Received 7/12/2023 5:09:55 PM Supreme Court Middle District

Filed 7/12/2023 5:09:00 PM Supreme Court Middle District
9 MAP 2023

No. 9 MAP 2023

IN THE SUPREME COURT OF PENNSYLVANIA

The Borough of West Chester,

Appellants

v.

Pennsylvania State System of Higher Education and West Chester University of Pennsylvania of the State System of Higher Education,

Appellees

On Appeal from the decision of the Commonwealth Court of Pennsylvania, dated January 4, 2023, No. 260 M.D. 2018.

BRIEF OF *AMICI CURIAE* PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, PENNSYLVANIA STATE ASSOCIATION OF BOROUGHS, PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP COMMISSIONERS, THE PENNSYLVANIA MUNICIPAL LEAGUE, CAPITAL REGION WATER, THE WYOMING VALLEY SANITARY AUTHORITY, THE BOROUGH OF CHAMBERSBURG, EAST HANOVER TOWNSHIP MUNICIPAL AUTHORITY, THE CITY OF PHILADELPHIA, THE CITY OF LANCASTER, THE CITY OF LOCK HAVEN, THE CITY OF FRANKLIN, SUSQUEHANNA TOWNSHIP, MT. LEBANON TOWNSHIP, FERGUSON TOWNSHIP, THE BOROUGH OF STATE COLLEGE, AND EBENSBURG BOROUGH IN SUPPORT OF APPELLAN

Dated: July 12, 2023

/s/ E. Lee Stinnett II
E. Lee Stinnett II
Attorney ID No. 307128
Isaac P. Wakefield
Attorney ID No. 311909
Idan V. Ghazanfari
Attorney ID No. 329517
Salzmann Hughes, P.C.
1801 Market Street, Suite 300
Camp Hill, PA 17011
Phone: (717) 234-6700
lstinnett@salzmannhughes.com
iwakefield@salzmannhughes.com
ighazanfari@salzmannhughes.com
Counsel for Amici Curiae in Support of Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF INTERESTS

The *amici curiae* submitting this brief consist of individual municipal entities and associations that represent the vast majority of political subdivisions across the Commonwealth. There is no common budget size, density, configuration, or policy preference that ties them together. Nevertheless, each of the *amici* recognize the profound impact that this decision can have upon the configuration and funding of stormwater management programs.

Both Federal and state law demands municipalities meet onerous stormwater related regulatory requirements. The Commonwealth Court's holding imperils a decade of progress municipalities made in implementing compliant stormwater programs and the equitable funding mechanisms that make them possible. Moreover, it allows the Commonwealth to continue flouting its obligation to pay its fair share of the costs municipalities incur meeting these mandates. The Commonwealth Court's decision will acutely affect *amici*, as well as their members, and they ask that this Court not allow it to stand.

The Pennsylvania Municipal Authorities Association ("PMAA") is the largest association in Pennsylvania specifically representing the interests of more than 2,600 municipal authorities. For 81 years, PMAA has provided advocacy on governmental affairs issues, education and training, and group programs. The Pennsylvania State Association of Boroughs ("PSAB") is a statewide, non-partisan, non-profit

organization that, since 1911, dedicated to serving over 950 borough governments throughout the Commonwealth. The Pennsylvania State Association of Township Supervisors ("PSATS") is a statutorily authorized non-profit state association that has been providing training, educational opportunities, and other member services to officials and employees from over 1,400 second class townships for more than 100 years. PSATS' member townships serve approximately 5.7 million Pennsylvanians and cover approximately 95% of the Commonwealth's land mass. PSATS advocates for its members before the legislative, executive, and judicial branches at state and federal levels on matters important to township administration and the performance of officials' duties, including through the submission of *amicus curiae* briefs such as this. The Pennsylvania State Association of Township Commissioners ("PSATC") is a statewide association that, since 1925, has represented the interests of the roughly 90 first class townships. The Pennsylvania Municipal League ("PML") is a non-partisan, non-profit organization, established in 1900, that now represents participating cities, boroughs, townships, and home rule communities with legislative advocacy, publications, trainings, consulting programs, and group insurance trusts.

Capital Region Water ("CRW") is a municipal authority that improves, maintains, and operates the water, wastewater, and stormwater systems in the City of Harrisburg and surrounding communities. Wyoming Valley Sanitary Authority

("WVSA") is a municipal authority providing wastewater and stormwater services across 36 municipalities within Luzerne County. WVSA takes a regional approach to stormwater management to meet federal mandates aimed at protecting and enhancing water quality. The Borough of Chambersburg is a full-service Franklin County municipality that was among the first to adopt a storm sewer utility intended to address federal stormwater mandates. East Hanover Township Municipal Authority is a dual-purpose authority that provides sewer and stormwater service to the residents of East Hanover Township, a second class township with a population of roughly 6,000.

Also signed on to this brief are the City of Philadelphia (Pennsylvania's only first class city), the City of Lancaster, City of Lock Haven, and City of Franklin, all cities of the third class; Susquehanna Township and Mt. Lebanon Township, townships of the first class; Ferguson Township, a township of the second class; and State College Borough and Ebensburg Borough.

All of these representative associations and municipal stakeholders have a shared interest in the outcome of this litigation because, undoubtedly, the various *statutorily-mandated* stormwater management programs they and their members have implemented across the Commonwealth, and the fees charged in support thereof, will be impacted. The Commonwealth Court's decision weighed whether the Borough of West Chester's stormwater charges were more akin to fees or taxes.

And part of that analysis examined the efficacy of impervious surface area as a tool to measure benefits conferred to property owners when determining stormwater fees. The above entities have an interest in the Commonwealth paying its fair share of stormwater charges so that other ratepayers are not required to pay a disproportionate share. Many have implemented stormwater programs that employ impervious surface area to calculate stormwater fees. These programs and supporting fees are part of a comprehensive regulatory framework to meet federal and state environmental mandates. The Commonwealth Court's ruling could upend that scheme. No other persons or entities financed or authored this brief.

II. SUMMARY OF ARGUMENT

Stormwater runoff carries pollutants and can harm both wildlife and property. Environmental laws form the backbone of programs designed to manage these problems. Such laws strive for clean water and mitigating pollution at their core. State and Federal agencies promulgate regulations to define what stormwater programs must do to carry out this purpose. They issue permits and punish programs that do not meet issued requirements. Additionally, Pennsylvania's Constitution imposes a duty upon all its agencies and entities to protect its water.

Local municipal entities are the permit holders that develop programs and carry out this comprehensive regulatory scheme. These programs must target the source of stormwater runoff and maintain adequate resources to address existing

issues. Such stormwater management, planning, and implementation efforts are best characterized as a provided service.

Developed properties generate more runoff than undeveloped properties. Naturally, they require more stormwater service. Stormwater programs that administer a fee corresponding to a property's impervious surface characteristics are reasonable and advance the purpose of the underlying comprehensive regulatory scheme. Conversely, providing an exception to properties that generate runoff in need of management because of a tax designation defeats the entire purpose. This conclusion is undeniable when considering the scale of development that occurs on tax-exempt properties and the effects of having other ratepayers subsidize the costs of managing their runoff.

III. ARGUMENT

A. Stormwater Programs and Supporting Fees Are Part of a Comprehensive Regulatory Scheme.

Stormwater runoff is water from the surface of land that comes from precipitation, snow, and ice melt. It requires management because the runoff can pick up and transfer pollutants, increase erosion, and transfer heat to waterways causing temperatures to rise. Undeveloped lands, or pervious surfaces, allow natural infiltration into the ground. But developed areas with impervious surfaces impair or prevent the natural infiltration process, thus generating more stormwater runoff.

Accordingly, the more impervious surface area, the more management of stormwater runoff is needed.

The consequences for insufficient stormwater management are severe and felt throughout the region. Stormwater is a significant and growing source of nitrogen and phosphorus pollution impacting the Chesapeake Bay, contributing to algae blooms that can block sunlight and interfere with underwater vegetation. Those blooms create "dead zones" when they decompose where aquatic life cannot survive. These are large scale problems that demand more than stopgap and piecemeal solutions. Coordinated efforts, therefore, are necessary from the Federal government, the Commonwealth, and local municipalities.

For the most part, stormwater runoff is managed by individual municipalities, who generally own and operate their own infrastructure systems. These can be either separate or combined—i.e., Municipal Separate Storm Sewer Systems ("MS4") or Combined Sewer Systems. The difference being that combined systems use the same pipes to transmit both household sewage and stormwater. Major demands from acute weather events can inundate the capacity of these systems, discharging untreated stormwater and wastewater into surrounding streams and rivers.

These systems are necessary in management efforts to safeguard against some of the problems set forth above. But many municipalities across Pennsylvania

manage aged systems that have long deferred both maintenance and modern improvements.

Managing stormwater is not a new problem. To meet the growing demands stormwater runoff poses to the environment, Pennsylvania's municipal entities must satisfy statutory and regulatory schemes implemented at both Federal and state levels. Understanding the purpose behind modern stormwater programs and related charges requires knowing why and how they are implemented locally.

1. *Background of Environmental Regulations.*

The Federal Water Pollution Control Act of 1948 was among the first major U.S. laws addressing water pollution. Over time, it has become commonly known as the Clean Water Act. Its requirements and structure have been clarified by the United States Supreme Court as recently as May 25, 2023. *See Sackett v. Environmental Protection Agency*, 143 S.Ct. 1322 (2023). "The Clean Water Act anticipates a partnership between the States and the Federal Government." *Id.* at 1344 (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)). Accordingly, "States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use." *Id*.

The Chesapeake Bay drives critical environmental policy across the mid-Atlantic region. More than 100,000 streams and rivers thread throughout its watershed—which spans Delaware, Maryland, New York, Pennsylvania, Virginia,

and West Virginia. The Environmental Protection Agency ("EPA") since 1983 has reached various agreements with these States as well as the District of Columbia to address pollutants and share responsibility for the Chesapeake Bay. On December 29, 2010, in accord with the Clean Water Act's goal that all U.S. waters be fishable and swimmable, the EPA established the Chesapeake Bay Total Maximum Daily Load ("TMDL"). The Chesapeake Bay TMDL sets pollution limits on nitrogen, phosphorus, and sediment with corresponding reduction goals for each of the above States and D.C., divided across jurisdictions.

2. *Duties under Pennsylvania's Constitution.*

Article 1, Section 27 of the Pennsylvania Constitution, the Environmental Rights Amendment, states, "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." PA. CONST. art. I, § 27. This Court recently held that the Environmental Rights Amendment imposes a fiduciary duty upon all the Commonwealth's agencies and entities, both statewide and local, to prohibit degradation, diminution, and depletion of our public natural resources—including water. *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017).

Pennsylvania's General Assembly has enacted laws, like the Clean Streams Law, to specify how government must safeguard the environment for its people. *See* Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001. The Clean Streams Law contains an explicit declaration of policy to prevent and eliminate water pollution through a comprehensive program of watershed management and control. 35 P.S. § 691.4. Pursuant to this requirement, Pennsylvania's Department of Environmental Protection ("DEP") must ensure compliance with permits that control local waterways within the larger watershed.

3. *Regulation and Oversight at a Local Level.*

Regulatory bodies, like DEP, issue MS4 permits to municipal entities under the Clean Water Act and set TMDL limits on local waterways. For a sense of scale, more than 1,000 Pennsylvania local governments are required to have MS4 permits. And roughly 360 MS4s exist within Pennsylvania's portion of the Chesapeake Bay watershed alone. Among other things, DEP's permitting system aims to ensure necessary maintenance of aged systems so overflow events are minimized, and pollutants are eliminated. Municipal permit holders pursue vetted projects under this scheme designed to accomplish the goals of that permit cycle. Significant fines can be imposed when permittees fail to meet their obligations.

Regulatory compliance has a price tag. And these environmental mandates do not come with structural funding mechanisms. Municipalities with stormwater

programs, like the Borough of West Chester and each of the *amici*, are responsible for meeting lofty and expensive regulatory clean water requirements at their own cost. Such requirements include, but are not limited to rehabilitating failing infrastructure, improving the health of local waterways, safeguarding against localized flooding, and implementing green infrastructure projects resulting in beautification.

By way of express example, the sample MS4 permit issued by DEP demonstrates these obligations. It states, "[t]he permittee must develop, implement, and enforce [a stormwater management program] designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act and Pennsylvania Clean Streams Law." (Sample MS4 General Permit Part C, "Special Conditions," (I)(A).)[1] And critically, "[t]he permittee shall develop and maintain adequate legal authorities, where applicable, and *shall maintain adequate funding and staffing* to implement this General Permit." (*Id*. at (III)(D) (emphasis added)). The stormwater programs of MS4 permittees require six minimum control measures. The heavy focus is to eliminate and prevent pollutants in local waterways.

[1] DEP's Sample MS4 General Permit is publicly available here: http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=11134&DocName=04%20SAMPLE%20APPROVAL%20OF%20COVERAGE%20AND%20MS4%20GENERAL%20PERMIT.PDF%20%20%3Cspan%20style%3D%22color%3Agreen%3B%22%3E%3C%2Fspan%3E%20%3Cspan%20style%3D%22color%3Ablue%3B%22%3E%3C%2Fspan%3E

Municipal entities across the Commonwealth have designed their stormwater programs with supporting fees to effectuate MS4 permit compliance. For example, WVSA's program is designed to minimize the impact of stormwater runoff carrying pollutants. Base Fees are calculated by tiers based upon the square footage of impervious area on a given parcel because more developed parcels generate more runoff. More than 15 different credit options are available for property owners that have taken some means of reducing their level of runoff. That credit is then applied to the Base Fee yielding the amount due. The structure incentivizes owners to reduce pollutants that otherwise flow from their properties while WVSA manages the rest. WVSA uses all generated money for stormwater purposes, including system maintenance and projects required under its MS4 permit.

4. *The Borough of West Chester's Stormwater Program.*

The Borough of West Chester owns and operates an MS4 subject to an MS4 permit. *Borough of W. Chester v. Pa. State Sys. of Higher Educ.*, 291 A.3d 455, 457 (Pa. Cmwlth. 2023). In 2016, West Chester adopted a "Stream Protection Fee" to serve as the required funding mechanism for its stormwater management program. *Id.* at 458. This fee is imposed upon owners of developed property within the Borough that are benefited by the stormwater management system. *Id.* at 457-58. Revenue was deposited in a separate fund dedicated to stormwater-related expenses.

Id. at 458. The amount charged depended upon the amount of impervious surface area. *Id.*

As noted above, *amici* and their membership have implemented programs like West Chester's. Most have adopted stormwater charges where the rate is calculated with reference to a developed property's impervious area. The Commonwealth has refused almost universally to pay these fees by arguing that the fees are a tax or that impervious area is not the best means to calculate the fee while not offering a practical alternative. The *amici* believe that this position and the Commonwealth Court's decision below is directly contrary to the statutory authorizations and common law principles applicable to such fees.

B. Pennsylvania's General Assembly Has Authorized Stormwater Programs and Recognized that Stormwater Charges are Fees for Service.

Pennsylvania is uniquely diverse with its local government structure. With varying classes and kinds of boroughs, townships, cities, counties, and municipal authorities, many different governing codes exist. The General Assembly has approached stormwater-related amendments of these codes in a piecemeal fashion while sensibly recognizing that charges implemented in support are fees for service.

Pennsylvania's General Assembly through Act 68 of 2013 amended the Municipality Authorities Act ("MAA"), 53 Pa.C.S. § 5601, *et seq*., to expressly provide for stormwater management as a valid purpose for authorities. More

specifically, Section 5607(a)(18) of the MAA allows municipal authorities to engage in stormwater management, planning, and implementation. 53 Pa.C.S. § 5607(a)(18). Act 123 of 2014 furthered support of stormwater programs by codifying authorities' rights to charge reasonable and uniform rates, based upon property characteristics, to fund stormwater management, planning, and implementation efforts. 53 Pa.C.S. § 5607(d)(34). Many municipalities across the Commonwealth have established municipal authorities pursuant to the MAA—*in express reliance on this statutory authorization*—to implement stormwater programs and associated fees based on impervious area.

Aside from the MAA, the General Assembly has incrementally authorized comprehensive stormwater management undertakings in the First Class Township Code, the Second Class Township Code, and the Borough Code. *See* 53 P.S. § 67705; *see* 53 P.S. § 56579.56; *see* 8 Pa.C.S. § 2201(a)(5). These legislative efforts demonstrate the General Assembly understands stormwater fees are intended to be charges for service throughout the Commonwealth and has passed legislation to effectuate this effort. This is like other charges for utility services—water, sewer, and trash collection—that are commonly accepted and paid by Commonwealth agencies. Authorizing municipal authorities to provide stormwater services is telling in and of itself because the General Assembly must grant political subdivisions the power to tax. *Appeal of Harrisburg School Dist.*, 417 A.2d 848, 850-51 (Pa.

Cmwlth. 1980). The General Assembly has not expressly granted taxation power to municipal authorities, for stormwater or otherwise. Thus, it has expressly authorized such fees.

Impervious surface area is a logical basis for calculating stormwater management costs because it directly relates to how much runoff a property generates. Explained below, courts around the country have understood and upheld this method as reasonable. *See Green v. Village of Winnetka*, 135 N.E.3d 103, 115 (Ill. App. Ct. 2019) ("there was a direct and proportional relationship between imperviousness and storm water run-off, thus creating a rational relationship between the amount of the fee and the contribution of a parcel to the use of the storm water system.'").

The fact that the MAA authorizes stormwater rates to be predicated upon property characteristics naturally embraces impervious surface area as a proper basis. From the outset, the provided service was understood to be how much runoff was being managed. The concept of stormwater charges being fees (rather than taxes) has already been acknowledged by Pennsylvania state and Federal courts. *See Appeal of Best Homes DDJ, LLC*, No. 239 C.D. 2020, 2021 WL 6068248 (Pa. Cmwlth. Dec. 23, 2021) (acknowledging relationship to costs of service); *see also Gibson v. Susquehanna Twp. Auth.*, No. 1:20-cv-01891, 2020 WL 13730073 (M.D.

Pa. Nov. 25, 2020), *aff'd*, No. 21-1140, 2021 WL 5768472 (3d Cir. Dec. 6, 2021) (understanding statutory authorization of stormwater charges).

In *Best Homes*, property owners sued the Chester Stormwater Authority for injunctive relief, alleging the stormwater charge was an illegal tax because it generated revenue and raised money for purposes unrelated to stormwater. *Best Homes*, 2021 WL 6068248, at *9. The Chester Authority argued that the charge was not a tax because the collected charges funded projects relating to repair of the City's stormwater management infrastructure only. *Id*. The trial court ruled in favor of the Chester Authority. On appeal, the Commonwealth Court affirmed.

The court used the "fee v. tax" framework restated in earlier stages of the *West Chester* litigation: whether the stormwater system "provides a discrete benefit" rather than "generally aiding the environment and the public at large," whether the value of the stormwater system is "reasonably proportional to the amount of the stormwater charge," and how exactly the Chester Authority utilizes the funds generated by the charge. *Id.* (citing *Borough of W. Chester v. Pa. State Sys. of Higher Educ.*, No. 260 M.D. 2018, 2019 WL 3069642, at *4 (Pa. Cmwlth. July 15, 2019)). The court upheld the Chester Authority's charges as valid fees because they were based largely on the costs of providing service, there was no evidence they were unrelated to stormwater, and the property owners failed to show the Chester

Authority did not provide them a discrete benefit or that its value was not reasonably proportional to the amount of the fees. *Id.*

In *Gibson*, a property owner challenged a municipal authority's stormwater utility fees as illegal taxes. *Gibson*, 2020 WL 13730073, at *1. Although sufficient facts were not alleged to maintain the claim, the district court recognized the fee "appears to have been imposed by [the municipal authority] to fund projects to update its aging stormwater infrastructure in compliance with federal and state environmental regulatory requirements." *Id*. The district court also noted that "the Commonwealth of Pennsylvania appears to have expressly authorized [Susquehanna Township Authority] and other municipal authorities to impose [stormwater] charges" through amendment of the MAA. *Id.* at *3 (citing 53 Pa.C.S. § 5607(d)(9), (34)).

The intention is clear and the outcome obvious. Stormwater fees supporting stormwater programs in Pennsylvania are fees for service. The need to plan for, manage, and maintain stormwater facilities is mandated by the Federal Clean Water Act and Pennsylvania's Clean Streams Law. Moreover, it was the Commonwealth itself that entered into agreements with EPA to reduce pollutants entering the Chesapeake Bay. These obligations will continue for decades to come.

The Commonwealth's hypocrisy to now claim that it need not pay stormwater charges leaves program operators, like West Chester and the *amici*, out in the cold.

Additionally, refusing to pay reasonable stormwater charges violates the Commonwealth's Constitutional obligation to provide pure water and protect the environment—a fiduciary duty that applies equally to Commonwealth agencies and municipal entities—because it threatens the ability of local municipalities to effectively manage stormwater runoff and reduce pollutants for Pennsylvania residents. Accordingly, correctly classifying stormwater charges as "fees" rather than hiding behind taxation immunity is of major consequence.

C. The Commonwealth Court's Fee v. Tax Analysis Falls Short and Misunderstands the Specific Benefits Stormwater Management Programs Provide.

1. *The Purpose of a Stormwater Charge is the Most Important Factor When Determining if it is a Fee.*

Challenging the nature of stormwater charges is not unique to Pennsylvania. A nationwide trend has emerged finding these charges to be fees as part of a comprehensive regulatory scheme. *See Norfolk Southern v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019). For example, in *Norfolk Southern v. City of Roanoke*, a railroad challenged a municipal stormwater fee alleging it was a tax from which it was immune. *Id*. at 318. The district court granted summary judgment in favor of the municipality holding the charge to be a fee, and the Fourth Circuit Court of Appeals affirmed. The challenged fee in *Norfolk Southern* was similarly calculated based on impervious surface area of developed parcels because "higher amounts of impervious surfaces contribute greater amounts of stormwater and pollutants to the

city's stormwater management system and that the owners of such parcels should carry a proportionate burden of the cost of such system." *Id*. Roanoke also offered credits for activities that reduced, controlled, or treated stormwater runoff, and all revenue was dedicated to stormwater management. *Id*.

The court deliberately walked through the three part "fee v. tax" framework outlined in *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992), which was adopted by the Fourth Circuit: "(1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge." *Norfolk Southern*, 916 F.3d at 319 (citing *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130 (4th Cir. 2000)).

In *Norfolk Southern*, the Fourth Circuit Court of Appeals held the most important factor is the purpose served by the charge. Who imposed the charge and who it applied to became ancillary considerations in a close case. *Id*. at 322. Ultimately, the court found the charge's purpose was being part of a *comprehensive regulatory scheme*: "Of course, the City doesn't directly regulate Norfolk Southern or other stormwater dischargers, nor does it issue permits for their discharges. Thus, rather than defraying the City's costs of regulating, the charge primarily defrays the City's costs of complying with regulations imposed upon it. At bottom, however, a classic regulatory fee is designed to address harmful impacts of otherwise permissible activities, and to ensure that the actors responsible for those impacts bear

the costs of addressing them. That is exactly the function served by Roanoke's stormwater management charge, which ensures that owners of impervious surfaces bear the cost of managing stormwater runoff." *Id*. The same is true here.

2. *The Commonwealth Court Erred by Not Examining the Charge's Purpose as Part of a Regulatory Scheme with Discrete Benefits*.

The Commonwealth Court's opinion in *West Chester*, while citing *San Juan Cellular* (just like *Norfolk Southern*) before proceeding with its own analysis, makes no reference to *Norfolk Southern*. *West Chester*, 291 A.3d at 462, 464. Instead, the Commonwealth Court found West Chester's stormwater program provided no discrete benefits to property owners because the supporting fee went to the expenses of "an ongoing series of evolving tasks and projects." *West Chester*, 291 A.3d at 464-66. But the court did not acknowledge these "tasks and projects" are required as part of the Borough of West Chester's MS4 permit—as they are required of all MS4 permits that comprise and serve the larger comprehensive scheme alluded to in *Norfolk Southern*. *See* Sample MS4 General Permit, Part C (I)(B)(5) (MCM #5).

The precepts from *Norfolk Southern* should control with respect to West Chester because the programs are nearly identical in nature. The stormwater programs and supporting fees are designed under the auspices of the Clean Water Act and state permitting requirements that follow. Regulatory fees may deliberately discourage particular conduct by making it more expensive, or by defraying regulation-related expenses. *Norfolk Southern*, 916 F.3d at 320 (citing *San Juan*

Cellular, 967 F.2d at 685-86). Add to that Pennsylvania's Constitutional requirements upon all governmental agencies under the Environmental Rights Amendment, and it is clear that the Commonwealth is not paying its fair share. The same is true for programs implemented by *amici* and their members.

The comprehensive regulatory scheme is clear. Charges are calculated based upon specific properties' given level of impervious surface area—meaning owners of parcels that contribute greater amounts of runoff and pollutants carry a proportionate burden of the cost. And the program design affords methods by which property owners can reduce the amount of fees owed by engaging in conduct that assists with mitigating pollution. Without these fees, permit holders could not achieve compliance with DEP requirements and the Commonwealth would not be able to follow through on its promises to the EPA in the Chesapeake Bay deal.

The Commonwealth Court's failure to acknowledge the purpose of *West Chester*'s stormwater charge is compounded by its failure to understand the benefits of the program. The simple truth is that handling a property owner's burden on a system is the benefit. Environmental regulators design requirements to combat the gambit of stormwater problems—not just to handle flooding events. "Although municipalities may have traditionally provided stormwater management as a public benefit at the discretion of their legislatures, the Clean Water Act's regulatory scheme now requires the City to take myriad concrete actions to reduce discharges

and pollutant concentrations—many of them relating directly to runoff from Norfolk Southern's property and the waters that receive it." *Norfolk Southern*, 916 F.3d at 321-22. The same is true for West Chester as well as the *amici*.

Local municipalities develop compliant programs under regulatory requirements and allocate incurred costs in an equitable manner the best they can. Other state appellate courts have held the same. *See City of Key West v. Key West Golf Club Homeowners', etc., et al.*, 228 So.3d 1150 (Fla. Dist. Ct. App. 2017).

In *City of Key West*, landowners brought a challenge against Key West's stormwater utility charge. The lower court found the charge to be a tax, and the appellate court reversed. The general anti-flooding public benefit was an ancillary consideration. *Id*. at 1155. The appellate court understood that the owners *also* benefitted from the citywide stormwater anti-pollution services provided by the fees. *Id*. Through that, the landowners were able "to avoid more onerous and expensive treatment for their runoff under applicable state and local laws" and received a specific benefit. *Id*.

Moreover, the charge in *City of Key West* was predicated upon impervious surface area and had a reasonable relationship to the benefits received. The property owners unsuccessfully argued that the stormwater management system benefitted them "only to the extent that its stormwater travels through the utility's pipes and infrastructure." *Id.* at 1158. The court rejected this position and held a utility fee

was legally imposed regardless of physical entry into sections of utility infrastructure and used sewer as an example. *Id.* It then warned of the harm in holding otherwise as "[a]d hoc judicial utility rate adjustments based on the balkanization of utility infrastructure …invites abuse because they fail to account for the need to have such systems operate as part of a cohesive, unitary, regional whole." *Id.* at 1159.

Instead of following *Norfolk Southern* or *City of Key West*, the Commonwealth Court noted the lack of precise calculation of stormwater runoff as a failure to directly measure use of the Borough's stormwater system. *West Chester*, 291 A.3d at 464. It found that "the impervious surface area of a property does not correlate to the level of benefit accorded the owner of that property." *Id*. (citing *DeKalb Cty., Ga. v. U.S.*, 108 Fed. Cl. 681 (Fed. Cl. 2013)). Specifically, it adopted the "burdens, not benefits" reasoning in *DeKalb Cty., Ga. v. U.S.*—a 10-year old nonprecedential case that has had much of its applicability undercut by subsequent amendment to the Federal statute at issue. *Id.* (citing *DeKalb*, 108 Fed. Cl. at 703).

The Commonwealth Court's reliance upon *DeKalb* and failure to mention *Norfolk Southern* is curious. *DeKalb* was decided over a decade ago and *Norfolk Southern*, a Fourth Circuit Court of Appeals decision that directly involves the same Chesapeake Bay considerations that are at issue here, declines to extend it for good reason. Absolving large, developed properties from having to pay fees for their generated runoff because of their tax-exempt status with a "burdens-not-benefits"

theory is patently absurd when considered in the context of a comprehensive regulatory scheme.

The Commonwealth Court's reliance upon *DeKalb* is further misplaced with a closer examination of its subject matter. In *DeKalb*, a county, as owner and operator of an MS4 system, passed an ordinance creating a stormwater utility and corresponding service fees. *DeKalb*, 108 Fed. Cl. at 686. But the *DeKalb* case involves a Georgia federal claims court that began its reasoning by acknowledging the Georgia Supreme Court has held the type of stormwater charges at issue to be fees instead of taxes. *See McLeod v. Columbia Cnty.*, 599 S.E.2d 152 (Ga. 2004); *see also DeKalb*, 108 Fed. Cl. at 697 (citing *Carpenter v. Shaw*, 280 U.S. 363 (1930)). It distinguished its own analysis because federal rights were involved. *Id*.

A large portion of the court's opinion concerned the Federal Facilities Section of the Clean Water Act, 33 U.S.C. § 1323, prior to its 2011 amendment. The Federal Facilities Section has a tortured history of legislative amendments followed by executive reluctance. Subsection 1323(c)(1)(a) was added in 2011 in a successful attempt at clarity. In fact, in *DeKalb*, the United States conceded that the 2011 amendment expressly required it to pay stormwater management charges in the future. *DeKalb*, 108 Fed. Cl. at 690. The case would not have been litigated following the 2011 amendment because both parties agreed the stormwater charges were reasonable and should be paid.

What's more, *Norfolk Southern*'s rejection of *DeKalb* is not unique. In *City of Wilmington, Del. v. U.S.*, 68 F.4th 1365 (Fed. Cir. May 31, 2023), Wilmington brought a lawsuit against the U.S. Army Corps of Engineers for unpaid stormwater management fees. Wilmington charged a monthly stormwater management fee to mitigate pollution based on an estimation of each property's contribution to stormwater runoff. *Id*. at 1368. For residential properties, the city summed the square footage of impervious area as documented by county records. *Id*. And for non-residential properties, the city employed a formula that took the total area of the property and a runoff coefficient based on land use codes in an attempt to measure a property's impervious area. *Id*. at 1369.

Similar to *DeKalb*, the Federal Facilities Section of the Clean Water Act was at issue in *City of Wilmington*. Following the 2011 amendment, the Federal government must pay reasonable stormwater charges when based upon some fair approximation of the proportionate contribution of the property or facility to stormwater pollution. 33 U.S.C. § 1323(a). The *City of Wilmington* court clarified, "the approximation used by a state or local entity need not be the most accurate or most fair approximation. The standard is thus an objective standard based on what a reasonable person would consider a fair approximation." *Id*. at 1371-72.

There was no issue with the Wilmington's general approach in establishing a stormwater management program by using impervious surface area. Expert

testimony showed that "at least three quarters of municipalities base their stormwater utility rate methodologies on impervious area." *Id*. at 1372. In fact, the court emphatically clarified, "*We do not seek to disturb other municipalities' systems that meet the statutory definition of 'reasonable service charges.'*" *Id*. at 1374 (emphasis added). It continued, "A city need not visit properties in its jurisdiction nor perform a 'tape measure' analysis to satisfy the 'some fair approximation' standard in estimating the amount of stormwater runoff emitted." *Id*. Wilmington's program fell short simply because it failed to link the amount of impervious surface on each property to its charge. That is not the case with West Chester or the *amici*.

City of Wilmington further evidences how *DeKalb*'s reasoning should not serve as the foundation of the Commonwealth Court's decision in *West Chester*. Estimating runoff is sufficient in establishing a reasonable service charge. A "precise calculation" is not required, nor would one be practicable. Impervious surface, clearly, is not only a fair approximation of levels of service, it is a logical methodology blessed by numerous courts.

D. <u>The Necessity of Fair Approximation with Respect to Stormwater</u>.

The exact measurement of stormwater management services provided to a given property presents great difficulties. The goal, instead, should be to prepare reasonable and fair stormwater management programs.

The fair approximation concept dates back to a United States Supreme Court holding from the 1970s. *See Mass. v. U.S.*, 435 U.S. 444 (1978). In *Mass. v. U.S.*, Massachusetts sued the United States to recoup money the Federal government collected under the Airport and Airway Revenue Act. The Supreme Court determined that a precise calculation was not possible given the nature of aviation services provided. The Supreme Court held that the federal government was not unduly interfering with a state's ability to perform essential functions as long as federal charges do not discriminate against state functions, are based upon a fair approximation of use of the system, and are structured not to exceed the costs of benefits supplied.

Stormwater services present similar issues with respect to exactness. Unfortunately, measuring stormwater runoff for a given property is not as simple as installing a meter as is the case with sewage. Calculating stormwater fees based on impervious area property characteristics ensures individual owners pay a fee proportional to the amount of managed runoff. This methodology is consistent with a growing national consensus. *See Sanitation Dist. No. 1 v. Weinel*, 625 S.W.3d 774 (Ky. App. 2020); *see Steeplechase Village, Ltd. v. Columbus, OH*, No. 19AP-736, 2020 WL 7777889 (Oh. Ct. App. Dec. 31, 2020); *see Green*, 135 N.E.3d 103 (Il. App. Ct. 2019); *see City of Key West*, 228 S.3d 1150 (Fla. Dist. Ct. App. 2017). All

money collected goes back to funding stormwater management efforts, exclusively. None is used for other purposes.

Municipal entities are stewards of public money, hence the Commonwealth's various transparency requirements with checks and balances provided by public oversight. Responsible use of funds is of chief importance. When generated fees are used to support a program, the goal is to charge users what it costs to keep the program operational as intended. But getting overly granular to measure exact amounts can become expensive. Perfection is not a cost-effective pursuit. *See City of Key West*, 228 So.3d at 1159 ("It is extremely difficult, if not impossible, to establish a perfectly fair and accurate method of assessing these types of stormwater charges"). Structuring through stormwater programs and related charges presents a more equitable solution that marries contributors of stormwater runoff to related costs.

Properly categorizing these charges as fees continues this equitable structure. This is best exemplified by examining the alternative. If stormwater charges are deemed taxes, non-tax-exempt property owners (residential, mostly) would be forced to subsidize the stormwater management costs of tax-exempt entities at scale. For example, in Philadelphia, roughly 23 percent of stormwater management revenue comes from customers that are likely tax-exempt. And in Harrisburg, roughly 41 percent of property is owned by the Commonwealth with more held by

other tax-exempt entities. Then consider that tax-exempt entities commonly own properties with the largest amount of impervious surface area. Treating true, regulatory stormwater fees as taxes ignores the underlying purpose to curb unwanted conduct and allows the largest users of the system to shirk their responsibility to pay their fair share for services they receive.

E. Public Policy and Real Consequences.

1. *The Perspective of Good Policy*.

The Commonwealth's practice of refusing to pay reasonable stormwater charges citing its tax-exempt status would truly set it apart for the worse. Not only would it be undermining efforts to follow through on its promises to the EPA, but it would also be departing from the national consensus. Even the Federal government has acknowledged it too must pay such charges. *See* 33 U.S.C. § 1323(a). The Commonwealth's non-payment of these fees jeopardizes adequate stormwater management. Local communities must then scramble to make up the difference or face legal consequences.

2. *The Impact of Pennsylvania's Choices Played Out.*

Thrusting these difficult circumstances upon a municipality can become dire when resources are tight. Having a secure means to fund stormwater management expenses is a necessity. By way of example, *amicus curiae* Capital Region Water took over operation and maintenance of water and wastewater systems responsible

for the greater Harrisburg area. CRW faced a common problem plaguing many municipalities across the Commonwealth—aging infrastructure.

Addressing necessary but expensive projects to improve a system that keeps promulgating pollution is not a simple task. Especially for cities with a history of financial distress, like Harrisburg, where one out of every three residents lives in poverty. The price tag for improving the long-neglected combined sewage and stormwater pipes in the Capital region was $315 million over 20 years. After dozens of community meetings/forums, direct meetings with Commonwealth and the Department of General Services' executive and legal teams, feedback from nearly 100 residents/businesses, and three formal public hearings, CRW adopted an equitable fee structure.

That fee structure included funds derived from Commonwealth properties, the size of which cannot be understated. Not paying stormwater fees, as it has done since October 2020, throws a wrench into the significant investments CRW has made to adopt and implement its program. In effect, it dumps the huge environmental compliance price tag onto the doorstep of local taxpayers. And now, the Commonwealth Court's decision says that's correct while not acknowledging the comprehensive regulatory scheme. Affirming that decision hamstrings local programs and allows properties that generate large amounts of runoff to proceed with impunity.

There is nothing equitable about dissociating financial responsibility from discouraged conduct. It leads to situations like Harrisburg, where the Commonwealth government is free to construct impervious surface behemoths—like the sprawling Capital Complex and administrative buildings in Harrisburg, which represent 22 separate accounts totaling nearly 5.4 million square feet in impervious area. All the while the taxpaying citizens of Harrisburg, many of whom qualify as low-income, foot the increasing bills for the service CRW is providing to the Commonwealth.

While CRW and Harrisburg offer a helpful illustration, they are sadly not alone. Consider Philadelphia, Pennsylvania's largest city. Philadelphia is home to many universities, hospitals, and other tax-exempt entities. The Commonwealth, educational institutions, and medical facilities own a total of 963 parcels in Philadelphia. If the Commonwealth Court's decision is allowed to stand—particularly if this Court issues a broad holding—these (and potentially other tax-exempt) entities will avoid their financial responsibility for the stormwater runoff they create in Philadelphia. Indeed, almost a quarter of the revenue Philadelphia receives to manage stormwater to meet its statutory and regulatory obligations comes from customers that own a large quantity of parcels in the City that are potentially tax-exempt.

Making up the revenue shortfall created if tax-exempt entities do not have to contribute to financing stormwater management will fall disproportionately on its citizens. Consider that Philadelphia's owner-occupied housing rate is roughly 50 percent and approximately 22 percent of Philadelphia's residents live in poverty. It is these individuals who will have to pay for the cost of managing Philadelphia's stormwater runoff while multimillion-dollar entities will be absolved of their responsibility to contribute their fair share.

But this would not simply be a blow to cities like Harrisburg and Philadelphia. Modest communities like East Hanover Township, a second class township who structured its program through a municipal authority, also use impervious surface area as a means to fairly charge residents based on levels of service received. Programs like this would similarly be turned on their head if the Commonwealth Court's handling of impervious surface area is affirmed.

The *amici* and their members are plagued by similar situations. Local taxpayers would be stuck bearing the brunt of the Commonwealth's hypocrisy and the Commonwealth Court's misunderstanding. In tandem, it creates paradoxical scenarios where the Commonwealth (via DEP) can mandate stormwater compliance levels from an MS4 while not having to pay for its own property's runoff that discharges into that same MS4.

Not all stormwater programs are the same. But the negative consequences experienced by tax-paying residents mainly are. Declaring stormwater charges taxes forces taxpayers to subsidize costs from runoff of tax-exempt properties. The Commonwealth's incentive to mitigate its sizeable contribution to stormwater management problems becomes less meaningful because it need not pay its fair share. Thus, it circumvents the design of the comprehensive regulatory scheme.

IV. CONCLUSION

The Federal Clean Water Act, national caselaw developments, and Pennsylvania's own Constitution and statutes require that reasonable stormwater charges based upon impervious surface that support regulatory programs be classified as fees. Otherwise, tax-exempt entities, like the Commonwealth, are free to allow runoff to flow from their large, developed properties without limitation and with the comfort that someone else will manage the consequences and handle the check.

Respectfully Submitted,

SALZMANN HUGHES, P.C.

Date: July 12, 2023

By: */s/ E. Lee Stinnett II*
E. Lee Stinnett II
Attorney ID No. 307128
Isaac P. Wakefield
Attorney ID No. 311909
Idan V. Ghazanfari
Attorney ID No. 329517
Salzmann Hughes, P.C.

1801 Market Street, Suite 300
Camp Hill, PA 17011
Phone: (717) 234-6700
lstinnett@salzmannhughes.com
iwakefield@salzmannhughes.com
ighazanfari@salzmannhughes.com
Counsel for Amici Curiae in Support of Appellants

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the foregoing brief complies with the word count limitations set forth in Pa.R.A.P. 531, and that it contains 6,990 words, which was determined in reliance upon the word count feature of the word processing system used in preparation.

Dated: July 12, 2023

By: */s/ E. Lee Stinnett II*
E. Lee Stinnett II

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the United 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: July 12, 2023

By: */s/ E. Lee Stinnett II*
E. Lee Stinnett II

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July 2023, a true and correct copy of the foregoing Brief of *Amici Curiae* was served upon all parties via PACFile.

Dated: July 12, 2023

By: */s/ Michelle McGroary*
Michelle McGroary, Paralegal

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JEFFREY GIBSON, Plaintiff, v. SUSQUEHANNA TWP AUTHORITY, Defendant.	CIVIL ACTION NO. 1:20-cv-01891 (JONES, C.J.) (SAPORITO, M.J.)

REPORT AND RECOMMENDATION

In this *in forma pauperis* civil action, *pro se* plaintiff Jeffrey Gibson appears to claim that a stormwater utility fee imposed by defendant Susquehanna Township Authority ("STA") constitutes an illegal "tax" on the plaintiff and his real property.[1] This stormwater utility fee, commonly known as a "rain tax," appears to have been imposed by STA

[1] We note that it is unclear whether the stormwater runoff charges challenged by this plaintiff are properly considered fees or taxes. This is a fact-intensive question that we are unable to resolve on the sparse facts alleged in the *pro se* complaint. *See generally Borough of W. Chester v. Pa. State Sys. of Higher Educ.*, No. 260 M.D. 2018, 2019 WL 3069642 (Pa. Commw. Ct. July 15, 2019) (unpublished decision). If the charges at issue are indeed taxes, as characterized by the plaintiff, we would lack subject matter jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341. *See generally Gass v. Cty. of Allegheny*, 371 F.3d 134, 136–39 (3d Cir. 2004). For present purposes, we have treated the charges as fees for services.

to fund projects to update its aging stormwater infrastructure in compliance with federal and state environmental regulatory requirements. The plaintiff's *pro se* complaint is vague and not entirely intelligible, but it appears to contend that this fee is illegal because STA lacks the power to impose taxes—he contends that, under the Necessary and Proper Clause[2] and the Privileges and Immunities Clause[3] of the United States Constitution, only the federal, state, and county governments have the power to impose taxes. He also appears to contend that "environmental property tax[es]" are unconstitutional because God made the rain, and a property tax cannot be legally imposed on God.

Gibson now comes before this Court, "[i]nvoking United States Constitutional Citizen Marshal Status" to request an order directing the

---

[2] The *pro se* complaint repeatedly references "Article 2 Section [1] 18" of the United States Constitution, but there is no such provision. The plaintiff appears to be referring to the Necessary and Proper Clause, which provides that "[t]he Congress shall have the Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, cl. 18.

[3] The *pro se* complaint references "Article 4 Section 2 [1]," which we liberally construe as a reference to the Privileges and Immunities Clause, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV, § 2, cl. 1.

STA to reduce the stormwater utility fee to a maximum of $12 per year, or to set it aside altogether, and to award him $7,800 in damages.

I. LEGAL STANDARD

Under 28 U.S.C. § 1915(e)(2), the Court is required to dismiss an action brought *in forma pauperis* if it is "frivolous," 28 U.S.C. § 1915(e)(2)(B)(i), or if it "fails to state a claim on which relief may be granted, *id.* § 1915(e)(2)(B)(ii). Under this statute, an *in forma pauperis* action may be dismissed *sua sponte* for these reasons "at any time," before or after service of process. *See* 28 U.S.C. § 1915(e)(2); *Walker v. Sec. Office of SCI Coal Twp.*, No. 3:CV-08-1573, 2010 WL 1177338, at *4 (M.D. Pa. Mar. 25, 2010).

An action is "frivolous where it lacks an arguable basis in either law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also Thomas v. Barker*, 371 F. Supp. 2d 636, 639 (M.D. Pa. 2005). To determine whether it is frivolous, a court must assess a complaint "from an objective standpoint in order to determine whether the claim is based on an indisputably meritless legal theory or clearly baseless factual contention." *Deutsch v. United States*, 67 F.3d 1080, 1086 (3d Cir. 1995) (citing *Denton v. Hernandez*, 504 U.S. 25, 34 (1992)); *Thomas*, 371 F.

Supp. 2d at 639. Factual allegations are "clearly baseless" if they are "fanciful," "fantastic," or "delusional." *See Denton*, 504 U.S. at 32–33. "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Id.* at 33. A district court is further permitted, in its sound discretion, to dismiss a claim "if it determines that the claim is of little or no weight, value, or importance, not worthy of serious consideration, or trivial." *Deutsch*, 67 F.3d at 1089.

The legal standard for dismissing a complaint for failure to state a claim under § 1915(e)(2)(B)(ii) is the same as that for dismissing a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Brodzki v. Tribune Co.*, 481 Fed. App'x 705, 706 (3d Cir. 2012) (per curiam); *Mitchell v. Dodrill*, 696 F. Supp. 2d 454, 471 (M.D. Pa. 2010); *Banks*, 568 F. Supp. 2d at 588. "Under Rule 12(b)(6), a motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds the plaintiff's claims lack facial plausibility." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (citing

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–56 (2007)). In deciding the motion, the Court may consider the facts alleged on the face of the complaint, as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Although the Court must accept the fact allegations in the complaint as true, it is not compelled to accept "unsupported conclusions and unwarranted inferences, or a legal conclusion couched as a factual allegation." *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (quoting *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007)). Nor is it required to credit factual allegations contradicted by indisputably authentic documents on which the complaint relies or matters of public record of which we may take judicial notice. *In re Washington Mut. Inc.*, 741 Fed. App'x 88, 91 n.3 (3d Cir. Sept. 25, 2018); *Sourovelis v. City of Philadelphia*, 246 F. Supp. 3d 1058, 1075 (E.D. Pa. 2017); *Banks*, 568 F. Supp. 2d at 588–89.

II. DISCUSSION

This action should be dismissed as frivolous and for failure to state a claim.

As a threshold matter, this Court has previously advised Gibson

that "constitutional marshal status" is "unknown in the laws of the United States" and "grounded more in the fantasy than reality." *Gibson v. President of U.S.*, No. 1:13-cv-01904, 2013 WL 3946824, at *1 n.1, *2 (M.D. Pa. Aug. 1, 2013); *see also Gibson v. Pa. Pub. Utitilities Comm'n*, No. 1:15-cv-00855, 2015 WL 3952777, at *4 (M.D. Pa. June 18, 2015). To the extent Gibson seeks relief on the basis of "constitutional marshal status," his complaint clearly lacks any arguable basis in law and thus is frivolous.

A federal court, however, is obligated to liberally construe the filings of *pro se* litigants such as Gibson. *See generally Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244–46 (3d Cir. 2013). Gibson's complaint may be construed as a request for damages and for prospective injunctive relief under 42 U.S.C. § 1983. Section 1983 provides a private cause of action with respect to violation of federal constitutional rights. The statute provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

> proper proceeding for redress . . . .

42 U.S.C. § 1983. Section 1983 does not create substantive rights, but instead provides remedies for rights established elsewhere. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). To establish a § 1983 claim, a plaintiff must establish that a defendant, acting under color of state law, deprived the plaintiff of a right secured by the United States Constitution. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir. 1995).

Gibson refers to two separate constitutional provisions in his complaint in support of his attempt to invoke "constitutional marshal status." First, he references the Necessary and Proper Clause of the United States Constitution. U.S. Const. Art. I, § 8, cl. 18. But the Necessary and Proper Clause is not a grant of power, but a declaration that Congress possesses all of the means necessary to carry out those other powers specifically granted elsewhere in the Constitution. *Kinsella v. U.S ex rel. Singleton*, 361 U.S. 234, 247 (1960) ("As James Madison explained, the Necessary and Proper Clause is 'but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those (powers) otherwise granted are included in the grant.'").

It says nothing whatsoever about the power of a municipal sewer authority to levy fees for services, nor does it limit the power to do so to federal, state, and county governments. Therefore, to the extent Gibson seeks to assert a federal civil rights claim based on the Necessary and Proper Clause, his complaint is legally frivolous, and it fails to state a claim upon which relief can be granted.

Second, Gibson references the Privileges and Immunities Clause. U.S. Const. Art. IV, § 2, cl. 1. But this clause is intended to prevent a state from discriminating against residents of other states in favor of its own citizens. *Lutz v. City of York*, 899 F.2d 255, 262 (3d Cir. 1990); *DeFeo v. Sill*, 810 F. Supp. 648, 655 (E.D. Pa. 1993). Its protection is available only to out-of-state residents. *Stevenson v. Town of Oyster Bay*, 433 F. Supp. 2d 263, 267–68 (E.D.N.Y. 2006). Gibson is a resident of Pennsylvania and thus simply cannot plausibly allege that STA, a Pennsylvania municipal authority, discriminated against him because of his *out-of-state* residency. *See DeFeo*, 810 F. Supp. at 655; *Colandrea v. Town of Orangetown*, 490 F. Supp. 2d 342, 349 (S.D.N.Y. 2007); *Stevenson*, 433 F. Supp. 2d at 268. Therefore, to the extent Gibson seeks to assert a federal civil rights claim based on the Privileges and

Immunities Clause, his complaint is legally frivolous, and it fails to state a claim upon which relief can be granted.

We further note that, contrary to the plaintiff's bald assertion in his *pro se* complaint, the Commonwealth of Pennsylvania appears to have expressly authorized STA and other municipal authorities to impose such charges. *See* Pa. Cons. Stat. Ann. § 5607(d)(9), (34). Pennsylvania state courts have previously considered challenges to such charges and found no violation of the state or federal constitutions. *See Rankin v. Chester Mun. Auth.*, 68 A.2d 458, 464 (Pa. Super. Ct. 1949). There is nothing in the *pro se* complaint to distinguish this case from *Rankin* or to provide any other grounds upon which to find the statute unconstitutional, either facially or as applied.

Accordingly, we recommend that this action be dismissed as legally frivolous and for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii). We further recommend that Gibson be denied leave to file an amended complaint, because it is clear from the facts alleged, the nature of the legal theories advanced, and the plaintiff's prior history of frivolous litigation that amendment would be futile. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108

(3d Cir. 2002).

III. RECOMMENDATION

For the foregoing reasons, it is recommended that:

1. This action be **DISMISSED** as frivolous and for failure to state a claim, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii); and

2. The Clerk be directed to mark this case as **CLOSED**.

Dated: November 25, 2020

Joseph F. Saporito, Jr.

JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JEFFREY GIBSON, Plaintiff, v. SUSQUEHANNA TWP AUTHORITY, Defendant.	CIVIL ACTION NO. 1:20-cv-01891 (JONES, C.J.) (SAPORITO, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing Report and Recommendation dated November 25, 2020. Any party may obtain a review of the Report and Recommendation pursuant to Local Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof

> proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Failure to file timely objections to the foregoing Report and Recommendation may constitute a waiver of any appellate rights.

Dated: November 25, 2020

Joseph F. Saporito, Jr.

JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

271 A.3d 545 (Table)
Unpublished Disposition
See Pa. Commonwealth Court Internal Operating Procedures, Sec. 414 before citing.
OPINION NOT REPORTED
Commonwealth Court of Pennsylvania.

APPEAL OF BEST HOMES DDJ, LLC, et al., From the Order of the Court of Common Pleas of Delaware County Dated February 5, 2020

Appeal of: Best Homes DDJ, LLC,[1] Chester First Partnership,[2] VVP Partnership, MeKenney Property Management Inc., Robert Bradshaw, Mark Hall, Peter O'Konski, Patricia R. Martin, Steven Smerechenski, Derrell Wells, David Wiechecki, Steven Wiechecki, Cedar Ridge Group LLC, Murphy Management Co. Inc., P & P Properties Enterprises LLC, Ravens Towing, Patricia Smerechenski, Philp Tappenden, Twinbrook Realty Partnership, Nancy MeKenney, Nancy Smerechenski, David Sykes, Lawrence Wiechecki, Jr., Donald J. Weiss, Dr. James Bonner, Was Realty, Mark Elliott, Michael Carbonetti, Lawrence Irvin, Health Mats, Sykes Group LLC, Sykes Property Management LLC, Michael MeKenney, Catherine Fenza,[3] Robert Smerechenski, Aspen Enterprises, Inc., Community Light and Sound, Inc., Domann Enterprises, LLC, Spec Industries, Inc., T. Frank McCall's Inc., T.I.B.C. Bay Partners, T.I.B.C. Partners, LP, T.I.B.C. Depot Partners, LP, TKP Holdings, LP, Wellspring Homes, LLC, James Bockius, Lydia Pastuszek, Laran Bronze, Inc.

No. 239 C.D. 2020, No. 240 C.D. 2020
|
Argued November 15, 2021
|
Filed December 23, 2021

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge, HONORABLE ANNE E. COVEY, Judge, HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

Opinion

MEMORANDUM OPINION BY JUDGE COVEY

****1** VVP Partnership, MeKenney Property Management Inc., Robert Bradshaw, Mark Hall, Peter O'Konski, Patricia R. Martin, Steven Smerechenski, Derrell Wells, David Wiechecki, Steven Wiechecki, Cedar Ridge Group LLC, Murphy Management Co. Inc., P & P Properties Enterprises LLC, Ravens Towing, Patricia Smerechenski, Philp Tappenden, Twinbrook Realty Partnership, Nancy MeKenney, Nancy Smerechenski, David Sykes, Lawrence Wiechecki, Jr., Donald J. Weiss, Dr. James Bonner, Was Realty, Mark Elliott, Michael Carbonetti, Lawrence Irvin, Health Mats, Sykes Group LLC, Sykes Property Management LLC, Michael MeKenney, Robert Smerechenski, Aspen Enterprises, Inc., Community Light and Sound, Inc., Domann Enterprises, LLC, Spec Industries, Inc., T. Frank McCall's Inc., T.I.B.C. Bay Partners, T.I.B.C. Partners, LP, T.I.B.C. Depot Partners, LP, TKP Holdings, LP, Wellspring Homes, LLC, James Bockius, Lydia Pastuszek, and Laran Bronze, Inc. (collectively, Appellants) appeal from the Delaware County Common Pleas Court's (trial court) December 13, 2019 order that denied Appellants' Petition for Preliminary Injunction and Equitable Relief (Petition), and the trial court's February 5, 2020 order that denied Appellants' Post-Trial Motion.[4] Appellants present five issues for this Court's review: (1) whether the trial court erred or abused its discretion by denying Appellants' Post-Trial Motion; (2) whether the trial court erred or abused its discretion by denying Appellants' Petition; (3) whether the trial court erred or abused its discretion by concluding that the City of Chester (Chester) Stormwater Authority (Authority) did not violate Sections 5601, and 5607(b)(2), and (d)(9) of the Municipality Authorities Act (MAA);[5] (4) whether the trial court erred or abused its discretion by basing its determination solely on the finding that the Authority did not violate the MAA; and (5) whether the trial court erred or abused its discretion by failing to enter any findings of fact or conclusions of law regarding the additional issues of law and fact on which Appellants' case was predicated. After review, this Court affirms.

On January 17, 2018, Appellants filed a Complaint in the trial court seeking injunctive relief from the Authority. In their Complaint, Appellants claimed that the Authority was assessing Appellants an illegal tax for stormwater management, repairs, and maintenance. Specifically, Appellants alleged: (a) the Authority was improperly formed; (b) the Authority was improperly run; (c) the services for which the Authority are charging are duplicative of the services performed by the Delaware County Regional Water Authority (DELCORA); and (d) the monies the Authority is assessing Chester property owners are an illegal tax. Also on January 17, 2018, Appellants filed the Petition.

**2 On February 2, 2018, Appellants filed a First Amended Complaint seeking a preliminary injunction, a permanent injunction, and attorneys' fees. In the First Amended Complaint, Appellants asserted: (1) the Authority's services are duplicative, unnecessary, and unreasonable; (2) the Authority's fee scheme is not reasonably related to the services provided; (3) the fee is an illegally imposed tax; and (4) the fee scheme is unreasonable and arbitrary. On February 23, 2018, the Authority filed an answer and new matter. On March 2, 2018, the trial court held an emergency injunction hearing. On May 7, 2018, the trial court denied the Petition. On August 27, 2018, the Authority filed a motion for summary judgment (Motion). On November 1, 2018, the trial court denied the Motion.

The trial court held a trial on September 9 and September 10, 2019. On December 13, 2019, the trial court denied Appellants' request for permanent injunctive relief. On December 23, 2019, Appellants filed their Post-Trial Motion. Specifically, Appellants filed a motion for reconsideration of the trial court's December 13, 2019 order. On February 5, 2020, the trial court denied the Post-Trial Motion. On February 27, 2020, Appellants appealed to this Court.[6,7] On March 2, 2020, the trial court ordered Appellants to file a Concise Statement of Errors Complained of on Appeal pursuant to Pennsylvania Rule of Appellate Procedure (Rule) 1925(b) (Rule 1925(b) Statement). On March 17, 2020, Appellants filed their Rule 1925(b) Statement. On June 28, 2020, the trial court filed its opinion pursuant to Rule 1925(a) (Rule 1925(a) Opinion).

Initially, this Court observes that, in their "Statement of the Question[s] Involved," Appellants present the issues as whether the trial court erred or abused its discretion by denying Appellants' Post-Trial Motion, and whether the trial court erred or abused its discretion by denying Appellants' Petition. Appellants' Br. at 5. However, Appellants do not address those issues anywhere in their brief. This Court has explained:

> Rule 2111 ... requires that an appellant's brief include, among other components, a statement of questions involved, a statement of the case, a summary of argument, and an argument. Pursuant to Rule 2116 ..., the statement of questions involved "must state concisely the issues to be resolved," and the rule specifically instructs the parties that "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby." [Pa.R.A.P. 2116.] Thus, **where issues are raised in the statement of questions involved**, **but not addressed in the argument section of the brief**, **courts find waiver**. *See Harvilla v. Delcamp*, ... 555 A.2d 763, 764 n.1 ([Pa.] 1989).... Pursuant to Rule 2118 ..., the summary of argument "shall be a concise, but accurate, summary of the arguments presented." [Pa.R.A.P. 2118.] Furthermore, Rule 2119(a) ... requires that the argument section of the brief "be divided into as many parts as there are questions to be argued," and shall include "such discussion and citation of authorities as are deemed pertinent." [Pa.R.A.P. 2119(a).] **A party's failure to develop an issue in the argument section of its brief constitutes waiver of the issue**. *See City of Phila*[.] *v. Berman*, 863 A.2d 156, 161 n.11 (Pa. Cmwlth. 2004).

**3 *In re Tax Claim Bureau of Lehigh Cnty. 2012 Judicial Tax Sale*, 107 A.3d 853, 857 n.5 (Pa. Cmwlth. 2015) (emphasis added).

Here,

> [Appellants] fail[ ] to include any facts or references to the record in the statement of the case portion of [their] brief relating to the [above-stated] issues set forth on page[ ] [five] of [their] brief. These issues, other than being listed in [the Statement of Questions Involved] section of the brief, are not developed in the summary of argument or argument portions of [Appellants'] brief.[8] **Under these circumstances**, **th**[**is**] **Court must conclude that** [**Appellants**] **waived** [**the above-quoted**] **issues that** [**they**] **attempted to raise on appeal**[.]

Id. (emphasis added). Accordingly, Appellants waived the first two issues presented for this Court's review.

Regarding their remaining issues, Appellants argue that the Authority was not properly formed and continues to

be improperly formed. Specifically, Appellants contend that the Authority failed to comply with Section 704 of the Sunshine Act[9] and Section 5607(b)(2) and (d)(9) of the MAA. The Authority rejoins that Appellants failed to exhaust their administrative remedies. In particular, the Authority retorts that Appellants should have contacted the Authority to request a hearing. Because they did not, the Authority maintains that Appellants never exhausted their administrative remedies before filing this action in the trial court and, thus, their First Amended Complaint should have been dismissed.

Relative to the Authority's claim that Appellants failed to exhaust their administrative remedies, this Court recognizes: "The failure to exhaust administrative remedies is jurisdictional in nature and may be raised by the parties or by a court *sua sponte*." *Md. Cas. Co. v. Odyssey Contracting Corp.*, 894 A.2d 750, 756 (Pa. Super. 2006); *see also Provision of Grace World Mission Church v. City of Phila.* (Pa. Cmwlth. No. 1453 C.D. 2018, filed June 28, 2019)[10] ("the failure to exhaust administrative remedies is jurisdictional in nature and, therefore, can be raised at any time either by the parties or by the court *sua sponte*"), slip op. at 6 n.3.

> The doctrine of exhaustion of administrative remedies is intended to prevent the premature interruption of the administrative process, which would restrict the agency's opportunity to develop an adequate factual record, limit the agency in the exercise of its expertise and impede the development of a cohesive body of law in that area. *Shenango Valley Osteopathic Hosp*[.] *v. Dep*[*'t*] *of Health*, ... 451 A.2d 434 ([Pa.] 1982). It is appropriate to defer judicial review when the question presented is within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the desired result. *Indep*[.] *Oil* [*&*] *Gas Ass*[*'n*] *of* [*Pa.*] *v.* [*Pa.*] *Pub*[.] *Util*[.] *Comm*[*'n*], 789 A.2d 851 (Pa. Cmwlth. 2002); *Rouse & Assoc*[*s.*] *Ship* [*Rd.*] *Land* [*Ltd.*] *P*[*'*]*ship v.* [*Pa.*] *Env*[*'t*] *Quality* [*Bd.*], ... 642 A.2d 642 ([Pa. Cmwlth.] 1994). **However**, **the exhaustion doctrine is not so inflexible as to bar legal or equitable jurisdiction where, as here, the remedy afforded through the administrative process is inadequate**. *Indep*[.] *Oil*; *Shenango*.
>
> ****4** *Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304, 309 (Pa. Cmwlth. 2003) (emphasis added).

Here, Appellants are seeking to enjoin the Authority from collecting its fee. The Authority rejoins: "Appellants have all admitted that have [sic] never utilized the appeals process set forth on the [Authority's] website. Therefore, their claims should be dismissed with prejudice as they waived their right to sue under the Commonwealth [sic] as they have failed to exhaust their administrative remedies." Authority Br. at 9-10. The Authority's appeal process, as set forth on its website, provides:

> If a rate payer feels that the assessed fee is in error or improper in any way, you have the right to appeal the assessment, if the property status has changed since the original assessment, which means:
>
> (a) Significant corrections have been made to improve stormwater run-off;
>
> (b) Buildings that were previously situated on property are no longer in existence, therefore you may want to appeal the assessment.
>
> In order to appeal, you must have at least paid one month's payments prior to the appeal.

Stormwater Authority of the City of Chester, *Steps to File an Appeal with the Stormwater Authority of the City of Chester*, https://www.chesterstormwaterauthority.com/_files/ugd/fcf170_d9d521346e61452d96d695e8c1055f32.pdf (last visited December 21, 2021).[11]

The Authority contends that it is authorized to determine whether it is properly formed and operated, i.e., that an adequate administrative remedy exists. However, it appears that the Authority's appeal process can result only in a finding of what Appellants may *owe* on their assessments following a hearing; the procedure is not adequate to determine whether the Authority's formation and operation are MAA compliant.

> First, to avail one's self of the remedy in [the appeals process], i.e., [to receive a proper assessment,] the party must first pay the assessment. This is obviously not the remedy sought by [Appellants] nor can a "pay and appeal" remedy be considered the equivalent of not having to pay at all. ... [Second,] and more importantly, even if [Appellants] were required to submit to [the appeals process] to avoid assessments ..., there is no [ ] authority in [the appeals process] to grant prospective relief to Appellants so that [Chester property owners] would not be assessed in the future.

Ind. Oil, 789 A.2d at 856 (italics omitted). Accordingly, because "the remedy afforded through the administrative process is inadequate," *Hoke*, 833 A.2d at 309, the First Amended Complaint did not warrant dismissal.

**5 Concerning the formation of the Authority, Section 704 of the Sunshine Act requires:

> Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under [S]ection[s] 707 (relating to exceptions to open meetings), 708 (relating to executive sessions)[,] or 712 (relating to General Assembly meetings covered) [of the Sunshine Act, 65 Pa.C.S. §§ 707, 708, 712].

65 Pa.C.S. § 704. Appellants assert that, because the Authority was created in October 2016, and the first public meeting was not held until February 2017, approximately four months passed before the Authority even attempted to comply with Section 704 of the Sunshine Act.

Section 713 of the Sunshine Act provides:

> **A legal challenge under this chapter shall be filed within 30 days from the date of a meeting which is open, or within 30 days from the discovery of any action that occurred at a meeting which was not open at which this chapter was violated, provided that, in the case of a meeting which was not open, no legal challenge may be commenced more than one year from the date of said meeting**. The court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached. Should the court determine that the meeting did not meet the requirements of this chapter, it **may** in its discretion find that any or all official action taken at the meeting shall be invalid.[12] Should the court determine that the meeting met the requirements of this chapter, all official action taken at the meeting shall be fully effective.

65 Pa.C.S. § 713.

The Authority's Executive Manager Reverend Dr. Horrace Strand (Strand) testified: "[Chester] went through the process to establish the [ ] Authority. [It] held 12 public hearings and [ ] formulated a Board and that was the extent of that." Reproduced Record (R.R.) at 394.[13] Strand did not recall the reason for the delay between the filing of the Authority's letters of incorporation and its first public meeting.

> [T]his Court has repeatedly held that official action taken at a later, open meeting cures a prior violation of the Sunshine Act. *See League of Women Voters of* [*Pa.*] *v. Commonwealth*, 683 A.2d 685 (Pa. Cmwlth. 1996) (violation of the Sunshine Act was cured by a subsequent open meeting at which the official action was taken); *Moore v.* [*Twp.*] *of Raccoon*, ... 625 A.2d 737 ([Pa. Cmwlth.] 1993) (violation of Sunshine Act was cured when commissioners held open meeting afterwards).

Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Se. Pa. Transp. Auth. (SEPTA), 789 A.2d 811, 813 (Pa. Cmwlth. 2002). Here, there is no record evidence establishing the existence of closed Authority meetings, let alone whether official action was taken, and/or whether the action was cured by later open meetings. Notwithstanding, because Appellants allege that the private meetings occurred before October 2016, i.e., the date the letters of incorporation were received, and Appellants did not file the Complaint until January 17, 2018, their claims as to the Authority's Sunshine Act violations are beyond the required one-year filing period, and thus, untimely.

**6 Section 5607(d) of the MAA provides, in relative part:

> Every authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section, including, but without limiting the generality of the foregoing, the following rights and powers:
>
> ....
>
> (9) **To fix, alter, charge and collect rates** and other charges in the area served by its facilities **at reasonable and uniform rates** to be determined exclusively by it for the purpose of providing **for the payment of the expenses of the authority, the construction, improvement, repair, maintenance and operation of its facilities and properties** .... Any person questioning the reasonableness or uniformity of a rate fixed by an authority or the adequacy, safety and reasonableness of the authority's services, including extensions thereof, may bring suit against the authority in the court of common pleas of the county where the project is located .... The court of common pleas shall have exclusive jurisdiction to determine questions involving rates or service.

53 Pa.C.S. § 5607(d) (emphasis added).

Appellants also argue that the Authority failed to adopt a proper budget. Specifically, Appellants contend that the

record does not reveal the analytical process or computation which supports the Authority's final rate determination. The Authority rejoins that Appellants have failed to offer any material fact to show that the Authority's fees are not related to its budget. The Authority asserts that its expert with respect to stormwater and sanitary and public water, Howard Neukrug's (Neukrug), testimony supports its fee determination.

> [W]here the reasonableness of a fee is challenged, the party challenging the fee bears the burden of proving it is unreasonable. *M & D Prop*[*s.*]*, Inc. v. Borough of Port Vue*, 893 A.2d 858, 862 (Pa. Cmwlth. [2006]) ....
>
> "[T]he burden does not shift to a municipality to prove that a challenged fee is reasonable; it always remains the burden of the challenger to show that the fees are unreasonable." *Id*.

Ziegler v. City of Reading, 216 A.3d 1192, 1201 (Pa. Cmwlth. 2019).

Neukrug opined that Chester's stormwater impact fees, also known as user fees, are reasonably related to services or projects that the Authority will produce and execute. Specifically, Neukrug testified:

> Q. All right. Did you happen to see a document entitled "Stormwater Authority 5-Year Projection Budget"?
>
> A. Yes, I did.
>
> Q. Okay. Did you happen to see a document "Capital Project List" for the [Authority]?
>
> A. Yes, I did.
>
> Q. Did you happen to see a document which is a map produced by DELCORA in which it shows the various stormwater areas, including the [Municipal Separate Storm Sewer System (]MS4[)] areas, the combined system areas, and the other areas of the Chester [ ]service area?
>
> A. Yes, I did do that.
>
> ....
>
> Q. Okay. After reviewing these documents, do you have an opinion today within a reasonable degree of professional certainty as to whether or not the Chester stormwater impact fees are reasonably related to services or projects that the [Authority] will produce and execute?
>
> **7 ....
>
> A. Yes. From the materials I reviewed, I was quite impressed with how the [ ] Authority is starting off and the number of projects it has and how it's moving forward to forming a new organization.

R.R. at 1204.

Neukrug explained how an authority initiates the implementation of user fees:

> A. User fees are handled by conducting some form of cost of service. Of course, for a system like this where cost of service is difficult to project backwards because this hasn't been done before, you need some foundation on which to project forward and take those and then find a fair and equitable way to divide those costs amongst the different customer classes.
>
> Q. What would be some of those factors? When you have a new authority that is looking to establish cost of services, what factors would [it] use typically in order to come up with a plan or an idea of what those future costs would be?
>
> A. Well, basically you need two documents. One is an operations and maintenance operating budget, which has been done in the [ ] Authority 5-Year Projection Budget; and you also need a capital improvement program, which looks like they have [sic] I don't know how many projects here, but it looks like maybe in the range of about 40, 50 projects listed here.
>
> Q. Looking at the [ ] Authority 5-Year Projection Budget, in the heading that says "Expenses," there are 5-year categories of administration costs. Is that typical, that a stormwater authority or any authority would have sizable administration costs?
>
> A. Yes. And I don't know if I would refer to these as sizable, but this administrative cost of $600,000[.00] probably relates to five or six employees.
>
> Q. Okay. And the administrative costs related to "Total Collected Revenue," if you look above that line, there's a category that says "Revenue," and then there is a line that says "Total Billed Revenue" and then "5-Year Cost Analysis," considering the first year total billed revenue of $3,662,604[.00], the administrative cost figure, is that a reasonable administrative cost related to the total billed revenue that is expected?
>
> A. I have no reason to doubt it.

> Q. And then debt service, if you see that under "Expenses," in the first year the [ ] Authority projects that [its] debt service will be $283,372[.00]. From your experience and knowledge, carrying that amount of debt, is that considered excessive or not?
>
> A. That's a first year and that is not an excessive amount. Of course, excessive depends on the amount of revenue you have behind it; and given this table that I'm looking at, it seems reasonable.

R.R. at 1204-05. The trial court determined that Neukrug's testimony was credible, and the Authority's fees were reasonable. In view of the foregoing evidence, this Court concludes that the trial court did not err by ruling that the Authority did not violate Section 5607(d)(9) of the MAA.

Section 5607(b) of the MAA provides, in relevant part:

> **Limitations.--**This section is subject to the following limitations:
>
> ....
>
> (2) The purpose and intent of this chapter being to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety and prosperity and not to unnecessarily burden or interfere with existing business by the establishment of competitive enterprises, **none of the powers granted by this chapter shall be exercised in the construction, financing, improvement, maintenance, extension or operation of any project or projects or providing financing for insurance reserves which in whole or in part shall duplicate** or compete with **existing enterprises serving substantially the same purposes**....

****8** 53 Pa.C.S. § 5607(b) (text emphasis added).

Appellants argue that the Authority's services duplicate and compete with DELCORA's services in violation of Section 5607(b)(2) of the MAA. The Authority rejoins that Appellants have failed to offer any material fact to show that DELCORA is the "actual" stormwater authority of Chester. The Authority asserts that the Director of Operations and Maintenance for DELCORA, Michael DiSantis (DiSantis), testified that DELCORA has absolutely no control over Chester's stormwater inlets and pipes into the combined sewer system, and further that DELCORA has absolutely no control over any MS4 stormwater infrastructure whatsoever.

At the preliminary injunction hearing, DiSantis testified:[14]

> Q All right. There's a lot of infrastructure in the combine[d] system between DELCORA and [Chester]. Correct?
>
> A Yes.
>
> Q All right. And we talked about connection, right? At some point, there's a connection point where [Chester] stormwater infrastructure comes in to DELCORA, DELCORA's waste[-]water line.
>
> ....
>
> A Absolutely.
>
> Q Okay. And at no time did DELCORA ever maintain the infrastructure of [Chester's] inlets or piping into DELCORA.
>
> A It's not part of our system.
>
> Q [Chester] is responsible for that?
>
> A Correct.
>
> Q And that amount - there's a lot of infrastructure [Chester] has in terms of inlets and piping into the DELCORA system.
>
> A That's a very good assumption, that's true.

R.R. at 1104-05.

At the September 9, 2019 hearing, DiSantis clarified:

> Q Okay. And, again, just one question, one more. I believe it was your prior testimony back in [sic] March 23 of 2018, and [sic] [ ] DELCORA has no authority related to the maintenance and/or construction or repair of any of the combined sewer inlets and piping that goes into the combined sewer system?
>
> A I would -- if you phrase it differently, and your question, because they're not combined sewer inlets. They are stormwater inlets.
>
> Q I'm -- excuse me, stormwater inlets.
>
> A Okay.
>
> Q That DELCORA has no control, maintenance related to the stormwater inlets that go into the combined sewer system?

A That is correct.

Q All right. And you are aware that approximately a year ago, [Chester] sold all of the stormwater inlets to the combined sewer system to the [Authority]?

A Yes.

....

THE COURT: Just very briefly, Mr. DiSantis. If an inlet collapsed, would DELCORA fix it?

THE WITNESS: No.

THE COURT: If a stormwater pipe broke, would DELCORA fix it?

THE WITNESS: Stormwater only pipe, no.

THE COURT: Okay. Would a stormwater pipe that was leading into the DELCORA sanitary line, if that broke, who would fix it?

THE WITNESS: If it's before it gets to our line, it has to be fixed by, in this case, [the Authority].

THE COURT: Okay.

THE WITNESS: Previously, [Chester].

R.R. at 344-46. The trial court determined that the Authority's services do not duplicate or interfere with DELCORA's services. Based on the foregoing, this Court concludes that the trial court did not err by ruling that the Authority did not violate Section 5607(b)(2) of the MAA.

****9** Appellants further declare that the Authority's assessed fee is an impermissible tax. Specifically, Appellants contend that the charges are a tax because they generate revenue and are a burden placed upon property owners to raise money for public purposes. Appellants assert that the Authority has raised and used revenue for projects unrelated to stormwater. The Authority rejoins that Appellants have failed to offer any material fact to show that the fees charged by the Authority constitute a tax on the residents. To the contrary, the Authority proclaims that the fees are charged for the sole purpose of performing projects that relate to the repair of Chester inlets and pipes and the maintenance of Chester's infrastructure, as well as projects that deal with the control of stormwater.

This Court has held:

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

Rizzo v. City of Phila., 668 A.2d 236, 237 (Pa. Cmwlth. 1995) (quoting *City of Phila. v. Se. Pa. Transp. Auth.*, 303 A.2d 247, 251 (Pa. Cmwlth. 1973)).

Further,

> whether the [Authority's] [s]tormwater [c]harge constitutes a tax or a fee depends upon whether the [s]tormwater [s]ystem provides a discrete benefit to [Appellants], as opposed to generally aiding the environment and the public at large; whether the value of the [s]tormwater [s]ystem to [Appellants] is reasonably proportional to the amount of the stormwater charge; and, apart from general operation, maintenance and repair of the [s]tormwater [s]ystem, how exactly [ ] the [Authority] utilize[s] the funds generated by the [s]tormwater [c]harge.

Borough of W. Chester v. Pa. State Sys. of Higher Educ. (Pa. Cmwlth. No. 260 M.D. 2018, filed July 15, 2019), slip op. at 11. "[T]he party challenging a [ ] fee on the ground that it constitutes an unlawful tax bears the initial burden of establishing that the fees were not in fact used to reimburse the municipality for ... providing a service." *Rizzo*, 668 A.2d at 237.

Here, there is no record evidence that the Authority's collected fees, which are based to a large extent upon the costs of providing the service, are unrelated to stormwater. Nor did Appellants establish that the Authority does not provide a discrete benefit to Appellants or that the value of the Authority to Appellants is not reasonably proportional to the amount of the fees. Accordingly, Appellants have failed to meet their burden of proving that the Authority's fees are, in actuality, revenue-raising taxes rather than valid fees. Thus, this Court concludes that the trial court did not err by determining that the Authority's assessed fee was not an impermissible tax.

Finally, Appellants argue that the trial court erred or abused its discretion by basing its determination solely on the finding that the Authority did not violate the MAA, and that the trial court erred or abused its discretion by failing to enter any findings of fact or conclusions of law regarding the

additional issues of law and fact on which Appellants' case was predicated. Pennsylvania Rule of Civil Procedure 1038(b) provides: "The decision of the trial judge may consist only of general findings as to all parties but **shall dispose of all claims for relief**. The trial judge **may include** as part of the decision **specific findings of fact and conclusions of law** with appropriate discussion." Pa.R.Civ.P. 1038(b) (emphasis added). In addition, "[u]ltimately, the grant or denial of a permanent injunction will turn on whether the [trial] court properly found that the party seeking the injunction established a clear right to relief as a matter of law." *Buffalo Twp. v. Jones*, 813 A.2d 659, 664 n.4 (Pa. 2002). Here, the trial court concluded that Appellants did not establish a clear right to relief because they failed to meet their burden of proving the allegations set forth in their First Amended Complaint. Given that the trial court clearly explained the reasons for its conclusion in its Rule 1925(a) Opinion, there was no reason for the trial court to enter any findings of fact or conclusions of law regarding the additional issues.

****10** For all of the above reasons, the trial court's order is affirmed.

ORDER

AND NOW, this 23rd day of December, 2021, the Delaware County Common Pleas Court's December 13, 2019 and February 5, 2020 orders are ***546** affirmed.

Judge Fizzano Cannon did not participate in the decision in this case.

All Citations

271 A.3d 545 (Table), 2021 WL 6068248

Footnotes

1 On February 13, 2019, Appellants filed a praecipe to settle, discontinue and end this action, without prejudice, as to Best Homes DDJ, LLC.

2 On June 12, 2020, Chester First Partnership filed a praecipe to discontinue and end this action as to Chester First Partnership.

3 On February 13, 2019, Appellants filed a praecipe to settle, discontinue and end this action, without prejudice, as to Catherine Fenza.

4 By June 4, 2020 Order, this Court consolidated the two appeals.

5 53 Pa.C.S. §§ 5601 (MAA title), 5607(b)(2) ("[N]one of the powers granted by [the MAA] shall be exercised in the construction, financing, improvement, maintenance, extension or operation of any project ... which in whole or in part shall duplicate ... existing enterprises serving substantially the same purposes."), (d)(9) (an authority has the power "[t]o fix, alter, charge and collect rates and other charges in the area served by its facilities at reasonable and uniform rates to be determined exclusively by it for the purpose of providing for the payment of the expenses of the authority, the construction, improvement, repair, maintenance and operation of its facilities and properties [ ] [.]").

6 In reviewing a grant or denial of a permanent injunction, which "will turn on whether the lower court properly found that the party seeking the injunction established a clear right to relief as a matter of law," our standard of review of a question of law is *de novo*, and our scope of review is plenary. *Penn Square Gen*[.] *Corp*[.] *v.* [*Cnty.*] *of Lancaster*, 936 A.2d 158, 167 n.7 (Pa. Cmwlth. 2007) (quotation omitted).

Eagleview Corp. Ctr. Ass'n v. Citadel Fed. Credit Union, 243 A.3d 764, 770 n.1 (Pa. Cmwlth. 2020).

7 Judgment was entered on November 29, 2021, at which time the appeal was perfected. *See McGoldrick v. Murphy*, 228 A.3d 272 (Pa. Super. 2020); *see also* Pa.R.A.P. 905(a)(5) ("A notice of appeal filed after the announcement of a determination but before the entry of an appealable order shall be treated as filed after such entry and on the day thereof.").

8 Indeed, neither the standard of review for the denial of the Post-Trial Motion, nor the standard of review for a denial of, and/or the elements required for, a preliminary injunction are included in Appellants' brief.

9 65 Pa.C.S. § 704 (relating to open meetings).

10 Pursuant to Section 414(a) of this Court's Internal Operating Procedures, 210 Pa. Code § 69.414(a), an unreported panel decision of this Court issued after January 15, 2008, may be cited for its persuasive value, but not as binding precedent. The unreported decisions cited herein are cited for their persuasive value.

11 The appeals process is set forth under the tab marked "Public Notices/Announcements." https://www.chesterstormwaterauthority.com (last visited Dec. 2, 2021).

12 "A court's decision to invalidate an agency's action is discretionary, not obligatory[.]" *Borough of E. McKeesport v. Special/Temporary Civ. Serv. Comm'n of Borough of E. McKeesport*, 942 A.2d 274, 280 (Pa. Cmwlth. 2008).

13 Appellants' Reproduced Record fails to comply with the Pennsylvania Rules of Appellate Procedure. *See* Pa.R.A.P. 2173 ("[T]he pages of ... the reproduced record ... shall be numbered separately in Arabic figures ... thus 1, 2, 3, etc., followed in the reproduced record by a small a, thus 1a, 2a, 3a, etc."). However, for consistency of reference, the citations herein are as reflected in the Reproduced Record.

14 Counsel stipulated to and introduced the Notes of Testimony from the preliminary injunction hearing into evidence.