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IN THE SUPREME COURT OF PENNSYLVANIA

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**No. 9 MAP 2023**

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**THE BOROUGH OF WEST CHESTER,**

**Appellant**

**v.**

**PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION and WEST CHESTER UNIVERSITY OF PENNSYLVANIA OF THE STATE SYSTEM OF HIGHER EDUCATION,**

**Appellees**

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# BRIEF FOR APPELLEES

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APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT
ENTERED ON JANUARY 4, 2023, AT NO. 260 M.D. 2018

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## STATEMENT OF JURISDICTION

This is an appeal from a final order of the Commonwealth Court in a matter which was originally commenced in that court. This Court has appellate jurisdiction pursuant to 42 Pa. C.S. § 723(a).

## ORDER IN QUESTION

AND NOW, this 4th day of January, 2023, the motion for summary judgment filed by the Pennsylvania State System of Higher Education and West Chester University of Pennsylvania is GRANTED. The cross-application for summary relief filed by the Borough of West Chester (Borough) is DENIED.

*/s/ Christine Fizzano Cannon*
CHRISTINE FIZZANO CANNON, Judge

## STATEMENT OF STANDARD AND SCOPE OF REVIEW

In general, this Court's standard of review of an order granting summary judgment is *de novo*. *Pyeritz v. Commonwealth*, 32 A.3d 687, 692 (Pa. 2011). The scope of this Court's review of a summary judgment ruling is plenary. *Id.* (citing *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652, 657 (Pa. 2009). In such a case, then, this Court "may disturb a trial court order granting summary judgment only if the lower court committed an error of law." *Liss & Marion,* 983 A.2d at 657. *Accord LJL Transp., Inc. v. Pilot Air Freight Corp.*, 962 A.2d 639, 647 (Pa. 2009). *See also Missett v. HUB Intern. Pennsylvania LLC,* 6 A.3d 530, 534 (Pa. Super. 2010) (same standards apply in declaratory judgment action).

Ordinarily, at the summary judgment stage, all doubts as to the existence of a genuine issue of material fact are resolved against the moving party. *See, e.g., Hite v. Falcon Partners*, 13 A.3d 942, 945 (Pa. Super. 2011). Here, however, *both* sides sought summary judgment on the same legal question, so – by definition – the parties "are [or should be] in agreement that there are no genuine issues of material fact remaining." *Id.* In such a situation, the courts must determine whether, as a matter of law, "one of the parties has established a clear right to the relief requested." *Iseley v. Beard*, 841 A.2d 168, 169 n.1 (Pa. Cmwlth. 2004). It follows that resolution of this appeal will hinge on whether, given the agreed-to factual record, the legal conclusions of the Commonwealth Court were sound.

## STATEMENT OF THE QUESTIONS INVOLVED

*In an original jurisdiction matter commenced by the Borough of West Chester against West Chester University and the State System of Higher Education, both sides deemed the material facts undisputed (following extensive discovery) and filed cross-motions for summary judgment. The Commonwealth parties prevailed and the Borough has appealed. The questions presented are:*

I. Did Commonwealth Court correctly hold that – because Commonwealth parties are immune from local taxation – neither West Chester University nor the State System as a whole could be required to pay the Borough's recently-adopted "Stormwater Charge" which, as a matter of law, amounted to a tax?

Answer of the Commonwealth Court: Yes

Suggested answer: Yes

II. Beyond the tax immunity issue, should the Commonwealth parties still prevail because the Stormwater Charge is, in any event, not reasonably proportional to the costs incurred by the Borough?

Answer of the Commonwealth Court: (not specifically addressed)

Suggested answer: Yes

## STATEMENT OF THE CASE

West Chester University ("WCU") is one of fourteen public universities that comprise the Pennsylvania State System of Higher Education ("State System"). This litigation began in 2018, when the State System, on behalf of WCU, invoked its immunity from local taxation and refused to pay the "Stormwater Charge" the Borough of West Chester ("the Borough") had enacted two years earlier.[1] That refusal was legally justified, as Commonwealth Court correctly determined.

**Procedural History.**

The lower court record in this long-running matter is large but the pertinent procedural history, in and of itself, is straightforward.

The Borough commenced this litigation by filing a verified "Action for Declaratory Judgment" (*see* RR 20a-42a), including extensive supporting exhibits (*see* RR 44a-338a). In response, the named defendants, WCU and the State System (together, "the University") filed a single, comprehensive preliminary objection to the Borough's submission, based on the University's immunity, as a

[1] As Commonwealth Court observed, the Borough dubbed this new charge the "Stream Protection Fee," while the University and the State System have referred to it as the "Stormwater Tax." Eschewing both labels, the Court adopted "the neutral term 'Stormwater Charge'" (*See* RR 520a, n.1). That terminology will be utilized in this filing.

Commonwealth entity, from local taxation (*See* RR 344a-353a). Like the Borough, the University also attached various exhibits to its filing (*See* RR 358a-421a). Each side responded to the other's contentions and, with that, the matter was fully briefed (*See generally* RR 422a-518a).

In due course, Commonwealth Court issued a memorandum opinion, authored by Judge Fizzano Cannon (along with an accompanying order), overruling the University's preliminary objection (RR 519a-531a). After summarizing the factual information before the court at that point and the parties' respective contentions in detail, the Court observed, explicitly, that "whether the Borough has established a right to declaratory relief depends on whether the Stormwater Charge constitutes a tax or a fee" (RR 529a).[2] In the Court's estimation that, in turn, was "a question necessitating further factual development" (*Id.*). Specifically, the Court directed the parties to develop facts regarding: (1) whether the Borough's stormwater system provides any "discrete benefit," to the University ("as opposed to generally aiding the environment and the public at large"; (2) the relative value of the stormwater system to the University, compared to the amount of the Stormwater Charge; and (3) just how the Borough "utilize[s]

[2] In the record and in this brief, the phrase "tax vs. fee" is used occasionally as a shorthand to refer to the central legal question at issue here. As noted *infra*, however, both taxes and fees have subcategories, and the distinctions among them must be taken into account.

the funds generated by the Stormwater Charge" (*Id.*). Exploration of these points was expected to aid the court in analyzing and determining whether the Stormwater Charge was a valid fee-for-service or, alternatively, whether it was a type of tax from which the University is immune.

Given the court's concerns, the University was directed to file an answer (RR 531a). Accordingly, the University filed a timely answer with new matter (RR 534a-557a), and the Borough duly replied to that pleading (RR 562a-571a).

Following discovery, the parties filed cross-motions for summary judgment. The University's motion and supporting brief (including voluminous exhibits) were docketed on July 16, 2021 (*see* RR 574a-1650a), and the Borough's submissions followed three days later (*see* RR 1657a-2227a). Each side then responded to the other's contentions in detail (*See* RR 2229a-2239a, 2242a-2263a – University's answer and brief; RR 2268a-2286a, 2288a-2329a – Borough's answer and brief). Finally, on September 7, 2021, each side lodged a reply brief (*See* RR 2330a-2345a, 2350a-2364a).

Commonwealth Court *en banc* heard oral argument and, thereafter, rendered a thorough decision, which was subsequently published. *See The Borough of West Chester v. Pennsylvania State System of Higher Education*, 291 A.3d 455 (Pa.

Cmwlth. 2023) ("Opin.").[3] Specifically, the University's motion for summary judgment was granted, on the ground that "the Stormwater Charge constitutes a tax, [so] Respondents are immune from payment." *Id.* at 467.[4] And the Borough appealed.

