

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

UNITED STATES OF AMERICA, et al.,  
Plaintiffs,

Case No. 1:02-cv-107  
Barrett, J.  
Litkovitz, M.J.

vs.

BOARD OF HAMILTON COUNTY  
COMMISSIONERS, et al.,  
Defendants.

**ORDER RE: REQUEST  
FOR REVIEW BY  
DENNIS M. ODER**

This matter is before the Court on the Request for Review of the denial of a Sewer Back Up (“SBU”) claim by Dennis M. Oder (Doc. 735) and the Metropolitan Sewer District of Greater Cincinnati (“MSD”)’s response thereto (Doc. 744). On March 19, 2014, the Court held an evidentiary hearing on Mr. Oder’s request for review. (Doc. 754).

Mr. Oder’s request for review is filed under the Sewer Backup<sup>1</sup> program (formerly known as the Water-in-Basement [WIB] Claims Process Plan) (Doc. 131, Consent Decree, Exhibit 8). The Plan states in relevant part:

Subject to the requirements of this Plan, occupants who incur damages as a result of the backup of wastewater into buildings due to inadequate capacity in MSD’s Sewer System (both the combined and the sanitary portions) can recover those damages. This plan also provides a means for occupants to recover damages arising from backups that are the result of MSD’s negligent maintenance, destruction, operation or upkeep of the Sewer System. The Claims Process is not intended to address water in buildings caused by overland flooding not emanating from MSD’s Sewer Systems or caused by blockages in occupants’ own lateral sewer lines.

(*Id.* at 1). In determining the cause of SBU, MSD must exercise its good faith reasonable

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<sup>1</sup>The “Water-In-Basement” program has been renamed the “Sewer Backup” program to more accurately reflect MSD’s responsibility for sewage backups caused by inadequate capacity in MSD’s sewer system. *See* Doc. 452 at 4; Doc. 454 at 16.

engineering judgment and consider the following non-exclusive factors: amount of precipitation, property SBU history, condition of the sewer system in the neighborhood, results of a visual inspection of the neighborhood to look for signs of overland flooding, neighborhood SBU history, capacity of nearby public sewer lines, and topography. (Doc. 131, Consent Decree, Ex. 8 at 2). Damages arising from basement backups for which MSD is responsible are limited to documented real and personal property. *Id.* Homeowners who are dissatisfied with MSD's disposition of a claim under the SBU program may request review of the decision by the Magistrate Judge, whose decision is binding and not subject to any further judicial review. (Docs. 154, 190).

As an initial matter, the Court notes that there is no dispute that the cause of damage to Mr. Oder's property was the combination of an MSD sewer backup and overland flooding. (Doc. 744 at 1). The only issue in this case is the amount of compensation for personal property damage.

Mr. Oder and his wife are the former owners of the property located at 5617 Rapid Run Road, Cincinnati, Ohio. On or about July 1, 2013, sewage backed up into Mr. Oder's basement and attached basement-level garage, resulting in damage to his personal property. Mr. Oder made a claim for damages for the July 2013 sewer backup under the SBU program, seeking compensation in the amount of \$7,677.00 for the loss of personal property. MSD agreed to reimburse Mr. Oder for damages resulting from sewer backup in the amount of \$500.00. As MSD and Mr. Oder have been unable to agree on an amount that will fairly compensate Mr. Oder for his personal property loss, Mr. Oder filed the instant request for review before the undersigned magistrate judge.

This is not the first SBU at 5617 Rapid Run Road. (Doc. 744, Ex. C; Doc. 550). Due to ongoing flooding issues in the Rapid Run neighborhood, MSD worked with Delhi Township to obtain a grant from the Ohio Emergency Management Agency to purchase several affected homes, including the property owned by the Oders at 5617 Rapid Run Road. The purchase of the Oders' property was initiated by Delhi Township on March 31, 2011, in an offer letter under the "WIB Prevention Program – Rapid Run Flood Control Phase 1 – Delhi Township Pre-Disaster Mitigation Grant" project. (Doc. 744, Ex. D). Following an additional appraisal, Mr. and Mrs. Oder accepted the offer to purchase their property for \$90,300.00 on April 5, 2013. (Doc. 744, Ex. E, Agreement). At the time of this agreement, Mr. and Mrs. Oder's son had been residing at the property as their tenant. Mr. and Mrs. Oder's son continued to live at the property subsequent to the April 2013 agreement until early July 2013. The purchase of the house by MSD was not complete until the closing on July 19, 2013.

