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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 9 MAP 2023

THE BOROUGH OF WEST CHESTER

Appellant,

v.

PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION *ET AL.*,

Appellees.

BRIEF OF *AMICUS CURIAE* SUSQUEHANNA AREA REGIONAL AIRPORT AUTHORITY

Appeal from the Commonwealth Court decision dated January 4, 2023 at No. 260 MD 2018.

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I. STATEMENT OF INTEREST[1]

The Susquehanna Area Regional Airport Authority ("SARAA") is a municipal authority created pursuant to the Pennsylvania Municipal Authorities Act of 1945, 53 Pa.C.S. § 5601 et seq. SARAA owns and operates the Harrisburg International Airport ("HIA"), which is located in Lower Swatara Township ("Township"). HIA includes over 700 acres of land located to the south of Pennsylvania State Route 230, which is bordered on its south and southwest by the Susquehanna River (the "HIA Property"). Like Appellee, SARAA is as an agency of the Commonwealth that is immune from real property taxes and assessments.

SARAA owns and operates its own stormwater management system ("HIA Stormwater System") that is independent from the Township's, and that collects stormwater generated on the HIA Property. The stormwater collected through the HIA Stormwater System is monitored, treated, and discharged directly into Commonwealth waterways, including the Susquehanna River and the Post Run tributary, pursuant to an NPDES permit issued by the Pennsylvania Department of Environmental Protection. There is no stormwater runoff generated on the HIA Property that passes through any portion of the Township's stormwater system. Yet, the Township and its municipal authority are attempting to collect a stormwater "fee" from SARAA in an amount that exceeds 25% of the Township's entire annual

[1] No one other than amici, their members, or their counsel paid in whole or in part for the preparation of this brief or authored in whole or in part this brief. *See* Pa. R.A.P. 531(b)(2).

stormwater management program budget, even though SARAA neither discharges to, nor benefits from, the Township's system. As SARAA receives no benefit, let alone one that is proportional to any services provided in exchange for the payment of a fee, SARAA has challenged the legal propriety of the fee on the grounds that it is, among other things, an impermissible tax. *See Susquehanna Area Regional Airport Authority v. Lower Swatara Township et al.*, Dauphin County Court of Common Pleas, No. 2020-CV-10679 CV. Consequently, SARAA's interests are similar to Appellee's in this matter, and this Court's decision will undoubtedly impact the outcome of SARAA's pending litigation. As such, SARAA files this brief to weigh in on the significant issues pending in this appeal, and to urge this Court to affirm the well-reasoned decision of the Commonwealth Court below.

II. SUMMARY OF ARGUMENT

The question of whether stormwater management and the reduction of pollutants in Commonwealth waterways is a laudable goal is not at issue in this case. Neither is the question of whether local municipalities are required to meet such goals under current statutory and regulatory enactments at the federal and state levels. Rather, the question to be decided by this Honorable Court is whether the service charge ("Stormwater Charge") levied by the Borough of West Chester ("Borough") upon the West Chester University of Pennsylvania of the State System of Higher Education ("University") is a fee that may be charged against all of its

property owners, or a tax that may not be assessed against tax-exempt entities. For the reasons that follow, the Stormwater Charge in question is unquestionably a tax.

First, the Stormwater Charge fits several of the classic characteristics of an excise tax—a form of taxation commonly utilized in regulatory programs where revenues are often segregated in special funds. ***Second,*** the manner in which the Stormwater Charge is calculated—by measuring a property's impervious surface area—means that property owners have no choice in the decision to incur the charge, rendering it entirely compulsory. ***Third,*** the Stormwater Charge is not reasonably proportional to the value of the alleged service or benefit provided to the property owner because the tax is measured solely by a property's impervious surface area—a flawed method of apportionment that has no established correlation with any benefit a property owner receives in exchange for the payment of the charge. As the Stormwater Charge meets all the hallmarks of a tax, it *is* a tax, regardless of what the Borough chooses to call it. As such, it may not be assessed against the University.

III. ARGUMENT

The Borough attempts to characterize the Stormwater Charge as a regulatory fee or fee for services rendered to the University. The Borough's attempts fail for three reasons. First, the definition of taxes in Pennsylvania is much broader than simply "money. . . contributed to a general fund[.]" *Borough of W. Chester v. Pa. State Sys. of Higher Educ.*, 291 A.3d 455, 462 (Pa. Cmwlth. 2023) (quotation

omitted). Taxes regularly include those levies imposed as part of a regulatory scheme or segregated in a special fund. Second, the Borough failed to enter into voluntary, contractual relationships with any property owners abutting or receiving a value or service from the Borough's stormwater system. Third, the Stormwater Charge is not reasonably proportional to the value or benefit received by any property owner because "impervious surface area of a property does not correlate to the level of benefit accorded the owner of that property." *Id.* at 464. Each reason—either alone or in conjunction with any of the others—renders the disputed charge a tax incapable of being levied against the University. *See Delaware Cty. Solid Waste Auth. v. Berks Cty. Bd. of Assessment Appeals,* 626 A.2d 528, 530-31 (Pa. 1993) ("It is well settled that property owned by the Commonwealth and its agencies is beyond the taxing power of a political subdivision.").

