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APPENDIX B

**COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

No. 106806

[Filed December 6, 2018]

GPI DISTRIBUTORS, INC.)
)
PLAINTIFF-APPELLANT)
)
vs.)
)
NORTHEAST OHIO REGIONAL)
SEWER DISTRICT)
)
DEFENDANT-APPELLEE)
)

JOURNAL ENTRY AND OPINION

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-17-883825 and CV-17-887300

BEFORE: Celebrezze, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: December 6,
2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Plaintiff-appellant, GPI Distributors, Inc. (hereinafter “GPI”), appeals the trial court’s judgment granting defendant-appellee, Northeast Ohio Regional Sewer District’s (hereinafter “NEORS”) motion to dismiss GPI’s administrative appeal for failure to comply with R.C. 2505.06. GPI argues that the trial court erred by granting NEORS’s motion to dismiss because it was not required to file a supersedeas bond in order to perfect the administrative appeal and that even if a bond was required, the appeal could proceed on questions of law. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} The instant appeal arose from a dispute over sewer bills charged to a residential property owned by GPI between December 2014 and June 2015. GPI initiated two separate but related civil actions in the Cuyahoga County Court of Common Pleas.

{¶3} First, in Cuyahoga C.P. No. CV-17-883825 (hereinafter “declaratory judgment action”), GPI filed a complaint on August 1, 2017, against the city of Cleveland, the director of the city’s department of public utilities, NEORS, NEORS’s chief executive officer, Cuyahoga County’s fiscal officer, and Cuyahoga County’s treasurer. In its complaint, GPI sought a declaratory judgment and preliminary and permanent injunctive relief. Specifically, GPI alleged that (1) various policies and practices of the city of Cleveland and NEORS were unconstitutional, violating GPI’s constitutional rights to due process,

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protection from takings for public purposes without just compensation, and various civil rights, and (2) the city violated various sections of the Cleveland Codified Ordinances¹ in the manner in which it installed and maintained water meters and assessed water and sewer bills to customers.

{¶4} Second, in Cuyahoga C.P. No. CV-17-887300 (hereinafter “administrative appeal”), GPI filed an administrative appeal on October 12, 2017, challenging NEORSD’s September 21, 2017 decision that approved and adopted a hearing officer’s determination that GPI’s sewer bills were accurate. On October 12, 2017, GPI filed a motion to consolidate the declaratory judgment action with the administrative appeal. The trial court granted GPI’s motion, and the two cases were consolidated on October 13, 2017.

{¶5} Along with its motion to consolidate, GPI filed a motion to “determin[e] the necessity of a supersedeas bond to perfect notice of appeal” in which it requested an expedited ruling. On the same day, GPI filed an amended motion to “determin[e] that no supersedeas bond is necessary to perfect notice of appeal.” In the amended motion, GPI argued that it was not required to post the supersedeas bond required by R.C. 2505.06 in order to perfect its administrative appeal because (1) NEORSD did not issue an order for the payment of money, making the bond exemption set forth in R.C. 2505.12(B) applicable, and (2) NEORSD already obtained a lien on GPI’s property for the outstanding

¹ Cleveland Codified Ordinances 533.01(a)(1) and (c), 535.29, and 535.31.

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sewer charges, and thus, the interests that NEORSD had at stake in the administrative appeal were already secured. Alternatively, GPI requested that the trial court set a nominal cash bond of \$50.

{¶6} On October 18, 2017, NEORSD filed a brief in opposition to GPI's motion regarding the supersedeas bond. Therein, NEORSD argued that GPI was required to comply with R.C. 2505.06's bond requirement in order to perfect its notice of appeal.

{¶7} On October 19, 2017, the trial court denied GPI's motion for a determination that no supersedeas bond was required. The trial court's judgment entry provides, in relevant part,

R.C. 2505.06 requires that an administrative appeal upon questions of law and fact be superseded by a bond. Because this case involves an administrative appeal of a final order on a sewer bill charge in the amount of \$12,047.76, R.C. 2505.12(B), which exempts the supersedeas bond requirement, is inapplicable. [GPI's] additional argument that [NEORSD's] interest in the sewer bill charge has already been secured with a lien is without merit because the tax balance on the property at issue exceeds the value of the property. * * * R.C. 2505.09 requires that a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and in a sum that is not less than the cumulative total for all claims covered by [t]he final order. Therefore, [GPI] is required to post a supersedeas bond in the amount of \$12,047.76.

{¶8} On November 1, 2017, NEORSD filed a motion to dismiss the administrative appeal based on GPI's failure to comply with R.C. 2505.06's bond requirement. On November 28, 2017, GPI filed a brief in opposition to the motion to dismiss. In opposing the motion to dismiss, GPI argued, for the first time, that (1) it was indigent and could not afford to post the bond set by the trial court, and (2) R.C. 2505.06's bond requirement was unconstitutional because it violated GPI's constitutional rights to due process and equal protection. NEORSD filed a reply brief in support of its motion to dismiss on December 6, 2017.

{¶9} On January 12, 2018, the trial court granted NEORSD's motion to dismiss and dismissed GPI's administrative appeal. The trial court's judgment entry provides, in relevant part,

This court previously determined that a supersedeas bond was required to invoke jurisdiction to review the outcome of an administrative appeal regarding NEORSD placement of a lien against GPI property for unpaid sewer charges. GPI filed the administrative appeal citing issues of fact and law.*** [GPI] failed to file the bond in a timely manner or to substitute for bond pursuant to R.C. 2505.11. NEORSD moved for dismissal for GPI's failure to perfect the administrative appeal in compliance with R.C. 2505.06.

GPI opposes dismissal asserting that it could not afford the posting of the bond, thereby depriving it of a meaningful opportunity to be heard in violation of its rights to due process and equal

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protection under Federal and State Constitutions. Simply stated, GPI asserts that the bond requirement of R.C. [2505.06] is unconstitutional as an impediment to access court review of the administrative appeal. Legislative enactments are to be afforded a strong presumption of constitutionality. *Rocky River v. State Empl. Relations Bd.*, 43 Ohio St.3d 1[, 539 N.E.2d 103] (1989).

The administrative appeal was conducted for a determination of an amount due for the sewer charges, thereby requiring the posting of the supersedeas bond. As no bond was timely posted, case is hereby dismissed.

{¶10} It is from this judgment that GPI filed the instant appeal on February 7, 2018. GPI assigns one error for review:

I. The trial court erred in granting [NEORSD's] motion to dismiss [GPI's] administrative appeal for failure to post a supersedeas bond under R.C. 2505.06.

II. Law and Analysis

A. Final Appealable Order

{¶11} As an initial matter, we must determine whether the trial court's January 12, 2018 judgment granting NEORSD's motion to dismiss GPI's administrative appeal is a final, appealable order.

{¶12} As noted above, GPI filed (1) a declaratory judgment action in CV-17-883825, and (2) an

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administrative appeal in CV-17-887300. The trial court's January 12, 2018 judgment entry granting NEORSD's motion to dismiss was dispositive of GPI's administrative appeal. There was no disposition, however, of GPI's declaratory judgment action or the causes of action GPI asserted in its August 1, 2017 complaint.

An order of a court is a final appealable order only if the requirements of both Civ.R. 54(B), if applicable, and R.C. 2505.02 are met. *Chef Italiano Corp. v. Kent State Univ.*, [44 Ohio St.3d 86, 541 N.E.2d 64 (1989)], syllabus. Moreover, an order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B) in order to be final and appealable. *Noble v. Colwell*, [44 Ohio St.3d 92, 540 N.E.2d 1381 (1989)], syllabus. An order fully adjudicating a claim and accompanied by a Civ.R. 54(B) determination and direction is final and appealable despite the fact that a counterclaim remains pending. *Id.* at 94.

R.C. 2505.02 in relevant part defines a final order as "an order affecting a substantial right in an action which in effect determines the action and prevents a judgment." *Id.* at 88.

Philpott v. Ernst & Whinney, 8th Dist. Cuyahoga No. 61203, 1992 Ohio App. LEXIS 5930, 3-4 (Nov. 25, 1992).

{¶13} Furthermore,

[t]he Ohio Supreme Court has held that where multiple claims and/or parties exist, an order adjudicating one or more but fewer than all the claims or the rights and liabilities of fewer than all of the parties must meet the requirements of both R.C. 2505.02 and Civ.R. 54(B) in order to constitute a final appealable order. *Noble* at 96. The court explained that Civ.R. 54(B) “makes mandatory the use of the language, ‘there is no just reason for delay.’ Unless those words appear where multiple claims and/or multiple parties exist, the order is subject to modification and it cannot be either final or appealable.” *Id.*, quoting *Jarrett v. Dayton Osteopathic Hosp., Inc.*, 20 Ohio St.3d 77, 486 N.E.2d 99 (1985), and *Whitaker-Merrell Co. v. Geupel Constr. Co.*, 29 Ohio St.2d 184, 280 N.E.2d 922 (1972), syllabus. The court emphasized, however, that a trial court cannot turn an otherwise nonfinal order into a final appealable order by merely reciting the language required under Civ.R. 54(B). *Noble* at *id.*; *Cirino v. Ohio Bur. of Workers’ Comp.*, 2016-Ohio-8323, 75 N.E.3d 965, ¶ 124 (8th Dist.).

Foster v. Foster, 8th Dist. Cuyahoga No. 106173, 2018-Ohio-1961, ¶ 18.

{¶14} In the instant matter, as noted above, GPI filed (1) a declaratory judgment action in CV-17-883825, and (2) an administrative appeal in CV-17-887300. GPI filed the instant appeal challenging the trial court’s January 12, 2018 judgment entry granting

NEORSD's motion to dismiss and dismissing GPI's administrative appeal.

{¶15} The trial court's January 12, 2018 judgment entry is dispositive of and fully adjudicates GPI's administrative appeal. Furthermore, the trial court's judgment entry included an express determination of "no just cause for delay," satisfying the requirements set forth in Civ.R. 54(B). Accordingly, we find that the trial court's order granting NEORSD's motion to dismiss constitutes a final, appealable order because it fully adjudicates GPI's administrative appeal and is accompanied by a Civ.R. 54(B) determination and direction.

{¶16} The trial court's January 12, 2018 judgment entry does not, however, dispose of or adjudicate GPI's declaratory judgment action or the causes of action GPI asserted in its August 1, 2017 complaint. Because GPI's constitutional claims were not fully adjudicated, and remain pending, they are outside the scope of the instant appeal.

{¶17} Based on the foregoing analysis, we will only address the merits of the trial court's judgment dismissing GPI's administrative appeal because GPI's constitutional claims are not properly before this court.

B. Supersedeas Bond Requirement

{¶18} In its sole assignment of error, GPI argues that the trial court erred by granting NEORSD's motion to dismiss based on GPI's failure to post a supersedeas bond as required by R.C. 2505.06.

{¶19} R.C. 2505.06 provides that for administrative appeals involving questions of law *and* fact,

no administrative-related appeal shall be effective as an appeal upon questions of law and fact until *the final order appealed is superseded by a bond* in the amount and with the conditions provided in sections 2505.09 and 2505.14 of the Revised Code, and unless such bond is filed at the time the notice of appeal is required to be filed.

(Emphasis added.) Where an administrative appeal is brought *solely on questions of law*, however, the appellant is not required to file a bond. *Ballado v. Cleveland Hts.*, 76 Ohio App.3d 497, 498, 602 N.E.2d 394 (8th Dist.1991), citing *Adrian, Inc. v. Parrott*, 5th Dist. Delaware No. 90-CA-31, 1990 Ohio App. LEXIS 5521, 3 (Nov. 30, 1990); see *Am. Aggregates Corp. v. Concord Twp.*, 5th Dist. Delaware Nos. 90-CA-32 and 90-CA-33, 1991 Ohio App. LEXIS 1655, 5 (Apr. 11, 1991) (“the filing of a supersedeas bond is not a jurisdictional prerequisite to perfect [an] appeal under R.C. [Chapter] 2505 involving questions of law only.”). “Pursuant to R.C. 2505.06, it is the duty of appellants to designate the nature of the administrative appeal[.]” *Bell v. Richmond Hts. Equalization Bd.*, 8th Dist. Cuyahoga No. 66404, 1994 Ohio App. LEXIS 5159, 7 (Nov. 17, 1994).

