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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*.**

REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

QUESTIONS PRESENTED 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. REPLY TO MATTERS RAISED IN THE STATE SYSTEM'S BRIEF 5

A. THE STATE SYSTEM MISTAKES THE BURDEN OF PROOF 5

B. THE STATE SYSTEM FAILED TO ESTABLISH THE ABSENCE OF A SPECIFIC BENEFIT FROM THE UNIVERSITY PROPERTIES' CONNECTION AND DISCHARGE OF STORMWATER TO THE BOROUGH SYSTEM 7

II. REPLY TO MATTERS RAISED IN THE *AMICUS CURIAE* BRIEFS 10

A. THE *AMICI CURIAE* BRIEFS IN SUPPORT OF THE STATE SYSTEM RAISE AT LEAST ONE ISSUE WHICH THE PARTIES DID NOT PRESENT BELOW 10

B. *AMICUS CURIAE* INCORRECTLY ASSERT THAT MUNICIPAL STORMWATER COLLECTION AND CONVEYANCE SYSTEMS DO NOT PROVIDE DISCRETE BENEFITS TO THE OWNERS OF PROPERTIES WHICH DISCHARGE STORMWATER TO THOSE SYSTEMS 11

C. *AMICUS CURIAE* INCORRECTLY ASSERT THAT THE STREAM PROTECTION FEE IS AN EXCISE TAX 13

CONCLUSION 16

CERTIFICATION OF COMPLIANCE 17

CERTIFICATION OF WORD COUNT 18

TABLE OF AUTHORITIES

Cases

Banfield v. Cortes,
110 A.3d 155 (Pa. 2015) 10, 11

Blair Candy Co. v. Altoona Area Sch. Dist.,
613 A.2d 159 (Pa Commw. Ct. 1992) 14

Commonwealth v. Cotto,
753 A.2d 217 (Pa. 2000) 10

DeKalb Cnty. v. United States,
108 Fed. Cl. 681 (Fed. Cl. 2013) 11

Kennedy House, Inc. v. Phila. Comm'n on Hum. Rels.,
143 A.3d 476 (Pa. Commw. Ct. 2016) 11

McCaffrey v. Pittsburgh Athletic Assoc.,
293 A.2d 51 (Pa. 1972) 10

Williams v. City of Phila.,
64 A.3d 576 (Commw. Ct. 2017) 13

Wolk v. Sch. Dist. of Lower Merion,
228 A.3d 595 (Pa. Commw. Ct. 2020) 11

Rules

Pa.R.A.P. 531 .... 4, 11

QUESTIONS PRESENTED

I.A. DOES THE STATE SYSTEM MISSTAKE THE BURDEN OF PRROF IN THIS CASE?

Answer Below: No.

Suggested Answer on Appeal: Yes.

I.B. DID THE STATE SYSTEM FAIL TO ESTABLISH THE ABSENCE OF A SPECIFIC BENEFIT WHICH THE UNIVERSITY PROPERTIES ENJOY FROM THEIR CONNECTION TO THE BOROUGH SYSTEM?

Answer Below: No.

Suggested Answer on Appeal: Yes.

II.A. DO *AMICI CURIAE* RAISE AN ISSUE WHICH THE PARTIES DID NOT PRESENT BELOW?

Answer Below: Not Addressed.

Suggested Answer on Appeal: Yes.

II.B. DO *AMICI CURIAE* INCORRECTLY ASSERT THAT THE UNIVERSITY PROPERTIES DO NOT REALIZE A SPECIFIC BENEFIT FROM THEIR CONNECTION TO AND USE OF THE BOROUGH SYSTEM?

Answer Below: Not Addressed.

Suggested Answer on Appeal: Yes.

II.C. IS THE STREAM PROTECTION FEE AN EXCISE TAX IMPOSED ON THE USE OF DEVELOPED PROPERTIES?

Answer Below: Not Addressed.

Suggested Answer on Appeal: No.

SUMMARY OF ARGUMENT

As the Borough established in its First Brief, the Commonwealth Court erred when it granted the State System's Motion for Summary Judgment and denied the Borough's Application and Motion for Summary Relief.[1] The Borough submits this Reply Brief in response to certain arguments which the State System and *Amici* in support of the State System made in their Briefs.

