collection facilities . . . unless specifically provided for in a written agreement between the District and the respective local community. The Defendants argue that without the consent of member communities the District is powerless to impose the fee. Furthermore, the opposition argues that since no Regional Stormwater System has ever been defined or consented to, none exists. It is the consent requirement articulated in the District's Charter at Section 5(m) that led the defense to this conclusion.

The District maintains that Title V is not created to plan, construct, operate, maintain and repair local sewerage collection facilities owned by member communities. Rather it is created to manage a regional Stormwater System and, therefore, the consent of local communities is not required. The Plaintiff has further stipulated that no District project will be undertaken without the respective local community's consent.

The District further responds that the ditches, streams, culverts and rivers of the watershed comprise the Regional Stormwater System that does exist – but has not yet been managed as a system.

Plaintiff contends that under R.C. 6119.06(W) and 6119.09 the District is authorized to charge for the use of services of any water resource project or any benefit conferred by the project, without supervision or regulation by other commissions, boards or agencies. Plaintiff's contention is that property owners will use the system, or be provided a service or benefit under it. Plaintiff's evidence on this issue is summarized as follows: Plaintiff's expert, Hector Cyre testified that the District's planning of the SMP

was exhaustive, exceeding the norm in the industry. He articulated that regional flooding issues in the area are not getting solved and have been on the rise over a 30 plus year period.

He stated the use of impervious surface as a rate methodology is appropriate in Northeast Ohio because:

1) it does not discriminate among rate payers,
2) similar properties are treated similarly, and
3) the proportionality of who pays "does not need to be perfect."

In Mr. Cyre's opinion, the amount of the fee is reasonable and the community will receive a valuable return on the investment in addressing flood, erosion, pollution and other stormwater related problems. He stated the service is the capture and control of stormwater; "being protected from it." Cyre stated that no regional authority has complete control of its watershed, save perhaps an island.

Other witnesses called by the District testified that:

1) Property owners "use" the regional stormwater system where stormwater runs off impervious surfaces. (Francis Greenland)
2) Areas that drain in excess of 300 acres commonly impact several municipalities; therefore, storm flows will increase with development requiring a regional approach to solve water flow problems. (Erwin Odeal)
3) The SMP will result in the improved transportation of stormwater through the system, thus providing service and benefit to property owners residing within the member communities. (Hector Cyre)

4) The SMP will result in ecological and environmental benefits to the region. (David Beach)

5) The District sent teams out into the community, held rounds of meetings, met with mayors individually to discuss stormwater problems and the Stormwater Management Program. (Julius Ciaccia)

6) The District's Board of Trustees passed Title V unanimously.

7) Impervious surfaces (development) have the greatest impact on increased runoff. (Andrew Reese)

8) The 300-acre drainage area which defines what is regional was based upon what the experts felt local communities could handle, the costs associated to each political subdivision and at what point the runoff became a stream. The 300-acre cutoff was discussed publicly and accommodated "disparate voices." (Andrew Reese)

9) The first five years of projects have been identified and exceed the $38 million to be raised by the fee in year one. *See* Plaintiff's Ex. 44. (Francis Greenland)

The Defendants counter that the stormwater fee is not a "rental or other charge," nor is it imposed for "use or services." Further, the Defendants argue that there is no identifiable or specific "use or benefit" derived from the payment of the fee.

The defense's evidence on this issue is summarized as follows:

1) The proposed stormwater fee is unfair because it fails to take into account land use, i.e. pervious area. The fee structure discriminates against non-

residential property owners because there is no cap as provided for with residential parcels. (Phillip DeGroot)

2) Lot size is directly related to runoff volume and must be considered in fairly determining a stormwater fee. (Phillip DeGroot)
3) The fee formula does not take into account lot size, soil composition and land use. The result is unfair apportionment of fees. (Phillip DeGroot)
4) The fee structure is inequitable and penalizes owners of small lots. The District's plan for stormwater management is "end of the pipe" control. It will result in sediment overcoming district projects. Furthermore the project will have no effect on 80% of the watershed.

Other municipality representatives testified that stormwater issues are being handled effectively in their community and that District involvement is unnecessary.