{¶20} This court has recognized that “[i]t is well established that when an administrative appeal concerns questions of law and fact, a supersedeas bond *must* be filed.” (Emphasis added.) *Bell* at 6, citing *Ballado, Nutter v. Concord Twp. Bd. of Zoning Appeals*,

11th Dist. Lake No. 92-L-118, 1993 Ohio App. LEXIS 3337 (June 30, 1993), and *Landsittel v. Delaware*, 5th Dist. Delaware No. 89-CA-2, 1989 Ohio App. LEXIS 2736 (June 29, 1989). Furthermore,

when an administrative appeal concerns questions of law and fact, a supersedeas bond, unless otherwise provided by law, must be filed within thirty days of the final administrative order to perfect the notice of appeal. The requirement of timely filing a supersedeas bond with a notice of appeal is therefore *a jurisdictional requirement rather than one procedural and/or technical in nature*. See *Ballado, supra*; *Stevly v. Stoll*, 57 Ohio App. 401, 14 N.E.2d 419 [3d Dist.1937]; *Moore v. Cleveland Civil Serv. Comm.*, 11 Ohio App.3d 273, 465 N.E.2d 482 [8th Dist.1983].

(Emphasis added.) *Bell* at 7.

{¶21} Appellate courts in the state of Ohio have disagreed on the consequences of an appellant's failure to file the required bond upon an appeal of questions of law and fact. This court held that an appellant's failure to post the supersedeas bond in a timely manner when required to do so under R.C. 2505.06 mandates the immediate dismissal of all aspects — both questions of law and questions of fact — of an administrative appeal. *Ballado* at 498. In *Ballado*, the appellant's notice of appeal, like the notice of appeal filed by GPI, "dealt with questions of both law and fact, rendering R.C. 2505.06 applicable[.]" *Id.* The Fifth and Tenth Districts have also viewed an appellant's failure to file the required bond as being fatal to the entire appeal.

See Dawes v. Murphy, 119 Ohio App. 201, 197 N.E.2d 818 (10th Dist.1963); *Landsittel*.

{¶22} Other appellate districts, however, have held that when an appellant fails to post the requisite supersedeas bond, the appeals may proceed, but only on questions of law. *Pickrel v. Hrobon*, 106 Ohio App. 313, 151 N.E.2d 32 (10th Dist.1958); *Nutter* at 10-11 (the failure to post a supersedeas bond under R.C. 2505.06 is only fatal to the “fact” portion of the appeal); *see also Liberty Savs. Bank v. Kettering*, 101 Ohio App.3d 446, 449-450, 655 N.E.2d 1322 (2d Dist.1995) (when an appellant files an administrative appeal based on questions of law and fact, but fails to file a supersedeas bond, the common pleas court should first determine whether the appeal may continue solely on questions of law; if the appeal can proceed on only questions of law, the trial court should not dismiss the case, but rather proceed with the appeal and limit its review to the questions of law); *Salida Invest. Group v. Lake Cty. Util. Dept.*, 2015-Ohio-5066, 53 N.E.3d 857, 126 (11th Dist.) (remanding the matter to the trial court based on the court’s failure to engage in the analysis set forth in *Nutter* and failure to consider appellant’s argument that the appeal was solely on a question of law).

{¶23} In the instant matter, a review of the notice of appeal GPI filed in the trial court indicates that the administrative appeal was based on questions of law and fact. GPI’s notice of appeal states, in relevant part, “GPI appeals on *issues of both law and fact*. NEORSD’s decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, and/or unsupported by a

preponderance of substantial, reliable, and probative evidence.” (Emphasis added.)

{¶24} A review of GPI’s motion to consolidate CV-17-883825 and CV-17-887300 supports the conclusion that the administrative appeal was not based solely on questions of law, but rather on questions of law and fact. In its motion to consolidate, GPI asserted, in relevant part,

[t]he two cases arise from the same facts — the clearly erroneous measurement of water consumption by the Cleveland Division of Water at a property owned by GPI, and the resulting bills for water and sewer services issued for approximately six months ending June 8, 2015.

In [CV-17-887300], GPI is the Appellant in an administrative appeal from an NEORS D order rejecting GPI’s dispute over the excessive sewer bills.

The two cases have common *questions of law and fact*, including whether NEORS D sewer service charges that were billed to GPI for the period December 5, 2014, through June 18, 2015, are illegal, arbitrary, capricious, and unreasonable, and have no relationship to sewer services actually provided to GPI during that time or to the record of water consumption upon which the sewer charges were based.

(Emphasis added.)

{¶25} It is evident that GPI's administrative appeal was brought on questions of law and fact, and that GPI's primary concern was a question of fact — NEORSD's determination that the sewer bills were accurate — rather than a question of law. The supersedeas bond requirement was clearly an issue of concern for GPI, prompting GPI to file a motion and an amended motion to determine the necessity of such bond. *See Bell*, 8th Dist. Cuyahoga No. 66404, 1994 Ohio App. LEXIS 5159, at 10.

{¶26} In ruling on GPI's motions to determine the necessity of a supersedeas bond, the trial court, unlike the lower court in *Salida*, made a determination that the administrative appeal was brought on questions of law and fact, and that the appeal could not proceed on questions of law alone. The trial court further ordered GPI to file a \$12,047.76 bond, concluding that the bond exemption set forth in R.C. 2505.12(B) was inapplicable because the appeal was from a final order on a sewer bill.

{¶27} As noted above, in its brief in opposition to NEORSD's motion to dismiss the administrative appeal for failing to post the requisite bond under R.C. 2505.06, GPI argued that it was indigent and, as a result, could not post the \$12,047.76 bond set by the trial court. R.C. 2505.11 provides a mechanism for substituting the supersedeas bond requirement in connection with an appeal. GPI could have pursued this course of action in order to perfect its administrative appeal and invoke the trial court's jurisdiction. However, GPI failed to do so.

{¶28} Finally, we find no merit to GPI’s argument that the failure to comply with R.C. 2505.06 is only fatal to the questions of fact in the administrative appeal, such that the appeal can proceed on questions of law. GPI acknowledges this court’s holding in *Ballado*, but argues that *Ballado* is “an older case that engaged in only a cursory analysis of the issue.” GPI contends that we should instead follow the “better-reasoned decisions” in *Salida* and *Liberty Savs. Bank*.

{¶29} After reviewing the record, we find no basis upon which to depart from this court’s precedent. Although GPI advanced this argument in both the trial court proceedings and the instant appeal, GPI fails to identify any question of law it was challenging in the administrative appeal upon which the appeal can proceed, much less a question of law that can be decided without a factual appeal. *See Salida*, 2015-Ohio-5066, 53 N.E.3d 857, at ¶ 25 (in the absence of supersedeas bond, an administrative appeal can proceed on questions of law, “so long as a factual appeal is not necessary to decide the questions of law.”).

{¶30} For all of the foregoing reasons, we find that the trial court properly granted NEORS’s motion to dismiss. Based on GPI’s failure to comply with R.C. 2505.06’s bond requirement, the trial court lacked subject matter jurisdiction over the administrative appeal. GPI’s sole assignment of error is overruled.

C. Due Process and Equal Protection

{¶31} As noted above, in opposing NEORS’s motion to dismiss the administrative appeal based on GPI’s failure to comply with R.C. 2505.06, GPI argued

— for the first time — that R.C. 2505.06’s bond requirement violated its constitutional rights to due process and equal protection.

{¶32} The trial court’s January 12, 2018 judgment entry, from which GPI filed the instant appeal, references GPI’s assertion that R.C. 2505.06’s bond requirement violates the constitutional rights to due process and equal protection. Furthermore, the judgment entry acknowledges the general rule that all legislative enactments enjoy a presumption of constitutionality. The trial court did not, however, address the merits of GPI’s constitutional challenge or make a determination regarding the constitutionality of R.C. 2505.06 or the statute’s bond requirement. Rather, the court’s judgment entry reflects that it granted NEORS’s motion and dismissed the administrative appeal on jurisdictional grounds based on GPI’s failure to post the requisite bond.

{¶33} As an initial matter, we note that this court generally does not address constitutional issues unless it is absolutely necessary to do so. “Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary.” *Ohioans for Fair Representation, Inc. v. Taft*, 67 Ohio St.3d 180, 183, 616 N.E.2d 905 (1993), quoting *Hall China Co. v. Pub. Util. Comm.*, 50 Ohio St.2d 206, 210, 364 N.E.2d 852 (1977).

{¶34} “Constitutional questions will not be decided until the necessity for a decision arises on the record before the court.” *State ex rel. Herbert v. Ferguson*, 142 Ohio St. 496, 52 N.E.2d 980 (1944), paragraph two of the syllabus; see *Interstate Motor Freight Sys. v.*

Bowers, 164 Ohio St. 122, 128 N.E.2d 97 (1955), paragraph two of the syllabus (“[w]here a case can be determined upon any other theory than that of the constitutionality of a challenged statute, no consideration will be given to the constitutional question.”). *Accord Fulton v. Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 104561, 2017-Ohio-971, ¶ 10.

Although the doctrine of constitutional avoidance tends to apply most often in the context of appeals, the doctrine applies equally to the trial courts. *See, e.g., Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 29 (noting that trial court properly avoided reaching constitutional issue when it decided [the] matter based on statutory-interpretation principles).

Fulton at ¶ *id.*

{¶35} In this case, the record reflects that the trial court avoided reaching GPI’s constitutional challenge to R.C. 2505.06, and disposed of the administrative appeal based on statutory-interpretation principles — concluding that R.C. 2505.06 applied, requiring GPI to post a supersedeas bond, and that GPI’s failure to do so was dispositive of the case. We further find that the administrative appeal was not the appropriate vehicle for determining the constitutionality of R.C. 2505.06, particularly because GPI did not assert its constitutional challenge to the statute in the declaratory judgment action or its motions for determining the necessity of a supersedeas bond. Rather, GPI raised the issue for the first time in opposing NEORSD’s motion to dismiss. Based on GPI’s

belated constitutional challenge to R.C. 2505.06, the constitutional issue is underdeveloped in the record before this court. *See 75 Pub. Square v. Cuyahoga Cty. Bd. of Revision*, 76 Ohio App.3d 340, 346, 601 N.E.2d 628 (8th Dist.1991) (a reviewing court “needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony when a statute is challenged on the basis that it is unconstitutional in its application”); *Cleveland v. Williams*, 8th Dist. Cuyahoga No. 106454, 2018-Ohio-2937, ¶ 19.

{¶36} Finally, we cannot say that R.C. 2505.06’s bond requirement denied GPI access to the courts or violated GPI’s right to a legal remedy. In *Foster v. Wells Fargo Fin. Ohio, Inc.*, 195 Ohio App.3d 497, 2011-Ohio-4632, 960 N.E.2d 1022 (8th Dist.), this court recognized that a person’s constitutional right to access the courts is not unlimited. *Id.* at ¶ 19. Furthermore, this court explained,

a statute of limitations does not deny access to the courts, but limits that right to a reasonable period of time depending on the type of claim as prescribed by statute. Similarly, dismissal of claims pursuant to procedural rules does not violate one’s right to a legal remedy. *Wells v. Visual Sec. Concepts, Inc.*, [5th Dist. Richland No. 04-CA-118, 2005-Ohio-4272], ¶ 27 (holding that the trial court did not err to the prejudice of the appellant’s right to legal remedy and to access courts by granting summary judgment because the plaintiffs claims were barred by the statute of limitations).

Foster was not denied his constitutional right to a jury trial. He had access to the court until the applicable statutes of limitations expired, but he failed to bring his claims within the required time.

Foster at ¶ 20-21.

{¶ 37} In this case, GPI had access to the common pleas court by (1) filing an administrative appeal within 30 days of the final administrative order, and (2) posting the requisite supersedeas bond pursuant to R.C. 2505.06, or substituting the supersedeas bond pursuant to R.C. 2505.11. GPI did not post the requisite bond and did not substitute the bond requirement. Thus, GPI failed to perfect its notice of appeal.

{¶ 38} R.C. 2505.06's bond requirement did not deny GPI access to the courts or violate GPI's right to a legal remedy. Had GPI complied with R.C. 2505.06's bond requirement, GPI would have had access to the common pleas court to challenge NEORSD's administrative ruling. However, GPI failed to comply with the procedural rules in order to perfect its administrative appeal.

{¶ 39} For all of the foregoing reasons, we decline to address GPI's constitutional challenge to R.C. 2505.06.

III. Conclusion

{¶ 40} After thoroughly reviewing the record, we affirm the trial court's judgment. Because GPI filed an administrative appeal on questions of law and fact, GPI was required to post a supersedeas bond pursuant to

R.C. 2505.06. GPI failed to post the requisite bond, and as a result, the trial court lacked jurisdiction over the administrative appeal. Accordingly, the trial court properly granted NEORSD's motion to dismiss.

{¶41} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/ Frank D. Celebrezze Jr.
FRANK D. CELEBREZZE JR., JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR

APPENDIX C

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

Case No: CV-17-887300

Judge: NANCY A FUERST

[Filed January 12, 2018]

GPI DISTRIBUTORS, INC.)
Plaintiff)
)
NORTHEAST OHIO REGIONAL)
SEWER DISTRICT)
Defendant)

JOURNAL ENTRY

96 DISP.OTHER - FINAL

THIS MATTER IS BEFORE THE COURT ON APPELLEE NORTHEAST OHIO REGIONAL SEWER DISTRICT'S ("NEORS") 11/1/17 MOTION TO DISMISS. BASED UPON REVIEW OF THE BRIEFS SUBMITTED AND APPLICABLE LAW, APPELLEE'S MOTION TO DISMISS IS GRANTED.