**Names of the Judges Whose Decision Is To Be Reviewed.**

The author of the *en banc* Commonwealth Court opinion to be reviewed is Christine Fizzano Cannon, who was joined by Judges Cohn Jubelirer, McCullough, Covey, Wojcik, Ceisler, and Wallace. (Judge Dumas did not participate in the decision.)

**Statement of Facts**

This is a dispute between an arm of the Commonwealth and a municipality. Both the nature of these parties and the facts surrounding what the Borough is

[3] A copy of the Commonwealth Court opinion is attached to the Borough's brief, as Pa.R.App.P. 2111(b) contemplates.

[4] The Court added, in a footnote, "Even if deemed an assessment, rather than a general tax, [the University] would still be immune from the obligation to pay any amount assessed pursuant to the Stormwater Charge, because assessments are a form of tax." *See* Opin., 291 A.3d at 467 n.15. Commonwealth Court did not specifically address the separate "proportionality" issue that was briefed below and has been raised by the Borough at this stage.

trying to accomplish will guide the legal outcome. The controlling facts are undisputed and indisputable.

**1. The parties.**

By statute, the State System "is a body corporate and politic constituting a public corporation and government instrumentality[.]" 24 P.S. § 20-2002-A(a). Given its governmental nature, the State System has been "granted sovereign immunity and official immunity pursuant to [state law]." *Id.* *See also, e.g., Bradley v. West Chester Univ.*, 880 F.3d 643, 655-658 (3d Cir. 2018); *Kull v. Guisse*, 81 A.3d 148, 150 (Pa. Cmwlth. 2013). Put simply, the State System as a whole is, unquestionably, an arm of the Commonwealth.

The statute further specifies that the State System encompasses fourteen separate "institutions." *See* 24 P.S. § 20-2002-A(a). In this context, the term "institution" applies to each of the constituent State-owned colleges, "including its personnel, and its physical plant, instructional equipment, records and all other property thereof." 24 P.S. §20-2001-A(10). WCU is one of them.

Overall, WCU's campus consists of approximately 400 acres.[5] Part is known as North Campus and part is known as South Campus (*See* RR 22a – pet'n, ¶¶ 11-12).

[5] *See* https://www.wcupa.edu/visitors/, at 1/5 (visited Aug. 21, 2023).

WCU's real property does not all lie in the same political subdivision, however. Rather, the "North Campus is partially in West Chester Borough and partially in West Goshen Township. The South Campus, in turn, is partially in West Goshen Township and partially in East Bradford Township."[6]

In other words, only a portion of WCU's North Campus (and none of its South Campus) is located in the Borough (*See* RR 599a-602a – Bixby dep. at 6, 9)[7] (agreeing that parts of the University campus "are outside of the jurisdictional limits of the Borough of West Chester"). Moreover, as averred in ¶ 12 of the Borough's Action for Declaratory Judgment herein ("Ac. for Decl. Jud."), "the area of North Campus within the jurisdictional limits of the Borough measures approximately fifty-seven (57) acres" (RR 22a).[8] Far more campus property is *not* within the Borough.

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[6] *See* https://en.wikipedia.org/wiki/West_Chester_University, at 3/11 (visited Aug. 21, 2023). *See also* RR 599a, 602a – Bixby dep. at 6-9.

[7] Gary Bixby is WCU's Associate Vice President of Facilities (RR 608a – Bixby dep., at 15).

[8] In its declaratory judgment petition, the Borough avers that the State System is the "owner of fee simple title" to certain North Campus properties "within the jurisdictional limits of the Borough," while WCU is the "owner of fee simple title" to certain other North Campus properties "within the jurisdictional limits of the Borough" (RR 22a-23a – Action for Decl. Jud., at ¶¶ 14-15). Presumably this explains why the Borough named both the State System and WCU as defendants herein.

The Borough describes itself as a "Home Rule Municipality" in Chester County. Its "jurisdictional limits … extend over an area measuring 1.8 square miles, more or less" (RR 21a-22a – Action for Decl. Jud., at ¶¶ 2, 9).

**2. The flow of stormwater, on and near North Campus.**

For decades, the Borough has maintained a system for collecting stormwater throughout the Borough and transporting that water to nearby waterways. This is known as a Municipal Separate Storm Sewer System, or "MS4" (*See, e.g.,* RR 1266a-1268a – Perrone dep., at, *e.g.,* 118-120).[9] The Borough's MS4, also referred to as its Stormwater Conveyance System, includes "inlet boxes," underground pipes, connections, "headwalls," and culverts. It was installed under the Borough's original roads when they were first constructed about 100 years ago (*See* RR 1201a-1203a – Perrone dep., at 53-55).

Before 2016, initial construction and ongoing maintenance of the Borough's Stormwater Conveyance System were funded through the Borough's General Fund, comprised of tax revenue (including property taxes paid by residents) and any grants the Borough received. During this period, the Borough periodically passed ordinances requiring developers to use appropriate stormwater management

[9] Borough Manager Michael A. Perrone testified at deposition as a designated representative of the Borough pursuant to Pa.R.Civ.P. 4007.1(e) (*See* RR 1163a-1172a – Perrone dep., at 15-24).

practices in the development of land within the Borough, at their own expense.[10] But these ordinances did not mandate the collection of money for the Borough or require the Borough to spend any funds (RR 1193a-1200a – Perrone dep., at 45-52).

Within the Borough lies a small waterway known as Plum Run. Plum Run passes through North Campus, flowing west/southwest through the Borough and beyond. While on North Campus, Plum Run moves in an underground pipe owned by the Borough (RR 1179a-1180a – Perrone dep., at 31-32; RR 700a-701a – Bixby dep., at 107-108). As it traverses under North Campus, Plum Run is fed via inlets and pipes that are on or around North Campus, some of which are owned by the University and some of which are owned by the Borough (RR 1270a-1272a – Perrone dep. at 122-124; RR 691a-692a – Bixby dep., at 98-99). On the southwest edge of North Campus, Plum Run returns above ground via an outfall. It continues into neighboring municipalities until it eventually empties into the Brandywine River (RR 1180a-1182a – Perrone dep., at 32-34).

Stormwater that falls on or near North Campus may end up in a variety of places. Some infiltrates into the ground naturally on North Campus or is otherwise

[10] For example, when the University constructed dormitories, the building plans were required to include a stormwater management system for the project (RR 1198 – Perrone dep., at 51).

captured by the University (RR 1183a – Perrone dep., at 35). Some evaporates. (RR 959a-960a – Clark dep., at 106-107).[11] Some enters inlets and pipes owned by the University, on North Campus, which eventually connect to Plum Run (RR 700a-701a – Bixby dep., at 107-108). Some stormwater falls on or flows into the Borough-owned streets that run around and through North Campus (RR 1183a – Perrone dep., at 35). Finally, some flows across West Rosedale Avenue, either above ground or in underground pipes, into West Goshen Township (RR 1183a-1184a – Perrone dep., at 35-36; RR 700a-701a – Bixby dep., at 107-108).

