ERIE COUNTY LEGISLATURE
92 Franklin Street - 4th Floor
Buffalo, New York 14202

TO: Members of the Erie County Legislature

FROM: Karen M. McCarthy, Clerk

DATE: November 9, 2016

SUBJECT: Comments on EC Sewer District Nos. 1-6 & 8 Assessment Rolls Public Hearing

The attached comments received at the November 9, 2016 Public Hearing on Erie County Sewer District Nos. 1-6 & 8 Assessment Rolls from:

Mr. Sal Tirone, EC Senior Systems Accountant
Mr. Paul Taylor, Phillips Lytle, LLP

Public Hearing 2016 Assessment Rolls

Erie County Sewer District Nos. 1-6 & 8

November 9 , 2016 2:30 PM

I (Salvatore Tirone Sr Systems Accountant) Am here to represent the Board of Managers for each of the Erie County Sewer Districts, as well as the Erie County Department of Environment and Planning. This hearing is being held as stipulated under Article 5A, Sections 266,270 and 271 of the County Law and is part of the budget process

The Purpose of the Public Hearing is to allow the public an opportunity to voice their objections, if any, in the manner in which various lots and parcels have been assessed, Then once the Public Hearing is held. The Legislature may adopt and affirm the Assessment Rolls, or they can request the Assessment Rolls be revised.

The Assessment Rolls are available ,as noted in the Legal Notice, if anyone desires to review them and note their concerns regarding the method of sewer assessments for the following (2017) Budget year.

STATEMENT OF FACTS

A. The Sewer Charges Imposed by Erie County Sewer District No. 6

Petitioners either own, or previously owned, real property in the City of Lackawanna, New York, consisting of approximately 1,000 acres that were previously used by Bethlehem as a part of its steel-making plant (the "Property"). (*See* R. 35, 43, 52, 61, 70, 79, 88, 96, 106, 116, 124, 132 and 140). The Property lies entirely within the boundaries of Erie County Sewer District No. 6 ("District 6"), which is managed by the County's Department of Environment and Planning. Insofar as is relevant here, District 6 maintains a sanitary sewer collection system that services a portion of the Property and other parcels throughout the City of Lackawanna. (R. 13-15, 34-35).

The costs incurred by District 6 in providing sanitary sewer service are allocated among the users of those services using a three-part formula:

- the amount of sewage sent to the District from the landowner's property (which is used to calculate the "Use Charge" portion of the total charge) (the "Use Charge");
- the assessed value of the property (which is used to calculate the "Assessed Value" portion of the total charge) (the "Assessed Value Charge"); and
- the size and type of the property (which is used to calculate the so-called "Parcel/Benefit" portion of the total charge) (the "Parcel/Benefit Charge").

(R. 726). Expressed another way, the formula looks like this:

Total Sanitary Sewer Charge	=	Use Charge	+	Assessed Value Charge	+	Parcel/Benefit Charge

B. **Governing Law**

District 6's authority to impose sewer charges is limited by both the requirements of New York's County Law §§ 266, 270, and 271, and the guarantees of due process of law and equal protection that are mandated by the Fourteenth Amendment to the United States Constitution and Article I, §§ 6 and 11 of New York's Constitution.

County Law § 266 requires District 6 to apportion sewer charges among the users of the sanitary sewer system:

> on any equitable basis including but not limited to a system of classification which, for purposes of establishing differential rates, charges or rentals, may allocate among areas within the district . . . the costs of establishment of the district, the furnishing of improvements therein and operation and maintenance of district facilities or any combination thereof....

N.Y. County Law § 266 (McKinney 2004 and Supp. 2016). Pursuant to this section, District 6 decided to raise 100% of the cost for operation and maintenance of its sanitary sewer system from user charges. (R. 797-801, 817-28, 838-59, 862-64). Having so decided, County Law §§ 270 and 271 required that District 6 calculate such charges either: (a) based on the assessed value of each landowner's property (County Law § 270); or (b) "in proportion as nearly as may be to the benefit which each lot or parcel of land will derive therefrom." N.Y. County Law § 266 (McKinney 2004 and Supp. 2016).

C. **The Parcel/Benefit Charge Formula**

As indicated above, District 6 elected to adopt a three-part formula to calculate each landowner's total sewer district charges. District 6 has claimed that it did so in accordance with the requirements of both County Law §§ 270 and 271. (R. 724-26, 797-801, 817-28, 838-59, 862-64). Specifically, District 6 claims that it based the Assessed Value Charge on the assessed value of each property (pursuant to County Law § 270) and the

Parcel/Benefit Charge on the benefit provided to each lot or parcel (pursuant to County Law § 271).

However, with respect to the Parcel/Benefit Charge, District 6 did not conduct any analysis to ascertain the relative benefit that the sanitary sewer provided to each lot or parcel of land in District 6, nor did it conduct an analysis to determine whether any benefit provided was rationally related to the Parcel/Benefit Charges that District 6 imposed upon each lot or parcel of land, or whether the classifications that District 6 created were rationally related to the stated legislative goal of County Law § 271. (R. 550-69). Instead of doing so, District 6 concocted yet another formula (the "Parcel/Benefit Charge Formula"):

- All owners of one-, two-, or three-family residential properties in the District – no matter how large the parcel – were assigned a one-unit "parcel charge." (R. 777).
- All owners of commercial and industrial property equal to or less than one acre in size were also assigned a one-unit "parcel charge." (R. 737).
- All owners of commercial and industrial property larger than one acre were assigned a "parcel charge" that was equal to *five times* **(5x)** the property's acreage. (R. 737).

The resulting Parcel/Benefit Charge was then multiplied by a specified dollar amount (the "Charge per Unit"), as fixed by District 6 each year, to determine each landowner's Parcel/Benefit Charge for that year. (*See, e.g.*, R. 141). For example, the Charge per Unit was $70.00 per unit in 2002 through 2006 (R. 36, 44, 53, 62, 71), $78.00 per unit in 2008 and 2009 (R. 80, 89), and $88.00 per unit in 2010 through 2015 (R. 97, 107, 117, 125, 133, 141).

According to District 6's own witnesses, the District's adoption of a "five times" multiplier for commercial properties larger than one acre was not the result of any study or

analysis of the benefit that those properties would derive from the sanitary sewer system. (R. 550-69, 745). District 6 admits, in fact, that it still has no "specific formula" to determine the benefit a property receives from its access to the sanitary sewer system. (R. 678).

With respect to the Property, in particular, the architect of the Parcel/Benefit Charge Formula did not even bother to determine what portions of the Property were actually served by District 6's sanitary sewer system, or the extent to which unserved portions of the Property could be feasibly served by it. Instead, he merely assumed that the entire property was serviced by the sanitary sewer system and/or received the benefit of that system. (R. 551-52).

Instead of analyzing or studying the benefit that each lot or parcel would derive, and allocating costs accordingly, the architect of the Parcel/Benefit Charge Formula, Mr. Alessi, implemented that formula, and decided that the "five times" multiplier was appropriate, based solely on: (a) his look at information from "a couple of [residential] developments" (that were in municipalities other than the City of Lackawanna); and (b) an estimate that "60 percent was developable on a tract of land just generally" for "residential housing." *Id.* at 90-91. (R. 564-65). Mr. Alessi then took 43,560 square feet (which equals one acre), multiplied that measurement by .60 (to represent the 60 percent that he estimated to be developable), and divided the net result by "about 4,800 square feet" (which Mr. Alessi concluded was the "average parcel size" in Lackawanna). (R. 564). Based upon that calculation, Mr. Alessi concluded that "there would be about five residential units" per acre of land in Lackawanna. (R. 743). Mr. Alessi and his staff then decided, ***without any other analysis or justification,*** to impose the "five times" multiplier on commercial properties in the City of Lackawanna – ***but only if those properties exceeded one acre in size.*** (R. 737-43).

This Parcel/Benefit Charge Formula is used only in District 6, and not in any other sewer district in Erie County (or anywhere else). (R. 539, 558, 561,738, 746). It has also remained unchanged since 1983 – and District 6 continued to use it during all of the tax years at issue in these proceedings. (R. 686-87, 735, 737).

D. **The Impact Upon Petitioners**

As noted above, Petitioners either own, or previously owned, real property in the City of Lackawanna, New York, consisting of approximately 1,000 acres that were previously used by Bethlehem as a part of its steel-making plant. (R. 35, 43, 52, 61, 70, 79, 88, 96, 106, 116, 124, 132, 140). Because the Property is a commercial property, and exceeds 5 acres in size, Respondents have, at all relevant times, multiplied the acreage of the Property by "5x" to determine the Parcel/Benefit Charge for the Property. The resulting Parcel/Benefit Charge, for each year at issue, is reflected in the table below:

Year	Property Size (in acres)	Parcel Charge (in # of Units) (5 x acres)	Charge per Unit	Total "Parcel/Benefit Charge" Component	Source
2002	1,060.26	5,302	$70.00	$371,140	R. 36
2003	1,060.26	5,302	$70.00	$371,140	R. 44
2004	1,060.26	5,302	$70.00	$371,140	R. 53
2005	1,060.26	5,302	$70.00	$371,140	R. 62
2006	1,060.26	5,302	$70.00	$371,140	R. 71
2008	1,060.25	5,301	$78.00	$413,478	R. 80
2009	1,060.25	5,301	$78.00	$413,478	R. 89
2010	1,060.25	5,301	$88.00	$466,488	R. 97
2011	992.8	4,964	$88.00	$436,832	R.107
2012	994.74	4,974	$88.00	$437,712	R. 117
2013	995	4,975	$88.00	$437,800	R. 125
2014	957.18	4,787	$88.00	$421,256	R. 133
2015	957.18	4,787	$88.00	$421,256	R. 141

(R. 36, 44, 53, 62, 71, 80, 89, 97, 107, 117, 125, 133 and 141). Again, the resulting Parcel/Benefit Charge is not based on any alleged benefit that the Property derives from the

sanitary sewer system. In fact, approximately seventy percent (70%) of the Property did not use, or even have access to, sanitary sewer service. (R. 14, 23).

Nor is the Parcel/Benefit Charge rationally related to any such benefit. Although District 6 assigns one parcel charge to any commercial property of 1 acre of less, it automatically applies a "five times" multiplier to determine the Parcel/Benefit Charge for the Property – without any rational basis to do so. In other words, each of 1,000 separate one-acre commercial or industrial properties – or two to three-family residential properties of any size – would be billed a single parcel charge, for a total of 1,000 parcel charges. The Property, however, is currently subject to a parcel charge equal to *five times* 957, for a total of 4,787 parcel charges.

The percentage of the overall Parcel/Benefit Charges paid by Petitioners during the years at issue in these proceedings has varied between 27% and almost 33% of the total Parcel/Benefit Charges paid by *all* users of the system, while the Property's contribution to the annual flow into the system has ranged from 0.006% to a maximum of 1.149%. (R. 25-28). For example, in 2012, Petitioners paid approximately twenty-seven percent (27%) of the total Parcel/Benefit Charges paid by *all* users of the sanitary sewer system – even though Petitioners contributed less than two-tenths of a percent (0.016%) of the annual flow into that system. (R. 25-28, 117, 473).

Because the Parcel/Benefit Charge Formula used by District 6 is not based on *any* analysis of the benefit that the Property derives from District 6's sanitary sewer system, incorporates a Parcel/Benefit Charge that is "five times" greater per acre than the Parcel/Benefit Charge that applies to one-acre commercial and industrial properties, and incorrectly assumes that the entire Property is serviced by sewers and/or benefits from

District 6's sanitary sewer system (when, in fact, most of it is not and does not), Petitioners have been significantly overcharged for sanitary sewer services during each year at issue – in violation of Petitioners' rights to due process and equal protection under both the United States and New York Constitutions, and contrary to the requirements of County Law § 271.

ARGUMENT

POINT I

THE PARCEL/BENEFIT CHARGES IMPOSED UPON PETITIONERS' PROPERTY ARE ILLEGAL AND UNCONSTITUTIONAL

Although, where sewer charges are concerned, "[e]xact congruence between the cost of the services provided and the rates charged to particular customers is not required," the sewer charges relating to a particular property must still, as a matter of both statutory and constitutional law, "bear a direct relationship to the broader reality of the services and benefits actually rendered to [the Property's] owners as a whole . . .." *Watergate II Apartments v. Buffalo Sewer Author.*, 46 N.Y.2d 52, 59-61 (1978). Here, Respondents failed to establish the existence of such a relationship between the sanitary sewer charges at issue and the relative benefit that Petitioners' Property derived from District 6's sanitary sewers. The Record in these proceedings, in fact, demonstrates that Respondents did not even attempt to analyze any such "charge-benefit" relationship before (or after) adopting and implementing the "five times" multiplier that they use to generate the Parcel/Benefit Charge component of the sanitary sewer charges on Petitioners' Property. As a result, those charges are both illegal, under County Law § 271, and unconstitutional, under the due process and equal protection clauses of the New York and United States Constitutions.

A. **The Parcel/Benefit Charges Imposed by District 6 Violate County Law § 271**

County Law § 271 authorizes District 6 to impose sewer charges upon its customers "in proportion as nearly as may be to the benefit which each lot or parcel of land will derive" from the District's sewer infrastructure. N.Y. County Law § 266 (McKinney 2004 and Supp. 2016). In doing so, District 6 is (and was) required to perform an analysis to quantify the relative benefit for each parcel in the District.

"[I]n assessing the expenses of street improvements," such as sewers, "upon the property benefited the general rule is to consider the effect of that improvement upon the market value of the property," and to charge the property owner "in view of that fact, without regard to the present use, or the purpose of the owner in relation to future enjoyment." *In re Klock*, 30 A.D. 24, 31 (3d Dep't 1898) (internal quotation marks and citation omitted) (quoting *People ex rel. Howlett v. Mayor & Common Council of City of Syracuse*, 63 N.Y. 291, 300 (1875)). "That principle makes it necessary" that District 6 "should take into consideration the value of the property, . . . the fact whether the property is vacant or improved, and, if improved, the extent and value of such improvements" before it calculates the "benefit" component of any customer's annual sewer charges. 30 A.D. at 31. This is so, because:

> [a] sewer laid in front of a vacant lot undoubtedly increases the market value of that lot, ... [b]ut it is not benefited to the same extent as the lot that is already built upon . . . . Some improved lots [also] may be benefited to a greater extent than other improved lots, depending upon the character and extent of the improvement; and to hold that it makes no difference in the benefits received whether a lot is improved or not, and to assess the vacant lot an equal amount with the lot built upon, with its needs to dispose of its sewage and refuse water, . . ., is erroneous, unjust, and inequitable, and should not be permitted to stand.

Id. at 40-41.

Ellwood v. City of Rochester, 122 N.Y. 229 (1890), is analogous. That case concerned street improvement charges that a Rochester city ordinance had required to be levied upon property owners "'in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire by the making of said improvement[s].'" *Id.* at 236 (citation omitted). Because the properties "deemed specially benefited" by the improvements were billed only "a sum per foot front," however, "without reference to the value of the buildings or improvements thereon," the Court of Appeals held that the charges were "illegal," for failure to comply with the ordinance. *Id.* at 237.

The same reasoning pertains to benefit charges for sanitary sewer service. *Clark v. Village of Dunkirk*, 12 Hun. 181 (Sup. Ct. Gen. Term 4th Dep't 1877), *aff'd*, 75 N.Y. 612 (1878), interpreted a Dunkirk Village Charter provision that, like present-day County Law § 271, required the owners of "property so benefited" by sewers to be charged "the cost and expense of [their] construction, . . . as nearly as may be in proportion to the advantages which such owner of property may be deemed to derive therefrom." *Clark v. Vill. of Dunkirk*, 12 Hun. at 187 (internal quotation marks and citation omitted). Given this requirement, the Court annulled sewer charges imposed by the Village "at one uniform rate per foot, without regard to the distance [the charged properties] were situated from the sewer or to the expense of making a connection therewith." *Id.* at 188. In doing so, the Court relied in part upon *People ex rel. Parker v. County Court of Jefferson County*, 55 N.Y. 604 (1874), which held that assignment of sewer charges based upon a property's ***acreage,*** without more, did not properly approximate the ***benefit*** of sewer infrastructure to the property. *Clark v. Vill. of Dunkirk*, 12 Hun. at 189.

Similarly to the benefit charges at issue in *Ellwood* and *Clark*, the sanitary sewer Parcel/Benefit Charges at issue in this case must be levied "in proportion as nearly as may be to the benefit which each lot or parcel of land will derive therefrom," and cannot be calculated solely as a function of each parcel's frontage or size. N.Y. County Law § 266 (McKinney 2004 and Supp. 2016). Instead, to pass muster under County Law § 271, the Parcel/Benefit Charges must account specifically for the market value of the property and its improvements, and the extent of their access to sewer service.

The sewer charges imposed upon Petitioners' Property since 2002 have done neither. Without considering any unique circumstances particular to these individual parcels, District 6 has uniformly assigned five parcel charges per acre to the Property (and to all other commercial and industrial parcels larger than one acre). District 6's sole basis for doing so is the unsubstantiated guess by Mr. Alessi, after reviewing "a couple of [property] developments," that an acre of land would contain five residential units on average. (R. 564-65). That conclusion, however, fails to address or account for the ***benefit*** derived by the Property, fails to account for situations in which an acre of residential property could encompass a far greater number of residential units (*i.e.*, in the case of multi-family housing), and fails to provide any evidentiary basis whatsoever to conclude that larger commercial properties derive a ***five times greater benefit*** per acre than their smaller commercial counterparts.

Importantly, District 6 admittedly did no analysis of the relative benefit of sewer infrastructure to the Property, consisting of a shuttered steel mill and lacking sewers over much of its area, in comparison to other fully operational commercial and industrial parcels that rely upon sewer service. (R. 550-69). Instead, District 6 merely assumed,

without analysis or proof, that each acre of the Property received a benefit from its sanitary sewers. As Mr. Alessi testified,

> Q. . . . To the extent that there was any benefit at all from the storm and sanitary sewer, you attributed that to all of the property? . . . .
>
> A. Yeah, the entire property received benefit to some degree by being in the sewer district.
>
> Q. Regardless of whether that property was slag? Slag piles?
>
> A. Yeah.
>
> Q. Okay. Regardless of whether it was reclaimed land from Lake Erie?
>
> A. Yes, that's correct.
>
> Q. Regardless of what operation or lack of operation was ongoing on that property, correct?
>
> A. That's correct. . . .

(R. 551-52). As a consequence, District 6 concluded, without any rational or analytical basis, that its sewer services provide the same benefit per acre to the Property's slag piles and land reclaimed from Lake Erie that they do for functioning manufacturing facilities and commercial enterprises. This is not, and cannot be, so.

In addition, District 6 admits that it considered other methods of calculating Parcel/Benefit Charges, but elected not to pursue those methods because they would have required the District to prepare its own tax rolls, which would have been "very expensive and very cumbersome." (R. 562). Instead of pursuing those other methods, or otherwise attempting to ascertain the relative benefit that the Property derived from the District's sanitary sewer system, the District decided to "use what was available from the local

assessor's office" and, ultimately, to adopt the "five times" multiplier to calculate Parcel/Benefit Charges for properties such as Petitioners', as a result. (R. 562-65). In other words, District 6 elected to choose what it considered the cheapest and most expedient route, rather than following and complying with the requirements of County Law § 271, and repeatedly reaffirmed that ill-considered choice over the ensuing years. (R. 827-28, 832, 860-64).

This Court's recent decision in *Dorfman v. City of Salamanca Board of Public Utilities*, 138 A.D.3d 1424 (4th Dep't 2016), helps illustrate the inherent legal infirmity in the path chosen by Respondents. In *Dorfman*, the respondent Board of Public Utilities found itself obligated to make significant bond payments, and concluded that it needed to increase certain rates to raise the necessary revenue to make those payments. 138 A.D.3d at 1424. The Board ultimately decided to double the rates charged for water for consumers with a one-inch or larger water meter. *Id.* Affected users challenged that determination as being arbitrary and capricious, and sought to annul it. *Id.* This Court held that, although the size of a consumer's water meter provided a rational basis to determine water charges, the Board's determination had to be annulled because the record was "silent with respect to facts supporting the Commission's determination to double the rates charged for water for those consumers who have a one-inch or larger meter," and that determination lacked a rational basis as a result. *Id.* at 1424-25.

A similar analysis applies here, to a similar absence of facts to support Respondents' decision to employ a "five times" multiplier as a part of the Parcel/Benefit Charge Formula. Absent any attempt to evaluate the Property's particular geography, operations, facilities and improvements, or to otherwise ascertain the benefit to the Property

that it derived from the District's sanitary sewer system, District 6's supposition that it is quintuple the Property's acreage lacks any factual or rational support. The District's Parcel/Benefit Charge Formula therefore failed to satisfy County Law § 271, and Supreme Court should have granted summary judgment to Petitioners, declared that formula illegal, annulled the resulting Parcel/Benefit Charges, and directed that Respondents make appropriate refunds to Petitioners.

B. The Parcel/Benefit Charges Imposed by District 6 Violate Petitioners' Right to Due Process Under the United States and New York Constitutions

The sanitary sewer charges that Respondents imposed on Petitioners' Property were not only illegal, they were also unconstitutional because the burden of those charges far surpassed any benefit that the Property received from District 6's sanitary sewer system. As a result, the Parcel/Benefit Charge component of those sewer charges did not comply with constitutional due process requirements, because: (a) there was no analysis whatsoever to assure that the charge was rationally related to the benefit provided (it was not); and (b) the charge – on its face – was not (and is not) rationally related to any benefit that the Property derives from the sanitary sewer system.

Both the Fourteenth Amendment to the United States Constitution and Article I, § 6 of the New York Constitution prohibit New York State and its municipal government entities, such as District 6, from denying any person "life, liberty or property without due process of law." N.Y. Const. art. I, § 6. It is well established that a corporate entity, such as any of the Petitioners, is a "person" within the meaning of the Due Process Clause. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (citation omitted); *United Servs. Auto. Ass'n v. Curiale*, 88 N.Y.2d 306, 311 (1996). It is also well established that "money constitutes a property interest" that District 6 may take from Petitioners only

through levied municipal charges that comply with due process requirements. *Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1083 (E.D. Cal. 2008) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 571-72 (1972)); *accord*, *Bingham v. Zolt*, 66 F.3d 553, 562 (2d Cir. 1995).

Whereas "[t]axes are imposed for the purpose of defraying the costs of government services generally," fees or assessments "have been characterized as the 'visitation of the costs of special services upon the one who derives a *benefit* from them.'" *Albany Area Builders Ass'n v. Town of Guilderland*, 141 A.D.2d 293, 298 (3d Dep't 1988) (quoting *Jewish Reconstructionist Synagogue of N. Shore, Inc. v. Inc. Vill. of Roslyn Harbor*, 40 N.Y.2d 158, 162 (1976)) (emphasis in original) *aff'd*, 74 N.Y.2d 372 (1989). When an assessment to cover the cost of a public improvement – such as District 6's sanitary sewer system – is not made "in proportion to the benefits derived from the improvement," it imposes an "unconstitutional additional tax burden" upon the property owners disproportionately charged, and the assessment is void. *Skinner v. Vill. of Sylvan Beach*, 113 A.D.2d 1000, 1002 (4th Dep't 1985) (*citing In re Washington Ave.*, 171 A.D. 342, 346 (2d Dep't 1916); *In re Taxpayers of Twenty-third Ward*, 136 Misc. 278, 279 (Sup. Ct. Monroe Cty. 1930), *aff'd*, 236 A.D. 882 (4th Dep't 1932)).

Coconato v. Town of Esopus, 152 A.D.2d 39 (3d Dep't 1989), is illustrative. The Court in *Coconato* considered a water district "hook up fee" of $1,000.00 for all newly built homes, allegedly levied to pay for the water district's capital improvements. The Third Department held that this "uniform fee on all new dwelling units without regard to whether the development has necessitated an expansion of existing facilities or whether plaintiffs will be primarily and proportionately benefitted by any such expansion" was a "tax . . . violative of the Federal and State Constitutions," "as applied in [that] case . . . ." *Id.* at 44 (citing

Kamhi v. Town of Yorktown, 74 N.Y.2d 423, 435 (1989)). Two years later, a sewer connection fee imposed upon all owners of new homes in Onondaga County, without regard to the benefit they would receive from their sewer district's infrastructure, was invalidated as "unconstitutional as applied," "ultra vires," and "null and void" for the same reason. *Home Builders Ass'n of Cent. N.Y., Inc. v. Cty. of Onondaga*, 151 Misc. 2d 886, 889 (Sup. Ct. Onondaga Cty. 1991).