THIS COURT PREVIOUSLY DETERMINED THAT A SUPERSEDEAS BOND WAS REQUIRED TO INVOKE JURISDICTION TO REVIEW THE OUTCOME OF AN ADMINISTRATIVE APPEAL

REGARDING NEORS D PLACEMENT OF A LIEN AGAINST GPI PROPERTY FOR UNPAID SEWER CHARGES. GPI FILED THE ADMINISTRATIVE APPEAL CITING ISSUES OF FACT AND LAW. THE RECORD AND TRANSCRIPT OF THE APPEAL WERE FILED WITH THE COURT AND ESTABLISH THAT A HEARING OFFICER DETERMINED THE AMOUNT OF THE SEWER LIEN. APPELLANT GPI DISTRIBUTORS INC FAILED TO FILE THE BOND IN A TIMELY MANNER OR TO SUBSTITUTE FOR BOND PURSUANT TO R.C. 2505.11. NEORS D MOVED FOR DISMISSAL FOR GPI'S FAILURE TO PERFECT THE ADMINISTRATIVE APPEAL IN COMPLIANCE WITH R.C. 2505.06.

GPI OPPOSES DISMISSAL ASSERTING THAT IT COULD NOT AFFORD THE POSTING OF THE BOND, THEREBY DEPRIVING IT OF A MEANINGFUL OPPORTUNITY TO BE HEARD IN VIOLATION OF ITS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER FEDERAL AND STATE CONSTITUTIONS. SIMPLY STATED, GPI ASSERTS THAT THE BOND REQUIREMENT OF R.C. 25505.06 IS UNCONSTITUTIONAL AS AN IMPEDIMENT TO ACCESS COURT REVIEW OF THE ADMINISTRATIVE APPEAL. LEGISLATIVE ENACTMENTS ARE TO BE AFFORDED A STRONG PRESUMPTION OF CONSTITUTIONALITY. ROCKY RIVER V. STATE EMPL. RELATIONS BD., 43 OHIO ST. 3D 1 (1989).

THE ADMINISTRATIVE APPEAL WAS CONDUCTED FOR A DETERMINATION OF AN AMOUNT DUE FOR THE SEWER CHARGES,

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THEREBY REQUIRING THE POSTING OF THE
SUPERSEDEAS BOND. AS NO BOND WAS TIMELY
POSTED, CASE IS HEREBY DISMISSED.

SO ORDERED.
NO JUST CAUSE FOR DELAY.

/s/ N A Fuerst
Judge Signature 01/12/2018

APPENDIX D

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

Case No: CV-17-887300

Judge: NANCY A FUERST

[Filed October 19, 2017]

GPI DISTRIBUTORS, INC.)
Plaintiff)
)
NORTHEAST OHIO REGIONAL)
SEWER DISTRICT)
Defendant)

JOURNAL ENTRY

GPI DISTRIBUTORS, INC.'S 10/12/2017 MOTION FOR DETERMINING THE NECESSITY OF A SUPERSEDEAS BOND TO PERFECT NOTICE OF APPEAL IS DENIED.

R.C. 2505.06 REQUIRES THAT AN ADMINISTRATIVE APPEAL UPON QUESTIONS OF LAW AND FACT BE SUPERSEDED BY A BOND. BECAUSE THIS CASE INVOLVES AN ADMINISTRATIVE APPEAL OF A FINAL ORDER ON A SEWER BILL CHARGE IN THE AMOUNT OF \$12,047.76, R.C. 2505.12(B), WHICH EXEMPTS THE

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SUPERSEDEAS BOND REQUIREMENT, IS INAPPLICABLE.

PLTF'S ADDITIONAL ARGUMENT THAT DEFT'S INTEREST IN THE SEWER BILL CHARGE HAS ALREADY BEEN SECURED WITH A LIEN IS WITHOUT MERIT BECAUSE THE TAX BALANCE ON THE PROPERTY AT ISSUE EXCEEDS THE VALUE OF THE PROPERTY. SEE PLTF'S MOTION, EXHIBITS B & C.

R.C. 2505.09 REQUIRES THAT A SUPERSEDEAS BOND IS EXECUTED BY THE APPELLANT TO THE APPELLEE, WITH SUFFICIENT SURETIES AND IN A SUM THAT IS NOT LESS THAN THE CUMULATIVE TOTAL FOR ALL CLAIMS COVERED BY HE FINAL ORDER. THEREFORE, PLTF IS REQUIRED TO POST A SUPERSEDEAS BOND IN THE AMOUNT OF \$12,047.76.

/s/ N A Fuerst

Judge Signature 10/19/2017

APPENDIX E

**Northeast Ohio
Regional Sewer District** **240-17**

DATE: September 12, 2017

TO: Kyle Dreyfuss-Wells
Chief Executive Officer

FROM: Frank G. Foley
Director of Operations and Maintenance

RE: Sewer Use Code Matters

It is requested that a resolution be prepared for Board consideration regarding:

Adopting the findings of the Hearing Officer with regard to the sewer account of GPI Distributors, Inc.; Sewer District Case No. 17-006.

My recommendations, which are attached, are prepared pursuant to Section 1.0303 of the Sewer Use Code and the Rules of Procedure for Administrative Determinations Made by the Northeast Ohio Regional Sewer District.

APPROVED:

/s/Kyle Dreyfuss-Wells

Kyle Dreyfuss-Wells, Chief Executive Officer

Date 9/14/17

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/s/Eric Luckage

Eric Luckage, Chief Legal Officer

Date 09/14/17

/s/Kenneth J. Duplay

Kenneth J. Duplay, Chief Financial Officer

Date 09/14/17

Electronically Filed 11/28/2017 15:16 / BRIEF / CV 17
887300 / Confirmation Nbr. 1235824 / CLCCB

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Case Number 17-006 Hearing Date: July 12, 2017
GPI Distributors, Inc.
5335 Dolloff Road
Cleveland, OH 44127

Hearing: Administrative Appeal

Account Number: 2970550003

Request

On July 12, 2017, the NEORSD held an Administrative Hearing with customer GPI Distributors, Inc. regarding sewer service charges for the property located at 5335 Dolloff Road in Cleveland, Ohio. The customer was represented at the hearing by Ms Gloria Strong, the owner of GPI Distributors, Inc. and her attorney, Ms. Deborah Coleman. In its appeal, the customer disputed sewer services charges that accrued between December 5, 2014 and June 18, 2015.

Report

The customer indicated that she had requested an administrative hearing because of the large sewer and water service charges she had received for her property at 5335 Dolloff Road. According to Ms. Strong, her combined charges for water and sewer service were more than \$20,000. NEORSD charges of \$12,047.76 were certified to the Cuyahoga County Fiscal Officer on October 15, 2016. Ms. Strong indicated that she had never had bills like those she was disputing. She claimed there was no water consumption at the house during the time period that the large bills occurred. Ms. Strong also indicated that the house, which is a rental property, was vacant at the time.

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The customer provided the following additional information:

- The house at 5335 Dolloff Road is a single family, three-bedroom residence.
- She thought someone would catch the “mistake” in billing.
- A plumber checked the property and indicated that there was no water service connection to the property.
- She first notified the NEORS D of her concerns with her bills in early 2015.
- She noticed that there was no water meter in the house.
- She has dealt with break-ins between tenants. The property was broken into in the July/August timeframe of 2014. There was no vandalism around the time that the charges being disputed accrued.

The customer’s attorney provided the following information:

- She claimed that the high bills occurred after the installation of the AMR meter.
- A white paper titled, *Factors for Water Billing Accuracy*.
- She noted that there had been an increase in complaints about water billing, after AMR meter installation.
- A newsnet5 article from February 15 and 16, 2017, indicating that incorrect programming of water meters can lead to elevated bills.

Michael McGing, NEORSD Manager of Billing Services and Systems indicated the following:

- NEORSD compares sewer charges to water charges. In this case, it confirmed that water and sewer service charges were billed for the same consumption.
- NEORSD believes the bills are calculated accurately.
- No water usage occurred after the two periods with the disputed charges.
- A letter was sent to the customer in January 2015 by the Cleveland Division of Water, which indicated that the AMR meter was showing a continuous increase in water usage.
- If the account is shown to have incorrect meter readings and the Division of Water makes adjustments to correct the customer's billing, NEORSD would make corresponding adjustments.

Amanda Holzhauser, NEORSD Assistant General Consul asked Ms. Strong if she had asked the Division of Water or the NEORSD to inspect the water meter at the house. Ms. Strong indicated that she had not. Ms. Strong also indicated that she did not have any repairs done to her water meter. Her first correspondence with the NEORSD regarding the sewer charges being contested was the letter from her attorney on April 5, 2017.

Ms. Coleman summarized by indicating that Ms. Strong's house at 5335 Dolloff is a small house that was empty and locked at the time the high sewer bills occurred. She believes it is inconceivable that 1.3

million gallons of water could be used during the time period when the high sewer bills occurred. Ms. Coleman requested that NEORS D correct its bills to Ms. Strong to reflect zero usage and that the NEORS D withdraw its certification of her account to the Cuyahoga County Fiscal Officer.

MR. McGing believes that NEORS D bills for Ms. Strong's property have been calculated accurately based on the information available. He indicated that NEORS D would have no objection to reducing charges if it can be shown that the water meter at Ms. Strong's property was functioning incorrectly at the time the elevated bills occurred.

Findings and Recommendations

The customer claims that her sewer bills for the time period between December 2014 and June 2015 were erroneous. She has presented no evidence to substantiate this, however. Based on the information available, the customer's sewer bills appear to be accurate. I recommend that the customer's dispute of its sewer bill be denied.

Respectfully submitted,

/s/Frank G. Foley

Frank G. Foley

7/21/17

Date

APPENDIX G

**COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA
Nailah K. Byrd, Clerk of Courts**

COA NO. 106806

[Filed on January 24, 2019]

GPI DISTRIBUTORS, INC.)
)
Appellant)
)
-vs-)
)
NORTHEAST OHIO REGIONAL)
SEWER DISTRICT)
)
Appellee)

**LOWER COURT NO.
CV-17-883825
CV-17-887300**

COMMON PLEAS COURT

MOTION NO. 523873

Journal Entry

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Motion by appellant for reconsideration or, in the alternative, to certify a conflict is denied.

Adm. Judge, Mary Eileen Kilbane, Concurs

Judge Mary J. Boyle, Concurs

Frank D. Celebrezze, Jr.
Judge

APPENDIX H

O.R.C. § 2505.06

2505.06 Bond for administrative-related appeal

Except as provided in section 2505.12 of the Revised Code, no administrative-related appeal shall be effective as an appeal upon questions of law and fact until the final order appealed is superseded by a bond in the amount and with the conditions provided in sections 2505.09 and 2505.14 of the Revised Code, and unless such bond is filed at the time the notice of appeal is required to be filed.

O.R.C. § 6119.06

6119.06 Rights, powers, and duties of district

Upon the declaration of the court of common pleas organizing the regional water and sewer district pursuant to section 6119.04 of the Revised Code and upon the qualifying of its board of trustees and the election of a president and a secretary, said district shall exercise in its own name all the rights, powers, and duties vested in it by Chapter 6119. of the Revised Code, and, subject to such reservations, limitations and qualifications as are set forth in this chapter, such district may:

- (A) Adopt bylaws for the regulation of its affairs, the conduct of its business, and notice of its actions;
- (B) Adopt an official seal;

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(C) Maintain a principal office and suboffices at such places within the district as it designates;

(D) Sue and plead in its own name; be sued and impleaded in its own name with respect to its contracts or torts of its members, employees, or agents acting within the scope of their employment, or to enforce its obligations and covenants made under sections 6119.09, 6119.12, and 6119.14 of the Revised Code. Any such actions against the district shall be brought in the court of common pleas of the county in which the principal office of the district is located, or in the court of common pleas of the county in which the cause of action arose, and all summonses, exceptions, and notices of every kind shall be served on the district by leaving a copy thereof at the principal office with the person in charge thereof or with the secretary of the district.