A. The Stormwater Charge Has the Characteristics of a Tax

The Borough erroneously asserts that the Stormwater Charge is not a tax because it is not a general revenue-producing measure. As support, the Borough stresses that the revenues from the Stormwater Charge are part of a broader regulatory program dedicated to the Stormwater System's general upkeep and separately maintained in a special fund. Appellant's Br. at 29. The Borough largely

relies on the Commonwealth Court's test in *Rizzo v. City of Philadelphia*[2] which offers only a thirty-thousand-foot discussion regarding a potential distinction between some types of taxes and some types of fees:

> [I]n determining whether a levy under a municipal ordinance is a tax or a true license fee, the common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while licensing fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.

668 A.2d 236, 237 (Pa. Cmwlth. 1995) (citations and quotations omitted). However, any universal conclusions that all taxes are exclusively general "revenue-producing measures" while all fees exclusively support a "regulatory scheme" are reductive and easily disproven.

As an initial matter, the *Rizzo* test fails to capture the full gamut of reasons explaining why taxing authorities levy taxes. *National Federation of Independent Business v. Sebelius* sheds some light. There, the United States Supreme Court found that the federal Patient Protection and Affordable Care Act of 2010's "requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax[.]" *Nat'l Fed'n of Indep. Bus. v. Sebelius*,

[2] *See* Appellant's Br. at 20-21; *see also* Amicus Brief of Hampton Township *et al.* at 6-7; Amicus Brief of Radnor Township *et al.* at 18.

567 U.S. 519, 574 (2012). In reaching this conclusion, the Supreme Court observed that the goal of taxation often lays beyond mere revenue-production:

> [T]axes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. *See* W. Brownlee, Federal Taxation in America 22 (2d ed. 2004); *cf.* 2 J. Story, Commentaries on the Constitution of the United States § 962, p. 434 (1833) ("***the taxing power is often, very often, applied for other purposes, than revenue***"). Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns. *See United States v. Sanchez*, 340 U.S. 42, 44-45...(1950); *Sonzinsky v. United States*, 300 U.S. 506, 513...(1937). Indeed, ***"[e]very tax is in some measure regulatory.*** To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Ibid.*

Id. at 567 (emphasis added). An overview of, perhaps, the most prevalent form of taxation confirms that "the taxing power is often, very often, applied for other purposes, than revenue" in Pennsylvania. *Id.* (quoting J. Story, Commentaries on the Constitution of the United States § 962, p. 434 (1833)).

Pertinent here, the Borough overlooked an entire category of taxes often levied as part of a regulatory program and segregated into special funds—excise taxes.[3] Generally, "[a] tax is an 'excise' or 'transfer'' tax if the government is taxing 'a particular use or enjoyment of property or the shifting from one to another of any

[3] "Excise tax" and "privilege tax" are often used synonymously. *See, e.g., Amidon v. Kane*, 279 A.2d 53, 64 (Pa. 1971) .

power or privilege incidental to the ownership or enjoyment of property.'" *Williams v. City of Phila.*, 164 A.3d 576, 588 n.19 (Pa. Cmwlth. 2017) (quoting *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945)).

The Borough calculates the Stormwater Charge by determining the amount of impervious surface that exists on any given property. Specifically, the Borough's Ordinance defines the term "impervious surface" as:

> A surface that has been compacted or covered with a layer of material so that it prevents or is resistant to infiltration of water, including but not limited to, structures such -as roofs, buildings, storage sheds; other solid, paved or concrete areas such as streets, driveways, sidewalks, parking lots, patios, decks, swimming pools, tennis or other paved courts; or athletic playfields comprised of synthetic turf materials. For the purposes of determining compliance with this Ordinance, highly compacted soils or stone surfaces used for vehicle parking and movement shall be considered impervious. Surfaces that were designed to allow infiltration (i.e. areas of porous pavement) will be considered on a case -by -case basis by the Borough Engineer, based on appropriate documentation and condition of the material, etc.

R. 53a-54a.[4] In turn, "for purposes of determining the appropriate assessment rate for the [Stormwater Charge]," the Borough assigns "developed" Properties to one of six different tiers wherein the amount of tax is calculated by multiplying the number

[4] "Impervious surface" is then incorporated into the term "developed": "[p]roperty where manmade changes have been made which add impervious surfaces to the property, which changes may include, but are not limited to, buildings or other structures for which a building permit must be obtained under the requirements of the Pennsylvania Building Code and [the Borough] Code, mining, dredging, filling, grading, paving, excavation or drilling operations, or the storage of equipment or materials." W. CHESTER CODE § 94A-5 (2022).

of square feet of impervious surface area on the property by a certain dollar amount. R. 55a.