Overall, no one tracks, or knows, how much stormwater that falls on North Campus is captured by the University or how much enters the Borough-owned pipes (RR 698a-699a – Bixby dep., at 105-106; RR 962a-963a – Clark dep. at 109-110). What is more, stormwater falling in the Borough can flow *into* North Campus. Specifically, stormwater falling north of Sharpless Street tends to flow south and southwest (toward North Campus) (RR 1190a – Perrone dep., at 42). Some of that infiltrates into the ground on North Campus or is otherwise captured there (RR 914a – Clark dep., at 61). In turn, some of that stormwater enters inlets and pipes – some owned by the University and some owned by the Borough – which take it to Plum Run (RR 804a – Bixby dep., at 211). So, when Plum Run

[11] When deposed, Tom Clark was the Executive Director of Facilities Design and Construction (interim) (RR 873a – Clark dep. at 20).

comes above ground in the Borough (west of South New Street), Plum Run contains a mixture of some stormwater that fell on North Campus and other stormwater that fell elsewhere in the Borough (RR 805a-807a – Bixby dep., at 212-214).

### 3. The University's own stormwater standards and procedures.

North Campus contains a variety of structures of different types, including buildings of various ages, and adjacent green spaces, sidewalks, and streets. Newer buildings on North Campus tend to maintain their own stormwater management strategies; older ones do not, although they are incorporated into the University's overall stormwater management plan (RR 635a-649a – Bixby dep., at 42-56).

More specifically, the University's recent construction adheres to the Leadership in Energy and Environmental Design ("LEED") model, which requires the University to "manage all of the storm water within the boundaries of the project" (RR 708a-709a – Bixby dep., at 115-116). The University achieves this by installing green roofs, infiltration basins, retention basins, and pervious pavers as part of its construction projects (RR 635a-636a – Bixby dep., at 42-43). The University also employs non-engineered stormwater management strategies, such as using trees and open, grassy areas, to infiltrate stormwater and prevent it from flowing directly into waterways (RR 642a – Bixby dep., at 49).

Significantly, the University – unlike most private property owners – has its own MS4 system of inlets and pipes. Thus, the University also has a municipal permit to operate the MS4, which it does, consistent with the terms of the permit (RR 779a-784a – Bixby dep., at 186-191). Four of this system's five "outfalls" (places where stormwater leaves the University's MS4 system) are in West Goshen Township, while only one is in the Borough (*See* RR 1397a – Murphy decl., at ¶¶ 6-8; RR 805a-807a – Bixby dep., at 212-214). On that one outfall in the Borough, it is the University, and not the Borough, which has assumed the duty of measuring and mitigating any pollutants. Although that outfall contains stormwater from both the University and the Borough, the University has never charged the Borough for its efforts (RR 1397a-1398a – Murphy decl., at ¶ 9).

**4. The Borough's 2016 ordinance.**

On July 20, 2016, by ordinance No. 10-2016, the Borough adopted what it called "A USER FEE TO SUPPORT THE BOROUGH'S STORMWATER MANAGEMENT SYSTEM AND TO MEET THE BOROUGH'S REGULATORY REQUIREMENTS" (*See* RR 49a-60a – ordinance). By its terms, the ordinance required all owners of "developed property within the Borough" to pay a "Stream Protection Fee," defined as "an assessment levied by the Borough to cover the cost of constructing, operating, and maintaining stormwater management

facilities" (RR 54a – ordinance, at § 6.A).[12] This was not and is not a uniform, flat amount. Rather, pursuant to the ordinance, the amount any property owner would be required to pay would be calculated based on the "total impervious surface area" of the property in question (RR 55a – ordinance, at § 6.B). Relatedly, the ordinance goes on to provide that bills for the Stormwater Charge "shall be paid by the owner of the property and mailed to the address listed in the Chester County tax records for the property served by the Stormwater Management System" (RR 56a – ordinance, at § 7.D).[13]

In enacting the ordinance, the Borough explicitly found that "[a] comprehensive program of stormwater management is fundamental to the public health, safety, and general welfare of the residents of the Borough" (RR 49a – ordinance, at § 2.D). The Borough also observed that inadequate management of stormwater contributes to flooding, erosion, and sedimentation; overtaxes surface streams and storm sewers; increases costs to public facilities; and both increases pollution and harms the "ecological health of the stream biota" – all of which "threatens public health and safety" (RR 50a – ordinance, at § 2.F). In short, and

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[12] As mentioned earlier, at 5 n.1, this is what Commonwealth Court renamed "the Stormwater Charge."

[13] In a broad sense, the University is a property owner but, presumably, is not listed as a taxpayer in "Chester County tax records" because the University does not pay local property taxes.

as explained on the record by the Borough Manager, testifying as the Borough's designated representative during this litigation, the purpose of the ordinance was to make the Borough's waterways cleaner, thereby making the public healthier and reducing the environmental harms caused by the flow of stormwater (RR 1208a – Perrone dep. at 60).

While the Borough's Stormwater Conveyance System had existed for a century, paid for by tax dollars, the 2016 ordinance enacting the Stormwater Charge was designed to fund a variety of new and different projects. These included tree-planting, "street sweeping to keep pollutants out of [the Borough's] system," installation of water-cleaning facilities, regrading of alleys to improve water flow, relining of storm pipes, planting rain gardens, and installing curb extensions (RR 1250a-1254a – Perrone dep., at 102-106).

One of the largest projects undertaken by the Borough around this time, using funds from the Stormwater Charge, was restoration of the streambank along Plum Run (RR 1250a – Perrone dep., at 102). Downstream and away from the University, the Borough was constructing a retaining wall and installing soil nails (RR 1084a-1087a – Cline dep., at 26-29).[14] Phase 2 of the project was slated to

[14] This project was explained on the record by Nate Cline, a municipal engineer for the Borough (*see, e.g.,* RR 1072-1074a – Cline dep., at 14-16). Like Mr. Perrone, Mr. Cline also testified as a designated representative of the Borough for purposes of this litigation.

install "green infrastructure," meaning "riparian buffer plantings, vegetation, rock mirrors … making sure the stream is in the proper channels, perfecting utilities, things of that nature" (RR 1089a – Cline dep., at 31).

Another Stormwater Charge-funded project, more than half a mile north of the University, entailed renovations and improvements at John O. Green Memorial Park. This project included "pervious paving … tree plantings, vegetation improvements, storm sewer modifications and improvements," and other similar improvements to that park (RR 1099a-1100a – Cline dep., at 41-42).

Monies collected as a result of the Stormwater Charge have supported other "green infrastructure" throughout the Borough as well (*See generally* RR 1082a-1107a – Cline dep., at 24-49). Importantly, however, the Borough acknowledged that none of the projects funded by the Stormwater Charge were designed to provide any "specific benefit" to the University (RR 1273a-1275a – Perrone dep., at 125-127). Instead, as Borough Manager Perrone forthrightly put it, the University only received a "general benefit" – like cleaner water or a healthier environment – gained by all members of the community, not just those who pay the Stormwater Charge *per se* (RR 1208a – Perrone dep., at 60). Further – as this Borough-designated representative made clear – there were not and are not any current plans whereby the Borough might utilize Stormwater Charge funds for

specific projects that would benefit the University in particular (*See* RR 1274a-1275a – Perrone dep., at 126-127).

**5. The University's response to the ordinance.**

As averred in the Borough's petition for review herein, the Borough has assessed University property within the Borough's jurisdiction in accordance with the scheme set forth in the 2016 ordinance (*See* RR 38a-40a – Ac. for Decl. Jud. at ¶¶ 91-102). And the Borough has sent bills to the University, demanding payment of the Stormwater Charge (*Id.*). In 2019, for example, the University received invoices for its properties on North Campus totaling $ 117,168.04 (RR 1402a – Villella decl., at ¶¶ 7-8).