The Cleveland Municipal School System projects a $66 million deficit for next year due to declining property tax collection rates. Title V, they argue, provides no direct benefit to the system in exchange for a cost of $300,000.00 estimated per year. (Nicholas Jackson)

The Court has carefully considered the evidence, exhibits and arguments of counsel relative to the issue of statutory authority to impose the stormwater fee.

Initially, the Court finds that the Northeast Ohio Regional Sewer District's Stormwater Management Program fee is authorized under R.C. 6119.06 (W) and 6119.09 because the fee is for the use of services of a water resource project or any benefit conferred thereby.

The Court finds that property owners "use" the unmanaged Regional Stormwater System as rainfall creates runoff from each parcel. The District provides the service of effective transportation of stormwater decreasing the flooding of homes, businesses and preventing excessive erosion and sedimentation. The benefits include the improvements listed above, as well as improvements in water quality, habitat for wildlife and reduction of future costs relating to stormwater management. *See City of Cleveland v. Northeast Ohio Regional Sewer Dist.*, 8th Dist. No. 55709, 1989 WL 107162 (Sept. 14, 1989); *Huber v. Denger*, 38 Ohio St.3d 162, 527 N.E.2d 802 (1988).

The District's authority under Title 6119 may also be restricted by its charter. S*ee* Petition to Amend 10-30-81. Therefore, the question becomes, does the District's Plan for Operation, Section 5(m), limit and restrict the District's statutory authority to charge a stormwater fee? The Charter itself is silent as to a specific grant of authority to charge a stormwater fee but grants authority to finance local sewerage facilities with local municipality consent. Moreover, Section 5(e) provides for financing of District projects "in such a manner as may be deemed appropriate by the Board of Trustees." It appears the Board's authority here is comprehensive and exhaustive.

When Sections 5(m) and 5(e) are read together, the clear intent is not to restrict the authority of the Board regarding financing. Section 5(m) refers to a limit on the District's authority to finance ***local*** sewerage facilities, requiring a municipality's consent. When read with Section 5(e) it is not meant to include ***regional*** projects because if it did, no regional project could be undertaken without local consent. This is clearly contrary to the intent of R.C. Chapter 6119. *See also Huber supra.*

Based upon the foregoing analysis, the Court finds the District is authorized by Chapter 6119, and not otherwise restricted by its charter, to charge property owners of member communities a stormwater fee to finance Title V.

Tax/Fee Argument

Finally the Defendants argue that the fee is actually a tax since there is no correlation between the service provided and the amount charged (as with other utilities). Additionally, they argue the charges planned under the SMP exceed the cost of the service provided since the Regional Stormwater System is not yet in existence. *See City of Cincinnati v. United States*, 39 Fed.Cl. 271 (U.S. Ct. Cl. 1997). *But see City of Wooster v. Graines,* 52 Ohio St. 3d 180, 556 N.E.2d 1163 (1990).

The Defendants, Catholic Diocese of Cleveland and Northeast Ohio Apartment Association, et al., argue that the charges proposed by the District are nothing more than disguised taxes and not a "rental" or "other charge" under R.C. 6119.09.

The Plaintiff maintains that a "tax or fee" analysis is unnecessary because the stormwater fee is independently and specifically authorized by R.C. 6119.09, and that the analysis pertains only to the imposition of such a charge by a municipality or township ordinance or resolution. The Court has examined the relevant case law and finds there is no precedent for this position.

Taxes are involuntary general burdens imposed for the purpose of supporting the government for the benefit of all. Fees are voluntary payments made in exchange for a specific service or benefit. The Defendants position is that the stormwater charge is actually a tax because it:

1) confers a benefit on the general public (not a specific benefit),

2) is blanket-billed,

3) is not dependent upon the level of goods or services provided,

4) is not voluntary; property owners have no choice whether to use the service or not,

5) is not imposed as a result of EPA mandate, and

6) exceeds the "cost and expense" to government of providing the service.

The Plaintiff's position is that the stormwater fee is a charge imposed in exchange for services the District will be providing to property owners; it will not exceed the cost of providing the services; and, funds will be segregated in a separate account, only expended for stormwater related projects and not diverted for general District expenses.