Similar to the Stormwater Charge levied by the Borough, excise taxes are often imposed at a stated dollar amount per unit of measurement. *See, e.g.*, *Blair Candy Co. v. Altoona Area Sch. Dist.*, 613 A.2d 159, 161 (Pa. Cmwlth. 1992) (cigarette tax is "imposed at the specific rate of one and fifty-five hundredths of a cent per cigarette"); *Balt. Life Ins. Co. v. Spring Garden Twp.*, 699 A.2d 847, 848 (Pa. Cmwlth. 1997) (insurance premium tax is imposed at a specific rate upon "gross premiums received from business done within this Commonwealth during each calendar year."); *Williams v. City of Phila.*, 188 A.3d 421 (Pa. 2018) (upholding Philadelphia Beverage Tax as an excise tax which imposed a 1.5¢ per fluid ounce tax on any sugar-sweetened beverages). The privileges that are subject to taxation are diverse and include both personal and real property alike. *See, e.g.*, *Nat'l Biscuit Co. v. Philadelphia*, 98 A.2d 182, 186 (Pa. 1953) ("[A] mercantile license tax is ... an excise tax upon the privilege of transacting business[.]"); *Man, Levy & Nogi, Inc. v. Sch. Dist.*, 375 A.2d 832, 834 (Pa. Cmwlth. 1977) (the Gross Premiums Tax is a tax for "an insurance company's privilege of transacting business within the Commonwealth"); *Wilson Partners, L.P. v. Commonwealth*, 723 A.2d 1079, 1082 (Pa. Cmwlth. 1999) ("[T]he realty transfer tax [that] is imposed on all [real estate]

transactions . . . is an excise tax, imposed on the right to exercise the privilege of transferring beneficial ownership of property[.]").

Occasionally, the distinction between excise and real property taxes may appear blurred. This Court provided clarity over such distinction in *John Wanamaker v. School District of Philadelphia*. In *Wanamaker*, the Court confronted the question of whether the City of Philadelphia's business use and occupancy tax "imposed on the use or occupancy of real estate for commercial or industrial activity" violated the Uniformity Clause of the Pennsylvania Constitution. 274 A.2d 524, 524 (Pa. 1971). In attempting to discern whether the use and occupancy tax should be properly considered a property tax or an excise tax, the Court explained that the "use and ownership of property are distinct and separate. The right to use property is just one of the several rights incident to ownership[.]" *Id.* at 526. As such, the distinction between real estate taxes and excise taxes lies primarily in whether the burden falls upon the right of ownership or use:

> The general indicia of a property tax are said to be that it is a levy "on all property or on all property of a certain class . . . on a specified date in proportion to its value (as assessed by the assessors) . . . the obligation to pay ***which is absolute and unavoidable and is not based on any voluntary action of the person assessed.***" However, the tax obligation involved here is in no way absolute (it can be escaped by not using the property in one of the enumerated ways); it results from the voluntary election by the owner to use the property in a certain way; and it is measured by the extent to which this election is enjoyed.

Id. at 529 (emphasis in original) (quoting 51 Am. Jur., *Taxation*, § 29). In concluding that the business use and occupancy tax was in fact an excise tax, the Court reasoned that "[w]hile economically the incidence of the tax is on the property itself, its legal incidence is on the privilege of using, making it a true excise tax." *Id.* at 527, *cited with approval in Williams*, 188 A.3d at 431-32.

Here, the Borough has readily admitted that the Stormwater Charge burdens the use of real property. The Borough claims that "[b]y choosing to hold, maintain, and improve the University Properties as Developed parcels. . . , the University makes the affirmative voluntary choice to subject itself to the [Stormwater Charge]." Appellant's Br. at 43. The Borough has also previously asserted in this litigation that property owners "could, for example, ***elect to simply eliminate impervious coverage on their property such that the lot is no longer within the definition of the term Developed Property***." R. 494a-495a (Pet'r's Br. in Oppo'n to Resp't's Preliminary Objection) (emphasis added). But in using impervious area to calculate the Stormwater Charge, the Borough has levied a tax on the use of the property—specifically, the use or privilege of creating or maintaining impervious surfaces.[5]

[5] *But see Fish v. Twp. of Lower Merion*, 128 A.3d 764, 770-71 (Pa. 2015) ("[A] tax on the privilege of employing property is, from a practical standpoint, the same in effect as a tax upon the property itself[.]") (quoting *In re Sch. Dist. of Hampton Twp.*, 362 Pa. 395, 397, 67 A.2d 376, 377 (Pa. 1949)).