The University has declined to remit payment, on the ground that any such charge was legally improper, in light of the University's immunity from local taxation (*See* RR 24a-25a – Ac. for Decl. Jud., at ¶¶ 20-25). More particularly, in a detailed letter dated January 18, 2018, addressed to the Borough Manager, Chief Counsel for the State System "formally advise[d] the Borough that the University will not be paying the storm water management fee invoices that the Borough sent to the University," adding that "the University is not legally authorized to pay those invoices" (and thoroughly explaining why) (*See* RR 64a-65a – counsel's letter).

**Statement of the Determination Under Review.**

The determination under review is the January 4, 2023 order of the Commonwealth Court (with supporting opinion), granting the motion for summary judgment filed by the two named respondents, the Pennsylvania State System of Higher Education and West Chester University of Pennsylvania (and, concomitantly, denying the cross-motion of the Borough of West Chester). As noted above, the *en banc* court straightforwardly held that the Stormwater Charge amounts to a local tax, as to which the University, an arm of the Commonwealth, is immune.

**Statement of Place of Raising or Preservation of Issues.**

As already set forth at length, the University raised its tax immunity defense in preliminary objections and, later, by a motion for summary judgment. The Borough – appellant at this stage – opposed the University's contention and pursued an unsuccessful cross-motion for summary judgment. Thus, in general, the Borough raised and litigated the claims that underlie this appeal.[15]

[15] This should not be interpreted as a concession that each and every specific argument the Borough now seeks to litigate was duly preserved below.

## SUMMARY OF ARGUMENT

The primary issue before this Court is whether the Borough's "Stormwater Charge" constitutes a tax (or, alternatively, an "assessment"). If so, the University cannot be required to pay it, because the University, as a Commonwealth entity, is immune from local taxation. The Borough acknowledges this key principle but contends it is inapplicable here because the Stormwater Charge is merely a "fee."

The Borough's legal position does not withstand scrutiny, as Commonwealth Court correctly determined. Only if the Borough could show that the University has received a "discrete benefit" traceable to the Stormwater Charge would it follow that the charge amounts to a permissible local fee that can be imposed on otherwise-immune Commonwealth parties. But the Borough could not make this showing. Rather, crucial testimony by the Borough Manager (and other evidence), established that projects paid for using Stormwater Charge dollars were meant to promote – and do promote – public health and the general welfare of everyone in the Borough. (Furthermore if, instead, the Stormwater Charge is considered an "assessment," tax immunity nevertheless shields the University.)

Alternatively, even if the Stormwater Charge is not a tax, the University still cannot be required to pay it. Compared to the Borough's actual, specific costs, the charge is not "reasonably proportional."

## ARGUMENT

All parties agree "that the University enjoys immunity from local taxation in accordance with applicable law." *See* Brief of Appellant ("Boro. Brf."), at 14, 17. The controlling issue before this Court, then, is whether – as a matter of law – the Stormwater Charge constitutes a local tax.[16] It does, as Commonwealth Court correctly held. That ruling must be affirmed.

### I. BECAUSE THE BOROUGH'S STORMWATER CHARGE WAS A LOCAL TAX, THE UNIVERSITY - AN ARM OF THE COMMONWEALTH - COULD NOT BE REQUIRED TO PAY IT.

In its effort to overturn the Commonwealth Court's decision, the Borough offers a combination of procedural and substantive arguments, but they are unavailing. The main issue concerns University's entitlement to tax immunity.

#### A. All agree that, as a matter of law, Commonwealth property is not subject to local taxation.

As noted, this case concerns the propriety, or impropriety, of the Borough's Stormwater Charge, which the University has viewed, from the outset, as an impermissible local tax that cannot be assessed against a Commonwealth entity. "It is well settled that property owned by the Commonwealth and its agencies is

[16] Alternatively, and at a minimum, the Stormwater Charge cannot survive, due to a lack of proportionality. *See* Section II, *infra.*

beyond the taxing power of a political subdivision." *Delaware Cty. Solid Waste Auth. v. Berks Cty. Bd. of Assessment Appeals,* 626 A.2d 528, 530-31 (Pa. 1993). *See also Indiana Univ. of Pa. v. Jefferson County Bd. of Assessment Appeals*, 243 A.3d 745, 749 (Pa. Cmwlth. 2020). That is to say, local governmental bodies cannot, on their own initiative, impose taxes on Commonwealth parties that, like the University here, are arms of the state itself. *See, e.g., Lehigh-Northampton Airport Authority v. Lehigh County Bd. of Assessment Appeals*, 889 A.2d 1168, 1172 n.2 (Pa. 2005) ("Tax immunity precludes a locality from imposing taxes upon the Commonwealth and its agencies").

"Immunity in this context derives from the Commonwealth's sovereign right to be free of taxation unless some statutory authorization or concession to the contrary exists." *City of Philadelphia v. Cumberland Cnty. Bd. of Assessment Appeals*, 81 A.3d 24, 50 (Pa. 2013). This tax immunity extends to every "arm, agency, subdivision, or municipality of the Commonwealth." *Id.*[17]

[17] As an aside: Even before most of the tax immunity rulings cited in the text, this Court had implicitly recognized the governmental status – and tax immunity – of the State System of Higher Education (and its constituent institutions). *See Pennsylvania State University v. Derry Tp. School Dist.*, 731 A.2d 1272, 1274-1275 (Pa. 1999). In that decision, this Court contrasted member institutions of the State System – such as the University in this case – with Pennsylvania State University itself (which is structured differently and was found *not* entitled to immunity from local taxation).

While tax immunity can be waived,[18] the University has steadfastly asserted its immunity from taxation generally and from the charge now at issue in particular (*E.g.,* RR 64a-65a – 1/18/18 ltr). And the Borough acknowledges this. In Counsel's words: "If the Stream Protection Fee [sic] is a tax, the Borough may not require the University to pay that charge without proving that there is some legal authority for that imposition. … The Borough's lack of power to levy a tax upon the University is not in question." *See* Boro. Brf. at 14. What *is* in question is the validity of the Borough's attempt to get around this principle by characterizing the Stormwater Charge as a fee.

### B. Procedurally, The Borough Misstates The Parties' Respective Burdens And Incorrectly Implies That A Trial Is Still Needed.

The ultimate burden in this case is on the Borough – as a local taxing authority – to overcome the University's (*i.e.,* the Commonwealth's) tax immunity. *See, e.g., Norwegian Twp. v. Schuylkill County Bd. of Assessment Appeals*, 74 A.3d 1124, 1130 (Pa. Cmwlth. 2013).[19] Disregarding this crucial principle, in its brief

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[18] *See Delaware Cty. Solid Waste Auth.*, 626 A.2d at 530-531. *See also Lehigh-Northampton Airport Authority*, 889 A.2d at 1175 (waiver must be explicit and will be narrowly construed).

[19] This contrasts with tax *exemptions*, where it is the taxed party's burden to demonstrate entitlement to any claimed tax exemption. A private taxpayer is bound to pay any applicable tax unless that party can establish entitlement to an exemption.

the Borough appears to take a wholly procedural approach to this appeal, flipping the parties' respective burdens. But even on its own terms, the Borough's procedural approach is entirely unjustified.

