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SUPREME COURT OF PENNSYLVANIA

No. 9 MAP 2023

The Borough of West Chester, Appellant

v.

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

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BRIEF OF *AMICUS CURIAE*
THE TOWNSHIP OF HAMPTON, THE TOWNSHIP OF NORTH FAYETTE and THE CORAOPOLIS WATER & SEWER AUTHORITY

Appeal from Opinion of the Commonwealth Court of Pennsylvania dated January 4, 2023, 260 MD 2018, from a case with original jurisdiction.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, the Township of Hampton ("Hampton"), the Township of North Fayette ("North Fayette") (collectively, the "Townships") and the Coraopolis Water & Sewer Authority ("CWSA"), are municipal corporations, duly organized and existing under the laws of the Commonwealth of Pennsylvania. Hampton Township is a home rule municipality charging a stormwater management fee pursuant to the Stormwater Management Act of 1978 (Act 167) and the Municipalities Planning Code, 53 P.S. §10101. North Fayette Township is a Second Class Township charging a stormwater management fee pursuant to the specific power provided by the Pennsylvania legislature under the Second Class Township Code, 53 P.S. § 65101, et seq. CWSA is a municipal authority charging a stormwater management fee pursuant to the specific power provided by the Pennsylvania legislature under the Municipal Authorities Act, 53 P.S. § 5607, et seq.

This issue is of particular importance to the Townships as they are each MS4 communities required to and as CWSA was created by its creating municipality to work toward the development, implementation and enforcement of comprehensive stormwater management controls and planning pursuant to state and federal laws. The municipalities, similar to the Borough of West Chester, are at the forefront of combatting the negative impact of stormwater runoff, i.e. water pollution within our rivers, lakes, streams, etc., and need to have the ability to have stable sources of

funding to continue working towards these developments to control water pollution within their municipalities.

SUMMARY OF THE ARGUMENT

The main argument is that the stormwater management charges assessed by the Borough of West Chester, and municipalities throughout Pennsylvania, should not be considered a tax. The Commonwealth Court's decision completely hinders and weakens municipalities throughout Pennsylvania to adhere to the stormwater requirements they are forced to meet through federal and state laws. Rather than raising general revenue, the stormwater fees are charged to help municipalities maintain and upgrade their stormwater infrastructure and controls to prevent water pollution within their municipalities. Additionally, a contractual relationship is not required to charge stormwater fees as municipalities and municipal authorities have the authority to charge various other fees for services. For example, sewage fees. Lastly, this brief argues that, if the Commonwealth Court's decision is upheld it should not be applied to Second Class Townships or Municipal Authorities as they both are specifically granted the authority to charge stormwater fees.

ARGUMENT

The Commonwealth Court's Opinion leaves municipalities throughout the Commonwealth vulnerable to challenges of stormwater management fees from those immune from taxation. Despite the limited nature of the Commonwealth's Court Opinion, i.e. limited to the home rule charter of the Borough of West Chester rather than specific to Second Class Townships and Municipal Authorities, the Townships believe it is critical to make the following arguments in support of the Borough of West Chester's appeal. The Townships, as amicus curiae, argue that (1) the stormwater management charges are not impermissible taxes, or taxes in general, as they are a fee for the distinct purpose of providing the service of preventing stormwater pollution within Pennsylvania municipalities; (2) the Commonwealth Court's decision, if upheld, should not be applied to Second Class Townships as the Pennsylvania legislature specifically authorized Second Class Townships to assess reasonable and uniform fees for stormwater management activities and (3) the Commonwealth Court's decision, if upheld, should not be applied to Municipal Authorities as the Pennsylvania legislature specifically authorized Pennsylvania municipalities to create stormwater authorities to help meet the stormwater management requirements mandated by the state and federal government.

I. THE COMMONWEALTH COURT'S DECISION SHOULD NOT BE UPHELD AS A STORMWATER FEE IS NOT A TAX AND IT HINDERS MUNICIPALITIES' RESPONSIBILITIES TO MANAGE STORMWATER POLLUTION AS REQUIRED BY FEDERAL AND STATE REGULATIONS.

The stormwater fee charged by numerous municipalities throughout the Commonwealth is not a tax as it is not a general revenue-producing measure but rather a fee that directly funds compliance with regulatory requirements municipalities face with regard to stormwater management.

Federal and state regulations include requirements for municipalities to implement programs for regulating stormwater runoff. Essentially, municipalities are tasked with being at the forefront of stormwater management and required to find funding to implement the expensive infrastructure required to regulate stormwater runoff. In order to establish, operate, and maintain the stormwater infrastructure in their respective municipalities, as well as all systems upon which the infrastructure depends, sufficient and stable funding is required. Inadequate development and maintenance of stormwater facilities increases stormwater runoff, contributes to erosion and sedimentation, exceeds the capacity of storm sewers and streams, increases the cost of public facilities to carry and control stormwater, undermines flood plan management and flood control efforts in downstream communities, threatens public health and safety, and increases pollution of water resources. To

manage stormwater pollution and meet the requirements placed on them by the federal and state governments, municipalities are forced to establish stormwater fees. Allowing municipalities to implement a stormwater fee, instead of relying on general tax revenue, ensures that all members of the community, especially those that disproportionately burden stormwater systems, who contribute to the generation of stormwater runoff, and who benefit from stormwater management, will contribute to paying for the solution.

A. The Stormwater Management Fees are not for general revenue raising but rather for the distinct purpose of regulating and controlling stormwater runoff within the municipalities.

In this situation, the importance lies in determining whether the stormwater fee is a true fee versus a tax and distinguishing between the two. As explained by the Commonwealth Court, the distinction between a tax and a fee for a service is as follows:

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

Rizzo v. City of Phila., 668 A.2d 236, 237 (Pa. Cmwlth. 1995) (*quoting City of Phila., v. Se. Pa. Transp. Auth.*, 303 A.2d 247, 251 (Pa. Cmwlth. 1973)). Further, "[T]he party challenging a [] fee on the ground that it constitutes an unlawful tax bears the

initial burden of establishing that the fees were not in fact used to reimburse the municipality for . . . providing a service." *Rizzo*, 668 A.2d at 237. The Commonwealth Court, in *In Appeal of Best Homes DDJ, LLC*, 271 A.3d 545 (Pa. Cmwlth. 2021), was faced with a similar question as to whether stormwater fees were an impermissible tax. In that case, the appellants argued that the stormwater charges were a tax because they generate revenue and are a burden placed upon property owners to raise money for public purposes and for projects unrelated to stormwater. In response, the appellee argued that the fees were charged for the distinct purpose of performing projects related to repairing inlets, pipes and infrastructure and stormwater control. The Court held that the stormwater management fee is not a tax because there was no evidence that the fees are revenue-raising taxes rather than valid fees. Similarly, in *Norfolk S. Ry. Co. v. City of Roanoke*, 916 F.3d 315 (4th Cir. 2019), the Fourth Circuit Court of Appeals held that a stormwater charge imposed by the City of Roanoke was a fee, not a tax. In that case, Roanoke implemented a stormwater fee that would fund its stormwater management system. Norfolk South Railway sued Roanoke alleging that the stormwater charge was a discriminatory tax against railways. The Fourth Circuit Court applied a multi-factor analysis to determine whether the charge was a fee or tax. The Court ultimately determined the charge was a fee as the properties charged received a discrete benefit from the stormwater system as the City controlled and

treated polluted stormwater contributed by the developed properties. The Court determined that the primary purpose of the stormwater charge was to serve a regulatory function that would manage stormwater runoff to comply with state and federal requirements, constituting a fee and not a tax.

Here, it is imperative to understand that the stormwater fees levied upon property owners within the municipalities are to provide municipalities with a sustainable way to comply with the stormwater regulations put in place by the state and federal government. Stormwater fees help local municipalities pay for infrastructure projects and services that clean up pollution and reduce the amount of stormwater runoff reaching nearby waterways. The fees collected stay local and are strictly dedicated to funding projects that will allow municipalities to meet their stormwater permit requirements. Unlike a tax, the fees are not for general revenue raising. Similar to the cases set forth above, the stormwater fee here was implemented to fund the Borough's stormwater management plan. If the Commonwealth Court's decision is upheld, it will significantly impair Pennsylvania municipalities' ability to manage stormwater runoff because it pushes the costs of stormwater management onto the taxpayers of the municipalities rather than allowing the municipalities to charge a fee on tax-exempt bodies who are major contributors to stormwater run-off with paved parking lots, service roads, large buildings and sidewalks.

In conclusion, the stormwater fees charged by municipalities for stormwater management are not impermissible taxes as they are to provide for the narrow purpose of maintaining or upgrading stormwater management infrastructure in addition to providing services that clean-up pollution and reduce the amount of stormwater runoff reaching local waterways as mandated by state and federal laws.

B. Contractual Relationships are not required to assess stormwater fees or fees generally as municipalities charge similar fees without contractual relationships with the property owners.

The Commonwealth Court's reasoning that a municipality must contract with a property owner to charge a stormwater fee is flawed as there are various other charges property owners pay that have similar aspects to a stormwater charge, such as sewage. For example, a property owner does not contract with a municipality for connection to a sewer line, they are required to connect if they are within one hundred and fifty feet (150) of the sewer line.

In this matter, the Commonwealth Court determined that a fee is not a tax if it is entered into by the property owned through a voluntary and contractual relationship. They further rely upon case law that states a fee is paid to an agency for bestowing a benefit which is not shared by the whole community and is paid by choice. *Borough of West Chester v. Pennsylvania State System of Higher Education, et al*, 291 A.3d 455 (Pa. Cmwlth. 2023). The Commonwealth Court's reasoning

contradicts the authority provided to municipalities to charge non-voluntary fees. For example, under the authority of the Municipal Authorities Act and Second Class Township Code Section 67502, property owners that have property within one hundred and fifty (150) feet of a public sewer line are required to connect to that sewer line and pay the associated fee required.

> (a) The board of supervisors may by ordinance require adjoining and adjacent property owners to connect with and use the sanitary sewer system, whether constructed by the township or a municipality authority or a joint sanitary sewer board. In the case of a sanitary sewer system constructed by the township pursuant to either section 2501 or 2516, the board of supervisors may impose and charge to property owners who desire to or are required to connect to the township's sewer system a connection fee, a customer facilities fee, a tapping fee and other similar fees, as enumerated and defined by clause (t) of subsection B of section 4 of the act of May 2, 1945 (P.L. 382, No. 164), known as the "Municipality Authorities Act of 1945," as a condition of connection to a township-owned sewer collection, treatment or disposal facility. If any owner of property adjoining or adjacent to or whose principal building is within one hundred and fifty feet from the sanitary sewer fails to connect with and use the sanitary sewer for a period of sixty days after notice to do so has been served by the board of supervisors, either by personal service or by registered mail, the board of supervisors or their agents may enter the property and construct the connection. The board of supervisors shall send an itemized bill of the cost of construction to the owner of the property to which connection has been made, which bill is payable immediately. If the owner fails to pay the bill, the board of supervisors shall file a municipal lien for the cost of the construction within six months of the date of completion of the connection.

53 P.S. § 67502. A tapping/connection fee is a charge reflecting capital cost to property owners who are required to connect to a sewer system. The concept is to recover a portion of a fixed capital investment costs from new customers as they

connect to the sewer. The customer essentially "buys in" to the system before obtaining service. There is no contractual relationship between the municipality and the property owner, rather the property owner is required to do so. If the property owner fails to pay those fees, they will be subject to penalties.

In conclusion, the Commonwealth Court's reasoning that a fee must be contractually bargained for is flawed as property owners pay various fees to their municipalities authorized by Pennsylvania Law.