Mr. Oder testified that on the weekend immediately preceding the July 2013 SBU event, he and his wife were preparing to help their son move the following week. Mr. Oder testified that in preparation for the move, they relocated certain items from the main level of the residence to the basement as a temporary measure. These were items that would not be moved by the professional moving company, and they moved these items to the basement to save on moving expenses. The items included an electronic "Jazzy" wheelchair, mattress and box spring, TV and computer, among others.

On the evening of Monday, July 1, 2013, the Oders experienced a combination of SBU and overland flooding into their basement and garage. Mr. Oder contacted MSD on July 2 to report the SBU. On July 5, 2013, an MSD cleaning crew was dispatched to the Oders' residence

to clean the basement and dispose of contaminated items. By July 5, the Oders had already removed and cleaned some of the items in the basement. The property offsite disposal report documents the items removed from the basement and garage. (Doc. 744, Ex. B). The property was vacated by the Oders' son on July 5, 2013. On July 19, 2013, MSD and Delhi Township completed the purchase of the Oders' property.

The question for the Court is whether Mr. Oder is entitled to compensation for the loss of personal property under the unique circumstances of this case. The Consent Decree does not explicitly address the situation where MSD enters into an agreement to purchase a property and another SBU occurs prior to closing on the property. MSD contends that it is unreasonable for the Oders to have used their basement for any purposes given their knowledge of previous sewer backups and the purchase of their property by MSD. The Oders contend that the storage of the items in the basement was merely a temporary measure and they should nevertheless be fairly compensated for their loss.

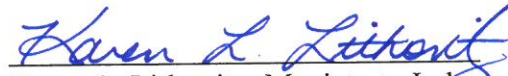
Under the Consent Decree, property purchase is to be used only as a last resort where no other "feasible cost-effective alternative exists to a building backup situation." (Doc. 131, Consent Decree, Exhibit 8 at 4). The Oders were on notice that there was no feasible solution to the ongoing backups and flooding at their residence by virtue of MSD's agreement to purchase their property. Despite this notice, the Oders nevertheless relocated certain items to the basement for temporary storage immediately prior to the backup on July 1 to save moving expenses. This action was risky given the history of prior backups and purchase agreement. Under the circumstances, their actions were not reasonable and the Oders should therefore bear the responsibility for the loss of items that were moved from the main level of the home to the

basement. However, the Court is cognizant that MSD and Delhi Township did not legally own the residence at the time of the backup. The Oders' son was still living at the residence and had not yet moved when the SBU occurred on July 1. It was not unreasonable for the Oders to maintain the washer and dryer in the basement of the residence and items like the lawnmowers in the garage – items that are generally in regular use – until the moving company removed them on the day of the move. Therefore, the Court determines that Mr. Oder is entitled to compensation for the washer and dryer, the two lawnmowers, the tires, and Michelin floor jack in the amount of \$1,304.00. The Court declines to award any compensation for the 1952 Chevrolet Car as the Oders received compensation for this item in a prior claim. *See* Doc. 550.

In conclusion, the Court awards \$1,304.00 to Mr. Oder for the damages sustained in this case.<sup>2</sup>

**IT IS SO ORDERED.**

Date: 11/20/15

  
Karen L. Litkovitz, Magistrate Judge  
United States District Court

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<sup>2</sup> Although Mr. Oder also testified that he believed their home was worth more money than MSD and Delhi Township agreed to pay, the Oders ultimately accepted MSD's offer to purchase the residence for \$90,300.00 and entered into a purchase agreement for that amount. (Doc. 744, Ex. E).