The Parcel/Benefit Charge component of Petitioners' sanitary sewer charge is likewise constitutionally infirm. Even putting aside that District 6 made no charge-benefit analysis whatsoever, and regardless of Petitioners' lack of use or access to sanitary sewer services and infrastructure, District 6's Parcel/Benefit Charge Formula – both on its face and as applied – unconstitutionally taxes Petitioners in comparison to other commercial and industrial property owners. At its most fundamental level, whereas a one-acre commercial and industrial parcel in District 6 receives only one parcel charge, the Property is assigned five parcel charges per acre, for no rational (or analytical) reason other than it exceeds one acre in size. Crucially, it is already well-settled (for good reason) that "[s]ize of the land is not necessarily a measure of the benefit derived from a sewer improvement." *Pikas v. Town of Grand Island*, 106 A.D.2d 887, 889 (4th Dep't 1984). Even if size were an appropriate measure, and clearly it is not, there is no rational basis for imposing one parcel charge per acre to some commercial and industrial tracts, but five parcel charges per acre to the Property, solely because it consists of multiple contiguous acres owned by the same entity. ***Simply put, a commercial or industrial parcel larger than one acre, such as the Property, does not receive quintuple the benefit per acre from the District 6 sanitary sewer system that a one-acre commercial or industrial parcel receives.*** This is especially true here, since approximately

seventy percent (70%) of the Property has no access to sanitary sewer service (or did not use such services) during the years in question, and the rest of the Property consisted of a shuttered, largely demolished steel mill which produced far less sewage per acre than an ongoing and operational commercial or industrial concern. (R. 14-15).

C. The Parcel/Benefit Charges Imposed by District 6 Violate Petitioners' Right to Equal Protection Under the United States and New York Constitutions

District 6's Parcel/Benefit Charge Formula is also unconstitutional because it violates Petitioners' right to equal protection of the law guaranteed under both the New York and United States Constitutions. *See* N.Y. Const. art. I, § 11, U.S. Const. amend. XIV, § 1. Specifically, District 6's Parcel/Benefit Charge Formula imposes an unreasonable, arbitrary classification on owners of commercial properties in the City of Lackawanna that exceed one acre in size.

Although the equal protection guarantee "does not mandate absolute equality of treatment," a legislative classification must "be rationally related to a legitimate State purpose." *Citizens for a Safer Cmty. v. City of Rochester*, 164 Misc. 2d 822, 837 (Sup. Ct. Monroe Cty. 1994) (internal quotation marks and citation omitted). Equal protection "does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation." *Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg*, 238 U.S. 56, 59 (1915); *see also Burrows v. Bd. of Assessors*, 98 A.D.2d 250 (3d Dep't 1983), *aff'd as modified by* 64 N.Y.2d 33 (1984) (striking down Real Property Tax Law § 458 on the grounds that it discriminated against veterans who received different tax exemptions based only on whether the jurisdictions in which they resided had adopted the full-assessment rule voluntarily or by court order).

"[T]he traditional test for a denial of equal protection under State law is 'whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective.'" *Abrams v. Bronstein*, 33 N.Y.2d 488, 492 (1974) (citation omitted) (reversing trial court decision dismissing police officer's equal protection claim and finding that the City of New York's determination denying certain benefits to officers who were not parties to a particular stipulation, while providing such benefits to other similarly situated officers who were parties to that stipulation, denied equal protection). A distinction – without a difference that is material to the aims of the legislation – violates equal protection, and should be struck down. *See Citizens for a Safer Cmty. v. City of Rochester,* 164 Misc. 2d 822 (Sup. Ct. Monroe Cty. 1994).

In *Citizens for a Safer Community*, the Court struck down part of a city ordinance which regulated specific models of assault-type rifles, but did not regulate models which were materially identical. 164 Misc. 2d at 838. The Court noted that, under the ordinance, possessors and manufacturers of such named weapons could be treated differently than possessors and manufacturers of identical unnamed weapons. *Id.* The Court held that the naming of specific weapons "*does not aid the City in achieving the stated goals of this legislation,*" and that there was "no support for the notion that there is a difference in the danger posed to society by identical guns produced by different manufacturers, and no such distinction can be found through an exercise of reason." *Id.*

In *Countryman v. Schmitt*, the petitioner claimed that a town law which discriminated between private landowners and public landowners violated petitioner's right to equal protection. 176 Misc. 2d 736 (Sup. Ct. Monroe Cty. 1998). The ordinance prohibited private landowners from erecting telecommunication towers on their property,

while allowing public landowners to erect such towers in the same zoning district. *Id.* at 748. The purported basis for the prohibition was to protect the aesthetic character of the town. *Id.* at 747. The court ruled, however, that there was no rational relation between the classification - private landownership – and the objective. *Id.* at 748. Certainly the aesthetic character of the town was as adversely affected by a tower on a piece of land owned by a public landowner as it was by such a tower on land owned by a private landowner. Accordingly, the Court ruled that the law violated the petitioner's right to equal protection.

Here, for equal protection purposes, it is not enough to establish distinctions between: (a) residential property owners whose parcels exceed one acre in size and commercial property owners whose parcels exceed one acre in size; or (b) commercial property owners whose parcels are less than five acres in size and those whose parcels exceed one acre in size. Rather, in order for the Parcel/Benefit Charge Formula to withstand equal protection scrutiny, the distinctions drawn by District 6 must be rationally related to the stated legislative goal of County Law § 271 – namely, that sewer charges be allocated "as nearly as may be to the benefit which each lot or parcel of land will derive therefrom." N.Y. County Law § 271(1) (McKinney 2004 and Supp. 2016).

In this instance, there is no rational relationship between that stated legislative goal and the distinctions that are incorporated into the Parcel/Benefit Charge Formula. District 6 made no effort whatsoever to analyze or study the relative benefits that each category of property derived from the sanitary sewer system, and had no evidence whatsoever on which to base the distinctions drawn between the various categories. (R. 550-69). District 6 did not, for instance, make any attempt to answer the question of whether each acre of a shuttered steel mill derives ***five times the benefit*** from the sanitary

sewer system, in comparison to the benefit derived by a water-intensive business (such as a Delta Sonic car wash or Laundromat) that is situated on a parcel that is only one acre in size (or less). (*See* R. 550-69). Nor did District 6 make any effort to answer the question of whether the approximately seventy (70) percent of the Property that was not sewered derived ***any benefit*** from the sanitary sewer system. District 6 instead simply assumed that it did – without any evidentiary basis to do so. (R. 551).

Instead of undertaking an analysis of the benefits each category of property derived from the sanitary sewer system, District 6 also decided to create categories based solely on whether properties were residential or commercial and, in the case of commercial properties, whether those properties were one acre in size or greater. (R. 563-64). With respect to the latter, District 6 then imposed its "five times" multiplier based solely on a mathematical computation of the estimated "developable" portion of each property and the number of residential units that could, in the District's estimation, be built upon that portion of each acre. (R. 563-64). None of the distinctions that it created as a result, or that it incorporated into the Parcel/Benefit Charge Formula, had any relationship to the benefit derived by the affected parcels – let alone a rational relationship that would be sufficient to pass equal protection scrutiny. Consequently, the application of the Parcel/Benefit Charge Formula to property owners such as Petitioners violates their equal protection rights.

PRELIMINARY STATEMENT

Petitioners Bethlehem Steel Corporation, ISG Lackawanna LLC, Tecumseh Redevelopment Inc., ArcelorMittal Lackawanna LLC, and ArcelorMittal Tecumseh Redevelopment Inc. (collectively, "Petitioners") submit this Reply Brief in further support of their appeal from an Order and Judgment entered in 13 proceedings by the Supreme Court, Erie County (Hon. Timothy J. Walker, J.C.C., A.J.S.C.), on October 30, 2015. The Trial Court erred in: (1) denying Petitioners' motion for summary judgment, (2) allowing Respondents Erie County and Erie County Sewer District No. 6 (collectively, "Respondents") to amend their answers to assert new affirmative defenses on the eve of trial, (3) granting Respondents' summary judgment motions, and (4) upholding the Parcel/Benefit Charges imposed upon Petitioners' Property constituting a portion of the former Bethlehem Steel manufacturing plant in the City of Lackawanna, New York.