The State System argues that the ultimate burden of proof falls on the Borough. This argument must fail. The State System cannot provide an answer to the burden-related cases which the Borough cited in its First Brief which clearly hold that the party challenging a fee as a tax bears the burden of proof. The fact that the Borough needed to seek judicial review of the State System's refusal to pay the Stream Protection Fee does nothing to invalidate those precedents. The State System also ignores its burden as a movant for summary judgment.

The remainder of the State System's Brief largely rehashes the same claims briefed below, offering few arguments not already comprehensively addressed in the Borough's First Brief. The State System's assertions are most glaring relative to the "specific benefits" element of the fee versus tax analysis. There, the State System claims that the testimony by former Borough Manager Michael Perrone and the

[1] Capitalized terms used in this Reply Brief but not defined have the meanings given in the Borough's First Brief.

NTM Report prove the absence of any specific benefit of the University Properties' connection (and discharge of stormwater to) the Borough System. The State System's claims are belied by the record, as Mr. Perrone's deposition testimony and the NTM Report contain numerous references to specific benefits to the State System. Moreover, the State System's own witnesses confirmed that the University Properties are, in fact, connected to the Borough System.

With respect to the *Amici* Briefs, this Court should disregard them to the extent they discuss new issues which the parties did not raise below. Pa.R.A.P. 531. For the benefit of this Court's review, however, the Borough addresses arguments raised by two *Amici Curiae*, the Lehigh-Northampton Airport Authority ("Lehigh") and the Susquehanna Area Regional Airport Authority ("SARAA").

Lehigh mistakes the facts of this case by asserting that the State System receives no benefit from (what it calls an "involuntary") connection to the Borough System, as well as by suggesting that a property owner need not mitigate runoff in the absence of stormwater charges. Each of these assertions is incorrect. Susquehanna likewise makes claims which warrant correction . . . characterizing the Stream Protection Fee as an excise tax despite the Borough charging this fee for a service, not for use and enjoyment of property.

Based on the foregoing reasons, in addition to the reasons set forth in Borough's First Brief, this Court must reverse the Commonwealth Court's Order.

ARGUMENT

I. REPLY TO MATTERS RAISED IN THE STATE SYSTEM'S BRIEF[2]

A. THE STATE SYSTEM MISTAKES THE BURDEN OF PROOF.

The Borough and the State System dispute which party holds the ultimate burden in this case. The State System insists that this Court's analysis should start and end with the Borough having filed the initial Action for Declaratory Judgment. State System's Br. at 25.

The State System offers no answer to the burden-related cases which the Borough cited in its First Brief and does not tell this Court or the Borough why they should ignore such cases involving similar facts and otherwise applicable law. Instead, the State System asks this Court to disregard those cases only for the vague reason that they were not decided "on *this* record[.]" State System's Br. at 26 n.21.

The State System also fails to acknowledge that then-Judge Brobson ordered that this matter would be treated as a Petition for Review and that it "shall proceed in accordance with Chapter 15 of the Pennsylvania Rules of Appellate Procedure."

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[2] The Borough filed its Brief with this Court on July 13, 2023. The State System was originally required to file its Brief with this Court by not later than August 15, 2023. Following receipt of two (2) extensions to which the Borough graciously consented, the State System's Brief was due on October 16, 2023. On October 13, 2023, the State System filed a request for a third extension which this Court did not rule upon until October 31, 2023. Notwithstanding that this Court did not extend the due date for the State System's Brief on or prior to October 16, 2023, the State System did not file that document until October 20, 2023. On October 31, 2023, this Court accepted the State System's untimely filed Brief. On that same day, the Office of the Prothonotary advised that the this Reply Brief is due on November 14, 2023.

R. 340a. The action under review, of course, was the State System's refusal to pay the Stream Protection Fee based on the State System's averment that the Stream Protection Fee is a tax. R. 64a-65a.

The State System, and not the Borough, is the party which challenged the proper characterization of the Stream Protection Fee. That the Borough needed to seek in the Commonwealth Court's original jurisdiction judicial redress of that challenge and the State System's refusal to pay does not upend the rule that the party challenging a fee as a tax bears the burden of proving that point. Other than continuing to irrelevantly argue *ad infinitum* that the Borough cannot impose a tax upon the State System, the State System does not, and cannot, offer any contrary argument.[3]

Finally, the State System ignores the burden it bore as a movant for summary judgment - the burden of establishing the absence of material fact relative to each element in the fee versus tax analysis.[4] To any extent not addressed here, the

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[3] The State System's argument is irrelevant because this case is NOT about whether the Borough can impose a tax upon the State System . . . it cannot! Rather, this case is about how to characterize the Stream Protection Fee in the first place. Simply calling that charge a tax and, from there, arguing that the Borough cannot impose it places the proverbial rabbit into her now well-worn hat. Moreover, the State System suggests that this case is about determining whether some exception to the proscription on municipal taxation of the Commonwealth applies. That is wrong. This case is not about taxation at all . . . it's about characterization of the Stream Protection Fee as a fee or a tax.