(E) Assume any liability or obligation of any person or political subdivision, including a right on the part of such district to indemnify and save harmless the other contracting party from any loss, cost, or liability by reason of the failure, refusal, neglect, or omission of such district to perform any agreement assumed by it or to act or discharge any such obligation;

(F) Make loans and grants to any person or political subdivisions for the design, acquisition, or construction of water resource projects by such person or political subdivisions and adopt rules, regulations, and procedures for making such loans and grants;

(G) Acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent

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to or from, or contract for operation by or for, a political subdivision or person, water resource projects within or without the district;

(H) Make available the use or service of any water resource project to one or more persons, one or more political subdivisions, or any combination thereof;

(I) Levy and collect taxes and special assessments;

(J) Issue bonds and notes and refunding bonds and notes as provided in Chapter 6119. of the Revised Code;

(K) Acquire by gift or purchase, hold, and dispose of real and personal property in the exercise of its powers and the performance of its duties under Chapter 6119. of the Revised Code;

(L) Dispose of, by public or private sale, or lease any real or personal property determined by the board of trustees to be no longer necessary or needed for the operation or purposes of the district;

(M) Acquire, in the name of the district, by purchase or otherwise, on such terms and in such manner as it considers proper, or by the exercise of the right of condemnation in the manner provided by section 6119.11 of the Revised Code, such public or private lands, including public parks, playgrounds, or reservations, or parts thereof or rights therein, rights-of-way, property, rights, easements, and interests as it considers necessary for carrying out Chapter 6119. of the Revised Code, but excluding the acquisition by the exercise of the right of condemnation of any waste water facility or water management facility owned by any person or political subdivision,

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and compensation shall be paid for public or private lands so taken;

(N) Adopt rules and regulations to protect augmented flow by the district in waters of the state, to the extent augmented by a water resource project, from depletion so it will be available for beneficial use, to provide standards for the withdrawal from waters of the state of the augmented flow created by a water resource project which is not returned to the waters of the state so augmented, and to establish reasonable charges therefor, if considered necessary by the district;

(O) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6119. of the Revised Code;

(P) Enter into contracts with any person or any political subdivision to render services to such contracting party for any service the district is authorized to provide;

(Q) Enter into agreements for grants or the receipt and repayment of loans from a board of township trustees under section 505.705 of the Revised Code;

(R) Make provision for, contract for, or sell any of its by-products or waste;

(S) Exercise the power of eminent domain in the manner provided in Chapter 6119. of the Revised Code;

(T) Remove or change the location of any fence, building, railroad, canal, or other structure or improvement located in or out of the district, and in

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case it is not feasible or economical to move any such building, structure, or improvement situated in or upon lands required, and if the cost is determined by the board to be less than that of purchase or condemnation, to acquire land and construct, acquire, or install therein or thereon buildings, structures, or improvements similar in purpose, to be exchanged for such buildings, structures, or improvements under contracts entered into between the owner thereof and the district;

(U) Receive and accept, from any federal or state agency, grants for or in aid of the construction of any water resource project, and receive and accept aid or contributions from any source of money, property, labor, or other things of value, to be held, used, and applied only for the purposes for which such grants and contributions are made;

(V) Purchase fire and extended coverage and liability insurance for any water resource project and for the principal office and suboffices of the district, insurance protecting the district and its officers and employees against liability for damage to property or injury to or death of persons arising from its operations, and any other insurance the district may agree to provide under any resolution authorizing its water resource revenue bonds or in any trust agreement securing the same;

(W)(1) Charge, alter, and collect rentals and other charges for the use of services of any water resource project as provided in section 6119.09 of the Revised Code. Such district may refuse the services of any of its projects if any of such rentals or other charges, including penalties for late payment, are not paid by

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the user thereof, and, if such rentals or other charges are not paid when due and upon certification of nonpayment to the county auditor, such rentals or other charges constitute a lien upon the property so served, shall be placed by the auditor upon the real property tax list and duplicate, and shall be collected in the same manner as other taxes.

(2) A district shall not certify to the county auditor for placement upon the tax list and duplicate and the county auditor shall not place upon the tax list or duplicate as a charge against the property the amount of unpaid rentals or other charges including any penalties for late payment as described in division (W)(1) of this section if any of the following apply:

(a) The property served has been transferred or sold to an electing subdivision as defined in section 5722.01 of the Revised Code, regardless of whether the electing subdivision is still the owner of the property, and the unpaid rentals or other charges including penalties for late payment have arisen from a period of time prior to the transfer or confirmation of sale to the electing subdivision.

(b) The property served has been sold to a purchaser at sheriff's sale or auditor's sale, the unpaid rentals or other charges including penalties for late payment have arisen from a period of time prior to the confirmation of sale, and the purchaser is not the owner of record of the property immediately prior to the judgment of foreclosure nor any of the following:

(i) A member of that owner's immediate family;

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(ii) A person with a power of attorney appointed by that owner who subsequently transfers the property to the owner;

(iii) A sole proprietorship owned by that owner or a member of that owner's immediate family;

(iv) A partnership, trust, business trust, corporation, or association of which the owner or a member of the owner's immediate family owns or controls directly or indirectly more than fifty per cent.

(c) The property served has been forfeited to this state for delinquent taxes, unless the owner of record redeems the property.

(3) Upon valid written notice to the county auditor by any owner possessing an ownership interest of record of the property or an electing subdivision previously in the chain of title to the property that the unpaid water rents or charges together with any penalties have been certified for placement or placed upon the tax list and duplicate as a charge against the property in violation of division (W)(2) of this section, the county auditor shall promptly remove such charge from the tax duplicate. This written notice to the county auditor shall include all of the following:

(a) The parcel number of the property;

(b) The common address of the property;

(c) The date of the recording of the transfer of the property to the owner or electing subdivision;

(d) The charge allegedly placed in violation of division (W)(2) of this section.

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(4) When title to property is transferred to a county land reutilization corporation, any lien placed on the property under this division shall be extinguished, and the corporation shall not be held liable for any rentals or charges certified under this division with respect to the property, if the rentals or charges were incurred before the date of the transfer to the corporation and if the corporation did not incur the rentals or charges, regardless of whether the rentals or charges were certified, or the lien was attached, before the date of transfer. In such a case, the corporation and its successors in title shall take title to the property free and clear of any such lien and shall be immune from liability in any collection action brought with respect to such rentals or charges. If a lien placed on property is extinguished as provided in this division, the district shall retain the ability to recoup the rents and charges incurred with respect to the property from any owner, tenant, or other person liable to pay such rents and charges before the property was transferred to the corporation.

(X) Provide coverage for its employees under Chapters 145., 4123., and 4141. of the Revised Code;

(Y) Merge or combine with any other regional water and sewer district into a single district, which shall be one of the constituent districts, on terms so that the surviving district shall be possessed of all rights, capacity, privileges, powers, franchises, and authority of the constituent districts and shall be subject to all the liabilities, obligations, and duties of each of the constituent districts and all rights of creditors of such constituent districts shall be preserved unimpaired,

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limited in lien to the property affected by such liens immediately prior to the time of the merger and all debts, liabilities, and duties of the respective constituent districts shall thereafter attach to the surviving district and may be enforced against it, and such other terms as are agreed upon, provided two-thirds of the members of each of the boards consent to such merger or combination. Such merger or combination shall become legally effective unless, prior to the ninetieth day following the later of the consents, qualified electors residing in either district equal in number to a majority of the qualified electors voting at the last general election in such district file with the secretary of the board of trustees of their regional water and sewer district a petition of remonstrance against such merger or combination. The secretary shall cause the board of elections of the proper county or counties to check the sufficiency of the signatures on such petition.

(Z) Exercise the powers of the district without obtaining the consent of any other political subdivision, provided that all public or private property damaged or destroyed in carrying out the powers of the district shall be restored or repaired and placed in its original condition as nearly as practicable or adequate compensation made therefor by the district;

(AA) Require the owner of any premises located within the district to connect the owner's premises to a water resource project determined to be accessible to such premises and found to require such connection so as to prevent or abate pollution or protect the health and property of persons in the district. Such connection

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shall be made in accordance with procedures established by the board of trustees of such district and pursuant to such orders as the board may find necessary to ensure and enforce compliance with such procedures.

(BB) Do all acts necessary or proper to carry out the powers granted in Chapter 6119. of the Revised Code.

APPENDIX I

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

CASE NO: 17 CV 887300

JUDGE Nancy A. Fuerst

[Filed November 28, 2017]

GPI DISTRIBUTORS, INC.,)
)
 Appellant,)
)
 vs.)
)
 NORTHEASTERN OHIO)
 REGIONAL SEWER)
 DISTRICT,)
)
 Appellee.)

**APPELLANT GPI DISTRIBUTORS, INC.'S
BRIEF IN OPPOSITION TO DEFENDANT
NORTHEAST OHIO REGIONAL SEWER DISTRICT'S
MOTION TO DISMISS**

INTRODUCTION

Appellant GPI Distributors (“GPI”) appeals the decision of Appellee Northeastern Ohio Regional Sewer District (“NEORS”), which held a procedurally unfair

and biased hearing and — unsurprisingly — rejected GPI’s challenge to excessive sewer charges. NEORS D now seeks dismissal of GPI’s appeal because GPI filed no supersedeas bond under R.C. 2505.06. But GPI could not afford to post a bond, and — as the United States Supreme Court has held — depriving it of a meaningful opportunity to be heard solely on that basis would violate its right to due process and equal protection under the United States and Ohio Constitutions. Constitutional issues aside, the statute did not require GPI to post a bond in this case. And finally, even if the bond requirement were both constitutional and required, the absence of a bond does not affect GPI’s right to pursue this appeal on issues of law.

BACKGROUND

NEORS D adopted Resolution 240-17 on September 21, 2017, rejecting GPI’s challenge to its sewer bills for the real property located at 5335 Dolloff Road (“the Property”) from December 2014 to June 2015. (9/12/17 Resolution and Recommendation, attached as Exhibit A (the “Resolution”). Those sewer bills were based on the supposed consumption of **1.3 million gallons of water** at the Property even though the Property was vacant and locked for the entire six-month period in question. (*See id.*) NEORS D’s bills rely on the measurement of water consumption by the Division of Water of the City of Cleveland Department of Public Utilities (“City Division of Water”).

The Resolution followed a July 2017 administrative hearing conducted by Frank Foley, who presented

himself as NEORSD’s “hearing examiner” (Transcript¹ at 4) but whose actual title is NEORSD’s Director of Operation and Maintenance.² Mr. Foley is part of NEORSD’s governing leadership and therefore has a fiduciary obligation to further NEORSD’s mission, which includes the goal to “[e]nhance District revenue” and improve NEORSD’s financial status. (See NEORSD’s 2016-2018 Strategic & Operational Action Plan.³) But Mr. Foley did not disclose his affiliation with NEORSD to GPI before or at the administrative hearing. (Coleman Aff.,⁴ ¶ 7.) And not surprisingly, Mr. Foley recommended that NEORSD deny GPI’s request for relief from the excessive sewer bills. (Resolution.) Also not surprisingly, NEORSD’s Board of Trustees subsequently adopted the Resolution, which states, in its entirety:

Adopting the findings of the Hearing Officer
with regard to the sewer account of GPI

¹“Transcript” refers to the transcript of the administrative hearing at NEORSD, held on July 12, 2017, and filed with the Court by NEORSD on November 14, 2017.

² See NEORSD’s website, <https://www.neorsd.org/about/trustees-and-directors>.

³ NEORSD’s 2016-2018 Strategic & Operational Action Plan is available online at https://www.neorsd.org/I_Library.php?SOURCE=library/strategic_plan_2016_for_employees_one_up_2_web.pdf&a=download_file&LIBRARY_RECORD_ID=7193. A copy is also attached as Exhibit B.

⁴ “Coleman Aff.” refers to the Affidavit of Deborah A. Coleman, dated November 27, 2017 (attached as Exhibit C).

Distributors, Inc.; Sewer District Case No. 17-006.

(Id.)

GPI filed a notice of appeal with NEORS D on October 12, 2017, on questions of law and fact. The Court rejected GPI's request for an order relieving it of the obligation to post a supersedeas bond under. (*See* 10-19-17 Journal Entry.)

GPI could not afford to post the supersedeas bond (Strong Aff.,⁵ ¶ 4) and therefore did not do so. NEORS D has now moved to dismiss GPI's appeal for lack of jurisdiction.

LAW AND ARGUMENT

I. THE COURT SHOULD DENY NEORS D'S MOTION TO DISMISS BECAUSE THE BOND REQUIREMENT OF R.C. 2505.06 IS UNCONSTITUTIONAL.

The Court should deny NEORS D's motion to dismiss because the basis of NEORS D's motion, the bond requirement of R.C. 2505.06, violates GPI's right to due process and equal protection under the United States and Ohio Constitutions.

A. The Bond Requirement of R.C. 2505.06 Violates Due Process.

R.C. 2505.06 provides that "no administrative-related appeal shall be effective as an appeal upon

⁵ "Strong Aff." refers to the Affidavit of Gloria Strong, dated November 27, 2017 (attached as Exhibit D).

questions of law and fact until the final order appealed is superseded by a bond.” This bond requirement violates the due-process clause of the United States Constitution and the due-course-of-law clause of the Ohio Constitution⁶ because it deprives indigent litigants of their constitutional right of access to the judicial system solely on the basis of their inability to pay.