Contrary to Respondents' arguments, the Property's Parcel/Benefit Charges at issue – equal to five times the Property's acreage, in contrast to the single parcel charge assigned to commercial and industrial parcels one acre or smaller – should have been entirely invalidated. The Parcel/Benefit Charges' calculation violated County Law § 271, which expressly required those Charges to bear proportionality with the benefit the Property receives from the District 6 sewer system. Pursuant to settled appellate precedent evaluating other benefit assessments, no such proportionality existed, because Respondents made no effort to perform any analysis as to how specific attributes of the Property – such as its improvements, its assessed value, or its capability to use the sewer system – impacted the sewer infrastructure's benefit to the Property.

Even so, the Property's Parcel/Benefit Charges also violated Petitioners' rights to due process of law and equal protection. Contrary to Respondents' insistence, assigning five parcel charges per acre to the Property solely because it consists of more than one acre, while imposing only one parcel charge on a commercial or industrial parcel smaller than one acre, is wholly arbitrary and irrational. This dichotomy bears no relation at all to the benefit that a parcel receives from the District 6 sewer system, particularly in that Petitioners could have subdivided the Property into hundreds of one-acre plots, maintained the Property's proportionate benefit from sewer infrastructure, and reduced the Property's parcel charges by up to 80%. Absent a rational relationship between the calculation of the Parcel/Benefit Charges for the Property and the Property's benefit from District 6 sewers, the Parcel/Benefit Charges are unconstitutional and invalid.

Respondents' affirmative defenses do not change this outcome. Petitioners had no duty to pursue any administrative remedies for the Parcel/Benefit Charges, because they are the subject of a constitutional challenge, and because Respondents' published notices of Petitioners' alleged administrative remedies failed to comply with the requirements of County Law § 271. Respondents never should have received permission to assert a voluntary payment defense for the first time on the eve of trial, years after Respondents could have done so and compelled Petitioners to pay subsequent Parcel/Benefit Charges "under protest." The voluntary payment defense nonetheless fails, however, because Petitioners presaged their later challenges to Respondents' Parcel/Benefit Charge calculation method in 2002, when the first of the pending proceedings was commenced. The settlement agreement that ended the 1997 litigation lacks res judicata effect, moreover, because it did not provide for dismissal with prejudice of any claims made

by Bethlehem Steel; and because it could not contest future Parcel/Benefit Charges that would not be imposed or calculated for years to come, pursuant to then-unknown and unknowable formulae.

Accordingly, this Court should reverse the Trial Court's Order and Judgment; grant summary judgment to Petitioners; declare the formula that Respondents have used since 2002 to calculate the Parcel/Benefit Charge component of Petitioners' overall sewer charges to be illegal and unconstitutional; annul the Parcel/Benefit Charges imposed upon Petitioners' Property for each year at issue; and direct Respondents to refund those Parcel/Benefit Charges to Petitioners, with interest.

ARGUMENT

POINT I

THE PARCEL/BENEFIT CHARGES IMPOSED UPON PETITIONERS' PROPERTY ARE ILLEGAL AND UNCONSTITUTIONAL

Because the record before this Court offers no evidence that Respondents assigned the Property a Parcel/Benefit Charge proportionate to the benefit it receives from the District 6 sewer system, and no rational basis for its calculation five times greater per acre for the Property than for commercial or industrial parcels one acre or smaller, the Property's Parcel/Benefit Charges at issue violate County Law § 271 and Petitioners' rights to due process of law and equal protection under the United States and New York Constitutions. They should be annulled entirely on any of these grounds.

A. The Property's Parcel/Benefit Charges violate County Law § 271

County Law § 271 authorized Respondents to impose annual Parcel/Benefit Charges upon the Property, provided that they were "assessed in proportion as nearly as may be to the benefit which [the Property] will derive" from the District 6 sewer system.

Despite this requirement, Respondents argue they had no duty to "perform an exhaustive charge/benefit analysis" for the Property or other parcels in District 6, and that Petitioners "cite no authority" to the contrary. Respondents' Brief dated September 22, 2016, at p. 16 ("Resps. Br. p. ___").

Both assertions are incorrect. *Ellwood v. City of Rochester*, 122 N.Y. 229 (1890); In re *Klock*, 30 A.D. 24 (3d Dep't 1898); and *Clark v. Village of Dunkirk*, 12 Hun. 181 (Sup. Ct. Gen. Term 4th Dep't 1877), *aff'd*, 75 N.Y. 612 (1878), all discussed by Petitioners in their principal Brief, demonstrate that, when the language of a municipal ordinance (as in *Ellwood*), a State statute (as in *Klock*), or a municipal charter provision (as in *Clark*) expressly requires an assessment for an infrastructure enhancement to be "***in proportion***" "***as nearly as may be***" (*Ellwood*, 122 N.Y. at 236; *Klock*, 30 A.D. at 25; *Clark*, 12 Hun. at 187 (emphasis added)) to the "benefit" (*Klock*, 30 A.D. at 25) or "advantage[ ]" (*Ellwood*, 122 N.Y. at 236; *Clark*, 12 Hun. at 187) that a parcel will receive from that infrastructure, the assessment's calculation must account for that parcel's unique characteristics – such as its pre-existing improvements (as in *Ellwood* and *Klock*) or capability to use the new infrastructure (as in *Clark*) – that bear upon the magnitude of that benefit or advantage. Petitioners' Brief dated August 18, 2016, at pp. 14-15 ("Pet. Br. pp. ___-___").

Likewise, in order to comply with County Law § 271 and assign a Parcel/Benefit Charge "***in proportion as nearly as may be***" (emphasis added) to the benefit that the Property receives from District 6 sewers, Respondents needed to account for the Property's unique characteristics, such as its assessed value, improvements (or lack thereof), or capability to access the sewer system. Contrary to Respondents' argument (Resps. Br. p. 17), County Law § 271 mandated Petitioners' Parcel/Benefit Charges to satisfy this

requirement on their own, regardless of their role as one component of a three-part Formula for calculating all sewer assessments for the Property. Because Petitioners performed no requisite analysis concerning the Property, the Parcel/Benefit Charges are invalid *per se*.

The cases upon which Respondents rely do not counsel otherwise. *Elmwood-Utica Houses, Inc. v. Buffalo Sewer Authority*, 65 N.Y.2d 489 (1985); *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52 (1978); and *Arcuri v. Village of Remsen*, 202 A.D.2d 991 (4th Dep't 1994), all concerned sewer rents that a statute had authorized to be calculated "'***on any . . . equitable basis***.'" *Elmwood-Utica Houses*, 65 N.Y.2d at 493 (*quoting* N.Y. PUB. AUTH. LAW § 1180); *Watergate II Apts.*, 46 N.Y.2d at 56 (same); *Arcuri*, 202 A.D.2d at 992 (*quoting* N.Y. GEN. MUN. LAW § 451(1)) (emphasis added). In each case, the Court upheld sewer rents determined pursuant to such an "equitable basis" – a property's assessed value in *Elmwood-Utica Houses* and *Watergate II Apartments*, or assignment of "user units" developed "[a]fter public hearings and consultation with . . . engineers" in *Arcuri* (202 A.D.2d at 992) – because the enabling statute, unlike County Law § 271, did not mandate those rents to be proportionate to a parcel's benefit from the sewer system. Nor was a proportionality analysis necessary to sustain the sewer assessments challenged in *People* ex rel. *Scott v. Pitt*, 169 N.Y. 521 (1902), because a city charter provision required them to equal "a fixed sum based upon each linear foot of sewer built" in front of a parcel. *Id.* at 524.

Only *Matter of Carriero v. Town Bd. of Town of Stillwater*, 72 A.D.3d 1479 (3d Dep't 2010), and *Pikas v. Town of Grand Island*, 106 A.D.2d 887 (4th Dep't 1984), concerned assessments required by statute to be calculated "in just proportion to the amount of benefit which the improvement shall confer upon" a parcel of land. N.Y. TOWN LAW § 202. Those

assessments were properly upheld, because they were devised upon completion of the benefit proportionality analysis required by *Ellwood*, *Klock*, and *Clark*.