At the outset of this controversy, it was the Borough that filed suit against the University. Specifically, the Borough filed a one-count "ACTION FOR DECLARATORY JUDGMENT" in Commonwealth Court (in its original jurisdiction). That filing consisted of a formal petition (*see* RR 20a-43a) along with numerous attached exhibits (*see* RR 44a-339a). Pursuant to Pa.R.Civ.P. 1601(a), in such a case – seeking a declaratory judgment – "[t]he practice and procedure shall follow, as nearly as may be, the rules governing the civil action."

Thus, by initiating this litigation, the Borough assumed the role of plaintiff (or petitioner) and, as such, shouldered the burden of proof, going forward. At the same time, the Borough was well aware of the University's contention that it was and is shielded by immunity from local taxation as a matter of law. Purely as a procedural matter (and apart from governing substantive principles), by filing suit, the Borough took on the legal burden of overcoming the University's immunity.

In due course, the University filed its answer (with new matter) to the Borough's petition (*see* RR 532a-556a) and the Borough replied (*see* RR 562a-

572a).[20] Extensive discovery ensued. Thereafter, each side contended – on cross-motions for summary judgment filed pursuant to Pa.R.Civ.P. 1035.1-1035.5 – that it should prevail as a matter of law, based on the paper record, without any trial, because any material facts were undisputed (*See generally* RR 573a-2364a – summary judgment filings). That is, absent any contested facts (and there were none), who might otherwise be required to prove what, through a full-blown trial in open court, how, and when, was beside the point. The record was fully developed. As a practical matter, the two sides agreed, via their cross-motions, that only issues of law remained to be addressed.[21]

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[20] Initially responding to the Borough's petition, the University lodged a single preliminary objection (*see generally* RR 341a-421a), based on "a straightforward question of law" (RR 345a). That is to say, given the Borough's factual averments, the University focused on a discrete legal issue, its immunity from local taxation. The University's preliminary objection was overruled, due to the need – according to Commonwealth Court – for further factual development (*see* RR 519a-531a). At that point, as petitioner in the Commonwealth Court original jurisdiction matter, the Borough remained, effectively, the "plaintiff" and (as such) had the burden of proof; to prevail, the Borough would have to prove its case in due course. On the other hand, the University remained the "defendant," obliged to respond and attempt to neutralize the Borough's contentions, both factual and legal.

[21] Decisions cited by the Borough, on pages 18-22 of its brief, are factually and procedurally different from each other and from this case. They shed no light on the controlling issue in *this* case: whether, as to the University, and on *this* record, the Stormwater Charge was an impermissible tax or a permissible fee.

Once Commonwealth Court considered and rejected the Borough's substantive arguments (and entered summary judgment in favor of the University), the Borough lodged this appeal. In so doing, however, the Borough seems to have shifted gears, distancing itself from its own prior approach to this litigation.

Now the Borough argues that "the University bore the burden of establishing the absence of any genuine issue of material fact … [while, conversely,] it was not the Borough's burden to establish that the Stream Protection Fee is not a tax." Boro. Brf. at 23 (underlining in original). Contrary to that convoluted characterization, this case could be, and was, properly decided on the paper record, as a matter of law.

*Both* sides filed summary judgment motions in Commonwealth Court. Like the University's dispositive filing, the Borough's own motion rested – by definition – on the premise that no material facts were in dispute. That being so, there were not and still are not any *material* questions of *fact* to be adjudicated. *Cf. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts").

Whatever may or may not be so in other lawsuits, based on other evidence, it makes little sense to suggest, now, that *this* action should be remanded for trial. This case continues to hinge on how, given the undisputed and indisputable facts

of record, developed by both sides in their respective cross-motions, the pivotal underlying *legal* issue – tax vs. fee – is resolved.

In other words, by filing cross-motions for summary judgment in the trial court, the parties agreed that the material facts were clear-cut and not subject to dispute. *Ergo,* no trial would be necessary. *Cf. Adelphia Cablevision Associates of Radnor, LP v. University City Housing Company*, 755 A.2d 703, 707-708 (Pa. Super. 2000) (after POs were overruled, both sides sought summary judgment; dispositive ruling in favor of one and against the other affirmed on appeal). Given the factual record here, any contrary suggestion by the Borough, in Section "A" of its appellate brief, cannot withstand scrutiny. This was and is a "paper" case.

Although the Borough knows all this, Section "C" of its appellate brief sets forth a further argument that is flatly inconsistent with what it suggested in Section "A" of that submission. That is to say, in Section "C," the Borough takes the position that *its* dispositive motion should have been granted because *it* "met the standard applicable to the grant of summary relief." *See* Boro. Brf. at 56-61. Substantively, the Borough is incorrect (as explained *infra*), but procedurally, the Borough's supposed fallback point is sound: Final resolution of the tax immunity issue "on paper" was and is both feasible and essential.

### C. Commonwealth Court correctly held that the University could not be required to pay the Stormwater Charge.

Lacking any legal basis for suggesting that the University can be required to pay local taxes, the Borough must establish, instead, that its Stormwater Charge is not a "tax" at all but, rather, falls within some exception to the Commonwealth's tax immunity. It did not and cannot do so, as Commonwealth Court correctly determined

Preliminarily, the ordinance's terminology – including the use of the word "fee" in particular – is not inherently significant. Simply labelling the Stormwater Charge a "fee" – in the ordinance itself, in court filings, or elsewhere – does not make it a "fee," period, full stop, for *all* purposes, including those involving the imposition, or possible imposition, of this purported "fee" on Commonwealth entities.

It was and is up to the Borough, as the moving party here, to establish its legal entitlement to the relief it affirmatively sought in this litigation: a declaratory judgment against the University, requiring the University to pay the Stormwater Charge, as billed by the Borough (*See, e.g.,* RR 40a-42a – claim for relief). To that end, and as Commonwealth Court fully understood, *see* Opin., 291 A.3d at 467 & n. 15, the Borough would have to demonstrate the applicability – in the present scenario – of some exception to the University's tax immunity. *See, e.g., Norwegian Twp.*, 74 A.3d at 1130 (and in the end, the Borough did not carry that

burden). In contrast, once named in the declaratory judgment action initiated by the Borough, the University had no choice but to respond, and (after its preliminary objections were overruled) the University did so (*See, e.g.,* RR 549a-550a – general denial).

The potentially-controlling immunity issue presented here is relatively narrow. Importantly (and as Commonwealth Court explicitly and correctly observed), the University "[did] not seek to invalidate the Stream Protection Ordinance" in its entirety. *See* Opin., 291 A.3d at 462 n.13. Rather, the University only contested the Borough's actions and policies insofar as they affected, or could affect, the University itself (or perhaps others in the Borough who may also be shielded by tax immunity). It therefore followed, as Commonwealth Court explicitly determined, that – in the declaratory judgment action that the Borough initiated – "the Borough [had] the burden of proving [the University's] property is not immune from taxation." *Id.*

That is to say, can the Borough collect stormwater-related payments from the University just as it collects such payments from other (*i.e.*, non-Commonwealth) property owners? That was and is a discrete question of law. And the Borough's proposed answer to that legal question is incorrect as a matter of law, as Commonwealth Court recognized.

### 1. What constitutes a classic "tax" is well-established.

Taxes "proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; [and] for those means it has the right to compel all citizens and property within its limits to contribute[.]" *Broad St. Sewickley Methodist Episcopal Church's Appeal*, 30 A. 1007, 1008 (Pa. 1895) (*quoting Railroad Co. v. Decatur*, 147 U.S. 190, 197 (1893)). The purpose of taxes is not to render a "return or special benefit to any property," but rather to provide for the "*general* benefit which results from protection to [one's] person and property, and the promotion of those various schemes which have for their object the welfare of *all*." *Id.* (emphasis added).