The Defense has cited a plethora of cases wherein charges have been found to be in reality, taxes. Also worth noting is *Zweig v. Metropolitan St. Louis Sewer District*, St. Louis County Circuit Court, Case No. 08SIL-CC03051, 2010 WL 7765902, a case interpreting the Missouri Hancock Amendment finding that the district's stormwater "user charge" is in reality an unlawful tax. The Hancock Amendment is a constitutional amendment prohibiting Missouri counties and other political subdivisions from levying any new or increased taxes without voter approval.

The Court is hesitant to adopt or find instructive the "Keller Factor analysis" of the *Zweig* decision because it is mainly interpretive of the Hancock Amendment in Missouri. *See Keller v. Marion County Ambulance District* (1991) 820 S.W. 2d 301, 302.

The Court makes the following findings with regard to the proposed fee:

1) The fee essentially is involuntary in that property owners cannot "shut off" the "service," although they may limit their use of the stormwater runoff through stormwater credits.
2) The imposition of the SMP fee will generally benefit the public who reside in or frequent the service area of the District.
3) The charges will not exceed the cost of the SMP because there is a backlog of projects totaling in excess of $200 million within the District's plan. *See* Plaintiff's Ex. 44.
4) The funds will be segregated from other monies of the District and used only for stormwater-related projects.
5) The fee would be paid in return for services provided by the District (stormwater maintenance and construction projects).

The Court, based upon the foregoing finds that the charges proposed in Title V are charges authorized by R.C. 6119.09 and not an unlawful imposition of a tax by the Regional Sewer District.

Constitutional Issues

The Defendants argue that the proposed stormwater fee impermissibly interferes with a municipality's right to own and operate a utility under Section 4 Article XVIII of the Ohio Constitution. Absent a local community's consent, the defense argues, the District is without authority to charge residents for maintenance of its local stormwater system, including portions that drain 300 or more acres. (The Court has previously found

in its April 21, 2011 Journal Entry that the Stormwater Management Program does not unlawfully interfere with a municipality's home rule power. The Court will consider, however, the District's decision to include watercourses receiving drainage of 300 acres or more in its Regional Stormwater System here.)

The District has essentially defined "regional" as portions of stormwater system watercourse that drain 300 or more acres. The District has attempted to draw the proverbial local/regional line in the sand. The Plaintiff's witnesses here opined that the 300 acreage cutoff represents a reasonable parameter per industry standards and was the area focused upon by the District's consultants who prepared the Regional Intercommunity Drainage Evaluation ("RIDE") Study believing this area represented the backbone of the Regional Stormwater System. Finally, the Plaintiff's experts have opined that watercourses draining over 300 acres typically affect more than one community, therefore require a regional approach.

The Defendants believe the proposed 300-acre rule would "unmistakably constitute a material interference with member communities' constitutional rights to own and operate their own local utility systems" as a result of either 1) imposing the fee for projects that drain over 300 acres, or 2) managing any portion of a local stormwater system that drains over 300 acres, without the local community's consent. But the Plaintiff has stipulated it will not undertake such a regional project without consent of the local member.

The Northeast Ohio Regional Sewer District has operated for decades without a defined line setting forth what is regional and what is local. The essence of the unified

regional district is articulated in *Huber*, *supra* at 164-165 (interpreting ORC Chapter 6117 analogous).

> [R]ates assessed for the sewer works of a district are not dependent upon the fact that the ratepayer be physically attached to the particular facility for which the debt servicing is required.
>
> * * *
>
> This approach appears to be imminently sensible. To hold otherwise would result in the Balkanization of financial support for treatment plants by constricting the base upon which the cost of the facility would be spread. It would defeat the purpose of a unified sewer district…"
>
> * * *
>
> Accordingly we hold R.C. 6117 authorizes a board of county commissioners to allocate the costs of a facility serving a portion of a sewer district among all residents of the district.

The Court therefore finds that the 300-acre cutoff is a rational way for the District to advance a legitimate government interest, and that it is not arbitrary [per the Plaintiff's experts and RIDE Study], capricious or unreasonable.

Defendants further articulate that the stormwater fee violates the Equal Protection Clauses of the U.S. and Ohio Constitutions by improperly treating similarly situated persons differently as follows:

1. By imposing the fee only on member communities even though the District has countywide authority granted in its charter.
2. Through the disparate treatment of residential/commercial property owners in its fee formula without any rational basis.
3. By discriminating against small lot owners.
4. By failing to consider other factors in runoff calculation such as slope, land use and soil type.