Nonetheless, the Borough contends that because "all revenue from the [Stormwater Charge] must be deposited into the Stormwater Fund . . . for stormwater-related purposes. . . the [Stormwater Charge] is not a general revenue-raising device." Appellant's Br. at 29. This argument is meritless. The segregation of tax proceeds into a special fund for use as part of a greater regulatory scheme does not automatically transform them into fees. *See Hamilton's Appeal*, 16 A.2d 32, 36 (Pa. 1940) ("The fact that a special fund will be created is of no importance."). On the contrary, when it comes to excise taxes, the General Assembly regularly requires some or all of these taxes to be deposited in a special fund as part of some greater regulatory program. Indeed, the Pennsylvania Constitution contains one such example.

Under Article VIII, Section 11, "[a]ll proceeds from gasoline and other motor fuel ***excise taxes*** . . . shall be appropriated by the General Assembly . . . and used solely for construction, reconstruction, maintenance, and repair of and safety on public highways and bridges[.]". PA. CONST. art. VIII, § 11. In carrying out this constitutional mandate, the General Assembly levies an "an excise tax of 60 mills . . . upon all liquid fuels" and requires $35 million each year to be "deposited into the Multimodal Transportation Fund . . . in accordance with section 11 of Article VIII of the Constitution of Pennsylvania." 75 Pa.C.S. § 9502(a). Additional excise taxes on liquid fuels are also levied for distribution into various special funds, e.g.

the Motor License Fund and Liquid Fuels Tax Fund, for the express purpose of the construction, maintenance, and safety of public highways and bridges. *See generally id.* §§ 9502, 9010(b).

Also, illustrative here, under the Third Class County Convention Center Authority Act, the General Assembly has authorized third class counties "to impose an excise tax" on hotel rentals. 16 P.S. § 2399.23(a). One hundred percent of all revenues reaped from this excise tax are earmarked for special funds—eighty percent to be deposited in a special fund for the use of the authority for convention center purposes and twenty percent to be deposited in the county's tourist promotion agency fund. *Id.* § 2399.23(c); *see also Downs Racing, L.P. v. Luzerne Cty.*, 297 A.3d 20 (Pa. Cmwlth. 2023). Other examples abound—each one undermining the Borough's contention that a tax cannot support a regulatory scheme. *See* 16 P.S. § 1770.10(a)-(d) (permitting third through eighth class counties to levy a hotel room rental *tax* to be deposited in a *special fund* exclusively dedicated to tourism promotion); 72 P.S. § 7902 (each year, diverting the greater of $430 million or forty-six and a half percent (46.5%) of the excise tax on insurance companies' gross premiums to the Fire Insurance Tax Fund or the Municipal Pension Aid Fund); 35 P.S. §§ 10231.901-10231.902 (enacting an excise tax, similar to the cigarette tax, on medical marijuana, depositing those proceeds into the Medical Marijuana Program Fund, and allocating those proceeds among the Department of Health, the

Department of Drug and Alcohol Programs, and the Pennsylvania Commission on Crime and Delinquency).

In sum, the very two characteristics of the Stormwater Charge which the Borough asserts are only specific to fees—the generation of revenue for a regulatory program and the use of special funds—have historically been common features of taxes. Moreover, by the Borough's own admissions, the "legal incidence [of the Stormwater Charge] is on the privilege of using [real property]," making it akin to an excise tax. *Wanamaker,* 274 A.2d at 527; Appellant's Br. at 29, 43, R. 494a-495a.

B. The Stormwater Charge Lacks the Necessary Hallmark of a Voluntary Contractual Relationship to be Considered a Fee.

The Commonwealth Court correctly determined that a distinguishing factor between a tax and a fee is that the latter is incident to a voluntary act and paid by choice. *Borough of W. Chester*, 291 A.3d at 466 (quoting *City of Phila. v. Pa. PUC*, 676 A.2d 1298, 1307 (Pa. Cmwlth. 1996)). The Borough does not dispute that voluntary "choice" is a necessary element to determine the existence of a fee. Instead, the Borough contends that "[b]y choosing to hold, maintain, and improve the University Properties as ***Developed parcels***. . ., the University makes the affirmative voluntary choice to subject itself to the [Stormwater Charge]." Appellant's Br. at 43. In other words, per the Borough, the University could avoid the Stormwater Charge by simply surrendering the use of its own property to construct and operate any buildings, sidewalks, roads, or parking spaces and cease

providing any services to the public as a Commonwealth entity. As the Michigan Supreme Court held in *Bolt v. City of Lansing*, that is not a choice at all.