[4] Because the Commonwealth Court incorrectly assigned the burden of proof to the Borough, that court also incorrectly held that the **Borough** was required to prove that the Stream Protection Fee **is not a tax** (as opposed to holding that the **University** was required to prove that the Stream Protection Fee **is a tax**). When the proper burden of proof is applied and this case is

Borough has fully addressed in Section A of its First Brief why the State System bore the burden of proof on both the ultimate issue and as movant for summary judgment.

B. THE STATE SYSTEM FAILED TO ESTABLISH THE ABSENCE OF A SPECIFIC BENEFIT FROM THE UNIVERSITY PROPERTIES' CONNECTION AND DISCHARGE OF STORMWATER TO THE BOROUGH SYSTEM.

The State System leans heavily upon deposition testimony by former Borough Manager Michael Perrone to assert the absence of any genuine issue of material fact relative to the "specific benefits" element of the fee versus tax analysis. State System's Br. at 34-39. The State System also cites a series of cases which essentially restate Pa.R.C.P. 4007.1(e) concerning testimony of corporate designees to argue that Mr. Perrone's testimony binds the Borough. State System's Br. at 36-37. Even assuming that Mr. Perrone's deposition testimony is binding, the State System's obvious cherry-picking creates the false impression that Mr. Perrone testified regarding the absence of **any** specific benefits to the State System. That false impression, though, is plainly inconsistent with other parts of Mr. Perrone's

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viewed through that proper lens, the incorrectness of granting summary relief to the State System is laid bare. Likewise, when this case if viewed under the proper allocation of the burden of proof the Borough's entitlement to summary relief is clear.

testimony. That impression is also belied by testimony from the State System's own witnesses.[5]

At multiple instances in Mr. Perrone's deposition, he expressly testified to specific benefits of the University Properties' connection and discharge to the Borough System. R. 1211a; 1218a; 1285a; 1287a. Not only did Mr. Perrone testify "[t]here is [*sic*] general benefits and **there are specific benefits. I think there is**

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[5] See, e.g., T. Clark Dep. at R. 911a-912a (testifying that stormwater falling onto campus buildings flows into municipal roadways); R. 918a ("[W]e attach to the Borough's conveyance system, then we would attach our building to . . . the Borough's conveyance system."); R. 919a ("[T]he piping that goes . . . through the northwest part of our campus is a Borough underground conveyance system attaching there to Plum Run."); R. 919a-920a (confirming points of connection between the University gutter system and Borough-owned pipes); R. 921-924a (identifying specific points of connection between University buildings and Borough-owned pipes); R. 956a-957a (admitting it would be "foolhardy" to not have overflow devices "which connect to the municipal system" when asked whether campus stormwater facilities eliminate all stormwater from entering the Borough System); R. 959a-960a (confirming that "rainwater which falls on to North Campus ultimately either infiltrates or is discharged to the Borough-owned stormwater collection system" or evaporates); R. 965a-966a (clarifying that the University's statement that it "does not utilize the Borough's MS-4 to manage stormwater runoff" was meant to say that the University does not use the Borough's MS-4 permit—not that the University does not use the Borough System); R. 969a (confirming that "stormwater is ultimately discharged to the municipal system" in cases of "overflow"); R. 981a-982a ("Q. [D]oes the fact that [t]he University can connect into the Borough's municipally-owned stormwater system plan any role? A. That's part of the design of the stormwater management system."); R. 991a-992a (describing flooding events occurring when Borough-owned inlets within the roadway were clogged with leaves).