Consistent with these principles, Commonwealth Court observed here that a "classic tax" is imposed by the legislature upon many or all citizens, to raise and spend money for the benefit of the entire community. Opin., 291 A.3d at 463 (internal alterations and citations omitted). In contrast, a fee for service "is is paid to a public agency for bestowing a benefit which is not shared by the general members of the community and is paid by choice [to secure an available benefit]." *Id*.[22]

[22]A fee for service is distinct from a *regulatory* fee, which is a charge imposed by a regulator on a particular regulated entity. Whether the Stormwater Charge might be a regulatory fee is immaterial here. The Borough has not suggested, let alone shown, that it is. Nor has the Borough cited any authority for

Pennsylvania Courts have historically taken a broad view regarding what constitutes a community benefit. Proximity of a particular municipal project, relative to specific properties, does not make that project one for the specific benefit of nearby property owners in particular (and no one else). To the contrary, "the maintenance of the streets of a municipality [is] for the benefit of the entire community and not merely of the abutting property owners." *Supervisors of Manheim Twp., Lancaster Cty. v. Workman*, 38 A.2d 273, 276 (Pa. 1944).

**2. Either of two potential exceptions to tax immunity comes into play here.**

In order to enforce the Stormwater Charge against the University, the Borough had to establish that the Stormwater Charge fits into one of the potential exceptions to tax immunity. Conceptually, a charge like the Stormwater Charge might fit into one of at least four categories: (1) a fee for service; (2) a regulatory fee; (3) a "classic" tax; or (4) an assessment. The Borough has taken the position that the Stormwater Charge is a fee for service. On the other hand, the University contends that the Stormwater Charge is indeed a tax but, if not, it is an assessment, which is a species of tax, as to which the Commowealth's tax immunity still

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the proposition that a municipality can impose a regulatory fee on a Commonwealth agency or entity.

applies. As further discussed below, Commonwealth Court agreed with the University. *See* Opin., 291 A.3d at 465-467 & n.15.

Routine "classic" taxes are common and relatively familiar. Separate from those, and consistent with the idea that physical connection does not necessarily result in private benefit, this Court held nearly 60 years ago that assessments – mandatory charges on only certain kinds of property owners, which pay for a specific "public, though local improvement" – are also a form of taxation, and subject to immunity. *See Southwest Del. Cty. Mun. Auth. v. Aston Twp.*, 198 A.2d 867, 869-870 (Pa. 1964) (addressing an assessment to pay for construction and maintenance of a sewer system). Faced in that case with a challenge (by two local entities) to a sewer-related assessment, this Court specifically recognized that, like taxes in general, an assessment is an exercise of governmental "taxing power." *Id.*, 198 A.2d at 870 (internal citation and quotation marks omitted). Reasoning that "public property used for public purposes is exempt from taxation *and from assessments for improvements,*" *id.*, at 871 (emphasis added), the assessment at issue in that case was barred by tax immunity.

### 3. As to the University in particular, the Stormwater Charge is not a fee for service.

Commonwealth Court specifically concluded that the Stormwater Charge constitutes a tax (not a fee for service), and the University – which is immune from

local taxes – could not be required to pay it. *See* Opin., 291 A.3d at 462-467. That conclusion was sound as a matter of law.

Early in these proceedings, at the preliminary objections stage, Commonwealth Court had zeroed in on an important detail that turns out to be crucial to, indeed dispositive of, the tax vs. fee inquiry: "whether the Borough's Stormwater system provides a *discrete benefit* to [the University], as opposed to generally aiding the environment and the public at large" (*See* RR 529a) (emphasis added). For there to be a "discrete benefit," the property owner (and potential taxpayer) must both receive an individual, specific benefit from the service performed *and* the owner must actually seek out that service (like a consumer in a market). A benefit would not be "discrete" if (in this context) the University were to receive, and could only expect to receive, the same general, environmental benefits from the Stormwater Charge as everyone else in the Borough. Similarly, if the alleged service provided is not something that the University would otherwise seek for its own benefit, then the service would not afford a discrete benefit at all. In either situation, the Borough would be imposing an impermissible tax.

In due course, Commonwealth Court resolved the "discrete benefit" issue in the University's favor. *See* Opin., 291 A.3d at 464-465. That determination was sound and should be affirmed.

It is apparent that the Stormwater Charge is meant to foster a general, social good (rather than affording discrete, individual benefits). Indeed, the Borough has said so. On its face, the ordinance establishing the Stormwater Charge authorized various projects that were intended, from the outset, to promote "the public health, safety, and general welfare of the residents of the Borough" (RR 49a – ordinance, at § 2.D). Borough Manager Perrone, as designee for the Borough, testified about this in considerable detail. He admitted, throughout his deposition, that the primary, if not exclusive, purpose of the Stormwater Charge was and is to provide an array of general benefits for everyone in the Borough, not just a specific benefit for serviced property owners. He explained, for example, that:

- The Stormwater Charge funds projects that provide "a general benefit to the community" (RR 1208a – Perrone dep., at 60).

- Funded projects promote a "cleaner and more well-maintained community" (RR 1218a – Perrone dep., at 70).

- Projects funded by the Stormwater Charge, like tree-planting and installation of rain gardens and curb extensions, benefit all citizens and residents regardless of whether they pay the Stormwater Charge or even own property themselves (RR 1225a-1226a – Perrone dep., at 77-78).

- Even on projects at specific locations, such as streambank repair, street sweeping, and regrading alleys, the purpose goes beyond aiding individual property owners, to benefit the community as a whole (RR 1213a-1218a, 1250a-1251a (Perrone dep., at 67-70, 102-103).

Furthermore, even if certain projects paid for by the Stormwater Charge may afford relatively more benefit to some Borough property owners than to others,

legally that reality, in and of itself, does not transform general benefits into specific benefits. For example, building a new road may provide a greater benefit to those who live on or near that road than to those whose homes are further away, but the road is still unquestionably a general, communal benefit that should be paid for by all. *Cf. Supervisors of Manheim Twp.,* 38 A.2d at 276 (maintenance of street is a general community benefit, not only a benefit for property owners along particular street).

Evidently stung by the implications of what Mr. Perrone unquestionably said, the Borough does not want the "discrete benefit" issue to be resolved on the basis of testimony by its own official. Instead, the Borough attempts to discount that testimony by suggesting that what Mr. Perrone said "does not rise to the level of judicial admission." Boro. Brf. at 31-34 & nn. 6-7. The problem is, Mr. Perrone was not just a random witness, and what he said during his deposition cannot be swept under the rug or otherwise discounted.

The University had noticed the *Borough's* deposition pursuant to Pa.R.Civ.P. 4007.1(e) (RR 1315a-1318a – dep. notice and Ex. A thereto). That rule requires an entity (such as the Borough) to specify who will appear and testify on the entity's behalf. In particular, under that rule, "an organization must prepare its designee to give *binding testimony* on its behalf." *Commonwealth ex rel. Corbett v. Peoples Benefit Services, Inc.*, 923 A.2d 1230, 1235 (Pa. Cmwlth. 2007)

(emphasis by the Court). *See also Graham v. I.M.O. Industries, Inc.*, 16 Pa. D.&C.4th 492, 499 (Pa. Com. Pl. 1992). Crucially, admissions made by a party's designated deponent, who is an officer or agent of that party – as was true here – will be binding on the party. *Cf. Ierardi v. Lorillard, Inc.*, No. 90-7049, 1991 WL 158911 (E.D. Pa. Aug. 13, 1991) (discussing procedure under analogous federal rule).