In *Bolt v. City of Lansing*, the City of Lansing, Michigan attempted to impose a storm water service charge upon its residents "to help defray the cost of the administration, operation, maintenance, and construction of the stormwater system" in an effort to comply with the Clean Water Act and the National Pollutant Discharge Elimination Standards permit-program. 459 Mich. 152, 154-156 (1998). Like the Borough in the instant appeal, the City in *Bolt* calculated its storm water service charge in terms of "the amount of pervious and impervious areas within the parcel." *Id.* at 155-156. Among the factors the *Bolt* Court used to determine whether the storm water service charge was a fee or a tax was "voluntariness"—or whether "property owners were able to refuse or limit their use of the commodity or service." *Id.* at 162. When confronted with the suggestion now offered by the Borough here —that property owners had a choice to simply build less, the *Bolt* Court found that that such choice was illusory at best:

> The charge in the present case is effectively compulsory. The property owner has no choice whether to use the service and is unable to control the extent to which the service is used. The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee ***because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property***.

Id. at 167-68[6] (emphasis added). So too here, the Borough asks property owners, including the University, to relinquish "their rights of ownership to their property by declining to build on the property" in order to avoid the Stormwater Charge. That is not the type of "voluntary act" that is characteristic of a fee. Rather, it is decidedly compulsory, and indicative of a tax.

C. The Stormwater Charge is Neither Reasonable Nor Proportional Because Calculating Impervious Area Fails to Measure the Value or Benefit Allegedly Conferred Upon the Taxpayer By the Stormwater System.

The Borough lastly claims that the Stormwater Charge is reasonable and proportional because "the amount [of the Stormwater Charge] . . . for which a given property is responsible is a function of the amount of impervious cover at their property." Appellant's Br. at 49-50. But this very claim lays bare the lack of any relationship between "impervious cover" and the value or benefit the Stormwater System purports to provide.

The Commonwealth Court correctly reasoned that "a charge is a tax rather than a fee for service if it is not reasonably proportional to the value or benefit received in return for its payment." *Borough of W. Chester*, 291 A.3d at 463 (citing *Supervisors of Manheim Twp.*, 38 A.2d at 276). Applying this prong to the

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[6] The compulsory nature of the Stormwater Charge suggests that it may be a property tax after all. *See John Wanamaker*, 274 A.2d at 529 (One of the general indicia of a property tax is "the obligation to pay which is absolute and unavoidable and is not based on any voluntary action of the person assessed.").

Stormwater Charge, the Commonwealth Court noted that the value or benefits that the Borough's stormwater system actually provided were ones "'enjoyed by the general public,' such as decreased flooding, erosion and pollution, as opposed to 'individualized services provided to particular customers.'" *Id.* at 465 (quoting *Dekalb County v. United States*, 108 Fed. Cl. 681, 701 (Fed. Cl. 2013)). The Commonwealth Court further concluded that the Stormwater Charge "is calculated based on a lot's impervious surface area" and thus "based not on the benefits derived by the payor, but by the anticipated burden that its property imposes on the stormwater system." *Id.* (quotation omitted).

The Borough does not dispute either the relevance of the proportionality requirement or the Commonwealth Court's findings. In fact, the Borough further concedes that its Borough Manager, Michael Perrone, admitted that the Stormwater Charge "is not directly related to the amount of benefit each homeowner gets from the existence of the storm water measures." Appellant's Br. at 50 (citing R. 1239a). This admission is not surprising given that the Borough has pleaded from the inception of this case that "[t]he amount of the [Stormwater Charge] for which the owner of a developed property is responsible is dependent upon the amount of impervious surface at the subject property." Appellant's Action for Declaratory Judgment, ¶ 78, R.35a. Instead, the Borough attempts to deflect from these admissions by asserting that its expert report—the NTM Report—adequately

measures the specific benefit provided to the University. R. 48a-49a. But this assertion misses the mark—the Borough's methodology for assessing the Stormwater Charge is fatally flawed and cannot satisfy the proportionality requirement.

The Borough's use of "impervious surface" area does not actually measure the value or benefit conferred upon the property owner—it measures one specific characteristic of the property. R. 53a-55a. While Borough Manager Perrone testified that "owners of both developed and undeveloped properties in the Borough receive the same general benefits from projects funded by the Stormwater [Charge]," the presence of general benefits alone is insufficient to establish that the Stormwater Charge is a reasonable and proportional fee. *Borough of W. Chester*, 291 A.3d at 463. Once again, the Michigan Supreme Court's observations regarding the use of "impervious surface" area to calculate a proper fee are applicable here:

> The extent of any particularized benefit to property owners is considerably outweighed by the general benefit to the citizenry of Lansing as a whole in the form of enhanced environmental quality. . . . When virtually every person in a community is a 'user" of a public improvement, a municipal government's tactic of augmenting its budget by purporting to charge a 'fee' for the 'service' rendered should be seen for what it is: ***a subterfuge to evade constitutional limitations on its power to raise taxes.***

Bolt, 459 Mich. at 166 (emphasis added).