1. Due Process Requires a Meaningful Opportunity to Be Heard.

Ohio’s Open Courts Amendment (Article I, Section 16 of the Ohio Constitution) requires access to the courts “for every person with a right to a remedy for injury to his person, property or reputation, with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner.” *Sedar v. Knowlton Constr. Co.*, 49 Ohio St.3d 193, 199, 551 N.E.2d 938 (1990).⁷ That right applies to the “process of appellate review,” because “litigants [have] a property interest in the right to appeal.” *Atkinson v. Grunman Ohio Corp.*, 37 Ohio St.3d 80, 85, 523 N.E.2d 851 (1988). The “opportunity to be heard” is the most

⁶ Ohio equates the due-course-of-law clause in Article I, Section 16 of the Ohio Constitution with the due-process clause of the Fourteenth Amendment to the United States Constitution. *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 14. For simplicity’s sake, GPI refers to “due process” throughout this brief to refer to both.

⁷ *Sedar* was overruled on other grounds by *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 1994-Ohio-322, 639 N.E.2d 425 (1994). But the proposition for which GPI relies on *Sedar* remains good law.

important of due-process guarantees. *United Tel. Credit Union, Inc. v. Roberts*, 115 Ohio St.3d 464, 2007-Ohio-5247, 875 N.E.2d 927, ¶ 13. The legislature may place restrictions on court access, but such restrictions should not limit “the party’s right to be heard.” See *Coburn v. Auto-Owners Ins. Co.*, 189 Ohio App.3d 322, 2010-Ohio-3327, 938 N.E.2d 400, 1 52 (10th Dist.).

The right to be heard is also established in federal law as a constitutional right. See Fourteenth Amendment to the U.S. Constitution, Section 1. The United States Supreme Court has interpreted the right to be heard as a duty upon the government to utilize a fair process when the government threatens a person’s property. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Like the Ohio Constitution, the U.S. Constitution requires the opportunity to be heard to be meaningful. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). This Constitutional guarantee prevents the legislature from empowering the government to be able to deprive a person of a property interest without due process. *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).

2. The Bond Requirement of R.C. 2505.06 Deprives Low-Income Litigants of a Meaningful Opportunity to Be Heard.

The bond requirement of R.C. 2505.06 directly violates GPI’s right to be heard. The NEORS administrative hearing was not a meaningful opportunity to be heard because the hearing was conducted by a biased decision maker and because the NEORS process did not permit GPI to present all

available evidence to support its challenge. As a result, this appeal is GPI's only meaningful opportunity to be heard, and the bond requirement stands as an unconstitutional barrier.

a. The NEORSD Hearing Is Not Meaningful Because the Hearing Officer Is Not Impartial or Legally Trained.

Due process requires that GPI receive an administrative hearing before an impartial tribunal and an unbiased judge. *Staschak v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 03AP-799, 2004-Ohio-4650, ¶ 40; *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997). An individual can challenge a hearing as violative of this aspect of due process by showing that the decision maker held personal bias towards the individual *or* that the decision maker was not impartial. *Staschak* at ¶ 42.

Mr. Foley, the Director of Operations and Maintenance at NEORSD who conducted the hearing in this case, is a high-ranking NEORSD employee — one of ten individuals identified as NEORSD's "leadership" on its website. But the U.S. Supreme Court has long recognized that " 'no [person] is permitted to try cases where he has an interest in the outcome.' " *Williams v. Pennsylvania*, — U.S. —, 136 S.Ct. 1899, 1906, 195 L.Ed.2d 132 (2016), quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

Mr. Foley decided GPI's challenge in NEORSD's favor, asserting that GPI had presented no evidence to

substantiate the billing dispute. But GPI *did* offer evidence. For example, its owner, Gloria J. Strong, testified that the property had been vacant during the time the excessive billing occurred. (Transcript at 16.) GPI also offered a letter from the City Division of Water to GPI indicating that a new “AMR” water meter had been installed before January 2015, around the start of the first billing period reflecting abnormally high charges. (Exhibit 1 to Transcript; Transcript at 17.) GPI also offered a report by the City’s prime contractor for the new meter installation entitled “Factors in Water Billing Accuracy” that identified all of the ways that errors in the selection, installation, or use of AMR water meters can produce billing errors. (Exhibit (unmarked) to Transcript; Transcript at 17.) Mr. Foley’s failure even to acknowledge GPI’s evidence reveals his predisposition to find in favor of the entity to which he owes a duty of loyalty and a specific obligation to help “[e]nhance * * * revenue.” (See NEORS’s 2016-2018 Strategic & Operational Action Plan.) He was not in position to, and did not, afford GPI the impartial hearing to which GPI was entitled.

There is also nothing in Mr. Foley’s background, at least insofar as his biography on the NEORS website is concerned, to suggest that he has a law degree, much less judicial experience. A search on the Ohio Supreme Court’s website⁸ reveals no licensed attorney by that name. But “[a]ccess to a legally-trained judge at some stage of the adjudicatory process would appear to be an especially compelling safeguard in our complex contemporary legal system.” *Lecates v. Justice of Peace*

⁸ See <https://www.supremecourt.ohio.gov/attorneysearch/#/search>.

Court No. 4 of State of Del., 637 F.2d 898, 911 (3d Cir.1980). Without an administrative appeal, then, GPI cannot receive the due process that comes only from a proceeding managed by a judicial officer.

b. The NEORSD Hearing Process Affords No Ability to Develop and Present an Adequate Record.

“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970); *State v. Patton*, 8th Dist. No. 103737, 2016-Ohio-4867, 68 N.E.3d 273, ¶ 8. In this case, GPI did not receive the opportunity to confront its opposing witnesses or develop a complete factual record and therefore did not receive due process.

At the administrative hearing, the NEORSD witness relied on his belief that the City’s measurements of water consumption were correct — that is, on hearsay. (Transcript at 9-20.) GPI’s counsel did not have the opportunity to develop and present evidence that would have supported GPI’s challenge — particularly evidence from the City Division of Water, which measures the water usage that in turn drives NEORSD’s sewer charges. (*Id.* at 29.) In theory, GPI should have been able to present this type of evidence; Rule 4.4 of NEORSD’s Rules of Procedure ostensibly provides a mechanism for securing it.⁹ But NEORSD

⁹ Rule 4.4 of the Rules of Procedure for Administrative Determinations Made by the Northeast Ohio Regional Sewer

denied GPI's pre-hearing request to secure those relevant records. (Coleman Aff., ¶ 8 and Exhibit 2 thereto.) Moreover, no representative of the City testified at the hearing, and NEORSD's Rules of Procedure provided GPI's counsel no means to summon a representative of the City or compel the production of relevant documents. (*Id.* at ¶ 9.) If NEORSD had required the City to produce the requested documents or provided a means for GPI's counsel to compel the City to testify or produce documents, she might have been able to submit evidence sufficient to show that NEORSD's sewer charges were based on inflated and erroneous water usage data. (*Id.* at ¶ 10-11.)

3. An Administrative Appeal Would Remedy These Procedural Defects.

Although GPI was not granted an impartial tribunal or the opportunity to establish an adequate record, this appeal would (and should) serve as the corrective measure. An administrative appeal would allow GPI to be heard by an impartial tribunal and

District (copy attached as Exhibit 1 to Coleman Aff.) provides:

Securing Witnesses and Documents; Special Investigations
- The production of books, papers and other documents, files and records, may be required by the Board of Trustees or Appeals Board, if deemed necessary, to present fully and adequately any issue to be determined. Whenever an investigation or other examination is necessary to fully and adequately present any issue to be determined in a case, the Board of Trustees or Appeals Board shall require or authorize that same be made and the findings submitted into evidence.

afford GPI the ability to conduct discovery and to call and confront witnesses.

Indeed, Ohio statutory law, R.C. 2506.03(B), explicitly allows the parties to present new evidence and testimony when, as here, the transcript of the administrative hearing reflects an inadequate procedure. A hearing is defective when the appellant is not able to present evidence due to a lack of subpoena power of the administration or if the appellant is unable to cross-examine adverse witnesses. R.C. 2506.03(A)(2)(b), (A)(2)(c), and (A)(4). These deficiencies are apparent in this matter, so GPI has the statutory right to supplement the original transcript with additional evidence in this appeal. Confining that right to individuals who can afford to pay the requisite bond conflicts with the due-process protections that the General Assembly saw fit to incorporate into the statutory appeal process.

4. Other Jurisdictions Have Recognized that Similar Statutory Bond Requirements Interfered with Due Process.

While GPI is aware of no Ohio court considering the due-process issue that GPI raises here, the courts of other states have addressed the issue and held that a statute requiring a bond is unconstitutional when “it deprives the plaintiff of due process and * * * open access to the courts.” *See Detraz v. Fontana*, 416 So.2d 1291, 1296 (La.1982). A Michigan court of appeals has held that a bond requirement deprived a claimant of a property interest without being given an opportunity to be heard, specifically because the claimant was unable

to afford the required bond. *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich. App. 562, 579-80, 892 N.W.2d 388 (2016). The Florida Supreme Court has also held that a statutory bond requirement violates due process because the requirement arbitrarily cuts off an indigent litigant's right to be heard. *Psych. Assocs. v. Siegel*, 610 So.2d 419, 426 (Fla.1992).

Because GPI will have no meaningful hearing on its legitimate challenge to the excessive NEORSD sewer charges in the absence of this appeal, the Court should find that the bond requirement of R.C. 2505.06 violates due process to the extent it conditions this Court's appellate jurisdiction on the posting of that bond, and it should therefore deny NEORSD's motion to dismiss.

B. The Bond Requirement of R.C. 2505.06 Violates Equal Protection.

The bond requirement imposed by R.C. 2505.06 also violates the equal-protection clauses of the United States and Ohio Constitutions because it draws arbitrary lines between litigants based on economic status without rational basis and based on the type of appeal. See Fourteenth Amendment to the U.S. Constitution, Section 1; Ohio Constitution, Article I, Section 2.

A statute violates equal protection if it discriminates against an individual because of indigent status. *Strattman v. Studt*, 20 Ohio St.2d 95, 101-102, 253 N.E.2d 749 (1969). The United States Supreme Court has held that a statutory bond requirement as a predicate to appeal violates equal protection; “[w]hen

an appeal is afforded, * * * it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.” *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972); see also *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 421 (Ky.2005) (holding that a statute requiring certain appellants to pay an added penalty if Kentucky Supreme Court denied discretionary review violated the equal-protection clauses of both the Kentucky and United States Constitutions); *Murphy v. Commr. of Dept. of Indus. Accidents*, 415 Mass. 218, 233, 612 N.E.2d 1149 (1993) (holding that a filing fee for represented parties — but not pro se parties — to challenge an administrative judge’s denial of worker-compensation benefits violated both the Massachusetts and United States Constitutions). The *Lindsey* Court recognized that a bond requirement can inflict particular “discrimination against the poor” because for them, “as a practical matter, appeal is foreclosed, no matter how meritorious their case may be.” *Id.* at 79.

In *Lindsey*, the Court invalidated an Oregon statute that required tenants who wished to appeal an eviction to post a bond equivalent to “twice the rental value of the premises.” *Id.* at 75-76. While the statute in *Lindsey* required a double bond, the size of the bond was not the issue that drove the Court to invalidate the statute. Instead, the Court struck down the bond requirement because it discriminated unfairly against the poor in actions for forcible entry and detainer. The Court in particular noted the distinction between the bond requirement that tenants had to satisfy simply in order to appeal and an Oregon statute that conditioned

a “stay of execution” upon the posting of a bond. *See id.* at 75. In essence, the Court recognized an important difference between a **stay bond** and an **appeal bond**; the former is a reasonable accommodation to a judgment winner as consideration for foregoing the right of immediate execution, but the latter is an unreasonable and unconstitutional limitation on the very right of access to appellate review.

Indeed, the Third Circuit explicitly recognized this distinction in *Lecates*. The court in *Lecates* held that a state “cannot erect an absolute requirement, such as a surety bond, that serves to deny a defendant access to these constitutional protections solely because he is indigent.” 637 F.2d at 911. But the court recognized the state’s legitimate interest in protecting a judgment; “to the extent the state wishes to protect a plaintiff’s judgment, it can separate the right of appeal from the bond requirement by imposing a bond only when the defendant desires a stay of execution pending appeal.” *Id.* at 911.

In this case, Ohio law provides judgment winners with protection by conditioning the right to a stay of execution pending appeal on the posting of an adequate supersedeas bond, just as the *Lecates* court held was proper. *See* R.C. 2505.09; Civ.R. 62(B). But R.C. 2505.06 also imposes a different kind of bond — one that locks the courthouse doors entirely to anyone who cannot afford to post it, just as the Court in *Lindsey* and the Third Circuit in *Lecates* held was unconstitutional. This bond requirement works a particular injustice on those appellants like GPI that cannot afford it, just as *Lindsey* and its progeny forbid.