The Borough designated Mr. Perrone to testify on its behalf, with respect to certain explicitly listed topics. At the outset of his deposition, Mr. Perrone specifically confirmed that he understood his role and would be doing just that (RR 1163a-1165a – Perrone dep., at 15-17). And that is what he in fact did: to the Borough's apparent chagrin, Mr. Perrone's own testimony established that the ordinance was and is broad and multi-faceted by design. *Ergo*, the Stormwater Charge was meant to bring in revenue that would be spent for everyone's benefit; it does not fund projects that directly benefit discrete property owners, like the University (or anyone else in particular), such that it could be characterized as a fee-for-service.

As noted, the Borough's attempted counter-argument, in its brief at 31-34 & nn. 6-7, questions whether what Mr. Perrone said qualifies as a "judicial admission," but that suggestion misses the mark. A judicial admission is

something else.[23] Because – in accordance with applicable discovery rules and procedures – the Borough itself chose Mr. Perrone to speak for the Borough at an upcoming deposition, and Mr. Perrone then did so, the Borough cannot disavow what he said. It is bound by Mr. Perrone's explication of the ordinance, its implementation, and the resulting array of general benefits to the University as well as the Borough. In other words, a party cannot defeat summary judgment by dismissing the testimony of its own designee (after the fact) as factually wrong.

To be sure, the record includes information about a variety of particular tasks and projects, undertaken in the Borough, that have been paid for or supported by funds collected via the Stormwater Charge. But these were and are for everyone in the Borough; in no way were they targeted toward or designed to afford "discrete benefits" to the University alone.

To cite one example, when – using Stormwater-Charge dollars – the Borough plants trees and installs rain gardens and curb extensions in order to increase infiltration, cleanse stormwater runoff, and slow the flow rate (and thus

[23] The Borough relies on cases regarding the extent to which prior statements of fact by a party, in pleadings, made for that party's benefit, are binding on that same party later in the proceedings. *See Porter v. Toll Brothers, Inc.*, 217 A.3d 337, 350 (Pa. Super. 2019); *Del Ciotto v. Pennsylvania Hospital*, 177 A.3d 335, 354 (Pa. Super. 2017); *Dearmitt v. New York Life Ins. Co.*, 73 A.3d 578, 599 (Pa. Super. 2013). The cited cases have nothing to do with the practical and legal import of a designee's testimony elicited pursuant to Pa.R.Civ.P. 4007.1(e).

any resulting erosion), the Borough provides a *general* environmental benefit, enjoyed by *all*. Similarly – when using Stormwater-Charge dollars – the Borough performs streambank repairs on waterways, those repairs benefit *all* property owners, not just abutting property owners (*See* RR 1215a-218a – Perrone dep. at 67-70) (acknowledging that streambank restoration benefits all because it creates a generally cleaner and better maintained community).

To counter this point, the Borough relies on the NTM Report, which is cited on pages 34, 36, and 48-49 of its brief. But the NTM Report does not undercut the University's argument, regarding the lack of discrete benefits to the University (or otherwise support the Borough's position).

The NTM Report was prepared by an engineering firm retained by the Borough. *See* RR 2026a-2042a (excluding attachments). The NTM Report opines about what the University would have to do in order to transport its stormwater from North Campus to a waterway, and it claims that avoiding this cost is, itself, a discrete benefit to the University. NTM purports to have "analyzed the discrete benefits" the University has derived from utilizing the Borough's Stormwater Management System "instead of implementing non-municipal options" to deal with stormwater (RR 2027a).

The NTM Report is no different from (and is no more relevant to the legal issue here) than a cost estimate for a homeowner (with access to existing roads) to

construct his or her own road in order to get to work. A collective and social good – like a roadway or a stormwater remediation system – might be more expensive if replaced individually. It does not follow that the existing roadway or system is any less of a collective social good.

Furthermore, it is not entirely clear whether, and to what extent, NTM understood and took into account the fact that, apart from the Borough's stormwater system, the University has an MS4 permit and stormwater management system of its own that has been in place for many years.[24] Be that as it may, the NTM report is wholly forward-looking and theoretical. It does not say or suggest that, to date, the University has in fact received any particular "discrete benefit" following adoption of the Stormwater Charge.

More specifically: After listing five "conceptual options" for dealing with stormwater runoff on the University's North Campus *in the future*, NTM recommended "Option 3," the "design and implementation of a new, separate, University-owned stormwater management system" (RR 2027a-2028a). In so doing, as Commonwealth Court recognized, the NTM Report "does not contain evidence of any distinct benefits" *already* accorded by the Borough to the

[24] NTM did note that "(e)xisting storm drain conveyance measures currently owned and maintained by the University are conservatively assumed to have adequate capacity to manage up to a 100-year event" (RR 2040a).

University (which, in turn, might justify imposing, and continuing, the Stormwater Charge). *See* Opin., 291 A.3d at 464. Rather, as correctly determined by that Court, the NTM Report merely described projected *future* expenses the University might have to bear to manage stormwater runoff (absent the *general – i.e.,* non-discrete – benefits now provided by the Borough's system). *Id.*

The lack of any discernable "specific benefit" to the University, traceable to the Borough's ordinance and the resulting imposition of the Stormwater Charge, is not at all surprising. For decades, the University has endeavored to manage on-campus stormwater and even has its own MS4 permit to do so (as the Borough acknowledges, *see* Boro. Brf. at 27, 28). Undoubtedly, those measures, adopted by the University and implemented at University expense, were intended to confer, and have conferred discrete, needed stormwater-related benefits upon the University itself.[25] And to that extent, the University has not been dependent upon the Borough.

The Borough's adoption of the Stormwater Charge, and its attempt to impose that charge on the University (along with practically everyone else in the Borough) is something else again. Vis-a-vis the University itself, the Stormwater

[25] In contrast, one may infer that few if any Borough residents have taken comparable steps, at *their* expense, to manage the flow of stormwater on *their* property.

Charge does not pay for anything specific, of value to the University, that is provided to the University by the Borough. It operates, instead, as an unconstitutional local tax, not a permissible fee for service.

#### 4. Alternatively, viewing the Stormwater Charge as an assessment, the University is still shielded by immunity.

As pointed out earlier, at 32-33, the Commonwealth's general immunity from local taxation also applies in situations involving assessments for specific purposes, which are deemed a form of tax. In footnote 15 of its opinion, Commonwealth Court relied on this principle to conclude, in the alternative, that the University was entitled to prevail against the Borough on this basis as well. While the Borough does not delve into this point at all, it is an analytical alternative that confirms the legal correctness of the decision under review.

On its face, the local ordinance establishing the Stormwater Charge (*see* RR 49a-60a) confirms that that charge was understood from the outset to be an assessment. Possibly in an effort to avoid characterizing the Stormwater Charge as a tax, the word "Fee" is sprinkled throughout that document. But the formal term "Stream Protection Fee" is one of many terms explicitly defined in Section 5 of the ordinance, under the heading "Definitions." And in pertinent part, "Stream Protection Fee (SPF)" is formally defined as "an *assessment* levied by the Borough to cover the cost of constructing, operating, and maintaining stormwater management facilities…" (RR 54a) (emphasis added).