II. THE COMMONWEALTH COURT'S DECISION SHOULD NOT BE APPLIED TO SECOND CLASS TOWNSHIPS AS THE PENNSYLVANIA LEGISLATURE SPECIFICALLY AUTHORIZES SECOND CLASS TOWNSHIPS TO ASSESS STORMWATER MANAGEMENT FEES.

If the Commonwealth Court's decision is upheld, it should not be applied to Second Class Townships as the Pennsylvania Legislature specifically authorized Second Class Townships to assess stormwater management fees.

On or around July 1, 2016, Governor Tom Wolf signed into law House Bill 1325, known as Act 62, amending Article 27 of the Pennsylvania Second Class Township Code (53 P.S. § 65101, et seq.), to authorize Second Class Townships to assess reasonable and uniform fees for stormwater management activities and facilities, without the need to establish a municipal authority. The Bill also authorized Second Class Townships to enact and enforce ordinances to govern and regulate the

planning, management, implementation, construction and maintenance of stormwater facilities. The fees to be imposed must be reasonable and uniform and must not exceed the amount necessary to meet the minimum requirements of the Federal Water Pollution Control Act (62 Stat. 1155, 33 U.S.C. § 1251 et seq.). Section 67705 of the Second Class Township Code provides as follows:

> (a) For the purposes of funding the construction, maintenance and operation of storm water management facilities, systems and management plans authorized under this article, a township may assess reasonable and uniform fees based in whole or in part on the characteristics of the property benefited by the facilities, systems and management plans. The fees assessed may not exceed the amount necessary to meet the minimum requirements of the Federal Water Pollution Control Act (62 Stat. 1155, 33 U.S.C. § 1251 et seq.), and Federal or State laws governing the implementation of the Federal Water Pollution Control Act, for the construction, maintenance and operation of storm water management facilities, systems and management plans, as specified in 40 CFR 122.26 (relating to storm water discharges (applicable to State NPDES programs, see § 123.25)). In establishing the fees, the township shall consider and provide appropriate exemptions or credits for properties which have installed and are maintaining storm water facilities that meet best management practices and are approved or inspected by the township.
>
> (b) Any fee levied by the township can be assessed in one of the following methods:
>
> (1) *On all properties in the township*.
>
> (2) On all properties benefited by a specific storm water project.
>
> (3) By establishing a storm water management district and assessing the fee on all property owners in the district.
>
> (c) Any fee collected for the purposes of storm water management may only be used for the purposes authorized by this article.
>
> (d) The assessments shall be filed with the township treasurer.

> (e) An ordinance shall specify whether payments are to be made by annual or more frequent installments.

53 P.S. § 67705 (emphasis added). The legislative intent behind this action is reasonably to provide the municipalities with the authority to charge *fees*. The Pennsylvania Legislature would not need to go through this process to provide municipalities this authority if the fee was intended to be considered a tax. Pennsylvania municipalities are given broad taxing authority under the Local Tax Enabling Act, 53 P.S. § 6924.101 et seq., and thus, would not need the legislature's approval for charging a tax for stormwater maintenance.

Even if the stormwater management fee is deemed to be a tax, Second Class Townships are expressly authorized to tax the Commonwealth entities as set forth above. The Commonwealth Court, in its opinion on this matter, provided:

> "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, 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")."

Borough of West Chester v. Pennsylvania State System of Higher Education, 292 A.3d 620 (Pa. Cmwlth. 2023).

Here, the Townships argue that, if it is upheld, the Commonwealth Court's decision should not be applied to Second Class Township as they are specifically authorized to assess stormwater management fees for their efforts to control stormwater under Section 67705 of the Second Class Township Code. As confirmed above, Second Class Townships are authorized to assess a stormwater management fee "on all properties in the township." There is no exemption for tax-exempt entities. In the alternative, if the stormwater management fee is deemed to be a tax, the Second Class Townships are still allowed to tax the Commonwealth entities as they are explicitly authorized to do so under the Second Class Township Code. Additionally, it must be concluded that the legislative intent behind specifically providing this authority to Second Class Townships was that the stormwater fees were not taxes as municipal bodies are already given the authority to tax its residents under the Local Tax Enabling Act, 53 P.S. § 6924.101 et seq.