And it imposes that requirement only on administrative appeals, not on appeals that emanate from trial-court proceedings, an arbitrary distinction that *Lindsey* and its progeny also forbid. The Court should therefore find that the bond requirement of R.C. 2505.06 unconstitutionally inhibits GPI's right to equal protection under the United States and Ohio Constitutions and, for that reason, GPI need not have posted a bond to secure this Court's appellate jurisdiction, and the Court should deny NEORS's motion.

II. THE COURT SHOULD DENY NEORS'S MOTION TO DISMISS BECAUSE R.C. 2505.06 DID NOT REQUIRE GPI TO POST A BOND.

The Court should hold that GPI is not required to post a supersedeas bond at all for two independent reasons: (A) this appeal falls within the bond exception codified at R.C. 2505.12(B); and (B) NEORS already has a lien on the Property and therefore needs no further protection.¹⁰

R.C. 2505.12(B) provides that an appellant is not required to post a supersedeas bond in connection with “[a]n administrative-related appeal of a final order that is not for the payment of money.” The Eighth District has held that “a supersedeas bond under R.C. 2505.06 ‘relates to a judgment rendered by a trial court for money damages.’” *Wenneman v. Cleveland Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 62390, 1992

¹⁰ GPI recognizes that the Court has already rejected GPI's arguments as set forth in this section of its brief. GPI reasserts these arguments in order to preserve them for appellate review.

WL 25311, *2 (Feb. 13, 1992), quoting *Mahoney v. Berea*, 33 Ohio App.3d 94, 96, 514 N.E.2d 889 (8th Dist.1986).

In this case, there is no NEORS D order requiring GPI to pay money. There is likewise no trial-court judgment against GPI for money damages. As a result, R.C. 2505.12(B) governs, and no supersedeas bond is required to perfect GPI's appeal under R.C. 2505.06.

In addition, NEORS D has already secured the only interest that is at stake by obtaining a lien on the Property. The Property is valued at \$16,000 (*see* Property Valuation, attached as Exhibit D), in excess of the challenged sewer bills, which amount to \$12,047.76. (*See* Resolution.) Even accounting for interest, the lien is more than sufficient to secure the only interest that NEORS D has at stake related to this proceeding.¹¹

III. THE COURT SHOULD DENY NEORS D'S MOTION TO DISMISS BECAUSE GPI'S APPEAL ON QUESTIONS OF LAW DOES NOT REQUIRE A BOND.

If the Court finds that the bond requirement of R.C. 2505.06 is constitutional and that GPI was required to

¹¹ Interest rates are set forth in R.C. 1343.03(A) and R.C. 5703.47. For the years in question, the interest rates have been three percent, or \$361.43 per year, except for 2017, when they went up to four percent, or \$481.91. *See* http://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx. The property value is sufficiently in excess of the disputed sewer bills and several years of continued interest accrual to justify a finding that no supersedeas bond is necessary.

comply with it, it should still deny NEORSD's motion, because GPI's appeal may still go forward on issues of law.

The statute by its own terms applies only to "an appeal on questions of law and fact." *Id.* And the Eleventh District has held that "when the lack of a supersedeas bond deprives the common pleas court of the authority to go forward on questions of both law and fact, the appeal ***proceeds on questions of law alone*** if the nature of the questions of law are such that they can be decided without a fact appeal." (Emphasis added.) *Salida Invest. Group v. Lake Cty. Util. Dept.*, 11th Dist. Lake No. 2015-L-004, 2015-Ohio-5066, 53 N.E.3d 857, 860, ¶ 24. The Second District has come to a similar conclusion. *See Liberty Sav. Bank v. Kettering*, 101 Ohio App.3d 446, 449, 655 N.E.2d 1322 (2d Dist.1995).

The Eighth District reached a contrary result in *Ballado v. Cleveland Heights*, 76 Ohio App.3d 497, 499, 602 N.E.2d 394 (8th Dist.1991). But *Ballado* is an older case that engaged in only a cursory analysis of the issue. The better-reasoned decisions of the Eleventh and Second Districts should guide the Court's decision in this case.

CONCLUSION

For the reasons stated herein, GPI respectfully requests that the Court deny NEORSD's motion to dismiss.

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Respectfully submitted,

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Attorneys and Legal Interns for
Plaintiff GPI Distributors

DATED: November 28, 2017
CV-3792-PLDG-171128-Brief in Opposition to
NEORSD's Motion to Dismiss.

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* * *

*[Proof of Service Omitted in the Printing
of this Appendix]*

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

Case No: CV 887300

Judge Nancy A. Fuerst

[Filed November 28, 2017]

_____)
GPI DISTRIBUTORS, INC.,)
)
Appellant,)
)
vs.)
)
NORTHEASTERN OHIO)
REGIONAL SEWER)
DISTRICT,)
)
Appellee.)
_____)

AFFIDAVIT OF GLORIA J. STRONG

STATE OF OHIO)
)ss:
COUNTY OF CUYAHOGA)

Gloria J. Strong, being duly sworn, deposes and states that the following facts are true to the best of her knowledge and belief.

1. I am the sole owner of GPI Distributors, Inc. ("GPI"), an Ohio corporation, which is the Plaintiff in this case.

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2. GPI owns the premises located at 5335 Dolloff Road, Cleveland, Ohio 44127 (PPN 131-22-010) (the "Property").

3. This case is an appeal from an adverse decision by NEORSB with respect to bills totaling \$12,040.86 for sewer services allegedly provided the Property during approximately six months ending June 8, 2015, a period during which the Property was locked, secured and vacant.

4. GPI cannot afford to post a supersedeas bond in the amount of \$12,040.86 or \$12,047.76 as required by this court.

5. GPI's expenses for its properties have exceeded rental income for many years, even without taking into account the sewer bills described above and the related water bills. GPI has had no other source of income for many years.

6. Further affiant sayeth not.

/s/Gloria J. Strong
Gloria J. Strong

Sworn to before me and subscribed in my presence this 27 day of November, 2017.

/s/Deborah A. Coleman
Notary Public

CV-3792-171127-PLDG-171128-Affidavit of Gloria Strong

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APPENDIX J

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

CASE NO: CV 17 887300

JUDGE NANCY MARGARET RUSSO

[Filed October 12, 2017]

GPI DISTRIBUTORS, INC.,)
)
 Appellant,)
)
 vs.)
)
 NORTHEASTERN OHIO)
 REGIONAL SEWER)
 DISTRICT,)
)
 Appellee.)

**APPELLANT GPI DISTRIBUTORS, INC.'S
AMENDED MOTION FOR DETERMINING
THAT NO SUPERSEDEAS BOND IS
NECESSARY TO PERFECT
NOTICE OF APPEAL**

EXPEDITED RULING REQUESTED

Plaintiff GPI Distributors, Inc. (“GPI”) hereby moves the Court under App.R. 7(B) for an **expedited**

determination and a ruling issued by October 19, 2017, that a supersedeas bond is not required in order to perfect its administrative-related appeal in accordance with R.C. 2505.06. A supersedeas bond is not required because 1) no judgment for money damages was entered by the administrative agency; and 2) the agency has already obtained a lien to secure the only interest it has at stake in this proceeding. Alternatively, GPI moves for an order setting a nominal cash-deposit amount of \$50 in lieu of a supersedeas bond.

BACKGROUND

Appellee Northeast Ohio Regional Sewer District (“NEORSD”) adopted Resolution 240-17 on September 21, 2017, rejecting GPI’s challenge to its sewer bills for the real property located at 5335 Doloff Road (“the Property”) from December 2014 to June 2015. (Resolution and Recommendation, attached as Exhibit A). Those sewer bills were based on the supposed consumption of **1.3 million gallons of water** at the Property, even though the Property was vacant and locked for the entire six-month period in question. (*See id.*)

NEORSD’s director of operation and maintenance held a hearing in July 2017 and found against GPI. NEORSD’s Board of Trustees subsequently adopted the Resolution, which states, in its entirety:

Adopting the findings of the Hearing Officer with regard to the sewer account of GPI Distributors, Inc.; Sewer District Case No. 17-006.

(*Id.*) Neither the Recommendation nor the Resolution orders GPI to a pay money.

Under R.C. 2505.07, GPI's notice of appeal to this Court was due 30 days from the date of NEORSD's order. Although GPI believes the 30-day period began to run on the date NEORSD mailed the Resolution to GPI (September 28, 2017), it is possible that the period began to run on the date of the Resolution itself (September 21, 2017).

GPI filed a notice of appeal with NEORSD on October 12, 2017, well before the 30-day period could possibly have run. GPI filed a copy of that notice with this Court on that same date. GPI's appeal is on questions of law and fact. In certain circumstances, an appeal on questions of law and fact must be superseded by a bond that is "filed at the time the notice of appeal is required to be filed." R.C. 2505.06.

As explained below, GPI does not believe it is required to post a supersedeas bond. But if it is, it must do so by the end of the 30-day time to appeal — potentially as early as October 21, 2017. *See Bell v. Richmond Heights Equalization Bd.*, 8th Dist. Cuyahoga No. 66404, 1994 WL 652837, *4 (Nov. 17, 1994). Thus, GPI requires an ***expedited ruling*** on this motion by October 19, 2017, in order ensure that it does not compromise its right of appeal.¹

¹ GPI believes the *Bell* case is wrongly decided. It makes absolutely no sense for an appellant in an administrative appeal to have to obtain approval for and post a supersedeas bond within the same 30-day period that R.C. 2505.07 provides for it to appeal. As a practical matter, the Court cannot set or approve a bond until it

LAW AND ARGUMENT

I. THE COURT SHOULD HOLD THAT GPI IS NOT REQUIRED TO POST A SUPERSEDEAS BOND.

The Court should hold that GPI is not required to post a supersedeas bond at all for two independent reasons: (A) this appeal falls within the bond exception codified at R.C. 2505.12(B); and (B) NEORSD already has a lien on the Property and therefore needs no further protection.

A. This Appeal Involves No Order for Payment of Money, so R.C. 2505.12(B) Excuses GPI of any Bond Requirement.

R.C. 2505.12(B) provides that an appellant is not required to post a supersedeas bond in connection with “[a]n administrative-related appeal of a final order that is not for the payment of money.” The Eighth District Court of Appeals has held that “a supersedeas bond under R.C. 2505.06 ‘relates to a judgment rendered by a trial court for money damages.’” *Wenneman v.*

first acquires jurisdiction, so the timing set forth in *Bell* has an Alice-in-Wonderland quality; it would necessarily require an appellant to file the appeal well in advance of the 30-day deadline (as GPI has done here) in order to obtain the necessary Court approval of the bond. Thus, if the Court does not rule on this motion in time to permit GPI to post any necessary bond by the end of the 30-day deadline, it reserves its right to challenge on further appeal any dismissal of this appeal as a consequence of failing to meet the statutory bond requirement, including on the basis that such a result would violate GPI’s due-process/due-course-of-law rights under the U.S. and Ohio Constitutions.

Cleveland Bd. of Zoning Appeals, 8th Dist. Cuyahoga No. 62390, 1992 WL 25311, *2 (Feb. 13, 1992), quoting *Mahoney v. Berea*, 33 Ohio App.3d 94, 96, 514 N.E.2d 889 (8th Dist.1986).

In this case, NEORS D assessed no damages, and—as in *Wenneman* — there is no NEORS D order requiring GPI to pay money. There is likewise no trial-court judgment against GPI for money damages. As a result, R.C. 2505.12(B) governs, and no supersedeas bond is required to perfect GPI’s appeal under R.C. 2505.06.

B. This Appeal Involves No Order for Payment of Money, so R.C. 2505.12(B) Excuses GPI of any Bond Requirement.

Even if the Resolution required the payment of money, NEORS D’s interests are adequately protected by the lien it placed on GPI’s property. NEORS D certified its assessment of delinquent sewer charges to the Cuyahoga County Fiscal Officer. Under R.C. 6119.06(W)(1) this certified assessment “constitutes a lien upon the property.” (See Exhibit B.)

R.C. 2505.09 does not set a specific bond amount required to perfect notice of an administrative-related appeal but states that the bond should have “sufficient sureties.” In the case of an administrative-related appeal where a stay of judgment is not the purpose of the bond, an appeal bond serves its purpose “if the [appellee] had an interest at stake that could be lost or squandered by the appellant during [the] appeal.” *Bell*, 1994 WL 652837, at *4, citing *Mahoney* 33 Ohio App.3d at 96. And courts have held that the “sufficient

sureties” language of R.C. 2505.09 “can reasonably be construed to mean no bond at all, if the trial court felt that none was necessary.” *Irvine v. Akron Beacon Journal*, 147 Ohio App.3d 428, 2002-Ohio-2204, 770 N.E.2d 1105, ¶ 108 (9th Dist.) (“An ‘adequate supersedeas bond’ could reasonably be construed to mean no bond at all, if the trial court felt that none was necessary * * *”).