In *Carriero*, for example, "the record reflect[ed] that the [Town] Board [had] commissioned the Town Engineer to formulate a Map, Plan and Report ["MPR"] for the construction and operation of a private water system. ***After examination of the MPR and consideration of public feedback***, the proposed benefit assessment was adopted." *Carriero*, 72 A.D.3d at 1480 (emphasis added). Pursuant to the Town's analysis, "parcels of two acres or less [were] assigned one benefit unit, with 0.3 benefit units added for each additional acre," and "property . . . not fit for development" was "entitled to reduced rates." *Id.* at 1480, 1481. In *Pikas*, the benefit assessment at issue was devised "after long deliberation by the Town Board based upon studies prepared by consultants," and was appropriately based upon both a property owner's "water consumption" and the property's assessed value, because "there is nothing inherently improper with relating the amount of benefits received to land values." *Pikas*, 106 A.D.2d at 887, 888.

Unlike the towns sued in *Carriero* and *Pikas*, Respondents failed to perform the analysis that *Ellwood*, *Klock*, and *Clark* required for calculation of a proportionate benefit assessment. District 6 commissioned no studies and made no effort to evaluate the proportionate benefit of the sewer infrastructure to the Property – most of which lacks any sewer service at all – in comparison to the benefit received by fully operational commercial or industrial parcels elsewhere. (R. 550-69). As a result, Respondents have consistently imposed upon the Property a Parcel/Benefit Charge that,

- unlike the assessments at issue in *Carriero*, does not afford a discount for land (such as the Property's slag piles and land reclaimed from Lake Erie) that cannot be developed;
- unlike the assessments challenged in *Pikas*, finds no basis in the Property's actual assessed value or sewer system use; and
- unlike a truly size-based assessment that would assign a uniform charge per acre among all commercial and industrial parcels, is five times greater per acre than the Parcel/Benefit Charge levied upon District 6's commercial and industrial parcels that are one acre or smaller.

Fewer than six months ago, in *Matter of Dorfman v. City of Salamanca Board of Public Utilities*, 138 A.D.3d 1424 (4th Dep't 2016), this Court invalidated – over the objection of Respondents' counsel in this proceeding – a "determination to double the rates charged for water for those consumers who [had] a one-inch or larger meter," in the face of a "'record . . . devoid of proof in support of [that] determination' . . . ." *Id.* at 1425 (*quoting, in part, Matter of Saviola v. Toia*, 63 A.D.2d 849, 850 (4th Dep't 1978)). So, too, does the record here fail to support the Property's Parcel/Benefit Charges. Respondents' (1) admitted failure to perform any analysis of the Property's characteristics, be they assessed value, use of the sewer system, availability of sewer infrastructure, or the Property's improvements or lack thereof, combined with (2) their quintupling of the Property's Parcel/Benefit Charges solely because the Property is not subdivided into parcels one acre or smaller, constitute the "affirmative proof" necessary to invalidate those Parcel/Benefit Charges for lack of proportionality with the Property's benefit from the District 6 sewer system and non-compliance with County Law § 271. *Pikas*, 106 A.D.2d at 888.

B. **The Property's Parcel/Benefit Charges violate Petitioners' Due Process rights**

Notwithstanding the requirements of County Law § 271, for years the Parcel/Benefit Charges' calculation for the Property has been indeed "wholly without legal justification" and "outrageously arbitrary," and therefore has abridged Petitioners' rights to substantive due process. *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 627, 629 (2004) (internal citations omitted).

Respondents purport that *Coconato v. Town of Esopus*, 152 A.D.2d 39 (3d Dep't 1989); *Skinner v. Village of Sylvan Beach*, 113 A.D.2d 1000 (4th Dep't 1985); and *Home Builders Ass'n of Central New York, Inc. v. County of Onondaga*, 151 Misc. 2d 886 (Sup. Ct. Onondaga County 1991), upon which Petitioners rely (Pet Br. pp. 20-21), "have nothing to do with Constitutional due process and are completely inapposite here." Resps. Br. p. 22. That is not so. To the contrary, each of these cases – all decided after *Watergate II Apartments v. Buffalo Sewer Authority*, *supra*, in which the plaintiff had alleged "no violation of any State or Federal constitutional provision" in any event (46 N.Y.2d at 58) – expressly asserts the unconstitutionality of a capital improvement assessment lacking proportionality with the benefit that a parcel receives from that improvement. *Coconato*, 152 A.D.2d at 44 (declaring such a disproportionate assessment to be a "tax . . . violative of the Federal and State Constitutions); *Skinner*, 113 A.D.2d at 1002 (finding an "unconstitutional additional tax burden" upon property owners disproportionately charged); *Home Builders Ass'n of Cent. N.Y.*, 151 Misc. 2d at 889 (invalidating an assessment that failed to account for a property owner's benefit from new sewer infrastructure to be "unconstitutional as applied").

So are Petitioners' Parcel/Benefit Charges for the Property unconstitutional also. Even if, *arguendo*, due process permitted calculation of the Parcel/Benefit Charge as a

function of the Property's size alone (which it does not), Respondents' Parcel/Benefit Charge Formula lacks any rational basis. The Formula assigns a single parcel charge to a commercial or industrial property one acre or smaller, but five parcel charges per acre to the Property, solely because it consists of a single parcel larger than one acre, rather than a subdivided array of parcels one acre or smaller. If the land encompassed by the Property were so subdivided, its total number of parcel charges under the Formula could decrease by approximately 80%, without any change to the Property's improvements, aggregate assessed value, water use, or benefit from sewer infrastructure.

Simply put, no rational justification exists to quintuple the Property's parcel charges due to its lack of subdivision into one-acre parcels – a characteristic wholly unrelated to the benefit that the Property receives from the District 6 sewer system. That is why Respondents' use of the "five times" multiplier to calculate the Parcel/Benefit Charges for the Property is irrational, outrageously arbitrary, and in violation of Petitioners' rights to substantive due process.

C. The Property's Parcel/Benefit Charges violate Petitioners' rights to Equal Protection

Because Respondents' assignment of five parcel charges for every acre of the Property, but only one parcel charge to commercial and industrial properties one acre or smaller, is "palpably arbitrary" and not "rationally related to a legitimate governmental purpose," it also infringes upon Petitioners' rights to equal protection of the laws. *Town of Tonawanda v. Ayler*, 68 N.Y.2d 836, 837 (1986) (quoted at Resps. Br. p. 24).

Respondents thusly describe the purported rational basis for the "five times" multiplier used to calculate the Parcel/Benefit Charges for the Property:

> The government objective behind the Parcel Charge was, ***in conjunction with the other components of the Sewer Assessment Formula***, to raise revenues to cover sewer operating and capital costs while determining sewer assessments as equitably as possible across benefitted properties in District No. 6 – particularly since previous assessment methods failed to raise revenues sufficient to cover those costs. . . . ***Imposing higher parcel charges on commercial operations larger than one acre in size helped District No. 6 raise these revenues. . . . It is perfectly reasonable to assume that larger commercial properties should have higher sewer assessments than smaller parcels . . . .***

Resps. Br. p. 25 (emphasis added). This explanation is inadequate, because it relies upon at least two inaccurate premises.

First, Respondents assume that their assignment of Parcel/Benefit Charges to the Property need not pass constitutional muster on its own, but rather only "in conjunction with the other components" of the Property's overall sewer charges. This is incorrect, because the Parcel/Benefit Charges are authorized by an independent statute, County Law § 271, that is different from other statutes that permit assessments based on Petitioners' water usage and the Property's assessed value. The alleged rationality of other sewer charges imposed upon the Property, therefore, cannot justify the irrationality of the Parcel/Benefit Charges derived from Respondents' "five times" multiplier calculation.

Second, Respondents suppose their assertion that "larger commercial properties should have higher sewer assessments than smaller parcels" justifies the Parcel/Benefit Charges at issue. Resps. Br. p. 25. This could be true if Respondents had assigned a uniform number of parcel charges per acre to any commercial or industrial property, but they did not. Instead, Respondents chose to impose only one parcel charge on a one-acre commercial or industrial property, but five parcel charges per acre upon the Property and other commercial or industrial properties larger than one acre.