In conclusion, Second Class Townships are specifically authorized to charge stormwater management fees on all properties within their boundaries. The legislative intent behind providing this power to municipalities was to allow municipalities to charge a fee rather than a tax as there would not need to be any specific legislation to provide taxing power beyond what has already been provided under the Local Tax Enabling Act. Lastly, because Second Class Townships are specifically authorized to assess stormwater management fees on all properties

within their township, if the stormwater fee is deemed a tax, the Township shall still continue to tax the Commonwealth entities as they are explicitly given that power.

III. THE COMMONWEALTH COURT'S DECISION SHOULD NOT BE APPLIED TO MUNICIPAL AUTHORITIES AS THE MUNICIPAL AUTHORITIES ACT SPECIFICALLY AUTHORIZES MUNICIPAL AUTHORITIES TO ASSESS STORMWATER MANAGEMENT FEES

If the Commonwealth Court's decision is upheld, it should not be applied to Municipal Authorities as they are specifically authorized to assess stormwater management fees under the Municipal Authorities Act.

As stated above, state and federal laws create requirements for municipalities in relation to stormwater control and management. In 2013, Pennsylvania passed legislation specifically allowing municipalities to create stormwater authorities for the planning, management and implementation of stormwater controls. Section 5607 of the Municipal Authorities Act enumerates the specific purposes and powers of municipal authorities which includes "stormwater planning, management and implementation." 53 P.S. § 5607(a)(18). In 2014, additional legislation was passed to allow stormwater authorities to adjust rates to recognize the implementation of best management practices, approved and inspected by the authority, to control stormwater on private property. 53 P.S. § 5607(d)(34). The purpose of this portion of the Municipal Authorities Act is to help municipalities respond to escalating costs

of stormwater management as imposed through federal and state regulatory requirements. Additionally, unlike municipalities, municipal authorities lack the authority to tax the public. A municipal authority is limited to revenues generated by their projects through fees and special assessments. Essentially, municipalities have the ability to create municipal authorities to address needed projects and facilities upgrades that can be managed by charging fees to users. User fees allow for a more equitable distribution of the burden of government by shifting costs to actual consumers with payments based on the service provided. A municipal authority is essentially a device to achieve financing.

Because they have been specifically authorized to collect a fee, and are not authorized to tax, the Commonwealth Court's decision should be narrowly construed and should not be applied to municipal authorities in Pennsylvania. Further, based on the fact that municipal authorities do not have the authority to assess taxes, it should be said that it seems the legislative intent behind stormwater fees was for them to be true fees rather than taxes.

CONCLUSION

In conclusion, the Commonwealth Court's decision in this matter should not be upheld as a stormwater fee is not a tax raising revenue for the general funds of municipalities but rather is a fee to help fund the regulatory requirements associated with stormwater management placed upon municipalities by the state and federal governments. Additionally, if the Commonwealth Court's decision is upheld, it should not be applied to Second Class Townships or Municipal Authorities as they are specifically authorized to implement stormwater management fees and the legislative intent would infer that the charges were meant to be a fee as municipalities were already granted the authority to tax under the Local Tax Enabling Act and municipalities authorities are not authorized to tax.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Amicus Brief, excluding the cover page, table of contents, table of citations, proof of service and signature block contains 3,667 words as calculated by the word count function of the word processing system used to prepare this brief, and complies with Pa.R.A.P., Rule 531.

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I, Vincent A. Tucceri, Esquire, do hereby certify that I did serve a true and correct copy of the within Brief of Amicus Curiae by United States First Class Mail, Postage pre-paid, on this 13th day of July, 2023, upon:

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