

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, <u>et</u>	:	
<u>al.</u> ,	:	
	:	
Plaintiffs,	:	NO. 1:02-CV-00107
	:	
v.	:	
	:	OPINION AND ORDER
BOARD OF COUNTY COMMISSIONERS	:	
OF HAMILTON COUNTY, OHIO, <u>et</u>	:	
<u>al.</u> ,	:	
	:	
Defendants.	:	

This matter is before the Court on the Ombudsman's Report (doc. 501), and the City of Cincinnati's Supplement (doc. 507), thereto. The Court held a hearing on this matter on May 24, 2011. For the reasons indicated herein, the Court CLARIFIES that under the Consent Decree in this case, the Magistrate Judge has jurisdiction to hear any matter in dispute between homeowners and the Metropolitan Sewer District arising from the Sewer Back Up program.

At the May 24, 2011 hearing the Ombudsman, the Legal Aid Society of Southwest Ohio, LLC, gave a comprehensive report of its activities since its last report, in August 2010. There is no dispute that the Sewer Back Up program is effectively addressing the issue of sewage back ups within the Metropolitan Sewer District ("MSD") service area, and that the program continues to adapt and improve. The Court is impressed with the efforts and cooperation of all the parties, and particularly, the work of the Ombudsman in shepherding homeowner complaints to resolution.

In addition to the report, counsel for the Ombudsman indicated, as in her Report, that she desired clarification in the light of the Magistrate Judge's September 30, 2010 Order (doc. 475). In such Order the Magistrate Judge made a distinction between the award of damages and the cost of "preventative devices." It appears to the Court that the Magistrate Judge, in reading this Court's February 3, 2006 Order (doc. 154) pertaining to the review process of denied claims in the Sewer Back Up program, understood that disputes regarding causation and value of claims were the only disputes within his jurisdiction. However, in the same Order, this Court stated, "a homeowner who is dissatisfied with the City's disposition of a claim under the [SBU] Program may request review of the decision by the Magistrate Judge" (doc. 154). The Court made no distinction regarding what sort of claim a homeowner could make.

At the hearing, counsel for the City, for Hamilton County, for the United States, and for Sierra Club also expressed their views regarding the Magistrate Judge's jurisdiction with regard to any disputes between homeowners and MSD about the scope of preventative devices. Counsel for the City explained that homeowners suffering from two sewer back up events are eligible for the installation of a fail-safe one-way check valve that will not allow sewage from the system to enter into a homeowner's sewer line. They can also be eligible for a "grinder pump" that ensures the homeowner's system can evacuate into the MSD system, even if the MSD system is at full capacity and is exerting pressure against

the check valve. Such a pump requires electricity to function. With a loss of electricity, the pump could not evacuate the homeowner's system, but the one-way check valve would still prevent sewage from a back up into the home.

The United States expressed opposition to the Magistrate Judge's review of scope of remedies, arguing that should the scope of remedies ultimately be enlarged, resources would be diverted from those needed to address the other Consent Decree projects. In contrast, the Sierra Club expressed support for such review.

Having reviewed this matter, the Court finds the position of the Ombudsman and the Sierra Club well-taken. The Court does not envision a flood of litigation resulting from clarification that scope of remedy issues are within the Magistrate Judge's ken. Nor does the Court find such understanding inconsistent with its previous Order or with the Consent Decree. In fact the Consent Decree envisioned an array of potential remedies, including the fail-safe check valves, the grinder pumps, and any other appropriate technology. All of these remedies constitute "preventative" devices, and should there be any issue with their failure, that the parties cannot resolve, the Magistrate Judge can do so. Of course, as stated at the hearing, the heavy burden would be on the homeowner to proffer technical evidence that any challenged MSD remedy is inadequate, a proposition that the Court finds unlikely.

Finally, although the Court in no way sits in appeal of Magistrate Judge Hogan's September 20, 2010 opinion, the Court

finds it appropriate to express its view that he reached the correct result. Although Magistrate Judge Hogan may have viewed the issue of preventative devices as outside the Consent Decree, and therefore outside of his jurisdiction, he correctly found the homeowner was not entitled to a back-up generator.

The Court again congratulates the parties on their collaboration and success in implementing the Sewer Back Up program. The Court further appreciates the assistance of counsel in enlightening it at the May 24, 2011 hearing.

Accordingly, the Court CLARIFIES that under the Consent Decree in this case, the Magistrate Judge has jurisdiction to hear any matter in dispute between homeowners and the Metropolitan Sewer District arising from the Sewer Back Up program.

SO ORDERED.

Dated: May 25, 2011

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge