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In the Supreme Court of Pennsylvania

NO. 9 MAP 2023

THE BOROUGH OF WEST CHESTER,

***APPELLANT*,**

v.

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

***APPELLEES*.**

BRIEF OF APPELLANT THE BOROUGH OF WEST CHESTER

DIRECT APPEAL FROM ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA (DOCKET NO. 260 MD 2018) DATED JANUARY 4, 2023

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STATEMENT OF JURISDICTION

This matter was originally commenced in the original jurisdiction of the Commonwealth Court pursuant to 42 Pa.C.S. § 761.(a)(1). The Supreme Court has jurisdiction over this direct appeal pursuant to 42 Pa.C.S. § 723.(a) and Pa. R.A.P. 1101.

ORDER IN QUESTION[1]

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

s/Christine Fizzano Cannon

CHRISTINE FIZZANO CANNON, Judge

[1] The Commonwealth Court's Opinion dated January 4, 2023, is published at Borough of W. Chester v. Pa. State Sys. of Higher Educ., 291 A.3d 455 (Pa. Commw. Ct. 2023).

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court's "standard of review of the grant of summary judgment is *de novo* and [its] scope of review is plenary." Pyeritz v. Commonwealth, 32 A.3d 687, 692 (Pa. 2011). "[S]ummary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Saksek v. Janssen Pharm., Inc., 223 A.3d 633, 639 (Pa. 2019) (quoting Atcovitz v. Gulph Mills Tennis Club, Inc., 812 A.2d 1218, 1221 (Pa. 2002)); Pa.R.Civ.P. 1035.2(1). On appeal, this Court will "'apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact.'" DeArmitt v. N.Y. Life Ins. Co., 73 A.3d 578, 585 (Pa. Super. Ct. 2013) (quoting Harber Phila. Ctr. City Office v. LPCI, 764 A.2d 1100, 1103 (Pa. Super. Ct. 2000)). "Where the parties have filed cross-motions for summary relief, the Court must determine whether it is clear from the undisputed facts that one of the parties has established a clear right to the relief requested." West Chester, 291 A.3d at 462 (quoting Isley v. Beard, 841 A.2d 168, 169 n.1 (Pa. Commw. Ct. 2004)). Only "[w]hen the facts are so clear that reasonable minds cannot differ" may a trial court properly enter summary judgment." Basile v. H & R Block, Inc., 761 A.2d 1115, 1118 (Pa. 2000).

This Court "must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party." Saksek, 223 A.3d at 639.

Furthermore, this Court will "resolve all doubts as to the existence of a genuine dispute regarding a material fact against the moving party." Starling v. Lake Meade Prop. Owners Ass'n, 162 A.3d 327, 330 n.2 (Pa. 2017) (citing Gilbert v. Synagro Cent., LLC, 131 A.3d 1, 10 (Pa. 2015)). "A fact is considered material if its resolution could affect the outcome of the case under the governing law." Hosp. & Health Sys. Ass'n of Pa. v. Commonwealth, 77 A.3d 587, 602 (Pa. 2013) (citing Strine v. MCARE Fund, 894 A.2d 733, 738 (Pa. 2006)).

STATEMENT OF QUESTIONS INVOLVED

A. DID THE COMMONWEALTH COURT ERR IN ALLOCATING TO THE BOROUGH THE BURDEN OF PROOF WHEN THE ISSUE IN THIS CASE IS NOT THE BOROUGH'S POWER TO IMPOSE A TAX ON THE TAX-IMMUNE UNIVERSITY BUT, RATHER, THAT ISSUE IS THE UNIVERSITY'S CHARACTERIZATION OF THE STREAM PROTECTION FEE AS A TAX?

Answer Below: *No.*

Suggested Answer on Appeal: *Yes.*

B. DID THE COMMONWEALTH COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE UNIVERSITY WHEN THE UNIVERSITY DID NOT (AND CANNOT) ESTABLISH A CLEAR RIGHT TO JUDGMENT AS A MATTER OF LAW?

Answer Below: *No.*

Suggested Answer on Appeal: *Yes.*

C. DID THE COMMONWEALTH COURT ERR IN DENYING SUMMARY JUDGMENT IN FAVOR OF THE BOROUGH?

Answer Below: *No.*

Suggested Answer on Appeal: *Yes.*

STATEMENT OF THE CASE

Appellant The Borough of West Chester (the "Borough") is a Home Rule Municipality organized and operating pursuant to its Home Rule Charter. R. 21a. The Borough is governed by its Borough Council. R. 21a.

Appellee West Chester University is a constituent institution of Appellee Pennsylvania State System of Higher Education (the "State System" and collectively with Appellee West Chester University, the "University"). R. 22a. The University is an arm of the Commonwealth of Pennsylvania. R. 21a. A portion of the University campus is known generally as North Campus, and a portion of North Campus is *situate* within the jurisdictional limits of the Borough. R. 22a.

In 2016, in response to ever-increasing federal and state regulatory requirements regarding municipal management of stormwater runoff from improved properties, the Borough Council adopted the Stream Protection Ordinance (the "Stream Protection Ordinance"). R. 49a. There, the Borough established (A) further regulation of stormwater from Developed properties (as hereinafter defined) and (B) collection of a fee from the owners of Developed properties (the "Stream Protection Fee"). R. 49a. As set forth in the Stream Protection Ordinance, the Stream Protection Fee is

> an assessment levied by the Borough to cover the cost of constructing, operating, and maintaining stormwater management facilities and to fund expenses related to the Borough's compliance with PADEP NPDES permit

> requirements under applicable state law based on the impact of stormwater runoff from impervious areas of developed land in the Borough.

R. 54a.

The Borough charges the Stream Protection Fee "[f]or the use of, benefit by and the services rendered by the Stormwater Management System, including its operation, maintenance, repair, replacement and improvement[.]" R. 55a. In that regard, the Stream Protection Ordinance defined a Developed property as one, *inter alia*, "where manmade changes have been made which add impervious surfaces to the property, which changes may include, but are not limited to, buildings or other structures for which a building permit must be obtained[.]" R. 53a. In that same ordinance, Borough Council defined the Stormwater Management System (which is referred to in this Brief as the "Borough System") as

> the system of collection and conveyance, including underground pipes, conduits, mains, inlets, culverts, catch basins, gutters, ditches, manholes, outfalls, dams, flood control structures, natural areas, structural and non-structural stormwater best management practices, channels, detention ponds, public streets, curbs, drains and all devices, appliances, appurtenances and facilities appurtenant thereto used for collecting, conducting, pumping, conveying, detaining, discharging and/or treating stormwater.

R. 55a.

Pursuant to the Stream Protection Ordinance, only the owners of Developed properties that are "connected with, use, are serviced by or are benefitted by" the Borough System must pay the Stream Protection Fee. R. 49a. The amount of the Stream Protection Fee which the Borough charges to the owner of any given Developed property is based on the amount of impervious surface at that property relative to the amount of non-impervious surface. R. 51a. Any owner of a Developed property can reduce or eliminate the amount of the Stream Protection Fee for that property pursuant to an appeal process. R. 58a-59a; R. 1915a-1981a. Pursuant to a change which occurred during the pendency of this litigation, an owner of a Developed property can even eliminate the Stream Protection Fee which it would otherwise pay. R. 2320a-2326a.

Within the Stream Protection Ordinance, the Borough established the Stormwater Management Fund (the "Stormwater Fund") and directed that all money which the Borough collects in the form of the Stream Protection Fee be deposited into that fund. R. 58a. The Borough further directed that monies in the Stormwater Fund may only be used by the Borough for specific and limited stormwater-related purposes. R. 58a. Those purposes include "[i]mplementation and management of a program to manage stormwater within the Borough [and c]onstructing, operating, and maintaining the" Borough System. R. 58a.

Starting in 2017, the Borough began sending to the owners of Developed properties (including the University) annual invoices for the Stream Protection Fee. R. 303a-317a; R. 1743a. The properties within North Campus for which the Borough sent such invoices are sometimes referred to in this Brief as the "University Properties."

Several of the University Properties are improved with structures, sidewalks, parking areas, and other impervious cover for which there are no on-site University-owned stormwater management facilities and from which stormwater (*i.e.* whatever is not absorbed into the ground or evaporates) enters the Borough System. R. 1682a-1684a; R. 1686a-1691a; R. 2328a-2329a. Other University Properties are the site of recent redevelopment activities. R. 2329a. At those properties, the University manages some stormwater runoff on-site while still discharging some volume of runoff to the Borough System. In the aggregate, an expert which the Borough retained, NTM Engineering, Inc. ("NTM") estimated that approximately 32,500,000 gallons of stormwater drains from some of the University Properties through the Borough System to an outfall known and referred to in this Brief as the "Plum Run Outfall." R. 1787a.

On January 18, 2018, Chief Counsel for the State System issued to the Borough a letter (the "January 18th Letter") pursuant to which he alleged that the Stream Protection Fee is

> not [a] charge[] for actual services provided to the University by the Borough. Instead [it is] the imposition of a general tax for the improvement and maintenance of the Borough's storm water infrastructure. As a result, these fees are a tax, regardless of what the Borough chooses to call them.

R. 65a.

In April of 2018, the Borough filed the Action for Declaratory Judgment in the Commonwealth Court's Original Jurisdiction to establish the Respondents' obligations under and pursuant to the Stream Protection Ordinance. R. 17a-339a. The Commonwealth Court docketed that as a Petition for Review and the University filed a single preliminary objection in the nature of a demurrer (the "Preliminary Objection"). The Commonwealth Court overruled the Preliminary Objection and further pleadings and discovery ensued. The Borough and the University then filed and briefed cross-motions for summary judgment. Oral argument before the Commonwealth Court *en banc* followed. On January 4, 2032, the Commonwealth Court granted summary judgment in favor of the University while denying the Borough's motion. In its Opinion in Support of that Order, the Commonwealth Court relied primarily on one case from the Federal Claims Court and focused on the general environmental benefits which the Borough System provides to the community-at-large. The Commonwealth Court did not give credence to the Borough's argument that property owners receive a specific benefit from a municipal service which collects and carries stormwater away from their properties.

The Commonwealth Court also questioned the use of impervious cover of a given site as a measure of the amount of stormwater fee which the owner of that property should pay.

This appeal followed.

SUMMARY OF THE ARGUMENT

What happens to stormwater which falls upon impervious surfaces at developed properties? What happens to that stormwater when portions of those developed properties have no stormwater management practices in place for construction which occurred decades ago? Even at properties where stormwater management practices are in place to meet current environmental regulations for design storms, what happens to the stormwater from events larger than those design storms? Does every drop of all of that stormwater evaporate or infiltrate to the aquifer, or does some (and in many cases, much) of it flow away from the developed property?

Experience, logic, and the facts of this case tell us that the latter condition prevails. In those cases, and in municipalities like the Borough where the local government maintains a municipal stormwater system in accordance with federal and state law, though, the owners of developed properties can rest easy. In the Borough, those owners need not worry about managing that outflow of excess stormwater because the Borough **provides that service for them** . . . collecting and conveying stormwater through the Borough System to receiving watercourses when, otherwise, the property owner would need to manage that stormwater in some other manner.

This case is about whether the Borough, and municipalities like it all around the Commonwealth, may charge the owners of developed properties a fee for that service or whether such charges are more properly characterized as taxes.

That is a question of first impression for this Court. While several of the Commonwealth's sister states and federal courts addressed the question, to the Borough's knowledge the Commonwealth Court's holdings in this case and in In re Appeal of Best Homes DDJ, LLC, Nos. 239 C.D. 2020, 240 C.D. 2020, 2021 Pa. Commw. Unpub. LEXIS 667 (Pa. Commw. Ct. Dec. 21, 2021) are the only two instances of a Pennsylvania appellate court ruling on the issue.[2] [3] As set forth in the various *Amicus Curiae* submissions in support of reversal which are being filed contemporaneously with this Court, this Court's resolution of this direct appeal will have implications far beyond the jurisdictional limits of the Borough. Within the Borough, this Court's resolution of this case will extend far beyond the University Properties. This Court's ultimate holding may well establish whether every property owner which is served by their connection to the Borough System will pay for that

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[2] The Borough cites Best Homes only for its persuasive value and, as noted below, to illustrate the discrepancy between the allocation of the burden of proof in this case and that other contemporaneous case regarding stormwater management fees.

[3] In another case which resulted in an unpublished opinion, the Commonwealth Court dismissed as moot a challenge to payment of a stormwater management charge which "had been calculated based upon the square footage of the [subject p]roperty that was either paved or covered with stone." Roosevelt Holding, LP v. Sampere, No. 410 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 2, at *2 (Pa. Commw. Ct. Jan. 4, 2022). That case was rendered moot when the challenger paid the fee. See id.

benefit or only those connecting beneficiaries who are also taxable will pay for that service.

Initially, the Borough acknowledges in clear and unequivocal terms that the University enjoys immunity from local taxation in accordance with applicable law. If the Stream Protection Fee is a tax, the Borough may not require the University to pay that charge without proving that there is some legal authority for that imposition. That, however, is not the issue in this case. The Borough's lack of power to levy a tax upon the University is not in question. Rather, the real issue in this case is the characterization of the Stream Protection Fee in the first place.

Erroneously, the Commonwealth Court put the cart before the horse and, at the outset, held "that the Borough has the burden of proving [the University's] property is not immune from taxation." West Chester, 291 A.3d at 462 n.13. Thus, the Commonwealth Court started with the presumption that the Stream Protection Fee is a tax and proceeded from there through the rest of its analysis. See id. Under clear Commonwealth Court precedent, though, that Court should have started with allocating to the University the burden of proving that the Stream Protection Fee is a tax.

As the party which should have borne the burden of proof, the University needed to establish a clear right to relief at the summary judgment stage of this case. In other words, the University needed to prove the existence of undisputed facts

which, as a matter of law, preclude a fact-finder from concluding that the Stream Protection Fee is a fee. On the elements of the fee versus tax analysis, and viewing the record in the light most favorable to the Borough, the University did not and cannot establish a clear right to relief.

Assuming, *arguendo*, that the Borough actually does have the ultimate burden of proof in this case, the University would have needed to show that, as a matter of law, the Borough cannot establish that the Stream Protection Fee is a fee. Even there, the University did not and cannot establish a clear right to relief.

Conversely, the Borough established a clear right to summary judgment. The Borough established that (A) the University discharges stormwater from the University Properties to the Borough System, (B) the University voluntarily does so on an ongoing basis instead of constructing stormwater management systems which would bypass the Borough System, and (C) the Stream Protection Fee (generally, and as charged to the University) is proportional to the Borough's cost to provide the service or the University's benefit from that service.

At the very least, this Court should reverse the Commonwealth Court's grant of summary judgment to the University and remand this matter to the Commonwealth Court for further proceedings. Alternatively, this Court should also reverse the Commonwealth Court's denial of summary judgment to the Borough,

thus settling the question that stormwater charges like the Stream Protection Fee are fees and not taxes.

ARGUMENT

A. THE COMMONWEALTH COURT ERRED IN ALLOCATING TO THE BOROUGH THE BURDEN OF PROVING THAT THE STREAM PROTECTION FEE IS NOT A TAX.

Again, the Borough acknowledges that, under applicable law, the University is immune from local taxation. See Ind. Univ. of Pa. v. Jefferson Cty. Bd. of Assessment Appeals, 243 A.3d 745, 751 (Pa. Commw. Ct. 2020); but cf. Pa. State Univ. v. Derry Twp. Sch. Dist., 731 A.2d 1272, 1274 (Pa. 1999).

That, however, is not the issue in dispute. The real issue is characterization of the Stream Protection Fee as a fee or a tax in the first place. The Commonwealth Court seemingly misapprehended the issue in dispute and, in so doing, erroneously allocated to the Borough "the burden of proving Respondents' property is not immune from taxation." West Chester, 291 A.3d at 462 n.13. That fundamental error impacts the remainder of the Commonwealth Court's holding because it necessarily colored the Commonwealth Court's review of the parties' cross-motions for summary relief and what each party needed to establish in those proceedings.

The genesis of this dispute is the January 18th Letter in which the State System challenged the Stream Protection Fee as an impermissible tax. R. 64a-65a. Following that challenge, the Borough filed a declaratory judgment action to establish the legal obligations of the University *vis-à-vis* the Stream Protection Fee. R. 17a-339a. On

April 18, 2018, now-Justice Brobson ordered that should be docketed as a petition for review under Rule 1511 of the Rules of Appellate Procedure. R. 340a.

The University does not acknowledge the validity of the Stream Protection Fee as a fee. R. 64a. Rather, the University assailed the Stream Protection Fee as a "general tax" and, from that conclusory position, argued that the Borough has no power to levy a tax on the University properties.

The Borough asserted that "[t]he Stream Protection Fee [] is a fee for service, and not a tax." R. 41a. The Borough asked the Commonwealth Court to "confirm[] that [the University is] responsible for payment of the Stream Protection Fee with regard to the [University Properties] and that the Borough may enforce the Stream Protection Ordinance with regard to those properties." R. 42a.

The Borough noted that **the University** bore "the initial burden of establishing that the Stream Protection Fee is not in fact used to reimburse the Borough for its administrative and regulatory costs in providing a service." R. 1661a (quoting Rizzo v. City of Philadelphia, 668 A.2d 236, 237 (Pa. Commw. Ct. 1995)) (*internal citation omitted*). The University responded, claiming that "[i]n a case involving tax immunity, like this one, 'property owned by the Commonwealth is presumed to be immune from taxation and [] the taxing authority bears the burden of proving the property's taxability.'" R. 2231a (quoting Norwegian Twp. v. Schuylkill Cty. Bd. of Assessment Appeals, 74 A.3d 1124, 1131 (Pa. Commw. Ct. 2013)). The University's

position, of course, puts the proverbial rabbit in her proverbial hat, as it presumes that the Stream Protection Fee is a tax. Reliance upon Norwegian Twp. is misplaced.

In Norwegian Twp., there was no question that the charge which Schuylkill County imposed upon the township was a tax. Norwegian Twp., 74 A.3d at 1126. The Commonwealth Court stated that "[o]n March 1, 2012, Schuylkill County sent a notice to the Township notifying the Township ***of municipal/county and school district tax liability*** for the property." Id. The Court observed that "[t]he trial court noted that, while the burden for establishing tax exemption is usually on the taxpayer under the general rule that all real estate is taxable, the taxing authority has the burden of proof when establishing tax liability for government-owned property." Id. at 1127. Continuing, the Commonwealth Court wrote that "the burden of proof of liability for taxes is on the taxing authority where the real estate in question is owned by a governmental body." Id. at 1131 (quoting Granville Twp. v. Bd. of Assessment Appeals of Mifflin Cty., 900 A.2d 1012, 1016 (Pa. Commw. Ct. 2006)).

As repeatedly noted, the Borough does not challenge that rule. The rule, though, only applies when the characterization of the governmental imposition as a tax is not in dispute. Here, that characterization is very much in dispute, but the University and the Commonwealth Court simply presumed that, for purposes of allocating the burden of proof, the Stream Protection Fee is a tax.

When allocating the burden of proof the Commonwealth Court **started** with the proposition that the Stream Protection Fee is a tax and, from there, held that "the Borough has the burden of proving Respondents' property is not immune from taxation." West Chester, 291 A.3d at 462 n.13. That was an error of law. As the party challenging the Borough's characterization of the Stream Protection Fee and attempting to have it characterized as a general tax, the University bore the burden of proving that the Stream Protection Fee is a tax. See Rizzo, 668 A.2d at 237 (citing National Properties, Inc. v. Borough of Macungie, 595 A.2d 742 (Pa. Commw. Ct. 1991)); Best Homes, 2021 Pa. Commw. Unpub. LEXIS 667, at *21-22.

In Rizzo, the Commonwealth Court addressed a case procedurally similar to this one. Individuals to whom the City of Philadelphia sent invoices for services brought suit "challenging the City's practice of charging a fee for emergency medical services (EMS) provided by the City's Fire Department." Id. at 236. The Court observed that "[t]he issue presented is whether the EMS fees charged to the public are revenue-producing and thus constitute an unlawful tax, which cannot be imposed in the manner that the City has employed[.]" Id. at 236-237. In the context of summary judgment proceedings, the challengers "contend[ed] that the EMS fees [were] in reality not regulatory fees intended to cover the administrative cost of the EMS but instead constitute an unlawful revenue-raising tax." Id.

The Commonwealth Court observed the maxim that,

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

Id.

The Court continued, holding that "[c]ontrary to [the appellants'] assertion that it is the City's burden to prove that the City Health Department's regulation authorizing the EMS charges is not in actuality revenue raising [] ***the party challenging a regulatory 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 its administrative or regulatory costs in providing a service***." Id. (*emphasis added*) (citing National Properties, 595 A.2d at 742).

In National Properties, the Commonwealth Court considered the legality of the Borough of Macungie's trash collection, conveyance, and disposal service and the fees which those who used that service paid. National Properties, 595 A.2d at 743. The Court held that,

> [f]ees charged by a municipality for services rendered are proper if they are reasonably proportional to the costs of the regulation or the services performed. Moreover, the municipality may not use its power to collect fees for a service as a means of raising revenue for other purposes. ***The party challenging the reasonableness of the fee bears the burden of proving it is unreasonable***.

Id. at 745-746 (*emphasis added*).

In an unreported opinion, a Panel of the Commonwealth Court recently confirmed that Rizzo applies in cases challenging a stormwater charge as an unlawful tax. Best Homes, 2021 Pa. Commw. Unpub. LEXIS 667, at *21-22. In that case, which the Commonwealth Court decided after this Borough and the University submitted their cross-motions but before Oral Argument, the Commonwealth Court decided a challenge to the City of Chester Stormwater Authority's stormwater charge. See id. One of the bases for that challenge was the plaintiffs' claim "that the [defendant's] assessed fee is an impermissible tax [] because [it] generate[s] revenue and [is] a burden placed upon property owners to raise money for public purposes." Id. at *20. The Court cited Rizzo and reaffirmed that "***the 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***." Id. at *22 (*emphasis added*).

The University is the only party in this litigation which challenged the Stream Protection Fee on the grounds that it is "not [a] charge for actual services provided to the University by the Borough [but is] the imposition of a general tax for the improvement and maintenance of the Borough's storm water infrastructure." R. 65a. Notwithstanding Rizzo, National Properties, and the Commonwealth Court's nearly contemporaneous holding in Best Homes, though, the Commonwealth Court

allocated to the Borough the burden of proving that the Stream Protection Fee is a fee.

That error impacts the entirety of the Commonwealth Court's disposition of this case. As the party with the burden of proof on the ultimate issue and as a movant for summary judgment, the University bore the burden of establishing the absence of any genuine issue of material fact relative to each of the elements in the fee versus tax analysis such that there could be no basis upon which a finder-of-fact could conclude that the Stream Protection Fee is a fee. Conversely, at summary judgment, it was not the Borough's burden to establish that the Stream Protection Fee is not a tax. The University did not meet its burden and the Court erred when it granted summary relief to the University. That error must be reversed.

B. THE COMMONWEALTH COURT ERRED IN GRANTING SUMMARY RELIEF TO THE UNIVERSITY.

1. The University did not meet the standard applicable to the grant of summary relief.

To properly prevail on its motion for summary judgment, the University needed to establish that there were no genuine issues of material facts regarding all of the following criteria:

(A) whether, as a matter of law, the University did not realize any specific benefits from the University Properties' discharge of stormwater to the Borough System;

(B) whether, as a matter of law, the University Properties' ongoing discharge of stormwater to the Borough System is involuntary; and

(C) whether, as a matter of law, the cost of the Stream Protection Fee to the University was out of proportion with the benefits which it realized from the University Properties' discharge of stormwater to the Borough System or the Borough's cost of maintaining and operating the Borough System.

See Supervisors of Manheim Tp. v. Workman, 38 A.2d 273 (Pa. 1944); City of Philadelphia v. Pa. Pub. Util. Comm'n, 676 A.2d 1298, 1307-08 (Pa. Commw. Ct. 1996).

a. The undisputed facts fail to clearly establish that the University does not enjoy specific benefits from Borough System.

The University Properties are connected and discharge to the Borough System. This Court can conclude that the University is entitled to summary judgment only if it holds as a matter of law that such connection and discharge is not itself a specific benefit to the University. That conclusion would defy logic, as one merely needs to observe a Developed property during and immediately after a rainfall event to appreciate the property-specific benefits of the Borough System.

To make the argument that the University receives no specific or discrete benefits from connection and discharge of stormwater to the Borough System, though, the University focuses nearly exclusively on the (Borough-acknowledged) truism that the Borough System does produce generalized environmental benefits. R. 589a-590a. The University also argues that the Borough does not have any present

plans to use money in the Stormwater Fund to do work which touches the University Properties.[4] R. 588a. The University avers that "[t]he [Stream Protection Fee] is a tax because the projects it funds, like roads and sewers, are designed to return a 'general benefit' and promote 'the welfare of all.'" R. 589a.

The University invokes (A) the text of the of the Stream Protection Ordinance regarding green infrastructure projects (which, in the University's view, do not benefit the University Properties), (B) deposition testimony by its own employees and from former Borough Manager Michael Perrone, and (C) the legally dubious notion that

> excluding the University from directly connecting to the [Borough System] would not exclude the University from being able to use it or benefit from it – if the University simply conveyed all the excess stormwater to the edge of its property, that water would still make its way into [the Borough System] via the Borough's streets and inlets.

R. 1637a.

At bottom, the University's claim is predicated upon the incorrect belief that the existence of generalized environmental benefits necessarily precludes the existence of specific benefits which accrue from connections to the Borough System.

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[4] The Borough is unaware of any legal requirement that, in order for the Stream Protection Fee to be a fee and not a tax, the Borough must use funds from the Stormwater Fund to perform work on or immediately adjacent to the University Properties. Nevertheless, the Borough observes the University's deposition of Borough Engineer Nate Cline. There, Mr. Cline described a stormwater project involving remediation of Plum Run downstream of the University Properties and stated that project "is dealing with the storm water runoff from the University campus[.]" R. 1127a.

i. The University Properties are connected to and use the Borough System.

The record includes the University's own plans showing that (A) the area of North Campus within the Plum Run watershed measures approximately 54.1 acres, 31.5 acres of which is impervious and (B) there are University buildings within that area for which no on-site stormwater management controls are in place. R. 2274a; R. 2276a; R. 2328a-2329a. Furthermore, at least some "[s]tormwater that falls on or near North Campus [] enters inlets and pipes on North Campus owned by the University, which eventually connect to Plum Run." R. 581a. Moreover, "[s]ome stormwater falls on or flows into the Borough-owned streets that run around and through North Campus, like Church St[reet]." R. 581a.

Additionally, the record includes a University-produced plan which depicts the storm collection system in place at North Campus and the outfall to Plum Run. R. 2274a. Also, as set forth in the University's own documents, the University has constructed new buildings at North Campus which discharge to the Plum Run Outfall. R. 2274a; R. 2276a; R. 2328a-2329a. Those buildings include (but are not limited to) the Student Recreation Center, the South New Street Parking Structure, certain residence halls, and The Commons/Science and Engineering Center. R. 2329a. Other documents establish ***the University's own approximation*** of the volume of stormwater which the University discharges to the Borough's Plum Run Outfall. R. 2328a. Though the University averred that it "has built and maintains

stormwater management systems on North Campus to handle stormwater before it leaves campus[,]"stormwater does, in fact, flow from North Campus. R. 2232a-2233a; R. 1686a-1691a.

Moreover, the University and the Borough agree that the University maintains its own MS4 Permit for the "system of inlets and pipes" which exists on North Campus. R. 583a; R. 2277a. The Borough also agrees that "North Campus contains different buildings of various ages [and that] newer buildings tend to have stormwater management strategies ***while older ones do not***." R. 582a (*emphasis added*). Though newer buildings may comply with regulatory requirements to manage some stormwater on-site, the older buildings to which the University itself refers do not include any on-site stormwater management systems. R. 2329a. In short, the University discharges stormwater from North Campus into the Borough System.[5] R. 1686a-1691a.

That fact remains true even with the University MS4 Permit in place. In his deposition, the Associate Vice President of Facilities at the University, Mr. Gary Bixby, discussed that MS4 Permit. He testified that the University "created [its] MS4 [] with the understanding that [the University was] able to use the [Borough-owned stormwater] conveyances that were already in place." R. 814a. Mr. Bixby noted that ". . . the MS4 strategy that [the University has] in place has it in a means of

[5] As discussed in more detail below, the volume of that discharge is substantial.

conveyance that's using the" Borough System. R. 816a. Mr. Bixby then confirmed that "[t]he University's MS4 permit is at least in part[] predicated upon the ability to discharge stormwater through the" Borough System. R. 816a.

Viewed in the light most favorable to the Borough, the fact of the University Properties' connection and discharge of stormwater to the Borough System prevents this Court from concluding as a matter of law that the University does not enjoy specific benefits from the Borough System. As above noted, the only way to reach the opposite conclusion would be to hold as a matter of law that connection to, and use of, a municipal stormwater system provides only general environmental benefits for the community-at-large and not specific benefits for the properties which discharge stormwater to that system.

ii. The Borough uses the Stormwater Fund to operate, maintain, and repair the Borough System.

Despite the fact that the University Properties are connected and discharge stormwater to the Borough System, the University suggests that it does not enjoy any specific benefit because the Borough uses money in the Stormwater Fund for stormwater mitigation projects which the University characterizes as "green infrastructure." R. 587a-590a. The University argues that it is not benefitted by those projects and asserts that the Borough does not use money in the Stormwater Fund for "the general operation, maintenance, or repair of the" Borough System. R. 590a.

The Borough observes that all revenue from the Stream Protection Fee must be deposited into the Stormwater Fund. R. 58a. The Stream Protection Ordinance prescribes that the Borough must use the Stormwater Fund for stormwater-related purposes which include "[c]onstructing, operating, and maintaining" the Borough System and the "maintenance, operation, [and] repair [] of stormwater facilities, programs and operations." R. 58a. In that, the Stream Protection Fee is not a general revenue-raising device but, rather, is paid by fewer than all property owners and, then, for a specific purpose.

The Borough also notes the Affidavit by Borough Finance Director Barbara Lionti (the "Lionti Affidavit"), pursuant to which the Borough Finance Director confirmed that expenditures from the Stormwater Fund include (but are not limited to) stormwater facilities maintenance, emergency stormwater facility repairs, inlet replacements, and storm drain materials. R. 1986a-2023a. Furthermore, the Borough notes the Affidavit by former Borough Director of Public Works, Alberto Vennettilli (the "Vennettilli Affidavit"). R. 1686a-1691a. There, Mr. Vennettilli confirmed that the "Borough's operation of the [Borough System] includes [] repair and maintenance of collection and conveyance pipes [and] clearing and unblocking of stormwater inlets, headwalls, and outflows[.]" R. 1688a. He also confirmed that "***Borough employees within the Public Works Department regularly perform work at and upon components of the [Borough System] which the University uses***

including, without limitation, maintenance and/or repair of such components, street sweeping, and inlet cleaning." R. 1690a (*emphasis added*).

The University suggested (wrongly) that the Borough does not use money in the Stormwater Fund to perform ongoing operational, maintenance, and repair work on the Borough System. The record includes evidence to rebut that suggestion and establish that the Stream Protection Fee is used for stormwater costs which include the system which the University uses. Viewed in the light most favorable to the Borough, there is (at least) a factual dispute regarding the University's claim about how the Borough uses money in the Stormwater Fund.

iii. The former Borough Manager's deposition testimony does not conclusively and in a non-rebuttable manner establish the absence of a genuine issue of material fact regarding specific benefits.

The University also points to the deposition testimony of former Borough Manager Michael Perrone as support for the proposition that the Borough System provides environmental benefits to the community-at-large but not property-specific benefits to those who pay the Stream Protection Fee. R. 587a-588a. Again, the Borough does not dispute that the Borough System does produce general environmental benefits which accrue to the community-at-large. The flaw in the University's argument, though, is that it assumes that benefits are zero-sum. Stated differently, the existence of general environmental benefits does not preclude the

existence of specific benefits which accrue to Developed properties which are connected to and use the Borough System.

The University characterized Mr. Perrone's testimony as admissions that the Borough System provides only general environmental benefits.[6] R. 1620a; R. 2338a. Mr. Perrone's testimony, though, does not rise to the level of judicial admission for purposes of summary judgment.[7] DeArmitt v. New York Life Ins. Co., 73 A.3d 578 (Pa. Super. 2013).

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[6] When the language of a municipal ordinance is clear and unambiguous, extrinsic evidence of the governing body's intent and purpose in enacting the ordinance is inapplicable. See Trigona v. Lender, 926 A.2d 1226, 1233 (Pa. Commw. Ct. 2006) (not relying upon a city solicitor's affidavit regarding such intent when an ordinance's preamble clearly evinced municipal purpose). This is especially relevant here where counsel for the University asked Mr. Perrone "[w]hy did the Borough enact the [S]tream [P]rotection [O]rdinance[?]" and Mr. Perrone responded "[u]m, I didn't make those decisions. I was kind of on the periphery of the meetings as to why . . ." before he stated that "the fee was to help defray the costs of managing the maintenance of our storm system." R. 1204a-1205a.

[7] Mr. Perrone testified regarding his interpretation of the Stream Protection Ordinance, the nature of benefits which flow from the existence of the Borough System, and certain projects which the Borough completed using funds from the Stormwater Fund. The Borough does not concede that those are the type of factual matters which can be the subject of judicial admissions, especially for summary judgment purposes. The Superior Court has observed that

> [f]or an averment to qualify as a judicial admission, it must be a clear and unequivocal admission of fact. Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and conclusions of law. The fact must have been unequivocally admitted and not be merely one interpretation of the statement that is purported to be a judicial admission.

See Porter v. Toll Bros., 217 A.3d 337, 350 (Pa. Super. Ct. 2019) (quoting Del Ciotto v. Pa. Hosp. of the Univ. of Penn Health Sys., 177 A.3d 335, 354 (Pa. Super. Ct. 2017)).

As the Superior Court held in DeArmitt, at least in the context of summary judgment proceedings (if not more generally), "[t]o carry the weight of a binding judicial admission [] the opposing party's acknowledgment must conclusively establish a material fact and not be subject to rebuttal." DeArmitt, 73 A.3d at 595 (citing John B. Conomos, Inc. v. Sun Co., 831 A.2d 696 (Pa. Super. Ct. 2003) (holding that "[f]or an averment to qualify as a judicial admission, it must be a clear and unequivocal admission of fact.")).

Mr. Perrone's testimony is far from a clear and non-rebuttable admission that the Borough System does not provide specific benefits. He did not unequivocally testify that the presence of general benefits is the equivalent of the absence of specific benefits. In fact, parts of Mr. Perrone's testimony suggest just such specific benefits.

For instance, Mr. Perrone testified that "[t]here is [*sic*] general benefits and there are specific benefits. I think there is both." R. 1218a. He also testified that "the storm sewer systems and ordinances you have in place, they also have the benefit to, you know, individual properties and individual property owners." R. 1211a. Explaining his answer, Mr. Perrone testified about a scenario in which a hypothetical property owner wanted to develop her property without utilizing the Borough System. R. 1211a. He observed that

> Ms. Smith is going to build a house and she has to, you know, put in a stormwater management system on her

> property and manage 100 percent of her water for every type of storm, you know, manageable, and not connect to the Borough's system. She would be impacted by how much land she would develop on her particular home. So the house would get smaller, and the storm sewage management system may get larger. So in that case, there is a benefit to, you know, each individual property owner as you develop or we develop.

R. 1211a.

Mr. Perrone also directly addressed development at the University Properties.

R. 1285a; R. 1287a. He testified that,

> The University, over the years, has been able to hook up to [a Borough-owned four-foot pipe which encloses a portion of Plum Run] for redevelopment over, say, the dorm buildings, that's their specific benefit, and, you know, the result of them putting in into the stream – into our stream, into our piping system, is creating a problem down the road, is there a specific benefit, I -- you know, might be more of a legal argument for the lawyers, but I think from my point of view, maybe it's too simplified, I would think, yeah. The University is getting some type of specific benefit from that.

R. 1285a.

Mr. Perrone continued his testimony regarding development at the University Properties and the benefits of connection to the Borough System, as follows:

> if the University had to or did not, you know, hook up to the [Borough] [S]ystem to cause the erosion [to downstream portions of Plum Run], then the harm to the University would be, they would have to build these facilities on their land. [The University] would have less land to build buildings on, and, you know, it's almost like, you know, I would use the term 'taking of land' but if the

> storm water management system says you have to do this, and if you can't or you can't connect to our system, the benefit is you're going to be able to build more buildings tying into the system then [*sic*] not tying into the system.

R. 1287a.

To the same extent that Mr. Perrone's testimony establishes **the presence of general environmental benefits** for the community-at-large which the Borough System produces, his testimony also establishes **the presence of specific benefits** which accrue to the University from connection and discharge to the Borough System. If nothing else, that testimony establishes an issue of material fact regarding the existence of those specific benefits (especially considering, though not necessarily because of, the significant amount of stormwater which, according to NTM's calculations, the University discharges to the Borough System).[8] Viewed in the light most favorable to the Borough, Mr. Perrone's testimony is far from an unequivocal admission of the absence of specific benefits and at least establishes an issue of material fact which precludes summary relief in favor of the University.

[8] NTM calculated that approximately 32,500,000 gallons of stormwater flow from the University Properties to the Plum Run Outfall each year. R. 1787a.

iv. The University incorrectly suggests that it could discharge stormwater runoff onto the Borough's streets instead of otherwise managing stormwater from the University Properties.

As stated, a specific benefit which the University realizes from connection and discharge of stormwater to the University System is that the University does not need to otherwise manage all of the stormwater which flows from North Campus. As Mr. Perrone suggested, benefits of that include the availability of more buildable space at North Campus and avoidance of the costs associated with self-management of all stormwater at North Campus and avoidance of on-site flooding. R. 1287a; R. 1299a.

The University, though, rejects the suggestion that non-use of the Borough System would deprive the University of the benefits of connection and discharge of stormwater to that system. In that regard, the University offers the legally dubious notion that it could avoid both (A) use of the Borough System and (B) on-site modifications to manage stormwater flow at the University Properties. The University claimed that

> just as [the Borough's] expert did, the Borough mistakenly assumes that the [University] receives a benefit because, without the [Borough System], the University would have to keep and manage all of its own stormwater. There is no reason the University could not simply convey stormwater to its property edge and discharge it there[.]

R. 2253a (*internal citation omitted*).

The expert report which the University references is the NTM Report. R. 1779a-1913a. NTM used "industry standard methodology, programs, and practices" and "considered whether, and to what extent, the [Borough System] provides a discrete benefit to the University." R. 1786a. Relying upon land use information which the University itself produced in discovery (on which the University reported that the area of impervious cover at North Campus and within the Plum Run watershed measures 31.5 acres), NTM "calculate[d] that more than 32,500,000 gallons of stormwater are generated annually by the portion of North Campus draining to the UNT Plum Run Outfall[.]" R. 1787a.

The University's claim that it could operate without the Borough System or alternative stormwater is both contrary to law and astounding.[9] One shudders to read that an instrumentality of the Commonwealth would suggest some legal power to simply develop its properties without consideration for the impacts upon downstream properties.[10]

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[9] The claim is also inconsistent with the University's own statement. In its Motion for Summary Judgment, the University stated that its "MS4 permit identifies five outfalls[,]" one of which is "where Plum Run begins to flow above ground[.]" R. 583a-584a. The University "is required by its own MS4 permit to manage and limit the pollutants in" the stormwater which it discharges to the Plum Run Outfall. R. 584a. As noted above, the claim is also inconsistent with Mr. Bixby's testimony.

[10] Though the Environmental Rights Amendment is not directly implicated in this case, one must also question how the University's suggestion to "simply convey stormwater to its property edge and discharge it there[]" is consistent with its trustee obligations under that amendment. Pa. Const. art. I, § 27.

The University's claims are likewise legally unsupportable, as stormwater flowing from one's property may not simply be ignored. For example, all landowners have a duty to manage the outflow of stormwater from their properties.

> A landowner may not alter the natural flow of surface water on his property by concentrating it in an artificial channel and discharging it upon the lower land of his neighbor even though no more water is thereby collected than would naturally have flowed upon the neighbor's land in a diffused condition. One may make improvements upon his own land, especially in the development of urban property, grade it and built upon it, without liability for any incidental effect upon adjoining property even though there may result some additional flow of surface water thereon through a natural watercourse, ***but he may not, by artificial means, gather the water into a body and precipitate it upon his neighbor's property***.

Ridgeway Court, Inc. v. Landon Courts, Inc., 442 A.2d 246, 247-48 (Pa. Super. Ct. 1981) (*emphasis added*) (quoting Rau v. Wilden Acres, Inc., 103 A.2d 422 (Pa. 1954)).

Moreover,

> [a]n upper landowner is liable for the effects of surface water running off his property in two distinct circumstances: (1) where the landowner has diverted the water from its natural channel by artificial means; or (2) where the landowner has unreasonably or unnecessarily increased the quantity or changed the quality of water discharged upon his neighbor.

Kowalski v. TOA PA V, L.P., 206 A.3d 1148, 1162-63 (Pa. Super. Ct. 2019) (citing Laform v. Bethlehem Twp., 499 A.2d 1373, 1378 (Pa. Super. Ct. 1985)).

"Under such circumstances, the [upper landowner] must make the proper accommodation so as not to place the burden of the increased flow upon the servient tenement." Id. (citing Miller v. C.P. Ctrs., Inc., 483 A.2d 912, 915 (Pa. Super. Ct. 1984)).

The Borough takes no position here on whether sovereign immunity would shield the University from liability for failing to comply with its stormwater management duties. Rather, the Borough is noting the legally inaccurate nature of the University's claim that (A) it does not specifically benefit from the Borough System and (B) in the absence of the Borough System, the University would need to otherwise manage all of its stormwater on the University Properties. That the University **might be** immune from **damages** arising out of a breach of a common law duty to prevent downstream impacts from stormwater runoff does not mean the University could disregard that duty. One way or the other, the University needs to address its stormwater management obligations. The University benefits because the Borough provides the means and infrastructure for the University to do so.

The University also has an ongoing duty to comply with the Pennsylvania Storm Water Management Act, 32 P.S. § 680.1 *et seq*. (the "SWMA"). Pursuant to the SWMA,

> [a]ny landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed

> storm water plan as are reasonably necessary to prevent injury to health, safety or other property.

32 P.S. § 680.13.

The SWMA's affirmative mandate that all landowners shall (i) comply with applicable watershed storm water plans, (ii) assure that development activities do not increase the maximum rate of runoff, and (iii) manage the quantity, velocity, and direction of storm water so as to protect health and property is binding upon Commonwealth instrumentalities when they act in their capacity as landowners. See Milestone Materials, Inc. v. Dep't. of Conservation & Nat. Res., 730 A.2d 1034, 1039 (Pa. Commw. Ct. 1999) (holding that, in cases where there is a non-discretionary duty involved, "the law is well settled that the doctrine of sovereign immunity does not bar suits that seek to compel state officials to carry out their duties in a lawful manner[]"); Kee v. Pa. Tpk. Comm'n, 685 A.2d 1054, 1059 (Pa. Commw. Ct. 1996); Montgomery Cty. Conservation Dist. v. Bydalek, 2021 Pa. Commw. Unpub. LEXIS 348 (Pa. Commw. Ct. 2021).[11]

As noted above, using information which the University produced in discovery, "industry standard methodology, programs, and practices" and "10 years of locally available rainfall data," NTM concluded, *inter alia*, "that more than 32,500,000 gallons of stormwater runoff are generated annually by the portion of

[11] The Borough cites Bydalek only for its persuasive value.

North Campus draining to the [] Plum Run Outfall." R. 1786a-1787a. NTM also noted that "in a 24-hour period, a single 100-year/24-hour design storm (maximum design event per stormwater standard of practice) generates approximately 9,000,000 gallons of runoff from the portion of North Campus considered in the land uses" addressed earlier in the NTM Report. R. 1787a. Adding a more technical flavor to the same idea which Mr. Perrone expressed in his testimony, NTM noted

> [b]y virtue of its ability to access the [Borough System] the University need not design and implement a system of its own which would otherwise need to control (by capturing, storing, reusing, conveying, infiltrating, or other method) all annual runoff (peak rate and volume) up to and including the largest regulatory storm – the 100-yr/24-hour design storm (7.55 inches in 24 hours).

R. 1787a.

The University Properties are connected to, and discharge stormwater into, the Borough System. The Borough presented evidence that it uses money in the Stormwater Fund to, ***inter alia***, maintain and repair that system. Despite its suggestion to the contrary, the University cannot simply ignore its obligation to address the stormwater which flows from the University Properties. The University benefits from the Borough System because the Borough relieves the University of that obligation thus allowing the University to maximize the use of its property otherwise. With the Borough System in place and being operated, maintained, and

repaired by the Borough, the University does not need to otherwise manage its stormwater on the University properties.

All that said, the University would have several options for how to manage all of its stormwater if it elected to discontinue benefitting from the Borough System. R. 1788a-1789. All of those options include significant cost in terms of land area, with the University needing to devote a minimum of 6.76 acres for infiltration facilities if it wanted to store and infiltrate all stormwater on-campus.[12] R. 1789a.

Viewed in the light most favorable to the Borough, the record fails to support the conclusion that the University does not receive a specific benefit from connection and discharge of stormwater to the Borough System. This Court must reverse the Commonwealth Court's grant of summary judgment to the University.

b. It is not clear that the University's use of the Borough System is involuntary.

The University argued that "a payment is voluntary when 'the consumer decides freely to consume the commodity or service.'" R. 1634a. Offering no evidence beyond the assertion that it (or the predecessors to the University)

[12] The Borough has the power to establish a monopoly of stormwater management services and "require[] all persons to use its facilities for essential services in the interest of uniformity and of assuring their availability to everyone." Council of Middletown Twp. v. Benham, 523 A.2d 311, 317 (Pa. 1987). In that case, the Borough would have the right to "collect[] . . . reasonable users fees . . . [to] obtain the financing necessary to provide services to those who are not in an economic position to provide the required level of services for themselves." Id. The Borough does not suggest here that it holds such a monopoly and, in fact, notes that the University could explore stormwater management solutions apart from the Borough System.

constructed many buildings at North Campus prior to Borough Council's enactment of the Stream Protection Ordinance, the University argued in conclusory terms that it "did not freely decide to incur the [Stream Protection Fee] when, years ago, it constructed its campus with impervious surfaces." R. 1635a. The University argued the legal point that "[t]he idea of voluntariness in the context of taxes versus fees is whether the property owner affirmatively takes action to purchase the particular service[.]" R. 1635a. The University ended, again arguing that "[a] property owner does not act voluntarily by taking no action, *i.e.* by electing not to undo prior construction." R. 1636a. On this issue, the Commonwealth Court held that "the Borough nevertheless fails to establish that it enters into 'voluntary, contractual relationship[s]' with property owners subject to" the Stream Protection Fee. West Chester, 291 A.2d at 466.

The University, though, did not present evidence to establish the absence of undisputed facts regarding the University's **ongoing** connection and discharge to the Borough System and the choice to maintain that use which the University makes on a daily basis.[13]

[13] The Borough is not aware of any requirement for an actual "contract" between itself and the University. Rather, and as this Court held in Manheim Twp., "[t]hose who [] receive the [municipal] service act in so doing voluntarily [] ***impliedly agree*** to pay the price of the product furnished or service rendered." Manheim Twp., 38 A.2d at 276 (*emphasis added*).

Whether one is obligated to pay the Stream Protection Fee (and the amount thereof) depends upon (A) the Developed nature of their property, (B) whether one discharges stormwater into and is benefitted by the Borough System, and (C) mitigation measures which one can institute to reduce the amount of such stormwater.

As set forth in the Stream Protection Ordinance, the Borough charges the Stream Protection Fee only to those whose properties are "Developed." By choosing to hold, maintain, and improve the University Properties as Developed parcels and maintain their ongoing connection to the Borough System, the University makes the affirmative voluntary choice to subject itself to the Stream Protection Fee.

Even in light of that affirmative choice, the University could have, but did not, take advantage of the appeal process or credits which exist under the Stream Protection Ordinance. As set forth in the Lionti Affidavit, "the party responsible for payment under each Stream Protection Fee Account may apply for and, under certain circumstance, obtain a credit against or rebate of the Stream Protection Fee which is applicable to each Developed Property." R. 1988a.

As set forth in the Appeal Manual, any party which receives a Stream Protection Fee Invoice (as that term is defined in the Lionti Affidavit) may lodge an appeal to reduce the amount of that invoice. R. 1915a-1981a; R. 1988a. Pursuant to a change in the Appeal Manual which the Borough implemented during the

pendency of this case, a party which receives a Stream Protection Fee Invoice may also submit a Special Condition Appeal and receive a reduction in the amount of the Stream Protection Fee for that "portion of the impervious area that the property owner [] demonstrate[s] has less or no impact on the [Borough System] and drains outside of the Borough . . . [a]ny property which drains completely outside of the Borough is not a developed property and is not responsible for the Stream Protection Fee." R. 1917a-1918a.

In short, each property owner makes the choice as to whether its parcel is a Developed parcel by virtue of the impervious area at that lot or whether it drains outside of the Borough. That the University did not avail itself of that choice does not make the Stream Protection Fee involuntary.

The record supports the conclusion that the University has maintained legacy structures (and constructed new structures) at North Campus which connect and discharge stormwater to the Borough System. The University has not taken any steps to avail itself of the credits which are available to it under the Stream Protection Ordinance or to cease its ongoing use of the Borough System altogether. Viewed in the light most favorable to the Borough, those choices are entirely voluntary and the University points to no evidence to suggest otherwise (and certainly not any evidence which makes the voluntariness issue one on which there is no dispute of a genuine issue of material fact).

The University would argue that the costs associated with non-use of the Borough System are so prohibitive that any voluntariness is illusory. Indeed, as the NTM Report suggests, the cost of non-use of the Borough System would be as much as $4,200,000.00. R. 2040a. The University's decision to avoid that cost, though, is a wholly voluntary act. See City of Lewiston v. Gladu, 40 A.3d 964 (Me. 2012); Church of Peace v. City of Rock Island, 828 N.E.2d 1282 (Ill. App. Ct. 2005).[14]

In Gladu, the Supreme Judicial Court of Maine considered the voluntariness of a stormwater fee. Gladu, 40 A.3d at 970. The Court focused on the availability of credits which the challenger could have invoked to "avoid the assessment if he wishe[d] to do so." Id. The Court rejected the challenger's "argument that the high cost of avoiding the stormwater assessment render[ed] the assessment involuntary." Id. Citing the applicable Storm Water Utility Fee Schedule and Credit Policy under which "a property owner could avoid the stormwater assessment by removing impervious surfaces from [their] property or by engineering a method to contain and disperse stormwater runoff so that [it] does not enter the City's stormwater system[,]" the Court held that the challenger "ha[d] the ability to weigh the costs of paying the stormwater assessment versus the relative costs of avoiding the

[14] In questions of first impression (*e.g.*, treatment of a stormwater management charge as a fee or tax) this Court may find persuasive value in the holdings of courts in other states regarding the treatment of stormwater service fees. See, e.g., Pittsburgh Logistics Sys. v. Beemac Trucking, LLC, 249 A.3d 918, 924 (Pa. 2021) (given a "lack of Pennsylvania case law [on an issue], it is helpful to review the decisions from other jurisdictions on which the parties and lower courts rely").

assessment." Id. n.5. Concluding, and noting the importance of the credit policy, the Court held that "[t]he fact that the costs of avoiding the assessment are quite high does not make the assessment involuntary." Id.

Here, the University failed to show the absence of a genuine issue of material fact regarding the voluntary nature of the Stream Protection Fee. At most, there is the undisputed fact that the University (or its predecessors) constructed many buildings at the University Properties prior to Borough Council's enactment of the Stream Protection Ordinance. From that undisputed fact, the University argued in conclusory terms that it "did not freely decide to incur the [Stream Protection Fee] when, years ago, it constructed its campus with impervious surfaces." R. 1635a. Notwithstanding that, the Borough presented evidence which, viewed in the light most favorable to the Borough, establishes the voluntary nature of the University's **ongoing** connection to, and use of, the Borough System. As to the voluntariness aspect of the fee versus tax analysis therefore, the Commonwealth Court erred in concluding that the University was entitled to summary judgment.

c. The University did not establish a clear right to relief regarding a lack of proportionality.

"[F]ees charged by a municipality for services rendered are proper if they are reasonably proportional to the costs of the regulation or the services performed." M & D Properties, Inc. v. Borough of Port Vue, 893 A.2d 858, 862 (Pa. Commw. Ct.

2006) (citing National Properties, 595 A.2d at 745)); see also Manheim, 38 A.2d at 276.

The University did not present evidence regarding money which the Borough receives from the Stream Protection Fee and expenditures from the Stormwater Fund (and did not mention proportionality in the January 18th Letter). Later, the University averred in conclusory terms that "even if it could be considered a fee, the [Stream Protection Fee] is not reasonable because it is not proportional to the Borough's cost to maintain the [Borough] System." R. 590a. In that regard, the University alleged that "[t]here is no plan to use it to fund the general operation, maintenance, or repair of" that system. R. 590a. As to NTM Report, the University argued that document "opines only on [the University's] replacement cost and says nothing about the costs actually incurred by the Borough in maintaining the existing infrastructure." R. 1648a.

Regarding the University's claim about the Borough's use of money in the Stormwater Fund, the Stream Protection Ordinance expressly provides that the Borough may use that money only for stormwater-related purposes. R. 58a. The Stream Protection Ordinance also provides that the money is used for "[c]onstructing, operating, and maintaining" the Borough System and the "maintenance, operation, [and] repair . . . of [s]tormwater facilities, programs and operations." R. 58a. Further pursuant to the Stream Protection Ordinance, the

Borough may use the Stormwater Fund for "[i]mplementation and management of a program to manage stormwater with the Borough." R. 58a.

The Lionti Affidavit confirms that expenditures from the Stormwater Fund include (but are not limited to) stormwater facilities maintenance, emergency stormwater facility repairs, inlet replacements, and storm drain materials.[15] R. 1986a-2023a. Ms. Lionti identified approximate annual stormwater-related expenditures of between $1,000,000.00 and $2,500,000.00 and annual revenue just in 2021 from the Stream Protection Fee of approximately $1,347,704.66. R. 1988a.

Looking at proportionality from the perspective of the University, the NTM Report does report on the value of the service which the Borough provides.[16] R. 2042a. Though the University assails the NTM Report as "opin[ing] only on the

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[15] As noted in the Vennettilli Affidavit, the former Director of Public Works confirmed that the Borough System is a single integrated system and that the "Borough's operation of the [Borough System] includes . . . repair and maintenance of collection and conveyance pipes [and] clearing and unblocking of stormwater inlets, headwalls, and outflows[.]" R. 1688a. He also confirmed that "***Borough employees within the Public Works Department regularly perform work at and upon components of the [Borough System] which the University uses*** including, without limitation, maintenance and/or repair of such components, street sweeping, and inlet cleaning." R. 1690a (*emphasis added*).

[16] The Commonwealth Court erred in concluding that "the NTM Report does not contain evidence of any distinct benefits accorded [the University], but rather, merely projects the expenses the University would allegedly bear to manage stormwater runoff in the absence of the [Borough System]." West Chester, 291 A.3d at 464. In so holding, the Commonwealth Court rejected NTM's conclusions and, based on that rejection, granted summary judgment to the University. See id. That was error. See Glaab v. Honeywell, Int'l., Inc., 56 A.3d 693, 698 (Pa. Super. Ct. 2012) (holding that, for purposes of summary judgment, "the trial judge must defer to [expert] conclusions[] and should those conclusions be disputed, resolution of that dispute must be left to the trier of fact[]") (quoting Summers v. Certainteed Corp., 997 A.2d 1152, 1161 (Pa. 2010)).

replacement cost" (the cost which one would incur to properly dispose of stormwater in the absence of the Borough System), that cost is an appropriate measure of proportionality. In other words, because the benefit which the University receives from the Borough System is relief from otherwise having to address its stormwater obligations, the proper measure of the value of that benefit is what the University would have to pay if it chose to not use the Borough System.

In that regard, NTM opined that, if it chose to discontinue its use of the Borough System, the University would need to spend $178,500.00 per year to build and maintain a system to properly manage and discharge stormwater at North Campus. R. 2042a. By electing to continue to discharge stormwater to the Borough System and enjoy the benefits of that service, however, the University should remit to the Borough the Stream Protection Fee in the amount of $132,088.68 per year. R. 303a-317a; R. 1743a.

When viewed in the light most favorable to the Borough, the Stream Protection Fee is characterized by proportionality, whether by measure of (A) reimbursement to the Borough of the cost of owning and operating the Borough Stormwater Management Collection and Conveyance System or (B) the value of the service which the Borough System provides to the University.

The Stream Protection Ordinance provides that the amount of the Stream Protection Fee for which a given property is responsible is a function of the amount

of impervious cover at their property. R. 51a. Despite the legislative findings set forth in the Stream Protection Ordinance (which track, to some extent, those in the SWMA as noted below), the Commonwealth Court held that "no direct measure of [the University's] purported use of the [Borough System] exists." West Chester, 291 A.3d at 464. The Court continued, holding that "the impervious surface area of a property does not correlate to the level of benefit accorded the owner of that property."[17] Id.

The Commonwealth Court may have been referring to Mr. Perrone's deposition testimony where he replied to a question in which the University's counsel stated that "[t]he amount of the fee is not directly related to the benefit each homeowner receives from the storm water protection measures of the Borough, right?" R. 1238a. After further back-and-forth, Mr. Perrone stated "[t]he amount of fee is based on the [impervious] coverage and the water you're putting into the system." R. 1239a. Mr. Perrone then responded in the affirmative to counsel's inquiry "[w]hich is not directly related to the amount of benefit each homeowner gets from the existence of the storm water management measures, correct?" R. 1239a.

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[17] The Commonwealth Court cited Page 27 of the University's Brief in Support of its Motion for Summary Judgment. A review of that page, however, reveals nothing regarding the use of impervious cover as a means of measuring the amount of benefit which a property owner receives from being able to discharge stormwater to the Borough System.

The Borough notes Mr. Perrone's earlier testimony in his deposition when asked about the method of calculating the Stream Protection Fee. When asked why it is so that "under the [Stream Protection O]rdinance, the higher you're told impervious surface square footage, the higher the fee assessment[,]" Mr. Perrone stated

> [t]hat I don't know. I didn't set up the fee structure, and how they -- with the -- how they came up with the calculations, you know, I generally remember there were different -- not tiers of fees or lots, but that there was tiers of how far the Borough wanted to go in improvements to infrastructure and maintenance of our system, and I think it was like, from low to very high, and I think that committee I just spoke about, I think they picked somewhere in the middle, like, medium. But somebody on that committee would probably be better to ask that question than I.

R. 1221a-1222a.

Continuing, counsel asked Mr. Perrone "why is the fee higher if there is more total impervious surface on the property?" R. 1222a. Mr. Perrone stated "[b]ecause you're adding storm water to our storm sewer inlets and the piping systems and it ultimately goes to the streams." R. 1222a-1223a.

As above, Mr. Perrone's testimony on the issue of how the Borough calculates the Stream Protection Fee is unclear, ambiguous, and subject to rebuttal, especially in light of his statement that he was not involved in the formulation of the Stream Protection Ordinance.

To the extent that the Commonwealth Court took exception to the use of impervious cover as a measure of a given property's Stream Protection Fee, the Borough observes that the relationship between impervious surface and stormwater runoff is axiomatic and well-recognized. For example, in the SWMA the General Assembly made the legislative finding that

> [i]nadequate management of accelerated runoff of storm water resulting from development throughout a watershed increases flood flows and velocities, contributes to erosion and sedimentation, overtaxes the carrying capacity of streams and storm sewers, greatly increases the cost of public facilities to carry and control storm water, undermines flood plain management and flood control efforts in downstream communities, reduces ground-water recharge, and threatens public health and safety.

32 P.S. § 680.2.

Moreover, "the characteristics of the property benefited by the [municipal stormwater management] facilities [and] systems" is the measure of calculating stormwater fees which the General Assembly approved when it enacted Act 62 of 2016 as an amendment to the Second Class Township Code.[18] Though the General Assembly did not define the term "characteristics of the property benefitted[,]" the

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[18] Pursuant to Act 62 of 2016, the General Assembly empowered Second Class Townships to "assess reasonable and uniform fees based in whole or in part on the characteristics of the property benefited by [municipal stormwater] facilities, systems and management plans." 53 P.S. § 67705. Second Class Townships may impose those fees "[f]or the purposes of funding the construction, maintenance and operation of storm water management facilities, systems and management plans[.]" Id. The General Assembly adopted a similar amendment to the Municipal Authorities Act, 53 Pa.C.S. § 5607(d)(34).

Borough is unaware of any measure for calculating a stormwater management fee which does not at least include the amount of impervious cover at a property.

Furthermore, the University admitted the following averments in the Borough's Application and Motion for Summary Relief which are quotes from the Environmental Protection Agency and the Department of Environmental Protection:

> 54. The United States Environmental Protection Agency states that
>
> > [s]torm water runoff continues to harm the nation's waters. Runoff from lands modified by human activities can harm surface water resources in several ways including by changing natural hydrologic patterns and by elevating pollutant concentrations and loadings. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients, heavy metals, pathogens, toxins, oxygen-demanding substances, and floatables.
>
> 55. The Department states that
>
> > [s]tormwater carries an enormous amount of pollution, including sediment, car oil, lawn fertilizers, pesticides, pet poop (and viruses and bacteria), and cigarette butts. As you might expect, this has many negative impacts on streams and rivers.

R. 1670a-1671a; R. 2236a-2237a.[19]

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[19] The Borough also observes the following statement from the DEP Stormwater Best Management Practices Manual:

> This additional flooding is a result of an increased volume of stormwater runoff being discharged throughout the watershed. **This**

Finally, the relationship between the amount of impervious cover at a property and stormwater runoff from that site has been recognized in other jurisdictions which have considered the characterization of stormwater charges. See e,g., Norfolk Southern Railway Co. v. City of Roanoke, Civil Action No. 7:16CV00176, 2017 U.S. Dist. LEXIS 211453 (W.D. Va. Dec. 26, 2017) (concluding that impervious surface area is a reasonable basis for the amount of a stormwater fee, particularly where a property owner can appeal the charge and where the law does not require "precise correlation" between fees collected and services provided); McLeod v. Columbia County, 599 S.E. 2d 152 (Ga. 2004) (holding that a stormwater charge based on the amount of impervious surface area bore a "reasonable relationship to the benefits received by the individual developed properties in the treatment and control of . . . stormwater runoff[]"); City of Gainesville v. State, 863 So. 2d 138 (Fla. 2003) (holding that a stormwater fee structure based on impervious area is reasonable and noting "other states have upheld rates that do not precisely correlate with actual use[]").[20]

> **increase in stormwater volume is the direct result of more extensive impervious surface areas** (Figure 2-2), combined with substantial tracts of natural landscape being converted to lawns on highly compacted soil or agricultural activities.

Pa. Dep't of Env't Prot., *Pa. Stormwater Best Mgmt. Practices Manual*, ch. 2 at 1, https://www.dep.pa.gov/Business/Water/CleanWater/StormwaterMgmt/Stormwater/MCM/Pages/MCM-5-Post-construction-Stormwater.aspx (December 30, 2006).

[20] In the context of sewer charges, the Superior Court has held that "there is value in simply being connected to a sewer system." GSP Mgmt. Co. v. Duncansville Mun. Auth., 126

2. Even if the Borough had the burden of proof on the ultimate issue of characterization of the Stream Protection Fee, the Commonwealth Court erred in granting summary judgment to the University.

The Commonwealth Court held that the Borough bore the burden of proving that the Stream Protection Fee is a fee (as opposed to the University having the burden of proving that it is a tax). That holding was legal error. Assuming, *arguendo*, that the Borough did have the burden of proof on the ultimate issue in this case, though, the Commonwealth Court still erred in granting the University's motion for summary judgment.

As noted above, based on the information set forth in the record a fact-finder could not conclude with certainty that the Borough would be unable to prove that (A) the University enjoys specific benefits from the University Properties' connection and discharge of stormwater to the Borough System, (B) the University's ongoing use of the Borough System is voluntary, and (C) the Stream Protection Fee which the Borough charges to the University is proportional to the benefits the University receives and, generally, the revenue which the Borough receives from the Stream Protection Fee is proportional to the Borough's cost to operate and maintain the Borough System.

A.3d 369, 373 (Pa. Commw. Ct. 2015) (citing Wash. Rlty. Co. v. Mun. of Bethel Park, 937 A.2d 1146 (Pa. Commw. Ct. 2007)). "[R]ates need not be proportioned with exactness to [the] use made or the cost to the individual customer, so long as it is reasonably related to the cost of maintaining the service for all customer, and the customers challenging the rates received 'some' benefit from the system.'" Id. (quoting Ack v. Carroll Twp. Auth., 661 A.2d 514 (Pa. Commw. Ct. 1995)).

In that regard, when viewed in the light most favorable to the Borough, the facts of (A) the University's connection and discharge to the Borough System for the collection and carrying away of stormwater, (B) the University's election to continue that use, the value of the Borough System to the University, and (C) the proportionality between the amount of revenue the Borough collects and the cost to operate and maintain the system preclude summary relief in favor of the University.

This Court must reverse the Commonwealth Court's error and either enter summary relief in favor of the Borough as set forth below or remand this matter to the Commonwealth Court for further proceedings.

C. THE COMMONWEALTH COURT ERRED IN DENYING THE BOROUGH'S MOTION FOR SUMMARY JUDGMENT.

1. The Borough met the standard applicable to the grant of summary relief.

To prevail on its application for summary relief, the Borough needed to establish that its right to judgment was clear and that there were no genuine issues of fact in dispute. Specifically, the Borough needed to establish the absence of a factual dispute such that a fact-finder would necessarily conclude (A) the University enjoys a specific benefit from the University Properties' connection and discharge to the Borough System; (B) the University's ongoing use of the Borough System is voluntary; and (C) the Stream Protection Fee which the Borough charges the University is proportional to the benefit which the University enjoys and, generally,

the revenue the Borough receives from the Stream Protection Fee is proportional to the Borough's cost to operate and maintain the Borough System.

a. The Borough established the absence of any genuine issues of material fact regarding the University's enjoyment of a specific benefit.

North Campus connects and discharges to the Borough System, including (without limitation) the Plum Run Outfall. R. 2274a; R. 2276a; R. 2328a-2329a; R. 1686a-1691a. Through the NTM Report, the Borough presented the University's own plans and documents in which the University acknowledged that connection and use of the Borough System and the University's approximation of the amount of stormwater which flows from the University Properties within the Plum Run watershed. R. 779a-1913a. This itself - the ability to divert its stormwater runoff to the Borough System rather than handling the runoff itself on its own property - is a clear benefit to the University, regardless of any general benefits the Borough System also provides.

Unless and until the University severs its connection to the Borough System and otherwise manages the approximately 32,500,000 gallons of stormwater it discharges to the Borough System each year, there can be no genuine issue of material fact surrounding the University's realization of a specific benefit from its use of the Borough System. R. 1787a.

The University fails to allege any genuine issue of material fact regarding its connection and discharge of stormwater to the Borough System. The University suggests that it has stormwater management facilities on-site, but acknowledges that stormwater still leaves campus. R. 2232a-2233a; R. 2274a-2276a; R. 2238a-2239a. Rather, the University noted the general benefits which the community-at-large realizes from the existence of the Borough System. In that regard, the University relied on Mr. Perrone's deposition testimony. As discussed above, though, that argument must fail because it treats Mr. Perrone's testimony as conclusive and irrebuttable and disregards Mr. Perrone's multiple statements describing discrete and specific benefits to the University - including increased potential for development. R. 1211a; R. 1218a; R. 1285a-1287a.

The University further argued the Borough System only provides general benefit by pointing to use of the Stormwater Fund to finance "green infrastructure" projects at places other than at or adjacent to the University. R. 587a-590a. The University cited no legal authority requiring that the Borough use the Stormwater Fund directly on the University Properties. Further, this argument disregards the Lionti Affidavit and Vennetilli Affidavit which specifically establish the Borough's use of money in the Stormwater Fund for operation, maintenance, and repair of the Borough System. R. 1686a-1691a; R. 1986a-2023a. Even when viewed in the light

most favorable to the University, the foregoing establishes the absence of disputed facts as to specific benefits to the University.

b. The Borough established the absence of any genuine issues of material fact regarding the voluntary nature of the University's ongoing use of the Borough System.

The Borough established the absence of any genuine issues of material fact regarding the voluntary nature of the University's ongoing connection to, and use of, the Borough System. The Borough explained that the Stream Protection Fee, unlike a tax, is only applicable to the owners of "Developed" properties which are "connected with, use[], [are] served by or [are] benefitted by" the Borough System. R. 49a. The University always has the choice to compare the costs of non-use of the Borough System to the costs of paying the Stream Protection Fee. No party disputes that the University discharges stormwater to the Borough System or that the Borough only charges the Stream Protection Fee to those University Properties that are "Developed." By making the choice to maintain Developed parcels and continue connecting to the Borough System, the University has voluntarily subjected itself to the Stream Protection Fee and offers no genuine issue of material fact to dispute this conclusion.

In fact, the University could, at any time, have lodged an appeal pursuant to the Appeal Manual to obtain a credit against the Stream Protection Fee. R. 1915a-1981a. As discussed above, though, the University never availed itself of this Appeal

Process. By establishing the existence of an Appeal Process which the University failed to use, the Borough established the absence of any genuine issues of material fact regarding the voluntary nature of the Stream Protection Fee. The Commonwealth Court erred in denying the Borough's Application for Summary Relief.

c. The Borough established the absence of any genuine issue of material fact regarding proportionality.

The Borough established the absence of disputed facts regarding the Stream Protection Fee's proportionality both as to the Borough's cost to administer its Stormwater Program (including the Borough System) and as to the University's benefit from that system. As a threshold matter, the purposes for which the Stream Protection Fee may be used include, *inter alia*, "[i]mplementation and management of a program to manage stormwater within the Borough[,]" and "[c]onstructing, operating, and maintaining the" Borough System. R. 58a. The Stream Protection Fee is charged by the Borough to cover costs associated with the Borough System. R. 58a. The Borough established that these costs are considerable, with approximate annual expenditures between $1,000,000 and $2,500,000 and annual revenue just in 2021 from the Stream Protection Fee of approximately $1,347,704.66. R. 1988a. That the Stream Protection Fee reimburses the Borough for, *inter alia*, the expense of the supervision and regulation of stormwater flowing into and through the Borough System, together with the related maintenance and repair costs for that

system, is clear evidence of proportionality between the Borough's costs of maintaining the system and the fee charged to the owners of Developed properties.

Additionally, the Borough produced evidence that the Stream Protection Fee is a bargain compared to the costs the University would otherwise incur if it elected to manage all of its stormwater without the benefit of the Borough System. NTM concluded that, without the benefit afforded by the Borough System, the University would incur initial capital costs of more than $4,200,000.00, and projected ongoing, annual operating costs of $45,600.00, to replicate the service which the Borough provides. R. 1796a. NTM annualized those capital costs, together with the annual maintenance costs, to conclude a total annual cost for such a replacement system at $178,500.00. R. 1796a. The annual amount of the Stream Protection Fee which the Borough charges the Respondents is $132,088.68, representing substantial savings to the University. R. 1743a-1744a. Given the value of the service provided to the University by the Borough System, the amount of the fee and the benefit provided to the University are proportional, and the University failed to produce any evidence to the contrary. Accordingly, the Commonwealth Court erred in denying the Borough's Application for Summary Relief.

CONCLUSION

The Borough respectfully requests that this Court enter an Order **REVERSING** the Commonwealth Court Order and remanding this matter to the Commonwealth Court for further proceedings or, in the alternative, granting summary judgment to the Borough.

Dated: July 13, 2023

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

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

Dated: July 13, 2023

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CERTIFICATION OF WORD COUNT

Based on the word count of the word processing system used to prepare this Brief, we hereby certify that the filing contains less than 14,000 words, exclusive of supplementary matter as defined in Pa.R.A.P. 2135.

Dated: July 13, 2023

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ATTACHMENT 1
TO APPELLANT'S BRIEF:
Commonwealth Court Opinion

Neutral
As of: July 13, 2023 12:15 PM Z

Borough of W. Chester v. Pa. State Sys. of Higher Educ.

Commonwealth Court of Pennsylvania

September 14, 2022, Argued; January 4, 2023, Decided; January 4, 2023, Filed

No. 260 M.D. 2018

Reporter
291 A.3d 455 *; 2023 Pa. Commw. LEXIS 21 **; 2023 WL 2486168

The Borough of West Chester, Petitioner v. Pennsylvania State System of Higher Education and West Chester University of Pennsylvania of the State System of Higher Education, Respondents

Subsequent History: [**1] Publication Ordered March 14, 2023.

Prior History: *Borough of W. Chester v. Pa. State Sys. of Higher Educ., 2023 Pa. Commw. Unpub. LEXIS 7 (Pa. Commw. Ct., Jan. 4, 2023)*

Core Terms

Stormwater, benefits, constitutes, Campus, immune, projects, properties, developed property, impervious, funded, property owner, municipal, runoff, general benefit, proportional, Pollution, streets, surface, flood, taxation, charges, manage, flows, sewer, taxes, special assessment, calculated, construct

Case Summary

Overview
HOLDINGS: [1]-Owners of both developed and undeveloped properties in the Borough received the same general benefits from projects funded by the Stormwater Charge; [2]-The Stormwater Charge provided benefits that were enjoyed by the general public, such as decreased flooding, erosion and pollution, as opposed to individualized services provided to particular customers; [3]-The Stormwater Charge was based not on the benefits derived by the payor, but by the anticipated burden that its property imposed on the Stormwater System; [4]-The Stormwater Charge subsidized a series of evolving tasks and projects and yielded a common benefit shared by residents of the Borough generally; [5]-Respondents were immune from taxation because they were property owned by the Commonwealth and its agencies.

Outcome
Motion granted.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Entitlement as Matter of Law, Appropriateness**

In ruling on an application for summary relief, the court must view the evidence of record in the light most favorable to the nonmoving party and enter judgment only if there are no genuine issues as to any material facts and the right to judgment is clear as a matter of law, *Pa.R.A.P. 1532(b)*. A fact is considered material if its resolution could affect the outcome of the case under the governing law. Where the parties have filed cross-motions for summary relief, the Court must determine whether it is clear from the undisputed facts that one of the parties has established a clear right to the relief requested.

Governments > Local Governments > Finance

HN2[] **Local Governments, Finance**

The Commonwealth Court has explained the distinction between a tax and a fee for service as follows: The classic tax is imposed by a legislature upon many, or all citizens. It raises

money, is contributed to a general fund, and is spent for the benefit of the entire community. A tax is an enforced contribution to provide for the support of government. Where a charge is imposed by a state or municipality not in its capacity as a sovereign but rather under a voluntary, contractual relationship, it has been held not to be a tax. A fee is paid to a public agency for bestowing a benefit which is not shared by the general members of the community and is paid by choice. Taxation is a legislative function, and a legislature may act arbitrarily and disregard benefits bestowed by a government on a taxpayer and go solely on ability to pay. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. In addition, a charge is a tax rather than a fee for service if it is not reasonably proportional to the value or benefit received in return for its payment.

Energy & Utilities Law > Pipelines & Transportation > Easements & Rights of Way

Transportation Law > Bridges & Roads > Grading

Governments > Public Improvements > Assessments

Governments > Public Improvements > Sanitation & Water

Governments > Local Governments > Property

HN3[] **Pipelines & Transportation, Easements & Rights of Way**

Taxes proper, or general taxes proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement. For instance, special assessments have been levied in connection with the grading, curbing and paving of streets, the building of sewers and culverts and the laying of water-pipes; where the question has arisen, it has also generally been held that the construction of the poles, wires, conduits, lamps and other fixtures of an electric street-lighting system constitutes a local improvement for the cost of the erection of which special assessments may be levied under proper statutory authorization.

Governments > Legislation > Interpretation

Governments > Local Governments > Property

HN4[] **Legislation, Interpretation**

It is well settled that property owned by the Commonwealth and its agencies is beyond the taxing power of a political subdivision. Thus, absent an explicit statutory grant of authority, property owned by the Commonwealth is immune from taxation. Pennsylvania courts strictly construe statutes purporting to permit taxation of Commonwealth property, and such a grant may not be found by implication. Property owned by the Commonwealth and its agencies and instrumentalities is presumed to be immune, with the burden on the local taxing body to demonstrate taxability. Tax immunity extends to every arm, agency, subdivision, or municipality of the Commonwealth.

Judges: BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge, HONORABLE PATRICIA A. McCULLOUGH, Judge, HONORABLE ANNE E. COVEY, Judge, HONORABLE MICHAEL H. WOJCIK, Judge, HONORABLE CHRISTINE FIZZANO CANNON, Judge, HONORABLE ELLEN CEISLER, Judge, HONORABLE STACY WALLACE, Judge. OPINION BY JUDGE FIZZANO CANNON. Judge Dumas did not participate in the decision of this case.

Opinion by: CHRISTINE FIZZANO CANNON

Opinion

[*457] OPINION BY JUDGE FIZZANO CANNON

The Borough of West Chester (Borough) filed with this Court, in our original jurisdiction, a petition for declaratory judgment against the Pennsylvania State System of Higher Education (PASSHE)[1] and West Chester University of Pennsylvania of

[1] Pursuant to *Section 2002-A.(a) of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §§ 1-101 - 27-2702*, PASSHE is a body corporate and politic constituting a public corporation and an instrumentality of the Commonwealth of Pennsylvania. *24 P.S. § 20-2002-A.(a)*; Decl. J. Pet. at 2, ¶ 6.

PASSHE (University) (jointly, Respondents) seeking to establish that the Borough's charge related to stormwater management (Stormwater Charge) is not a tax from which Respondents are immune, but a fee for service which Respondents are obligated to pay. Decl. J. Pet. at 21-22, ¶¶ 103-10. Currently before this Court are cross-motions for summary relief.[2] For the reasons that follow, we grant judgment in favor of Respondents, as the Stormwater Charge constitutes a local tax which Respondents are immune **[**2]** from paying as a matter of law.

I. Background

The Borough owns and operates a small municipal separate storm sewer system (MS4). *Id.* at 7, ¶¶ 31-32.[3] In or about 2016, the Borough Council enacted various provisions of the West Chester Code (Code) providing for the Stormwater Charge.[4] Decl. J. Pet. at 4, ¶ 15. The Borough adopted this charge, as set forth in Section 94A-6(A.) of the Code, W. CHESTER CODE § 94A-6(A.) (2022), as the mechanism by which it would raise revenue to further construct, operate and maintain its stormwater management facilities. *Id.* at 15-16, ¶¶ 72-73; *see also* Section 94A-5 of the Code (defining "Stream Protection Fee"). The Code provides, in relevant part:

> For the use of, benefit by and the services rendered by the stormwater management system, including its operation, maintenance, repair, replacement and improvement of said system and all other expenses, a stream protection fee [*i.e.*, the Stormwater Charge] as described, **[*458]** defined, and calculated herein is hereby imposed upon each and every developed property[5] within the Borough that is connected with, uses, is serviced by or is benefitted by the Borough's [S]tormwater [] [S]ystem, either directly or indirectly, and upon the owners of such developed property as set forth herein. **[**3]**

Section 94A-6(A.) of the Code, W. CHESTER CODE § 94A-6(A.) (2022). The Code further provides:

> A. All sums collected from the payment of stream protection fees shall be deposited into the West Chester Borough Stormwater Management Fund.
>
> B. The Stormwater Management Fund shall be used by the Borough for:
>
> (1) Implementation and management of a program to manage stormwater within the Borough.
>
> (2) Constructing, operating, and maintaining the Borough's Stormwater [] System.
>
> (3) Debt service for financing stormwater capital projects.
>
> (4) Payment for other project costs and performance of other functions or duties authorized by law in conjunction with the maintenance, operation, repair, construction, design, planning and management of stormwater facilities, programs and operations.

Section 94A-9(A.), (B.) of the Code, W. CHESTER CODE § 94A-9(A.), (B.) (2022).

In September 2016, the Borough Council adopted Resolution

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[2] The Borough is a home rule municipality organized and existing under and pursuant to the laws of the Commonwealth of Pennsylvania including, without limitation, the *Pennsylvania Home Rule Charter and Optional Plans Law, 53 Pa.C.S. §§ 2901-3171*. Decl. J. Pet. at 2, ¶ 2.

[3] Federal regulations provide the following relevant definitions:

> (16) ***Small municipal separate storm sewer system*** means all separate storm sewers that are:
>
> (i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, **[**4]** or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under *section 208 of the CWA* that discharges to waters of the United States.
>
> (ii) Not defined as "large" or "medium" municipal separate storm sewer systems. . . . .
>
> . . . .
>
> (17) ***Small MS4*** means a small municipal separate storm sewer system.

40 C.F.R. § 122.26(b)(16), (17).

[4] These provisions are contained in Chapter 94A of the Borough's Code, titled "Stream Protection Fee," and are referred to in the Borough's pleadings as the Stream Protection Ordinance. A digital copy of the Borough's Code is available at https://ecode360.com/31470563 (last visited Dec. 23, 2022).

[5] The Code defines the term "developed" as describing "[p]roperty where manmade changes have been made which add impervious surfaces to the property, which changes may include, but are not limited to, buildings or other structures . . . , mining, dredging, filling, grading, paving, excavation or drilling operations, or the storage of equipment or materials." Section 94A-5 of the Borough's Code, W. CHESTER CODE § 94A-5 (2022).

No. 11-2016 imposing the Stormwater Charge upon the owners of all developed properties within the jurisdictional limits of the Borough that are benefitted by the Borough's stormwater management system[6] (Stormwater System) and the public health, safety and welfare enhancements that are afforded by the Borough's Stormwater System. Decl. J. Pet. at 4, ¶ 17. The amount of the Stormwater Charge for which the owner of a developed property is responsible is dependent upon the amount of impervious surface on the property. *Id.* at 17, ¶ 78. All revenue generated by the Stormwater Charge is deposited into the Borough's Stormwater Management Fund. *Id.* The Borough uses revenue generated by the Stormwater Charge only for the purposes set forth in the Code, which include funding pollution remediation measures **[**5]** and complying with state and federal regulatory requirements. *Id.* at 19.

A portion of the University's campus, known as North Campus, lies in the south-central portion of the Borough. Decl. J. Pet. at 3, ¶ 11. PASSHE, in the name of the Commonwealth of Pennsylvania, is the title owner in fee simple of the properties **[*459]** which form a part of the North Campus, and the University is title owner in fee simple of another portion of that property. *Id.* at 3-4, ¶ 13. The Borough asserts that all of the Commonwealth titled and University titled properties, including North Campus, are "developed" for purposes of the Code and that these properties are connected with, use, and are served or benefitted **[**6]** by the Borough's Stormwater System. Decl. J. Pet. at 17, ¶¶ 76-77.

The Borough avers that the impervious area of the portion of the North Campus that lies in the Borough covers 32 acres, constituting nearly 8% of the total impervious area within the Borough. *Id.* at 11-12, ¶¶ 51-52. The Borough further avers that stormwater which flows from the impervious areas of the North Campus situated in the Borough either enters and flows through its Stormwater System or flows directly into a nearby watercourse. *Id.* at 12, ¶ 53. The Borough contends "there is a direct relationship between the amount of impervious surface within a given watershed and the health and quality of the watercourse (and its tributaries) within that watershed, as well as public health, safety, and welfare concerns related to flooding and other stormwater-related issues." *Id.* at 11, ¶ 50.

The Borough sent Respondents Stormwater Charge invoices in 2017, 2018, and 2019, all of which Respondents refused to pay. Decl. J. Pet. at 19-21, ¶¶ 92-102; Respondents' Motion for Summary Judgment (Respondents' MSJ) at 16, ¶¶ 47-48. The Borough does not dispute that both PASSHE and the University are immune from local taxation; however, **[**7]** the Borough argues that the Stormwater Charge constitutes a fee for service rather than a tax, such that Respondents are obligated to pay it. Decl. J. Pet. at 22, ¶¶ 106-07.[7]

Respondents filed preliminary objections demurring to the Borough's declaratory judgment petition on the basis that the Stormwater Charge is not a fee for service, but rather a tax from which they are immune as Commonwealth entities. Preliminary Objection to the Borough's Declaratory Judgment [Petition] (Preliminary Objection) at 4-5, ¶¶ 15-25. Respondents also asserted that even if the Stormwater Charge is considered an assessment rather than a general tax because it is limited to stormwater infrastructure projects, it is still a form of tax subject to the Commonwealth's tax immunity. *Id.* at 6, ¶ 24. Respondents additionally contended that the Stormwater Charge is not reasonably proportional to the value of any product or service provided to the Commonwealth in a quasi-private capacity, such as the provision of natural gas or garbage collection. *Id.* at 6-7, ¶ 26 (citing *Supervisors of Manheim Tp. v. Workman, 350 Pa. 168, 38 A.2d 273, 276, 36 Mun. L Rep. 10 (Pa. 1944)*).

On July 15, 2019, this Court issued a memorandum opinion overruling Respondents' preliminary objections. *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 11-12. We reasoned that

> questions remain[ed], **[**8]** *inter alia*, as to: whether the Borough's Stormwater System provide[d] a discrete benefit to Respondents, as opposed to generally aiding the environment and the public at large; whether the value of the Stormwater System to Respondents [was] reasonably proportional to the amount of the Stormwater

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[6] The Code defines the Borough's stormwater management system (Stormwater System) as

> [t]he system of collection and conveyance, including underground pipes, conduits, mains, inlets, culverts, catch basins, gutters, ditches, manholes, outfalls, dams, flood control structures, natural areas, structural and non-structural stormwater best management practices, channels, detention ponds, public streets, curbs, drains and all devices, appliances, appurtenances and facilities appurtenant thereto used for collecting, conducting, pumping, conveying, detaining, discharging and/or treating stormwater.

Section 94A-5 of the Borough's Code, W. CHESTER CODE § 94A-5 (2022).

[7] The Borough stated in its declaratory judgment petition that, "[a]s a threshold matter, [it] does not dispute the legal accuracy of PASSHE's counsel's statement that PASSHE and [the University] are immune to local taxation . . . ." Decl. J. Pet. at 22, ¶ 106 (internal quotation marks omitted).

> Charge; and, apart from **[*460]** general operation, maintenance and repair of the Borough's Stormwater System, how exactly [] the Borough utilize[d] the funds generated by the Stormwater Charge.

Id., slip op. at 11. We posited that "[f]urther factual development and the resolution of pending questions may enable the Borough to establish that the Stormwater Charge constitutes a fee for service that is reasonably proportional to the value of the benefit conferred to Respondents in a quasi-private capacity." *Id.*

Respondents countered that the Borough's Stormwater System confers a general environmental benefit on all property owners and citizens within and around the Borough. Respondents' Answer at 3, ¶ 19. Thus, Respondents maintained the Stormwater Charge constitutes a tax which they are immune from paying. *Id.* at 17 & 22, ¶¶ 1 & 32-33. Respondents averred that the University maintains its own separate **[**9]** MS4 permit and stormwater system to collect and manage stormwater runoff and, consequently, does not rely upon the Borough's MS4 for these purposes; rather, Respondents insisted that measures implemented on the University's campus pursuant to its own MS4 and at its own expense in fact decrease the amount of stormwater runoff managed by the Borough's Stormwater System. Respondents' Answer at 9, ¶ 53; Respondents' New Matter at 21, ¶¶ 27-28. Respondents also averred that the University has borne the cost of implementing numerous measures for the prevention of stormwater runoff, such as adding trees, green roofs, rainwater gardens, and pervious paver surfaces to various portions of campus; Respondents maintained that the University's MS4 permit likewise generally benefits residents both on campus and in the Borough. Respondents' New Matter at 21-22, ¶¶ 28-31.

Further, Respondents contended that the Borough developed the Pollution Reduction Plan, which is funded by the Stormwater Charge, specifically to address sediment in Brandywine Creek, Blackhorse Run, Plum Run,[8] and Taylor Run; to install infiltration facilities—including rain gardens,[9] vegetated curb extensions, bioswales,[10] infiltration **[**10]** trenches, and brick pavers—at Veterans Park, Marshall Square Park, and Brandywine Street; to conduct streambank restoration in the Blackhorse Run, Plum Run, and Taylor Run watersheds; to fund street sweeping and tree planting throughout the Borough; to address phosphorus buildup in Goose Creek; to install infiltration facilities-including rain gardens, vegetated curb extensions, bioswales, and infiltration trenches at John Green Memorial Park, Fugett Park, and Greenview Alley; to fund street sweeping and tree planting throughout the Borough; to install Jellyfish Filters at two discharge points on East Nields Street; and to manually clean inlet boxes **[*461]** throughout the Borough. *Id* at 17-20, ¶¶ 2-22 (citing MS4 Pollution Reduction Plan at 8 & 16-17; MS4 Total Maximum Daily Load (TMDL) Plan at 12, 19 & 20-21).[11] Respondents contended that none of the aforementioned projects will benefit University campus property. *Id.*

The Borough filed an answer denying Respondents' "characterizations" of the Borough's MS4 Pollution Reduction Plan and TMDL Plan. Answer to New Matter at 3-5, ¶¶ 9-13 & 16-19. The Borough admitted only that the streambank restoration projects referenced by Respondents will **[**11]** be located outside University property. *Id.* at 5, ¶ 19. The Borough admitted that the University manages its own MS4, but asserted that the University also benefits from the Borough's MS4. *Id.* at 7, ¶ 27.

II. Issues

Respondents contend that they are entitled to judgment as a matter of law because the Stormwater Charge constitutes a tax from which they are immune, rather than a fee for service. Respondents' MSJ at 16, ¶¶ 50-51. Respondents maintain that the Stormwater Charge constitutes a tax because the projects it funds are designed to return a "general benefit" and promote "the welfare of all." *Id.* at 16, ¶ 52 (quoting *In re Broad Street in Sewickley Borough, 165 Pa. 475, 30 A. 1007 (Pa. 1895)*). According to Respondents, the Borough's contention that the University derives a discrete benefit in return for payment of the Stormwater Charge is undermined by the stated finding of the Borough's Council that maintaining a stormwater system is fundamental to the "public health, safety, and general

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[8] Plum Run is a small waterway which flows to the west and southwest of North Campus. Respondents' MSJ at 7, ¶¶ 15-16 (citing Deposition of Michael A. Perrone (Perrone Dep.) at 31). Plum Run also flows beneath north Campus in an underground pipe owned by the Borough, where it is fed via both University-and Borough-owned inlets and pipes. *Id.* at 7, ¶¶ 16 & 18 (citing Perrone Dep. at 31-33 & 12-24; Deposition of Gary Bixby (Bixby Dep.) at 98-99 & 107-08). Bixby testified that he served as associate vice president of facilities for the University. *See* Bixby Dep. at 15.

[9] A rain garden is a collection of trees, bushes, and plants that can survive in a dry season but also absorb large amounts of water quickly in a storm. Respondents' MSJ at 13 n.11.

[10] Bioswales are storm water runoff conveyance systems that provide an alternative to storm sewers.

[11] A copy of the Borough's MS4 Pollution Reduction Plan is attached to Respondents' Answer with New Matter at Exhibit H, and a copy of the Borough's MS4 TMDL Plan is attached as Exhibit I.

welfare" of Borough residents. Respondents' Br. in Support of MSJ at 13 (quoting Section 94A-2(D.) of the Code, W. CHESTER CODE § 94A-2(D.) (2022)). Moreover, Respondents maintain that even if this Court were to deem the Stormwater Charge a special assessment on the basis that it funds certain infrastructure projects, such assessments **[**12]** nevertheless constitute a form of tax under Pennsylvania law. *Id.* at 16-17, ¶ 53 (citing *Southwest Delaware County Municipal Authority v. Aston, 413 Pa. 526, 198 A.2d 867, 870 (Pa. 1964)*).

Respondents also insist that even if deemed a fee, rather than a tax, the Stormwater Charge is not reasonable, as it is not proportional to the cost of maintaining the Stormwater System. Respondents' MSJ at 17, ¶ 55. Respondents further maintain that the purpose of municipal stormwater projects is to benefit not only adjacent properties, but the community as a whole. Respondents' Br. in Support of MSJ at 24-25 (citing *Supervisors of Manheim Twp., 38 A.2d at 276* (explaining that "the maintenance of the streets of a municipality are for the benefit of the entire community and not merely of the abutting property owners")). Respondents theorize that all property owners receive the same general benefits from the projects funded by the Stormwater Charge, such as decreased flooding, minimized erosion to public waterways, and cleaner water. *Id.* at 27 (citing Deposition of Michael A. Perrone (Perrone Dep.) at 67-70).[12] Respondents also note that prior to the enactment of the Stream Protection Ordinance, the Stormwater **[*462]** System was funded by the Borough's general fund. *See id.* at 41 (citing Perrone Dep. at 45-46). Thus, Respondents request that this **[**13]** Court conclude the Stormwater Charge is a tax. Respondents' MSJ at 18.

The Borough admits that the University has its own MS4. Borough's Answer in Opp. to Respondents' MSJ at 10, ¶ 27. However, the Borough contends that the Stormwater System simultaneously accords both specific and general benefits, maintaining that such benefits are not mutually exclusive. *Id.* at 17-18, ¶ 54. The Borough maintains that the Stormwater Charge constitutes a fee, because amounts imposed may be reduced through the appeals process, revenue is deposited only in the Stormwater Management Fund, and it is imposed only on owners of developed land. *Id.* at 13.

The Borough also asserts that if required to provide for disposal of their own stormwater, Respondents would incur initial capital costs in excess of $4,200,000, and that annualizing these costs along with annual maintenance costs yields a total annual cost of $178,500, whereas Respondents' actual annual Stormwater Charge bill is roughly $132,000. Borough's Br. in Support of ASR at 33 (citing *id.*, Exhibit C, NTM Engineering, Inc. Report (NTM Report) at 11). Thus, the Borough contends that its Stormwater Charge is reasonably proportional to the level **[**14]** of benefit afforded Respondents from connection to the Borough's Stormwater System. *See id.* at 2, 12, 20 & 33 (citing NTM Report).

III. Discussion

HN1[↑] "In ruling on an application for summary relief, the court must view the evidence of record in the light most favorable to the nonmoving party and enter judgment only if there are no genuine issues as to any material facts and the right to judgment is clear as a matter of law." *Buehl v. Horn, 761 A.2d 1247, 1248-49 (Pa. Cmwlth. 2000)*, *aff'd*, *568 Pa. 409, 797 A.2d 897 (Pa. 2002)* (citation omitted); *see also Pa.R.A.P. 1532(b)*. "A fact is considered material if its resolution could affect the outcome of the case under the governing law." *Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth, 621 Pa. 260, 77 A.3d 587, 602 (Pa. 2013)*. "Where the parties have filed cross-motions for summary relief, the Court must determine whether it is clear from the undisputed facts that one of the parties has established a clear right to the relief requested."[13] *Iseley v. Beard, 841 A.2d 168, 169 n.1 (Pa. Cmwlth. 2004)* (citing *Gehnett v. Dep't of Transp., 670 A.2d 217 (Pa. Cmwlth. 1996)*).

The present dispute turns on whether the Borough's Stormwater Charge constitutes a tax or a fee for service. *HN2*[↑] This Court has explained the distinction between a tax and a fee for service as follows:

> The classic tax is "imposed by a legislature upon many, or all citizens[. It] . . . raises money, [is] contributed to a general fund, and [is] spent for the benefit of the entire community." **[**15]** *San Juan Cellular Tel[.] Co. v. Pub[.] Serv[.] Comm['']n of Puerto Rico, 967 F.2d 683*

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[12] Perrone is currently the Borough Manager. *See* Perrone Dep. at 18. From 1986 to 2017, as Director of the Borough's Building, Housing Codes and Enforcement Department, he worked with Borough engineers on land development applications, storm water traffic and other aspects of residential and nonresidential development. *Id.* at 3, 15 & 19-20.

[13] The Borough asserts that Respondents bear the burden of proving that the Stream Protection Ordinance is invalid. *See* Borough's Reply Br. at 7-8 (citing *Johnston v. Twp. of Plumcreek, 859 A.2d 7 (Pa. Cmwlth. 2004)*). However, Respondents do not seek to invalidate the Stream Protection Ordinance. *See* Respondents' MSJ at 18. Thus, we agree with Respondents that the Borough has the burden of proving Respondents' property is not immune from taxation. *See* Respondents' Br. in Opp. to Borough's ASR at 3 (citing *Norwegian Twp., 74 A.3d at 1131*).

(1st Cir. 1992). A tax is an "enforced contribution to provide for the support **[*463]** of government." *United States v. LaFranca, 282 U.S. 568, 51 S. Ct. 278, 75 L. Ed. 551 . . . (1931)*. Where a charge is imposed by a state or municipality not in its capacity as a sovereign but rather under a voluntary, contractual relationship, it has been held not to be a tax. *United States v. City of Columbia, M[o.], 914 F.2d 151, 156 (8th Cir.1990)*. A "fee" is paid to a public agency for bestowing a benefit which is not shared by the general members of the community and is paid by choice. *City of Vanceburg, K[y.] v. Fed[.] Energy Regul[.] Comm[']n, 571 F.2d 630, 644, 187 U.S. App. D.C. 196 (D.C. Cir.1977)* . . . . The Supreme Court distinguished taxes and fees in *National Cable Television Association v. United States, 415 U.S. 336, 340, 94 S. Ct. 1146, 39 L. Ed. 2d 370, . . . (1974)*:

> Taxation is a legislative function, and [a legislature] . . . may act arbitrarily and disregard benefits bestowed by [a g]overnment on a taxpayer and go solely on ability to pay. . . . A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station.

City of Philadelphia v. Pennsylvania PUC, 676 A.2d 1298, 1307-08 (Pa. Cmwlth. 1996).

In addition, a charge is a tax rather than a fee for service if it is not reasonably proportional to the value or benefit received in return for its payment. *See Supervisors of Manheim Twp., 38 A.2d at 276* (holding that municipal charges "based upon contract rather than taxation . . . must be reasonably proportional to the value of the product or service received," and that charges "imposed without due regard **[**16]** to that requirement . . . [are], in legal effect, undoubtedly a tax," such that "the obligation to pay it could be created only by the [locality's] exercise of its general taxing power"); *In re City of Philadelphia, 343 Pa. 47, 21 A.2d 876, 879 (Pa. 1941)* (invalidating as an impermissible tax the city's imposition of a sewer rental charge based on the value of the property connected to the sewer system, reasoning that "[p]rimarily it [was] clear that the charge [was] based not upon extent of uses but the cost of furnishing the facilities"); *In re Petition of City of Philadelphia, 340 Pa. 17, 16 A.2d 32, 35 (Pa. 1940)* (holding that a municipal sewer system charge was "in legal effect, undoubtedly a tax," such that "the obligation to pay it could be created only by the [c]ity's exercise of its general taxing power," where the charge was "imposed without any regard whatever to the extent or value of the use made of the sewer facilities, or whether any use [was] made").

Here, the findings of the Borough Council published in the Code declare that "[a] comprehensive program of stormwater management is fundamental to the public health, safety, and general welfare of the residents of the Borough." Section 94A-2(D.) of the Code, W. CHESTER CODE § 94A-2(D.) (2022). The Borough maintains that the Stormwater Charge constitutes a fee for service as opposed to a tax generally benefitting the public **[**17]** at large, because revenue generated by the charge funds projects providing specific, discrete benefits to owners of developed property. *See* Borough's ASR at 11-12, ¶ 40 & 18-19. However, Perrone testified on behalf of the Borough that owners of both developed and undeveloped properties in the Borough receive the same general benefits from projects funded by the Stormwater Charge. *See* Perrone Dep. at 75-78. Perrone further testified that managing stormwater provides "a general benefit to the [c]ommunity" by, for instance, preventing damage to public infrastructure. *See* Perrone Dep. at 60 & 70. The Borough **[*464]** acknowledges that Respondents' own MS4 "equally benefit[s] property owners and citizens on campus and in the greater community." Borough's ASR at 18, ¶ 73 (quoting Respondents' Answer with New Matter at 4, ¶ 19).

The Borough reasons, however, that the alleged specific and general benefits imparted by the Stormwater System are not mutually exclusive. *See* Borough's Answer in Opp. to Respondents' MSJ at 17-18, ¶ 54. Assuming, *arguendo*, that this is true, the Borough nevertheless fails to point to any evidence that Respondents receive discrete benefits through payment of the Stormwater **[**18]** Charge. As observed by Respondents, the NTM Report does not contain evidence of any distinct benefits accorded Respondents, but rather, merely projects the expenses the University would allegedly bear to manage stormwater runoff in the absence of the Stormwater System. *See* NTM Report at 11.

Notably, the Borough admits "that neither [the] Borough nor Respondents maintains [sic] a precise calculation of the aggregate volume of stormwater runoff which flows from North Campus into the [Stormwater System]," despite "den[ying] that Respondents do not maintain any such calculation." Borough's Answer in Opp. to Respondents' MSJ at 8, ¶ 21 (citing Borough's Br. in Opp. to Respondents' MSJ, Exhibit B). Although the Borough argues there is a "direct relationship" between the amount of impervious surface area and the extent of stormwater related issues for any given watershed, the Borough nevertheless concedes that there is no means of measuring the amount of stormwater runoff that flows from North Campus into the Stormwater System. *See id.*; Decl. J. Pet. at 11, ¶ 50. Thus, no direct measure of Respondents' purported use of the Stormwater System exists.

We also agree with Respondents' assertion **[**19]** that the impervious surface area of a property does not correlate to the level of benefit accorded the owner of that property. *See* Respondents' Br. in Support of MSJ at 27. In *Dekalb County v. United States, 108 Fed. Cl. 681 (Fed. Cl. 2013)*, the United States Court of Federal Claims held that a county ordinance imposing a stormwater charge similarly calculated according to the impervious surface area of developed properties constituted a tax, rather than a fee for service, which the federal government was immune from paying. *See 108 Fed. Cl. at 686 & 710*. The Court explained:

> The purposes of the stormwater ordinance, and of the stormwater system—*i.e.*, flood prevention and the abatement of water pollution—are benefits that are enjoyed by the general public. For that reason, the charge is more properly viewed as a tax than as a fee. *See San Juan Cellular [Tel. Co. v. Pub. Serv. Comm'n, 967 F.2d 683, 685 (1st Cir. 1992)]* (noting that the revenue from a tax "is spent for the benefit of the entire community"). Those benefits are public; they are not individualized services provided to particular customers.
>
> The presence of a stormwater management system, and the imposition of charges to fund that system, create reciprocal benefits and burdens for nearly all owners **[**20]** of developed property within the unincorporated areas of [the c]ounty. While each property owner is burdened by payment of the charge, and enjoys no special benefit by virtue of the connection of its own property to that system, the property owner does derive a benefit from the fact that stormwater runoff from other properties is collected and diverted by the system. That benefit, however, is one that is shared with nearly every other member of the community. In short, flood control is a public **[*465]** benefit, and charges to pay for that benefit are typically viewed as taxes. *See, e.g., United States v. City of Huntington, W.V[a]., 999 F.2d 71, 73 (4th Cir.1993)* (explaining that because flood control and fire prevention are both "core government services," assessments to pay for those services are taxes).[14]
>
> . . . .
>
> The stormwater system is a local infrastructure improvement that provides benefits—*i.e.*, drainage, flood protection, and water pollution abatement—not only to the owners of developed property who pay stormwater utility charges, but also to the owners of undeveloped property, who do not pay the charge, and to other members of the general public who may not own any property in the county at all. The Supreme Court has noted that "[a]ssessments upon property for **[**21]** local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes." *Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707, 4 S. Ct. 663, 28 L. Ed. 569 . . . (1884)*.
>
> . . .
>
> While user fees are generally based on the quantum of services that are provided, the assessments in this case are not necessarily based on the benefits provided to each owner of developed property. First, the stormwater charges in this case are based not on the benefits derived by the payor, but [on] the anticipated burden that its property imposes on the stormwater system. However, the burden imposed on the system by the runoff from the property, and the benefits conferred upon that property by the system are not the same thing. There may be properties, for example, that impose significant burdens on the stormwater system while deriving no substantial benefit from that system (*e.g.*, a property with extensive impervious coverage that is located on the top of a hill). Similarly, there may be properties that have little impact on the stormwater system that receive substantial benefits from that system (*e.g.*, a small home on a large, otherwise undeveloped lot that is located downhill from extensive development). Second, even if the benefits conferred on specific properties **[**22]** and the burdens those properties impose on the system were treated as if they were the same, the amount of the charge does not depend upon the burden actually imposed on the system by a particular property. Regardless of how much rain falls on a property, and how much of that rain actually leaves the property and flows into the system, the charge remains the same. *See Cincinnati v. United States, 39 Fed. Cl. 271, 276 (1997)* . . . .

Dekalb, 108 Fed. Cl. at 701-03.

We find the reasoning of *DeKalb* persuasive. The Stormwater Charge provides "benefits that are enjoyed by the general public," such as decreased flooding, erosion and pollution, as opposed to "individualized services provided to particular customers." *Id. at 701*; *see also City of Philadelphia, 676 A.2d at 1308*. Further, as it is calculated based on a lot's impervious surface area, the Stormwater Charge is "based not on the benefits derived by the payor, but by the anticipated burden that its property imposes on the [S]tormwater

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[14] *United States v. City of Huntington, W.Va., 999 F.2d 71 (4th Cir. 1993)* did not involve a stormwater management charge, but rather a disputed municipal service fee subsidizing infrastructure improvements and flood and fire protection. *See City of Huntington, 999 F.2d at 72*.

[S]ystem." *Dekalb, 108 Fed. Cl. at 703*.

[*466] Moreover, although the Borough identifies an appeals process through which owners of developed properties may apply for credits against Stormwater Charge assessments under certain circumstances, the Borough nevertheless fails to establish that it enters **[**23]** into "voluntary, contractual relationship[s]" with property owners subject to Stormwater Charge assessments or that such property owners pay the charge "by choice." *City of Philadelphia, 676 A.2d at 1307-08*. Thus, the Stormwater Charge is not a fee. *See id.*

The remaining question is whether the Stormwater Charge constitutes a tax or an assessment. *HN3*[↑] Our Supreme Court has explained:

> Taxes proper, or general taxes . . . proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. . . . On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement.

In re Broad Street in Sewickley Borough, 165 Pa. 475, 30 A. 1007, 1008 (Pa. 1895) (quotation marks omitted). For instance,

> [s]pecial assessments have been levied in connection **[**24]** with the grading, curbing and paving of streets, the building of sewers and culverts and the laying of water-pipes; where the question has arisen, it has also generally been held that the construction of the poles, wires, conduits, lamps and other fixtures of an electric street-lighting system constitutes a local improvement for the cost of the erection of which special assessments may be levied under proper statutory authorization.

Supervisors of Manheim Twp., 38 A.2d at 275 (emphasis added); *see also Sw. Delaware Cnty. Mun. Auth. v. Aston Twp., 413 Pa. 526, 198 A.2d 867, 870 (Pa. 1964)* (stating that "[a]n assessment pays for a public, though a local, improvement").

Here, the Stormwater Charge does not constitute a special assessment subsidizing a particular project of limited duration, such as constructing culverts and pipes. *See id.*; *Supervisors of Manheim Twp., 38 A.2d at 275* (stating that "an assessment for special benefits may be imposed only once as to any given improvement"); *see also* Section 94A-2(B.) of the Code (stating that "much of [the Stormwater System] was constructed over 100 years ago"). Rather, the charge subsidizes an ongoing series of evolving tasks and projects. *See* Section 94A-6(A.) of the Code, W. CHESTER CODE § 94A-6(A.) (2022) (imposing the Stormwater Charge for the "operation, maintenance, repair, replacement and improvement" of the Stormwater System); *see also Supervisors of Manheim Twp., 38 A.2d at 275* (explaining that "[r]epairing streets **[**25]** is as much a part of the ordinary duties of the municipality—for the general good—as cleaning, watching and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments."). Further, the Stormwater Charge constitutes a general tax, as opposed to a special assessment, because the work funded thereby does not benefit individual properties, but rather, yields a common benefit shared by residents of the **[*467]** Borough generally. *See In re Broad St. in Sewickley Borough, 30 A. at 1008*.

As noted above, the Borough concedes, as it must, that Respondents are immune from taxation. *HN4*[↑] "It is well settled that property owned by the Commonwealth and its agencies is beyond the taxing power of a political subdivision. Thus, absent an explicit statutory grant of authority, property owned by the Commonwealth is immune from taxation." *Delaware Cnty. Solid Waste Auth. v. Berks Cnty. Bd. of Assessment Appeals, 534 Pa. 81, 626 A.2d 528, 530-31 (Pa. 1993)*; *see also Indiana Univ. of Pa. v. Jefferson Cnty. Bd. of Assessment Appeals, 243 A.3d 745, 749 (Pa. Cmwlth. 2020)* (holding that a "local taxing body may tax real property of the Commonwealth only where it has express statutory authorization to do so"). Pennsylvania courts "strictly construe statutes purporting to permit taxation of Commonwealth property, and such a grant may not be found by implication." *Delaware Cnty. Solid Waste Auth., 626 A.2d at 531*. "Property owned by the Commonwealth and its agencies and instrumentalities **[**26]** is presumed to be immune, with the burden on the local taxing body to demonstrate taxability." *City of Philadelphia v. Cumberland Cnty. Bd. of Assessment Appeals, 622 Pa. 581, 81 A.3d 24, 50 (Pa. 2013)* (citations and footnote omitted). Tax immunity extends to every "arm, agency, subdivision, or municipality of the Commonwealth." *Id.*

Because the Stormwater Charge constitutes a tax, Respondents are immune from payment.[15] Accordingly,

[15] Even if deemed an assessment, rather than a general tax,

because no genuine issue of material fact remains and Respondents are entitled to judgment as a matter of law, we grant judgment in their favor. *See Buehl, 761 A.2d at 1248-49*.[16]

CHRISTINE FIZZANO CANNON [**27] , Judge

Judge Dumas did not participate in the decision of this case.

ORDER

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

CHRISTINE FIZZANO CANNON, Judge

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Respondents would still be immune from the obligation to pay any amount assessed pursuant to the Stormwater Charge, because assessments are a form of tax. *Sw. Delaware Cty. Mun. Auth., 198 A.2d at 870* (stating that "statutes imposing assessments for local improvements are enacted in the exercise of the taxing power of the Legislature"). The Borough does not dispute that Respondents are immune from payment of local taxes. *See supra* note 8.

[16] Respondents also ask this Court to strike or disregard the expert report of the Borough's expert, Dr. Hank Fishkind, because it improperly offers legal opinions. *Id. at 39-40*. This Court has not considered Dr. Fishkind's report in the disposition of this matter.

ATTACHMENT 2
TO APPELLANT'S BRIEF:
Letter dated January 18, 2018

CC: BOR Council, Mayor
R. CAMP.
O.B. LAING

Pennsylvania's
STATE SYSTEM
of Higher Education

GOVERNOR'S OFFICE OF GENERAL COUNSEL
Office of Chief Counsel

RECEIVED
JAN 23 2017
BY:

January 18, 2018

Mr. Michael Perrone
Manager
Borough of West Chester
The Spellman Building
829 Paoli Pike
West Chester, PA 19380-4551

Re: Storm Water Management Fee
West Chester University of Pennsylvania

Dear Mr. Perrone:

I am Chief Counsel for Pennsylvania's State System of Higher Education ("State System"). As I am sure you are aware, West Chester University of Pennsylvania ("University") is one of fourteen (14) component universities of the State System.

I am writing to you to formally advise the Borough that the University will not be paying the storm water management fee invoices that the Borough sent to the University. As previously explained, the University is not legally authorized to pay those invoices because: (1) the Borough does not have the statutory authority to impose a storm water management fee on a Commonwealth entity, such as the University; and (2) even if such statutory authority existed, the Borough's storm water management fee is a tax, from which the University, as a Commonwealth entity, is immune.

Pursuant to the State System of Higher Education's enabling statute, the State System and its constituent universities are designated a "government instrumentality." 24 P.S. §20-2002-A(a). As an instrumentality of the Commonwealth, the University is a Commonwealth entity that is immune to local taxation unless the Pennsylvania General Assembly has expressly granted the political subdivision the authority to tax property owned by the Commonwealth.

In *Lehigh-Northampton Airport Authority v. Lehigh County Board of Assessment Appeals*, 889 A.2d 1168, 1172 (Pa. 2005), the Pennsylvania Supreme Court described the Commonwealth's tax immunity as follows:

> Because the power to tax is vested within the General Assembly, real estate is immune from local taxation unless that body has granted taxing authority to political subdivisions. Even where such local taxing power exists, property owned by the Commonwealth and its agencies remains unaffected by—or immune from—such power absent express statutory

authorization to the contrary. *SEPTA v. Board of Revision of Taxes*, 833 A.2d 710, 713 ("It cannot be presumed that general statutory provisions giving local subdivisions the power to tax local real estate, were meant to include property owned by the Commonwealth..."); *see also Commonwealth v. Dauphin County*, 335 Pa. 177, 180-181, 6 A.2d 870, 872 (1939) (explaining that legislation generally does not affect the sovereign's rights unless it clearly intends to do so, and that, particularly in the context of taxation, any other rule could "upset the orderly processes of government by allowing the sovereign power to be burdened by municipal taxes").

The Borough's storm water management fees are not charges for actual services provided to the University by the Borough. Instead, they are the imposition of a general tax for the improvement and maintenance of the Borough's storm water infrastructure. As a result, these fees are a tax, regardless of what the Borough chooses to call them. The proper characterization of a governmental charge does not depend on what it has been called, but the purposes for which it has been enacted. *See Clement & Muller, Inc. v. Tax Review Board*, 659 A.2d 596 (Pa. Commonwealth Ct., 1995), *aff'd*, 715 A.2d 397 (Pa. 1998) (distinguishing a tax from a regulatory fee); *Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 303 A.2d 247 (Pa. Commonwealth Ct., 1973) (distinguishing a tax from a license fee).

The Commonwealth pays neither for the general operations of local government nor for local infrastructure improvements, even though the Commonwealth may benefit from both. *Pittsburgh v. Sterrett Subdistrict School*, 54 A. 463 (Pa. Supreme Ct., 1903); *see also Southwest Delaware County Municipal Authority v. Aston Township*, 198 A.2d 867 (Pa. Supreme Ct., 1964); *McCandless Township Sanitary Authority v. PennDOT*, 488 A. 2d 367 (Pa. Commonwealth Ct., 1985).

In this case, none of the sources of legal authority for the imposition of storm water management fees stated in the Borough's ordinance contain the express statutory authority required.

Please let me know if there is anything further you need from the University on this matter.

Sincerely,

Andrew C. Lehman
Chief Counsel

ACL:mar

c: Jennifer Whare, Deputy General Counsel
Christopher M. Fiorentino, President
University Legal Counsel