Casting the numerous admissions of its Borough Manager aside, the Borough further contends that the Second Class Township Code empowers it to "assess

reasonable and uniform fees based in whole or in part on the characteristics of the property benefited" by the Borough's stormwater system. Appellant's Br. at 52 (quoting 53 P.S. § 67705(a)).[7] The Borough further argues that its "impervious surface" methodology satisfies the undefined phrase "characteristics of the property benefited[.]" *Id.* (quoting 53 P.S. § 67705(a)). As support, the Borough points to the United States Environmental Protection Agency ("EPA")'s general statement, among others, that "runoff from lands modified by human activities can harm surface water resources" to justify its uneven and disproportionate Stormwater Charge. Appellant's Br. at 53. But the EPA's own statements on the use of "impervious surface" undercut the Borough's reliance on "impervious surface" alone to calculate its tax.

Displayed prominently on its website, the EPA recognizes that "[m]any studies have found that [effective impervious area or] EIA (also known as drainage connection or directly connected impervious area ["DCIA"]) is a better predictor of ecosystem alteration in urban streams."[8] The EPA's recognition of the superiority of

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[7] The Second Class Township Code also requires such a fee to be imposed on: 1) all properties in the township; or 2) all properties benefited by a specific storm water project; or 3) all properties within a storm water management district. 53 P.S. § 67705(b)(1)-(3). None of these requirements are met here. First, by its very terms, the Stormwater Tax only applies to "developed" properties. Second, the Stormwater System is not a "specific storm water project" and the Stormwater Tax applies to all "developed" properties in the Borough—regardless of whether they benefit from the Stormwater System. Finally, the Borough did not create a storm water management district.

[8] *Urbanization—Stormwater Runoff*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, (Aug. 27, 2023) https://www.epa.gov/caddis-vol2/urbanization-stormwater-runoff.

EIA or DCIA is not limited to the theoretical sphere. The EPA's permit requirements for NPDES Small MS4 permits in Massachusetts and New Hampshire, for example, both "require regulated communities to estimate the number of acres of impervious area (IA)[9] and directly connected impervious area (DCIA)."[10,11] Further, the EPA does not consider DCIA to include "[i]solated [impervious surfaces] with an indirect hydraulic connection to the MS4, or that otherwise drain to a pervious area." *Id.* In contrast, the Borough's Stormwater Charge methodology does not remove impervious surfaces that have an indirect connection to the Stormwater System or that drain to pervious area from its calculations. R. 54a-55a.

While the Borough maintains that it is "unaware of any measure for calculating a stormwater management fee which does not at least include the amount of impervious cover[,]" Appellant's Br. at 52-53, the existence of EIA/DCIA has been well known for some time. In 2008, the National Research Council ("NRC")—the operating arm of the United States National Academies of Sciences, Engineering,

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[9] "IA" and impervious surface are interchangeable terms.

[10] *Estimating Change in Impervious Area (IA) and Directly Connected Impervious Areas (DCIA) for New Hampshire Small MS4 Permit,* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY at 1, *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi/P100ALMQ.PDF?Dockey=P100ALMQ.PDF; *Estimating Change in Impervious Area (IA) and Directly Connected Impervious Areas (DCIA) for Massachusetts Small MS4 Permit*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY at 1, *available at* https://www3.epa.gov/region1/npdes/stormwater/ma/MADCIA.pdf.

[11] The EPA defines DCIA as "the portion of [impervious surface] with a direct hydraulic connection to the permittee's MS4 or a waterbody via continuous paved surfaces, gutters, drain pipes, or other conventional conveyance and detention structures that do not reduce runoff volume." *Id.*

and Medicine—recognized the significant limitations on the use of "impervious surface" in designing and maintaining stormwater systems:

> The percentage of impervious surface or cover in a landscape is the most frequently used measure of urbanization. Yet this parameter has its limitations, in part because it has not been consistently used or defined. Most significant is the distinction between ***total*** impervious area (TIA)[12] and ***effective*** impervious area (EIA).

Committee on Reducing Stormwater Discharge Contributions to Water Pollution, *Urban Stormwater Management in the United States*, NATIONAL RESEARCH COUNCIL at 14, https://www3.epa.gov/npdes/pubs/nrc_stormwaterreport.pdf (emphasis in original). In particular, the NRC cautioned that "[h]ydrologically, . . . this definition [of impervious surface] is incomplete for two reasons."[13] *Id.*

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[12] The NRC defines TIA in a similar manner to the Borough's "impervious surface"—"that fraction of the watershed covered by constructed, non-infiltrating surfaces such as concrete, asphalt, and buildings." *Id.* For practical purposes, "impervious surface" and TIA are also interchangeable.

[13] The NRC also expressed concern that impervious surface measurements could vary wildly depending on the method used:

> Values of imperviousness can vary significantly according to the method used to estimate the impervious cover. In a detailed analysis of urban imperviousness in Boulder, Colorado, Lee and Heaney (2003) found that ***hydrologic modeling of the study area resulted in large variations (265 percent difference) in the calculations of peak discharge when impervious surface areas were determined using different methods***. They concluded that the main focus should be on effective impervious area (EIA) when examining the effects of urbanization on stormwater quantity and quality.