In this case, no bond is necessary because NEORS D has already secured the only interest that is at stake by obtaining a lien on the Property. The Property is valued at \$16,100 (*see* Exhibit C), in excess of the challenged sewer bills, which amount to \$12,047.76. (*See* Exhibit A.) Even accounting for the accrual of statutory interest, the lien suffices to secure the potential interest that NEORS D has at stake related to this proceeding.²

II. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THAT A NOMINAL CASH DEPOSIT IS ADEQUATE SECURITY.

If the Court determines that some amount of security is required, it should order a nominal amount that GPI can reasonably afford, such as \$50.00.

² Interest rates are set forth in R.C. 1343.03(A) and R.C. 5703.47. For the years in question, the interest rates have been three percent, or \$361.43 per year, except for 2017, when they went up to four percent, or \$481.91 per year. *See* http://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx. The property value is sufficiently in excess of the disputed sewer bills and several years of continued interest accrual to justify a finding that no supersedeas bond is necessary.

R.C. 2505.11 states that “[i]n any appeal, in lieu of filing a supersedeas bond, an appellant may deposit an amount of money equal to that specified for the bond” with the clerk of courts. Because the interest at stake in the suit has already been secured with a lien, as discussed above, a bond is not necessary to secure NEORS’s interests during the pendency of the appeal. *See Bell*, 1994 WL 652837, at *4.

The Court has discretion to set a bond for an amount that is less than the total amount of the fees assessed against GPI. In *Bell*, for example, this Court allowed the appellants to post a \$50 bond to satisfy the supersedeas-bond requirement even though the agency had assessed thousands of dollars of fines against them. *Bell*, 1994 WL 652837, at *4; *see also Irvine*, 2002-Ohio-2204, at ¶ 108. It is well within this Court’s discretion to permit GPI’s request to pay a nominal cash deposit with the Clerk in lieu of a bond. *See Sergi v. Sergi*, 9th Dist. Summit No. 17550, 1996 WL 233492, *3 (May 8, 1996).

CONCLUSION

For these reasons, GPI requests an expedited order excusing it from posting a supersedeas bond or, in the alternative, setting a nominal cash-deposit amount in lieu of a supersedeas bond.

Respectfully submitted,

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APPENDIX K

IN THE SUPREME COURT OF OHIO

CASE No. 2019-0352

[Filed March 11, 2019]

GPI DISTRIBUTORS, INC.,)
)
Appellant,)
)
v.)
)
NORTHEAST OHIO REGIONAL)
SEWER DISTRICT,)
)
Appellee.)

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE No. CA-18-106806

**MEMORANDUM IN SUPPORT OF
JURISDICTION OF APPELLANT
GPI DISTRIBUTORS, INC.**

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**I. WHY THIS CASE RAISES BOTH A
SUBSTANTIAL CONSTITUTIONAL
QUESTION AND AN ISSUE OF PUBLIC OR
GREAT GENERAL INTEREST**

A. Introduction

The Court should accept this appeal to clarify the limits of the doctrine of constitutional avoidance. That doctrine favors resolution on non-constitutional bases over constitutional ones. But it does not require a party to comply with an unconstitutional statute as a predicate to challenging the constitutionality of that statute. Nor does it justify heightening well-established principles that govern preservation of error for appeal.

In this case, Appellant GPI Distributors, Inc. (“GPI”) brought an administrative appeal to the Court of Common Pleas of Cuyahoga County to challenge an exorbitant \$12,047.76 sewer bill and a corresponding non-consensual lien that Appellee Northeast Ohio Regional Sewer District (the “Sewer District”) caused the County Fiscal Officer to place on GPI’s real property. But R.C. 2505.06 posed an impermissible barrier to that judicial review. That statute provides, in pertinent part, that “no administrative-related appeal shall be effective as an appeal upon questions of law and fact until the final order appealed is superseded by a bond.” Most supersedeas bonds are designed to stay execution of a judgment pending appeal — but not this one. Under R.C. 2505.06, a bond is the condition precedent to *any judicial review*.

To remedy the injustice, GPI raised timely challenges to the bond requirement on both due-process

and equal-protection grounds, in both the trial and appellate courts. Neither court addressed those challenges on their merits. Instead, the lower courts decided the case based on GPI's failure to post the statutory bond. The appellate court also held that GPI had not raised its challenges timely in the trial court, even though GPI had briefed those challenges fully in its unsuccessful opposition to dismissal of its administrative appeal. The appellate court characterized its holding as in keeping with the doctrine of constitutional avoidance. But GPI is aware of no case law, in Ohio or elsewhere, that so broadly and illogically construes that doctrine.

This Court should accept jurisdiction *not to resolve the underlying constitutional challenges, but instead to clarify the scope of the constitutional-avoidance doctrine* — that is, to clarify the appellate court's obligation to address GPI's constitutional arguments on their merits. The Eighth District's misapplication of the constitutional-avoidance doctrine exacerbated the already-existing due-process problems that plague this case. It also violated the First Amendment guarantee that litigants like GPI have "the right of access to the courts," which "is an aspect of the First Amendment right to petition the Government for redress of grievances." *See Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); *see also Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174 ¶ 11 (acknowledging "the paramount importance placed on the ability to access the courts for redress of injuries").

B. GPI's Many Thwarted Efforts to Challenge the Improper Sewer Bill and Tax Lien

GPI's struggle for justice began when it was hit with a \$12,047.76 sewer bill for a six-month period when its real property was vacant and used no sewer services. GPI's experience with its sewer bill was unfortunately not unique. *See, e.g.*, Ron Regan, Scripps TV Station Group, *Cleveland Water Department Cover-Up Fails to Disclose Serious Billing Errors* (Feb. 22, 2017), <https://bit.ly/2HlefNh> (accessed Mar. 11, 2019).

Because GPI did not pay the exorbitant and unexplained bill, the Sewer District certified the alleged debt to the Cuyahoga County Fiscal Officer under R.C. 6119.06(W)(1).¹ The County Fiscal Officer then placed a tax lien on GPI's property for the full amount without suing to collect on the bill or having to establish its accuracy in any forum. As a result, GPI has suffered a \$12,047.76 property deprivation, within the meaning of the Ohio and United States

¹ R.C. 6119.06(W)(1) provides that the Sewer District may certify an allegedly overdue sewer bill to the county auditor, at which point the alleged amount due "shall be placed by the auditor upon the real property tax list and duplicate, and shall be collected in the same manner as other taxes."

Constitutions,² that has so far evaded any judicial oversight or scrutiny.

GPI requested from the Sewer District an administrative hearing, which was the only mechanism available to challenge the \$12,047.76 sewer bill. But that hearing, run by an in-house Sewer District hearing examiner with no judicial experience, deprived GPI of the resources — including discovery and subpoena power — that a court proceeding would have permitted. Unsurprisingly, the Sewer District concluded that its bill was correct and took no steps to withdraw the lien, ruling that GPI failed to substantiate any inaccuracy.

GPI appealed the Sewer District's administrative decision to the Cuyahoga County Court of Common Pleas. But its pursuit of justice was again stymied. The governing statute, R.C. 2505.06, required GPI to post a supersedeas bond in the full amount of the disputed bill — \$12,047.76 — just to access a meaningful judicial proceeding in front of a qualified and neutral judicial officer. GPI asked to be excused from the bond requirement; the trial court denied that motion.

Because GPI did not post a bond, the Sewer District moved to dismiss the administrative appeal. In

² The Fourteenth Amendment to the U.S. Constitution, Section 1, provides in pertinent part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *." And this Court has held that "the 'due course of law' provision of [Section 16, Article I of] the Ohio Constitution is virtually the same as the 'due process' clause of the Fourteenth Amendment to the United States Constitution." *In re Hua*, 62 Ohio St.2d 227, 230, 405 N.E.2d 255 (1980).

opposing the Sewer District's motion, GPI challenged the bond requirement of R.C. 2505.06 on due-process and equal-protection grounds. The Government — with no due process — ***had already taken GPI's property*** in the form of a lien that was itself premised on disputed sewer bills. To add the bond requirement to this stack of injustices violates equal protection and due process, at least where (as here) the complainant has demonstrated a lack of financial ability to comply. GPI also demonstrated that the bond requirement improperly discriminated against administrative appellants regardless of financial status; unlike every other litigant, those appellants must ***post a bond in the full amount of a disputed debt*** simply to receive appellate review.³ The contrast is all the more striking because most other appellants, whose filing fees are much smaller, have already had their day in a trial court.

GPI's arguments were grounded in well-established principles of federal constitutional law, including *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (striking down Oregon bond requirement to appeal in forcible-entry-and-detainer action), and *Lecates v. Justice of Peace Court No. 4 of State of Del.*, 637 F.2d 898 (3d Cir.1980) (striking down statutory surety-bond requirement for indigent party requesting jury trial). The trial court nevertheless

³ Litigants in all other circumstances need only pay relatively small filing fees, such as the \$100 fee this Court charges to institute a notice of appeal. S.Ct.Prac.R. 3.04. And low-income litigants may seek relief even from those lower fees if they establish the inability to pay them. *E.g.*, S.Ct.Prac.R. 3.06.

granted the Sewer District's motion to dismiss, relying solely on the text of the statute and the "strong presumption" that all statutes are constitutional. (*See* Appendix C.) It did not address the substance of GPI's constitutionality arguments or discuss GPI's cited authorities.

The Eighth District affirmed. *See GPI Distributions, Inc. v. Northeast Ohio Regional Sewer Dist.*, 8th Dist. Cuyahoga No. 106806, 2018-Ohio-4871 (Appendix A). The Eighth District invoked the "constitutional avoidance" doctrine and refused to address GPI's constitutional arguments. *Id.* at ¶ 34. It accepted the trial court's circular reasoning that GPI's challenge failed because GPI had not posted the statutorily required bond, essentially holding that GPI was first required to comply with the statute before pursuing a constitutional challenge to it. *Id.* at ¶ 35. The Eighth District also held that GPI had raised its constitutional arguments in the trial court too late, even though GPI had raised them in a timely response to the Sewer District's motion to dismiss. *Id.*

In sum, this case involves due-process violation stacked upon due-process violation:

- First, GPI receives a \$12,047.76 sewer bill that seems facially inaccurate.
- Second, the Sewer District secures a non-consensual lien on GPI's property in the full amount of the exorbitant bill.
- Third, the Sewer District upholds the propriety of the bill after a hearing that deprived GPI of adequate process.

- Fourth, the trial court dismisses GPI's administrative appeal because GPI did not post a \$12,047.76 supersedeas bond, without addressing GPI's timely raised constitutional challenges to the bond requirement of R.C. 2505.06.
- Fifth, the appellate court invokes the constitutional-avoidance doctrine as a basis for affirming the trial court's dismissal.

It is only the last of these injustices that GPI asks this Court now to remedy — not the exorbitant sewer bill, the lien statute, or the deficient administrative hearing. The Eighth District's application of the constitutional-avoidance doctrine is itself both a due-process violation and a violation of the First Amendment's petitions clause. If due process and the right to petition have any meaning at all, they surely require the judicial system to address due-process and equal-protection challenges when, as here, a party raises them timely.

C. The Two Constitutional Issues this Court Should Hear

The Court should accept this case to clarify that the constitutional-avoidance doctrine is not a discretionary one that an appellate court may invoke regardless of the circumstances. The Court should reject both justifications the Eighth District offered for refusing to address squarely GPI's constitutional challenges to R.C. 2505.06.

First, requiring litigants to comply with unconstitutional statutory provisions *as a predicate*

to challenging constitutionality is itself a violation of due process and the petitions clause and grossly distorts the constitutional-avoidance doctrine. It places the litigant in an impossible dilemma and thwarts the foundational principal of our judicial system that “the constitution controls any legislative act repugnant to it.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Forcing a litigant to pay an alleged debt as a condition of challenging that debt is bad enough. But forcing that same litigant to pay the debt as ***a condition of challenging the statute that requires the prepayment of that debt*** undercuts the “ ‘fundamental requisite of due process’ ” — that litigants be afforded a “ ‘meaningful’ ” opportunity to be heard. *See Goldberg v. Kelly*, 397 U.S. 254, 268, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914), and *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *see also Ohio Assn. of Pub. School Emps., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn.*, 68 Ohio St.3d 175, 176, 624 N.E.2d 1043 (1994).