Put differently, from the very beginning, the Borough itself dubbed the Stormwater Charge an assessment for a particular purpose. The Borough cannot be heard to say otherwise now. Consistent with *Southwest Del. Cty. Mun. Auth. v. Aston Twp.*, 198 A.2d at 870, an assessment against the Commonwealth is considered a tax and, as such, is barred by the Commonwealth's tax immunity.

## II. EVEN IF THE STORMWATER CHARGE MIGHT BE CONSIDERED A FEE FOR SERVICE, IT STILL CANNOT BE IMPOSED ON THE UNIVERSITY BECAUSE SUCH A FEE WOULD NOT BE NOT REASONABLY PROPORTIONAL TO THE ALLEGED SERVICE.

If this Court agrees that the Stormwater Charge is a tax (or an assessment), as to which the University is immune, no further analysis is required; judgment as a matter of law in favor of the University was proper for that reason. *See Delaware Cty. Solid Waste Auth.*, 626 A.2d at 530-531.

On the other hand, if this Court determines that the Stormwater Charge might possibly be considered a fee for service (a point not conceded), a further question must be addressed: Given the service purportedly provided to the University by the Borough, is the Stormwater Charge (for that service) *reasonable*?[26] That is to say, if the Stormwater Charge levied against the

[26] Commonwealth Court posed this question in its memorandum overruling the University's preliminary objections (*see* RR 529a) but, given its subsequent

University is not reasonably proportional to the Borough's costs (for maintaining its Stormwater system), the charge cannot survive.

### A. The Stormwater Charge is not reasonable because it is not used to fund the operation, maintenance, or repair of the Borough's Stormwater Conveyance System.

As the Borough notes, *see* Brf. at 46, "fees charged by a municipality for services rendered are proper if they are reasonably proportional to the costs of the regulation or the services performed." *M&D Properties, Inc. v. Borough of Port Vue*, 893 A.2d 858, 862 (Pa. Cmwlth. 2006). Although a municipality can compel the payment of fees for particular services, they cannot use this power "to collect fees for a service as a means of raising revenue for other purposes." *Id.* In the context of a sewer system, a charge "must be based upon actual use, and must be reasonably proportional to the value of the service rendered and not in excess of it." *Borough of N.E. v. A Piece of Land Fronting on W. Side of S. Lake St.*, 159 A.2d 528, 530 (Pa. Super. 1960).

The Borough has suggested that the Stormwater Charge is a fee imposed for the service of conveying the University's stormwater to receiving watercourses. Even assuming, *arguendo*, that this is true, the fee is not reasonable. As Mr. Perrone admitted in his deposition, funds collected through the Stormwater Charge

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immunity decision in favor of the University, Commonwealth Court did not reach the issue.

are not actually being used to maintain the underground pipes that allegedly service the University (*See* RR 1274a-1276a – Perrone dep., at 126a-128a). Rather, Stormwater Charge receipts are being used for other services, such as streambank restoration, tree planting, street sweeping, regrading alleys, and installing rain gardens and curb extensions. The services provided and the benefits asserted are completely unrelated to each other.

The Stormwater Charge cannot be reasonably proportional to the cost of any service provided to the University because there is no information in the record regarding any such service. Indeed, for the better part of 100 years, the Borough has used tax money in its General Fund for the construction and maintenance of the Stormwater Conveyance System. (*See* RR 1193a-1194a – Perrone dep., at 45-46). Those costs have already been incurred and paid – using tax money.

In calculating the University's (or anyone else's) Stormwater Charge, the Borough did not analyze or consider the actual expected cost of maintaining the portion of the Stormwater Conveyance System associated with the University's (or anyone's) property in particular. At most, the Borough can suggest that Stormwater Charge proceeds may, theoretically, be used to perform *future* maintenance on pipes that service the University. That, however – according to the Borough – may well be decades away. In short, a current charge of some $130,000 per year, for no specific current or ongoing services, is inherently unreasonable.

### B. The Stormwater Charge is also unreasonable because it funds projects other than the general operation, maintenance, or repair of the Borough's Stormwater Conveyance System.

More significantly, the Stormwater Charge is unreasonable because the Borough is using it to fund things that are unrelated to the alleged benefits to the University, *i.e.,*the building and maintaining the Stormwater Conveyance System. A contractor for the Borough listed a number of "green infrastructure" projects for which the contractor is being paid by the Borough – but none of them involve building infrastructure to convey water away from the properties (*See generally* RR 1082a-1107a – Cline dep., at 24-49). For example, the Borough is using Stormwater Charge funds to pay for an "expensive project" to restore the streambank along Plum Run (*See* RR 1250a – Perrone dep., at 102). Other streambank projects – perhaps along Goose Creek – were expected to follow (*See* RR 1252a – Perrone dep., at 104). The Borough has also engaged in tree-planting along the public rights-of-way in the Borough, and subsidized private purchases of trees (*See* RR 1258a-1259a – Perrone dep., at 110-111). Even if the University thus derives some benefit from the Borough's MS4, it is unreasonable to rely on that benefit to justify compelling the University to pay for infrastructure improvement projects miles away from North Campus.

These projects do not directly involve the University's alleged use of the underground pipes to connect to the waterways. Even if all private landowners in

the Borough built their own private conveyance systems to carry water to public waterways, the above-mentioned projects would still be necessary to address environmental issues and hazards in public spaces. So, as to the University, the Stormwater Charge is unreasonable insofar as the funds received have been used for purposes unrelated to any services purportedly provided by the Borough to the University.

### C. The Borough cannot rely on the NTM Report to show that the Stormwater Charge is reasonable.

As the Borough notes in its brief, at 49, the authors of the NTM Report that the Borough proffered in opposition to the University's dispositive motion opined that the University would have to spend $178,500 per year to properly deal with stormwater on the North Campus. So, according to the Borough, by using the Borough's Stormwater Conveyance System, the University receives a "benefit" worth $178,500 each year. But even assuming the correctness of that cost calculation, it does not follow that the Stormwater Charge is reasonable. The Borough can only charge a fee proportional to the "costs of the regulation of the services performed." *See M&D Properties, Inc.,* 893 A.2d at 862. The NTM Report only opines on the *replacement* cost, not on the costs actually incurred by the Borough in maintaining the existing infrastructure.

In addition, the NTM Report does not take into account increased costs to the Borough from having to fully manage the outfall from Plum Run. The University manages that outfall and is responsible for remediation of excess pollutants in that stormwater, regardless of whether it originated with the Borough or the University. If the University were cut off from the Borough pipes, that outfall would still exist, and it would still need to be managed, but it would become the Borough's responsibility – a detail not considered in the NTM Report.

In short, the NTM Report does not support any claim by the Borough that the Stormwater Charge is reasonable.

## CONCLUSION

For all the foregoing reasons, this Court should affirm the decision of the Commonwealth Court.

Respectfully submitted,

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Date: October 20, 2023

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 10,479 words within the meaning of Pa.R.App.P. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further 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.

*/s/ Claudia M. Tesoro*
CLAUDIA M. TESORO
Senior Deputy Attorney General

## CERTIFICATE OF SERVICE

I, Claudia M. Tesoro, Senior Deputy Attorney General, hereby certify that I have this day served the foregoing Brief For Appellees electronically, via PACFile, upon counsel of record for appellant, the Borough of West Chester, and upon counsel of record for any *amici curiae*.

*/s/ Claudia M. Tesoro*___
CLAUDIA M. TESORO
Senior Deputy Attorney General

Date: October 20, 2023