Hence, the constitutionality of the Property's Parcel/Benefit Charges depends not upon the rationality of assigning a greater number of those Charges to a larger area, but rather upon the rationality of Respondents' unsubstantiated assumption that the Property receives five times greater benefit per acre from the District 6 sewer system than a commercial or industrial property one acre or smaller. This distinction is not at all rational: pursuant to Respondents' parcel charge allocation, Petitioners could subdivide the Property into hundreds of one-acre parcels, receive the same benefit from sewer infrastructure that they do now, and reduce their Parcel/Benefit Charges by 80%. As this loophole demonstrates, to quintuple the parcel charge per acre for commercial and industrial properties larger than one acre is palpably arbitrary, entirely unrelated to the benefit that a commercial or industrial property receives from the District 6 sewer system, and contrary to Petitioners' rights to equal protection.

Matter of Frontier Insurance Co. v. Town Bd. of Town of Thompson, 285 A.D.2d 953 (3d Dep't 2001), does not suggest otherwise. Like *Elmwood-Utica Houses*, *Watergate II Apartments*, and *Arcuri*, all discussed *supra*, *Frontier Insurance* concerned sewer charges that a statute allowed to be calculated on "any . . . equitable basis . . . ." *Id.* at 956 (*quoting* N.Y. GEN. MUN. LAW § 451(1)(e)). The Court properly determined, as the Court of Appeals had in *Watergate II Apartments*, that such an equitable basis could tie sewer assessments to a property's assessed value. "[E]mploying assessed valuation as a basis for the assignment of additional rent and debt points for commercial buildings is neither unreasonable nor arbitrary," the Court reasoned, "given the nexus between a higher assessed valuation and the number of people served within the commercial unit and the corresponding amount of sewage created . . . ." *Frontier Ins.*, 285 A.D.2d at 956.

County Law § 271, by contrast, expressly requires proportionality between Petitioners' Parcel/Benefit Charges and the Property's benefit from the District 6 sewer infrastructure: some other "equitable basis" of assessment is not sufficient. No rational nexus exists between the calculation of the Parcel/Benefit Charges for the Property and the sewer system's benefit to the Property, moreover, because Respondents assign only one parcel charge per acre to a one-acre or smaller commercial or industrial property, but five parcel charges per acre to commercial or industrial properties larger than one acre, even though: (1) the benefit of the sewer system should be uniform for any acre of commercial or industrial land, and (2) a strategic subdivision of a commercial or industrial parcel, without more, could reduce its parcel charges by 80% while the benefit from the sewer system would remain the same.

For these reasons, the Parcel/Benefit Charge assignment dichotomy between commercial and industrial properties one acre or smaller, versus those larger than one acre, constitutes an irrational and arbitrary classification, and violates Petitioners' rights to equal protection of the laws. The Trial Court should be reversed, and the Parcel/Benefit Charges challenged in the pending proceedings should be annulled in their entirety.

POINT II

RESPONDENTS' AFFIRMATIVE DEFENSES LACK MERIT

A. Petitioners had no duty to exhaust administrative remedies before they pursued the pending proceedings

Even though the Parcel/Benefit Charges violate the requirements of the County Law, lack a rational basis, and abridge Petitioners' constitutional rights, Respondents argue they should stand nonetheless because Petitioners have not sought an administrative remedy. According to Respondents, "Petitioners' decision to raise