The Court finds in the first instance that the District's jurisdiction is limited to member communities. The fact that the District may have authority countywide and has not exercised its authority over all communities within Cuyahoga County does not result in a violation of equal protection rights to those member communities who may be required to pay the fee.

The Court will address the final three constitutional arguments together, given they all concern the imposition of the fee based upon impervious surfaces of lands.

Chapter 7 of Title V pertains to stormwater fees. The fee is based upon area of impervious surfaces on parcels within the District service area. An impervious area of 3000 square feet is designated as one Equivalent Residential Unit ("ERU"). Parcels are divided into 3 tiers: small, less than 2,000 square feet (1.8 ERU), medium, 2,000 to 3,999 square feet (1.0 ERU), and large, 4,000 or more square feet (1.8 ERU). The base rate for 2012 is $4.95 per month. (See Section 5.0708) Those property owners qualifying for "Homestead" are afforded a reduced rate. Non-residential fees are calculated by multiplying the total number of ERU by the monthly fee amount. There is no ceiling as with residential tiers.

The Defendants argue that the fee is not rationally related to a legitimate government interest and amounts to an arbitrary and capricious government action. Specifically, they maintain that there is no rational relationship between the fee charged and the amount of burden placed on the regional stormwater system by the property owner being charged.

The Defendants are critical of the disparate treatment between residential and commercial property owners without any rational basis for same.

The Summit Defendants are particularly critical of the fee because it is based solely on imperviousness and fails to account for other factors contributing to runoff volume such as lot size, slope, land use and soil type.

The Plaintiff maintains that its fee basis, impervious surface, is appropriate and the most widely accepted means of calculating stormwater fees throughout the country. Plaintiff's expert, Andrew Reese, testified that 35 of 40 Ohio stormwater management programs use impervious surface as a basis for charging a fee. He opined that impervious surfaces as a result of development have the greatest impact on increased volume and rate of runoff. He recommended to the District, as its consultant, that impervious surface be used to determine fee rate. He further stated that the process used by the District in deciding the basis for the fee met or exceeded industry standards. Plaintiff further maintains that attempting to measure actual volume and rate of runoff would be unreasonable and cost-prohibitive.

Michael Clar, defense expert water resource engineer, opined that the sole use of imperviousness is fatally flawed. Soil types, slope, and land use all have significant impact on runoff. The proposed impervious surface fee is therefore inequitable. Also, small lots are discriminated against because the calculation does not take into account lot size. Summit Defendants argue the impervious surface fee discriminates against lot owners in forested areas by not taking into account reduction in runoff by presence of trees.

The question then becomes, is the sole use of impervious surface to calculate a stormwater fee a rational way to advance the District's legitimate government interest and not arbitrary, capricious or unreasonable?

The impervious surface method is not aimed at measuring total runoff from each property, but rather the goal is to measure increase in flow due to development, or urbanizing. The rational method is one well recognized in the profession but not as a tool to calculate a stormwater fee for thousands of properties. The problems of increased erosion, flooding and pollution have their origin in the construction of impervious surfaces. The Court is satisfied the calculation of impervious surface is a widely accepted method of calculating increased use of the stormwater system caused by development. It is by no means precise, but it bears a rational relationship to the purpose of addressing stormwater problems. The District concluded an exhaustive process in deciding to use impervious surfaces to calculate the fee. The Court finds that the fee is a rational way to advance the District's legitimate governmental interest in the regional management of stormwater. With the exception of the non-residential fee schedule, the Court finds the fee is not arbitrary, capricious or unreasonable. However, the Court finds no rational basis for the disparate treatment of non-residential property owners. The District must re-work this portion of the fee schedule providing either a cap or a reasonable declining block scale to non-residential property owners.

Credits and Exemptions

The District's SMP Credit Manual provides for certain "credits" or fee reductions by percentages, which are available to individuals, condominium associations, commercial and industrial land owners. Public and private schools may also qualify for the reduction through an educational credit wherein a continuing program curriculum is taught on stewardship of our water resources. The total credit available to each is

between 25 – 100%. The credits are afforded to landowners who use stormwater control measures that reduce the transporting of pollutants and limit the volume and /or rate of runoff. In certain instances the services of a professional engineer may be required to complete the application process. Credits are available to applicants who have constructed stormwater control measures before the effective date of the SMP.