Id. at 118 (emphasis added).

First, a municipality simply measuring impervious surfaces "ignores nominally 'pervious' surfaces that are sufficiently compacted or otherwise so low in permeability that the rate of runoff from them is similar or indistinguishable from pavement." *Id.* As an example, the NRC cited to a study conducted in Washington state which "found that the impervious unit-area runoff was only 20 percent greater than that from pervious areas—primarily thin sodded lawns over glacial till— . . . [a] hydrologic contribution [which] cannot be ignored entirely." *Id.* While "highly compacted soils or stone surfaces used for vehicle parking and movement" are deemed an impervious surface, the Borough does not consider "thin sodded lawns" within this calculation. R. 53a-54a.

Second, the definition of impervious surface or TIA "includes some paved surfaces that may contribute nothing to the stormwater-runoff response of the downstream channel." *Id.* The NRC elaborated as to the beneficial effect on stormwater runoff that "disconnected impervious areas" can provide—an effect unaccounted for in the Borough's "impervious surface" methodology:

> Runoff from disconnected impervious areas can be spread over pervious surfaces as sheet flow and given the opportunity to infiltrate before reaching the drainage system. Therefore, there can be a substantial reduction in the runoff volume and a delay in the remaining runoff entering the storm drainage collection system, depending on the soil infiltration rate, the depth of the flow, and the available flow length. Examples of disconnected impervious surfaces are rooftops that discharge into lawns, streets with swales, and parking lots with runoff directed to adjacent open space or swales. From a hydrologic point of view,

> road-related imperviousness usually exerts a larger impact than rooftop-related imperviousness, because roadways are usually directly connected whereas roofs can be disconnected (Schueler, 1994).[14]

Id. at 118; R. 53a-54a.

Designed to address at least this second limitation, EIA measures only those "impervious surfaces with direct hydraulic connection to the downstream drainage (or stream) system." *Id.* at 14. Practically speaking, EIA excludes "any part of the TIA that drains onto pervious (i.e., "green") ground" and thus "[t]his parameter, at least conceptually, captures the hydrologic significance of imperviousness." *Id.* As such, the NRC observed that "***EIA is the parameter normally used to characterize urban development in hydrologic models.***" *Id.* (emphasis added). In spite of the acknowledged superiority of EIA, the Borough chooses to utilize a significantly more variable and inaccurate method.

But although it is the preferred scientific method for calculating stormwater runoff, even EIA/DCIA suffers from significant limitations—namely, the inability to calculate the significant contributions to stormwater runoff posed by pervious surface areas. In a study conducted in 2013, researchers from the University of Illinois and Dankook University in South Korea "examine[d] the contribution from

[14] Despite the greater impact of road-related imperviousness on stormwater runoff, the Borough's Ordinance also provides no distinction between roads and roofs in its impervious surface area calculation. R. 55a-56a.

pervious areas in urban catchments[.]" Y. Seo, N.-J. Choi, and A. R. Schmidt, *Contribution of directly connected and isolated impervious areas to urban drainage network hydrographs*, HYDROL. EARTH SYST. SCI., May 2, 2013 at 3477, *available at* https://hess.copernicus.org/articles/17/3473/2013/hess-17-3473-2013.pdf. The researchers summarized the results of several earlier studies which had concluded that pervious areas contributed to stormwater runoff:

> [T]he infiltrated water takes more complicated flow paths in urban area than rural area especially with complex sewer systems involved. Butler and Davies (2004) recognized that the infiltrated water in pervious areas also infiltrates back into the sewers and contributes to the measured sewer runoff. Gregory et al. (2006) investigated that soil compaction during the construction of structural foundations can reduce the moisture loss out of the urban hydrologic system and they indicate that this increases the contribution to the runoff hydrograph. Pipe infiltration can be one of the possible flow paths of infiltrated water to the main drainage network. Weiss et al. (2002) investigated 34 combined sewer systems in Germany and found that sewer flow due to infiltration is widely underestimated and more than two thirds of the water passing through the waste water treatment plant can be attributed to infiltration and inflow. De Benedittis and Bertrand-Krajewski (2005) calculated that infiltration and inflow in the sewer system in Lyon, France can be up to 30 % of the dry weather flow. Vaes et al. (2005) also showed the importance of quantifying infiltration rate into sewer pipes. ***These studies emphasize the importance of pervious areas in urban catchments in that they should be treated with greater attention than they are in current practice for hydrologic modeling.***

Id. at 3474. Analyzing an urban stormwater catchment in the Chicago area, the researchers confirmed the consensus opinion of this long line of studies: as much as

fifty-five percent of infiltrated water from pervious areas contributed to stormwater runoff. *Id.* at 3482.