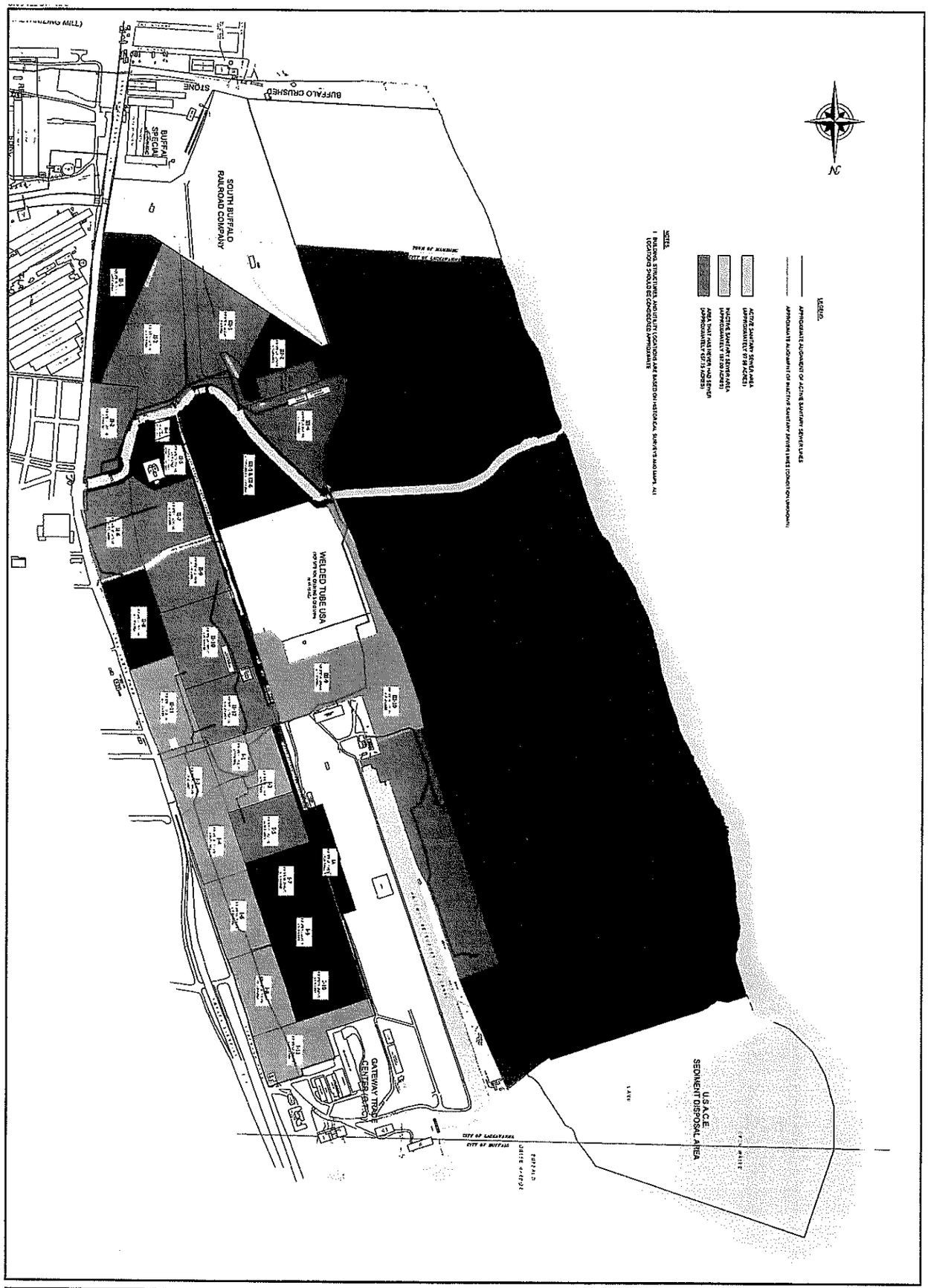

FIGURE 1

PLANT SANITARY SEWER SYSTEM

TECUMSEH LACKAWANNA SITE

LACKAWANNA, NEW YORK

PREPARED FOR

TECUMSEH REDEVELOPMENT, LLC

TurnKey

2558 HAMBURG TURNPIKE
SUITE 300
BUFFALO, NY 14218
(716) 856-0635

JOB NO.: 0071-011-710

Flow Summary
Tecumseh Redevelopment, Inc. to ECSD No. 6
2004 - 2014

Calendar Year	Measurement Period (as reported by Tecumseh to ECSD)	Flow (as reported by Tecumseh to ECSD) (Gallons)	Tecumseh Total Annual Flow (Gallons)	Tecumseh Total Annual Flow (Millions of Gallons)	ECSD No. 6 Reported Inflow (Millions of Gallons)	Tecumseh Flow Contribution (Percent)
	2/1/04 - 2/29/04	40,228				
	3/1/04 - 3/31/04	47,915				
	3/29/04 - 5/3/04	51,724				
	5/4/2004 - 7/2/2004	22,392				
	7/3/04 - 10/1/04	11,546				
2004	10/2/04 - 1/5/05	30,745	204,550	0.20455	1184.9	0.017%
	1/5/05 - 2/1/05	11,22				
	2/1/05 - 3/1/05	6,972				
	3/1/05 - 4/4/05	8,849				
	4/4/05 - 5/5/05	19,993				
	5/5/05 - 6/1/05	6,014				
	6/1/05 - 7/5/05	6,317				
	7/5/05 - 8/2/05	3,796				
	8/2/05 - 9/2/05	4,373				
	9/2/05 - 9/3/05	4,917				
	9/30/05 - 11/1/05	4,892				
	11/1/05 - 12/6/05	7,364				
2005	12/6/05 - 1/3/06	5,454	78941	0.078941	1069.5	0.007%
	1/3/06 – 2/1/06	6,444				
	2/1/06 – 3/1/06	3,663				
	3/1/06 – 4/3/06	4,442				
	4/3/06 – 5/2/06	12,093				
	5/2/06 – 6/1/06	2,968				
	6/1/06 – 7/13/06	4,442				
	7/13/06 – 8/3/06	2,609				
	8/3/06 – 9/5/06	2,827				
	9/5/06 – 10/3/06	3,070				
	10/3/06 – 11/6/06	25,857				
	11/6/06 – 12/4/06	1,978				
2006	12/4/06 – 1/2/07	771	71,164	0.071164	1184.8	0.006%

Flow Summary
Tecumseh Redevelopment, Inc. to ECSD No. 6
2004 - 2014

Calendar Year	Measurement Period (as reported by Tecumseh to ECSD)	Flow (as reported by Tecumseh to ECSD) (Gallons)	Tecumseh Total Annual Flow (Gallons)	Tecumseh Total Annual Flow (Millions of Gallons)	ECSD No. 6 Reported Inflow (Millions of Gallons)	Tecumseh Flow Contribution (Percent)
	1/2/07 – 2/5/07	1,713				
	2/5/07 – 3/5/07	2,201				
	3/5/07 – 4/2/07	2,767				
	4/2/07 – 5/9/07	131,231				
	5/9/07 – 6/1/07	2,826				
	6/1/07 – 7/3/07	2,827				
	7/3/07 – 8/3/07	6,402				
	8/3/07 – 9/1/07	8,862				
	9/1/07 – 10/9/07	8,863				
	10/9/07 – 11/1/07	4,121				
	11/1/07 – 12/6/07	3,483				
2007	12/6/07 – 1/8/08	3,002	178,298	0.178298	1012.2	0.018%
	1/4/08 - 2/1/08	5,937				
	2/1/08 - 3/4/08	3,938				
	3/4/08 - 04/10/08	6,139				
	4/10/08 – 5/3/08	2,847				
	5/3/08 – 6/3/08	4,286				
	6/3/08 – 7/1/08	6,636				
	7/1/08 – 8/4/08	12,040				
	8/4/08 – 9/3/08	8,462				
	9/3/08 – 10/3/08	7,189				
	10/3/08 – 11/1/08	2,943				
	11/1/08 – 12/3/08	4,887				
2008	12/3/08 – 1/9/09	4,665	69,969	0.069969	1243.4	0.006%
	1/9/09 – 2/9/09	540				
	2/9/09 – 3/9/09	5,087				
	3/9/09 – 4/8/09	7,278				
	4/8/09 – 5/4/09	11,993				
	5/4/09 – 6/17/09	4,294				
	6/17/09 – 7/10/09	2,173				
	7/10/09 – 8/3/09	5,963				
	8/3/09 – 9/1/09	15,185				
	9/1/09 – 10/6/09	21,971				
	10/6/09 – 11/4/09	9,888				
	11/4/09 – 12/7/09	6,816				
2009	12/7/09 – 1/13/10	2,025	93213	0.093213	1185.3	0.008%

Flow Summary
Tecumseh Redevelopment, Inc. to ECSD No. 6
2004 - 2014

Calendar Year	Measurement Period (as reported by Tecumseh to ECSD)	Flow (as reported by Tecumseh to ECSD) (Gallons)	Tecumseh Total Annual Flow (Gallons)	Tecumseh Total Annual Flow (Millions of Gallons)	ECSD No. 6 Reported Inflow (Millions of Gallons)	Tecumseh Flow Contribution (Percent)
	1/13/10 – 2/17/10	1729				
	2/17/10 – 3/5/10	162				
	3/5/10 – 4/19/10	2,054				
	4/19/10 – 5/5/10	23,362				
	5/5/10 – 6/4/10	5,497				
	6/4/10 – 7/12/10	4,568				
	7/12/10 – 8/6/10	5,034				
	8/6/10 – 10/9/10	6,098				
	10/9/10 – 6/10/10	3,869				
	10/6/10 – 11/5/10	2,693				
	11/5/10 – 12/14/10	2,303				
2010	12/14/10 – 1/13/11	1,872	59241	0.059241	1021.9	0.006%
	1/3/11 – 2/8/11	200				
	2/8/11 – 3/4/11	4,800				
	3/4/11 – 4/1/11	7,496				
	4/1/11 – 5/6/11	10,286				
	5/6/11 – 6/10/11	16,653				
	6/10/11 – 7/5/11	4,349				
	7/5/11 – 8/5/11	6,418				
	8/5/11 – /22/11	22,577				
	9/22/11 – 10/19/11	4,791				
	10/19/11 – 11/15/11	4,189				
	11/15/11 – 12/5/11	3,239				
2011	12/5/11 – 1/9/12	4,302	89300	0.0893	1205.9	0.007%
	1/9/12 – 2/7/12	4,302				
	2/7/12 – 3/1/12	2,100				
	3/1/12 – 4/5/12	1,454				
	4/5/12 – 5/10/12	43,465				
	5/10/12 – 6/1/12	70,584				
	6/1/12 – 7/24/12	8,323				
	7/24/12 – 8/14/12	3,667				
	8/14/12 – 9/6/12	4,216				
	9/6/12 – 10/8/12	5,658				
	10/8/12 – 11/12/12	3,286				
2012	11/12/12 – 1/15/13	1,982	149,037	0.149037	946.2	0.016%

Flow Summary
Tecumseh Redevelopment, Inc. to ECSD No. 6
2004 - 2014

Calendar Year	Measurement Period (as reported by Tecumseh to ECSD)	Flow (as reported by Tecumseh to ECSD) (Gallons)	Tecumseh Total Annual Flow (Gallons)	Tecumseh Total Annual Flow (Millions of Gallons)	ECSD No. 6 Reported Inflow (Millions of Gallons)	Tecumseh Flow Contribution (Percent)
	1/15/13 – 2/11/13	70,700				
	2/11/13 – 3/17/13	128,100				
	3/17/13 – 4/2/13	68,700				
	4/2/13 – 5/14/13	91,600				
	5/14/13 – 6/12/13	4,963,300				
	6/12/13 – 6/21/13	2,806,300				
	6/21/13 – 8/5/13	1,495,100				
	8/5/13 – 9/10/13	730,700				
	9/10/13 – 10/7/13	613,800				
	10/7/13 - 11/4/13	810,600				
	11/4/13 - 12/19/13	459,700				
2013	12/20/13 - 1/20/14	249,600	12,488,200	12.4882	1086.7	1.149%
	1/21/14 - 2/17/14	218,400				
	2/18/14 - 3/24/14	274,500				
	3/25/14 - 4/22/14	421,600				
	4/23/14 - 5/29/15	538,000				
	5/30/14 - 6/13/14	2,248,500				
	6/13/14 - 7/14/14	642,300				
	7/15/14 - 8/22/14	876,700				
2014	8/22/14 - 12/31/14	716,802	5,936,802	5.936802	1170.8	0.507%

Notes:
1. Highlighted cells represent unusually high discharges due to suspected infiltration and inflow during construction dewatering of Dona St. Water Line excavation
2. ATP Pretreatment System started up in late December 2012
3. Welded Tube USA started operations in Fall 2013