The defendants have objected to the fee credit on the basis that:

1) The cost of obtaining a credit may far exceed the benefit realized. (Requirement of a licensed engineer to complete a fee credit application/measure.)
2) Other than installing a rain barrel, additional means of obtaining further credits are not financially realistic for individual property owners.

The Stormwater fee credit system provides users with an opportunity to offset fees while advancing the overall purposes of the SMP, i.e. the reduction of volume and rate of stormwater runoff.

With a few exceptions, the fee credit system is a rational way to advance a legitimate governmental interest and is not otherwise arbitrary, capricious or unreasonable.

However, the District shall provide the school systems with appropriate curriculum for each of grades 1-12 to achieve the stated purposes of the credit.

The District shall submit a plan or formula providing for the accrediting of costs of licensed engineer in completing any applications for credits under the stormwater Fee Credit Manual. Such credit shall not exceed 10% of the stormwater fee. This cost/credit shall only be available to non-residential property owners, including school districts.

Community Cost Share

The SMP sets forth a community cost share of 7.5% to be returned to the local municipalities for stormwater-related projects. The Court has previously found that the District's definition of "regional" (drainage area in excess of 300 acres) is supported by competent evidence and not otherwise unreasonable. The Court further finds that as much as 78% of the watershed may be outside of District control. The Court finds, as a result, that the 7.5% cost share is unfair to member communities because many flooding problems are in areas that drain far less than 300 acres, and the communities are in need of additional funds to deal with these local stormwater issues. Either the meaning of "regional" must be arrived at by means of a consensus of the District and its member communities or cost share must reflect an amount no less than 25% to member communities for local stormwater projects.

Exemptions

In the stormwater fee manual, the District has generally followed the exemption on non-self supporting government functions it uses with sewer fees. The exception is the exemption of municipal and county airport runways and taxiways. The Plaintiff has argued that this exemption is similar to the exemption afforded public roads. Public schools are not exempt. They are likewise non-exempt from sewer fees. Approximately 13% of utilities exempt schools from user fees nationally, according to Francis Greenland, Director of Watershed Programs of the District.

The Defendants maintain there is no authority granted the District to exempt certain property owners (with the exemption of the homestead exemption). The

exemptions, without proper authorizations are therefore arbitrary, unreasonable and inequitable, they argue.

The Plaintiff contends that the authority to exempt certain properties is founded in R.C. 6119.09, "a regional water and sewer district may charge, **alter** and collect rentals . . .." (Emphasis added.)

The Court finds that the District's exemptions are reasonable, that there is a rational basis for exempting public roads, and airport runways and taxiways as they serve the public generally and provide drainage themselves. Only a small minority of utilities exempt schools, the Court on this account, cannot say the inclusion of schools is therefore unreasonable.

With regard to the remaining exemptions the Court finds they are a rational way of advancing a legitimate government interest and not otherwise arbitrary, capricious or unreasonable.

Hudson's Membership in NEORSD

Hudson maintains it is not a "member community" of the NEORSD. The City's Assistant Director of Public Works, Don Schroyer, testified that the District has not performed any projects within the City. Further, after the 2003 flood in Hudson, he stated that the city received assistance from FEMA and Summit County but not from the District. Residents of Hudson are billed from Summit County; the District has never billed the city. Hudson is connected to the Summit County sewer, which is connected to the District's southerly plant in Cleveland.

Hudson's mayor attends District committee meetings and has voted in the past. Hudson entered into an agreement with Summit County in order to route its wastewater

to the District's interceptor sewers via a Summit County trunk. Hudson's council authorized the City to become a member of the District in a resolution passed June 3, 1997. Plaintiff's Ex. 17

The Court finds that the City of Hudson is a member of the District. The order of this Court shall pertain to portions of Hudson which are within the service area of the NEORSD.

Conclusion

Defendants' Motion for Permanent Injunction is Overrruled. The Court will set a conference within 30 days and hear proposed changes to Title V regarding: 1) the creation of a non-residential cap or sliding scale; 2) the creation of a plan or formula to establish an engineering costs credit; and 3) an alternative cost share formula. Upon its conclusion, Plaintiff shall submit a proposed journal entry not inconsistent with this opinion.

IT IS SO ORDERED:

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THOMAS J. POKORNY, JUDGE