The takeaway from this study is simple. Despite the clear contribution of pervious areas to stormwater runoff and the burden they place on stormwater systems, the Borough excludes pervious areas, including undeveloped properties, from its Stormwater Charge calculations. R. 54a-55a.

Ultimately, the Borough's "impervious surface" methodology for calculating its Stormwater Charge comes up short. It fails to account for stormwater from nominal or substantial pervious areas that flow into its stormwater system. And, unlike EIA, it never makes adjustments for stormwater from disconnected impervious areas that never enters its stormwater system. The end result is that property owners of pervious areas receive a benefit for which they do not pay while property owners of disconnected impervious areas bear a greater share of the Stormwater Charge than they should.

The limitations on impervious area as a metric for determining the proportional impact of stormwater runoff from property is not simply theoretical. As indicated at the outset of this brief, SARAA maintains its own stormwater system that collects, transports, treats, and discharges all stormwater runoff generated from the HIA Property. Its system is regulated by the DEP via an NPDES permit which permits it to discharge its collected stormwater into the Susquehanna River and the

Post Run tributary. It contributes no stormwater runoff from the HIA Property to the Lower Swatara Township stormwater system. It receives no specific or discrete benefit from the Township or its storm water system. Yet, because the HIA Property is an international airport comprised of runways, aprons, roadways, parking lots and other nonporous surfaces, it represents a significant portion of all the pervious area in the Township—roughly 25%. And because the Township, like the Borough here, calculates a stormwater fee based solely upon the amount of impervious area a developed property has, SARAA has been assessed the largest fee by a significant margin of any property owner in the Township, without any corresponding benefit to support the assessment.[15] The Township is effectively attempting to have SARAA subsidize its stormwater program for the benefit of all of its other residents, merely because it has the largest amount of impervious area, without regard for where the stormwater generated from that property actually goes, what impact it actually has, and what benefit, if any, SARAA actually receives from the Township. There could not be a clearer example of how ineffective impervious area alone is to quantify the

[15] Since late 2020, the Township has assessed SARAA over $345,000 per year in purported stormwater "fees". The Township's entire stormwater management program budget for calendar years 2020 through 2023 averaged just over $1,000,000 per year, based upon the Township's 2019 budget projection. SARAA has refused to pay the assessed fee during the pendency of its action seeking to declare the fee null and void, currently pending in the Court of Common Pleas for Dauphin County, Pennsylvania. *See Susquehanna Area Regional Airport Authority v. Lower Swatara Township et al.*, Dauphin County Court of Common Pleas, No. 2020-CV-10679 CV.

benefit a property owner receives from a municipal stormwater system, or how disproportional a fee can be that is based on that method.

A stormwater charge based solely upon impervious area has no correlation to any impact an individual property has on a municipal stormwater management system, nor to any benefit conferred upon the property owner by the municipality operating a stormwater management program. Absent any correlation, there can be no proportionality between the charge and the service provided. As the Borough's Stormwater Charge in the instant appeal is based solely on impervious area, it is not "reasonably proportional to the value or benefit received in return for its payment" and therefore must be considered a tax. *Borough of W. Chester*, 291 A.3d at 463 (citing *Supervisors of Manheim Twp.*, 38 A. 2d at 276).

IV. CONCLUSION

While a suitable stormwater fee may be conceivably drafted and appropriately levied against a Commonwealth entity, the Borough has not presented one here. The Stormwater Charge at issue has all of the characteristics of a tax on the privilege of developing one's property. It does not reflect a voluntary exchange between property owners and the Borough. It is calculated by a method that is incapable of resulting in a proportional charge as measured against any benefit that is received by the property owner. It is a tax.

The Borough, like other municipalities across the Commonwealth, has characterized its stormwater charge as a fee in an effort to extend its application to those property owners that are exempt from paying taxes. However, our system of jurisprudence is not based upon an "ends justifies the means" approach. The Pennsylvania General Assembly determined that certain property owners are exempt from taxes, and the extent of such exemption. It is for the General Assembly to determine prospectively, not local municipalities or the courts, whether an exception to such exempt status should exist relating to costs associated with stormwater management programs.

The Commonwealth Court correctly determined that the Stormwater Charge constitutes a tax, notwithstanding what the Borough chose to label it. Its decision should be affirmed.

Respectfully submitted,

Date: September 13, 2023

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CERTIFICATE OF WORD COMPLIANCE

I certify that the foregoing brief complies with the word count limitations set forth in Pa. R.A.P. 531, and that it contains 6,891 words, which was determined in reliance upon the word count feature of the word processing system used in preparation.

Dated: September 13, 2023

Michael W. Winfield, Esquire

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania*: *Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: September 13, 2023

Michael W. Winfield, Esquire

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September 2023, a true and correct copy of the foregoing Brief of *Amicus Curiae* Susquehanna Area Regional Airport Authority was served upon all parties via PACFile.

Dated: September 13, 2023

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