Second, the Court should clarify that the constitutional-avoidance doctrine does not create greater burdens for litigants that wish to preserve issues for appeal. A constitutional challenge to a statute is preserved for appeal if raised in opposition to a motion to dismiss premised on that statute. The Eighth District’s contrary holding finds no support in Ohio or federal law. GPI raised its challenges in the trial court at the exact moment when the constitutionality of R.C. 2505.06 mattered — when the Sewer District invoked that statute in moving to

dismiss the administrative appeal in the trial court. Until the Sewer District filed that motion, GPI had no basis for challenging the statute; any challenge would have been a preemptive and improper request for the trial court to issue an advisory decision. In short, the challenges were not ripe until the Sewer District's motion rendered them so. GPI timely raised its constitutional claims.

D. The Public and Great General Interest at Stake

Beyond the constitutional infirmities, this case also presents issues of public and great general interest. At some point, a party victimized by the billing improprieties that have long plagued water and sewer customers in Cleveland must have a meaningful way to get justice. If left standing, the Eighth District's decision will preclude customers with exorbitant bills from accessing the judicial system, no matter how wrong the bills or resulting liens are. What if the bill were for \$100,000? What if it were for \$1,000,000? Surely aggrieved citizens have the right to at least one level of judicial process to address these billing improprieties without *first* having to pay the full amount allegedly owed. But the point here is this: if the bond requirement of R.C. 2505.05 is truly constitutional, the appellate court should say so directly, rather than invoke the constitutional-avoidance doctrine to leave these important questions unanswered.

II. STATEMENT OF THE CASE AND FACTS

The Sewer District caused the Cuyahoga County Fiscal Officer to place a tax lien of \$12,047.76 on GPI's real property at 5335 Dolloff Road in Cleveland (the "Property").⁴ It did so under the authority of R.C. 6119.06(W)(1) with *no adjudication*, based on a disputed bill for sewer services at the Property.

The Sewer District did not independently determine GPI's water consumption. Instead, it relied instead on measurements performed by the City of Cleveland Division of Water (the "Water Department"), which owns the meters and performs the meter readings. The Sewer District accepted without scrutiny the Water Department's report that GPI had consumed **1.3 million gallons of water** in the first six months of 2015 — almost 18 times higher than the average consumption for a family of four for that period⁵ — even though the Property remained vacant during the time in question and exhibited no leaks. The exorbitant bill came at a time when the Water Department was installing new water meters, and their notoriously

⁴ The original lien was for \$12,047.76. For reasons unknown to GPI, a search on the Cuyahoga County Fiscal Officer's website (<https://myplace.cuyahogacounty.us>) currently shows the value of the lien in question to be slightly less, \$11,879.47.

⁵ The average family of four consumes 400 gallons of water per day. Ron Regan, Scripps TV Station Group, *Cleveland Water Customers Could Face Higher Bills Due to Critical Meter Installation Error* (Feb. 15, 2017), <https://bit.ly/2VI1dNK> (accessed Mar. 11, 2019). That daily figure converts to about 73,000 gallons over a six-month period, about 1/18 of the consumption for which the Sewer District billed GPI.

inaccurate readings were the subject of several news reports. *See, e.g.*, Ron Regan, Scripps TV Station Group, *Cleveland Water Customers Could Face Higher Bills Due to Critical Meter Installation Error* (Feb. 15, 2017), <https://bit.ly/2VI1dNK> (accessed Mar. 11, 2019).

With the Property now encumbered by a lien it had no opportunity to dispute, GPI challenged the sewer bill through the Sewer District's administrative process. The Sewer District held a self-described "informal" hearing in July 2017. Frank Foley, the Sewer District's Director of Operations and Maintenance, presided over the hearing. But Mr. Foley is neither a judge nor a lawyer and could not act as a neutral hearing officer in light of his fiduciary obligations to "[e]nhance District revenue" and strengthen the Sewer District's financial status. *See* Northeast Ohio Regional the Sewer District, *Strategic Plan, 2017 — 2019*, at 10, <https://bit.ly/2UtLq4N> <https://bit.ly/2NVoU2u> (accessed Mar. 11, 2019).

At the hearing, GPI offered the limited evidence it could, despite the unavailability of the power to subpoena Water Department witnesses and documents. GPI's owner, Gloria Strong, testified that the Property was vacant and locked during the period covered by the excessive bills. She also testified that there was no evidence of leaking pipes or fixtures. GPI showed that at the beginning of the six-month period in question, the Water Department had installed a new electronic meter. GPI also submitted a report from the Water Department's prime contractor for the electronic meters warning that inaccurate billing could result from improper selection, programming, or installation

of the meters. The Sewer District, by contrast, offered no evidence demonstrating the accuracy of the billing. It acknowledged that it relied entirely upon the Water Department to calculate the alleged water consumption on which the sewer charges were based. No one from the Water Department testified.

Other than highlighting the known problems with the Water Department's meter readings, GPI had no meaningful opportunity to challenge the validity of the consumption measurements because it could not compel anyone from the Water Department to appear at the hearing. The Sewer District's Rules permit the Sewer District to subpoena documents only "if deemed necessary to fully present and adequately determine any issue to be determined." Code of Regulations of the Northeast Ohio Regional Sewer District Section 4.4, <https://bit.ly/2F3pf05> (accessed Mar. 11, 2019). But the Sewer District refused GPI's request to subpoena documents from the Water Department relating to calculation of water consumption and the functioning of the Property's water meter. The Sewer District's unexplained refusal left GPI with no ability to present evidence to challenge the accuracy of the Water Department's newly installed electronic metering system on which the Sewer District based its sewer bills.

Not surprisingly, (and in accordance with his fiduciary obligations to the Sewer District), Mr. Foley recommended that the Sewer District reject GPI's challenge, finding a lack of "evidence to substantiate" it. The Sewer District's Board of Trustees, also unsurprisingly, adopted Mr. Foley's findings.

GPI timely appealed the Sewer District's administrative decision to the Cuyahoga County Court of Common Pleas, challenging the Sewer District's ruling. The governing statute, R.C. 2505.06, required GPI to post a supersedeas bond in the full amount of the disputed sewer charge — \$12,047.76 — as a condition of seeking appellate review. This required bond is the central issue that GPI challenged in the Eighth District. Importantly, the bond was *not* required *to stay a judgment* (the more-typical purpose of a supersedeas bond pending appeal, *cf.* R.C. 2505.09); instead, the bond requirement functioned as a *filing fee* without which GPI could obtain no appellate review.

GPI moved the trial court to excuse the bond requirement, due in part to the lien the Sewer District had already obtained on GPI's property. The trial court denied that motion. GPI did not post the \$12,047.76 bond because it could not afford to do so.

The Sewer District moved to dismiss the appeal. In response, GPI challenged the application of the bond requirement in this case as an unconstitutional violation of GPI's rights to due process and equal protection. Instead of addressing these arguments on their merits, the trial court held that “[l]egislative enactments are to be afforded a strong presumption of constitutionality” and granted the Sewer District's motion to dismiss. (*See* Appendix C.)

GPI appealed the dismissal to the Eighth District Court of Appeals. That court, too, “decline[d] to address GPI's constitutional challenge to R.C. 2505.06.” *GPI*

Distrib., 2018-Ohio-4871, at ¶ 39. It articulated two reasons for invoking constitutional avoidance.

First, the appellate court endorsed the trial court’s approach, which was to “avoid[] reaching GPI’s constitutional challenge to R.C. 2505.06 * * * based on statutory interpretation principles — concluding that R.C. 2505.06 applied, requiring GPI to post a supersedeas bond, and that GPI’s failure to do so was dispositive of the case.” *Id.* at ¶ 35; *see also id.* at ¶ 38 (“Had GPI complied with R.C. 2505.06’s bond requirement, GPI would have had access to the common pleas court to challenge the Sewer District’s administrative ruling. However, GPI failed to comply with the procedural rules in order to perfect its administrative appeal.”). In short, the appellate court — like the trial court — took the circular position that GPI could not challenge the constitutionality of R.C. 2505.06 because it had not complied with the statute’s bond requirement.

Second, the appellate court would not address the constitutional issues because “GPI [had] raised the issue for the first time in opposing the Sewer District’s motion to dismiss.” *GPI* at ¶ 35. Apparently, the appellate court believed that GPI should have raised the constitutional challenges when first seeking relief from the bond requirement and that asserting them in response to the Sewer District’s motion to dismiss was “belated.” *Id.* The appellate court so held even though GPI raised the constitutional challenge in its timely opposition to the Sewer District’s motion to dismiss and even though the Sewer District responded fully to that challenge in its reply brief in the trial court.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: The constitutional-avoidance doctrine does not require a party challenging the constitutionality of a statute to have complied with the statute as a predicate to judicial review.

The Eighth District committed a gross error of constitutional law by refusing to address GPI's constitutional challenges. Instead, the appellate court endorsed the trial court's circular approach, which was to "avoid[] reaching GPI's constitutional challenge" because GPI had not complied with the statute it sought to challenge. *GPI* at ¶ 35. But the law does not permit avoidance of a constitutional challenge on that basis. If, as here, the statute works an unconstitutional result on a party challenging it, the language of that statute cannot possibly save it. If that circular argument were the law, a court could never find a statute unconstitutional.

But that is not the law. To the contrary, federal courts have found unconstitutional similar filing-fee requirements even when, as here, the party challenging them had not first complied with them. In *Lindsey*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36, for example, the Supreme Court struck Oregon's requirement that tenants post a double bond as a condition of appeal in a forcible-entry-and-detainer action. *Id.* at 74-76. Similarly, in *Lecates*, 637 F.2d 898, the Third Circuit struck a statutory surety-bond requirement for an indigent party requesting a jury trial even though the indigent party had not complied with the statute.

It is simply axiomatic that an unconstitutional statute cannot escape review merely because the party challenging it did not first comply with it. The trial court erroneously held otherwise, and the Eighth District endorsed that error.

PROPOSITION OF LAW NO. 2: The constitutional-avoidance doctrine does not alter well-established rules for preserving error for appellate review.

The Eighth District also erred in refusing to hear GPI's constitutionality challenges because GPI waited to raise them until after the Sewer District moved to dismiss the administrative appeal. *See GPI* at ¶ 8, 31, 35. The Eighth District essentially held that GPI had forfeited the issue by not raising it sooner in the trial court.

But GPI was under no obligation to present its challenge to the bond requirement any sooner than it did, which was in response to the Sewer District's motion to dismiss. There is no basis on this record for finding forfeiture. Indeed, this Court has considered the merits of constitutional challenges in far-less-obvious circumstances of preservation. *See In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988) (issue preserved only "in general terms"). The Eighth District itself has previously held that an issue is preserved if raised "by way of objection raised in a brief in opposition timely filed." *Novosel v. Gusto, Inc.*, 8th Dist. Cuyahoga No. 73575, 1998 WL 842135, *1 (Dec. 3, 1998).

The Eighth District premised its “belated” finding on the fact that GPI initially sought relief from the bond requirement without raising constitutional challenges. Ironically, GPI’s invocation of non-constitutional reasons for excusing the bond requirement is precisely what the Eighth District’s constitutional-avoidance holding would presumably endorse. Only when pushed by the Sewer District’s motion to dismiss was the constitutional challenge ripe or appropriate. The Sewer District had notice and a full opportunity to respond to GPI’s constitutional challenges and did so in a subsequent reply brief. The constitutional-avoidance doctrine has no application on these facts.

Finally, the Eighth District suggested that GPI’s assertion of certain constitutional challenges to the sewer bill in a separately filed declaratory-judgment action justified its refusal to address the different constitutional issues raised here. But GPI’s declaratory-judgment action challenges the underlying sewer bill and lien, not the statutory bond requirement. What is more, that declaratory-judgment action is now at risk of being dismissed now that GPI has sought unsuccessfully to pursue its administrative remedies. To the extent the Eighth District conflated those issues in its opinion, *see GPI* at ¶ 16, that conflation was erroneous.⁶ There was simply no justification for

⁶ The Eighth District also incorrectly suggested that GPI could have followed a procedure authorized by R.C. 2505.11 in lieu of posting a bond and that its failure to do so was an additional basis for not addressing the merits of GPI’s constitutional challenges. *See GPI* at ¶ 37. R.C. 2505.11 provides two potential bases for

refusing to hear GPI's challenge to the constitutionality of R.C. 2505.06.

IV. CONCLUSION

GPI requests that this Court accept jurisdiction over this case to review the merits of the two issues presented above.

Respectfully submitted,

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avoiding a supersedeas bond: “conveyance of property” or a “deposit of money equal to that specified for the bond.” However, the Sewer District *already had a lien* under R.C. 6119.06 *on the GPI property at issue*, and the trial court expressly rejected GPI's argument that the lien (the functional equivalent of a conveyance) was adequate. Having to convey some other property or cash in the full amount of the disputed sewer bill simply to enter the courthouse door would violate the Constitution's petitions, due-process, and equal-protection provisions even in the absence of a lien.

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DATED: March 11, 2019

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