See also G. Bixby Dep. at R. 671a (testifying that not all surfaces on North Campus have stormwater management and, on this basis, declining to agree that no volume of stormwater leaves North Campus); R. 690a-691a (confirming that stormwater flows from the University to Borough-owned streets); R. 695a (confirming that "storm water that is flowing through the University's collection and conveyance system . . . is discharged to . . . storm water pipes . . . that the Borough owns[.]"); R. 711a-712a (testifying that the University's "ability to discharge the storm water" to the Borough System is "just a necessary evil because if we can't manage it, the water has to go somewhere."); R. 762a-763a (confirming that if the University could not connect to the Borough System, the University would find space on campus to manage stormwater—but admitting no such plans or studies on this issue have been done).

both," he also testified to concrete examples of specific benefit to the University including the fact that "[t]he 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**[.]" R. 1218a & R. 1285a (emphasis added). Many other examples of Mr. Perrone testifying to specific benefit to the University appear throughout his deposition, which the Borough listed and discussed more fully in the Borough's First Brief at Section B(1)(a)(iii). <u>See</u> Borough's Br. at 30-34.

The State System also attempts to minimize the import of the NTM Report. State System's Br. at 39-41. In that regard, the State System claims that the NTM Report "is wholly forward-looking and theoretical," speaking only to "future" benefit to the University, and not any benefit "already accorded by the Borough to the University[.]" State System Br. at 40-41. This is plainly incorrect.

NTM relied upon land use information which the University itself produced in discovery. R. 1787a. NTM also analyzed "10 years of locally available rainfall data" and "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. 1786a-1787a. This 32,500,000 gallon figure is not a "theoretical" and "forward-looking" number which speaks only to the University's future stormwater

flow. Rather, NTM calculated that these are millions of gallons of water which the University already discharges to the Borough System. R. 1786a-1787a.

The State System's case rests only upon the logically unsupportable assertion that it does not realize a specific benefit from the Borough conveying that volume of stormwater away from the University Properties. See Borough's Br. at 35-41. This Court should reject that assertion.

II. REPLY TO MATTERS RAISED IN THE *AMICI CURIAE* BRIEFS[6]

A. THE *AMICI CURIAE* BRIEFS IN SUPPORT OF THE STATE SYSTEM RAISE AT LEAST ONE ISSUE WHICH THE PARTIES DID NOT PRESENT BELOW.

Pennsylvania Rule of Appellate Procedure 531 provides that a "non-party interested in questions involved in any matter pending in an appellate court" may file a brief as *amicus curiae*. Pa.R.A.P. 531. The Official Note to Pa.R.A.P. 531 makes clear that "[a]n *amicus curiae* is not a party and cannot raise issues that have not been preserved by the parties." Pa.R.A.P. 531, Note (quoting Commonwealth v. Cotto, 753 A.2d 217, 224 n.6 (Pa. 2000)). Nor can *amicus curiae* present facts or "evidence never entered into the record," as "consideration of such evidence by [an appellate] Court would be improper . . . ." Banfield v. Cortes, 110 A.3d 155, 172 n.14 (Pa. 2015) (citing McCaffrey v. Pittsburgh Athletic Assoc., 293 A.2d 51, 57

[6] The Borough does not take issue with PACA's (as defined below) and PCBI's (as defined below) argument regarding a service-based test. For the reasons set forth in the Borough's First Brief and here, the Borough is confident that the Stream Protection Fee would satisfy such a test.

(Pa. 1972)). Taken together, "'amicus briefs cannot raise issues not set forth by the parties,' and this Court cannot consider evidence [put forth by an amicus] that was never made part of the official record." Kennedy House, Inc. v. Phila. Comm'n on Hum. Rels., 143 A.3d 476, 486 (Pa. Commw. Ct. 2016) (quoting Banfield, 110 A.3d at 172 n.14). Courts consistently strike *amicus curiae* briefs which raise issues not presented by the parties or that rely upon evidence outside the record. See, e.g., Wolk v. Sch. Dist. of Lower Merion, 228 A.3d 595, 605 (Pa. Commw. Ct. 2020) (striking portions of *amicus curiae* briefs relying on facts outside the certified record and arguments made thereupon).

Here, SARAA raises for the first time the theory that the Stream Protection Fee is an excise tax. SARAA Br. at 6-13. This Court should strike those portions of SARAA's Brief.

B. *AMICUS CURIAE* INCORRECTLY ASSERTS THAT MUNICIPAL STORMWATER COLLECTION AND CONVEYANCE SYSTEMS DO NOT PROVIDE DISCRETE BENEFITS TO THE OWNERS OF PROPERTIES WHICH DISCHARGE STORMWATER TO THOSE SYSTEMS.

Lehigh suggests that the Commonwealth Court properly relied upon the Federal Claims Court's decision in DeKalb Cnty. v. United States, 108 Fed. Cl. 681 (Fed. Cl. 2013). Lehigh cites that court's holding that "[t]here may be properties, for example, that impose significant burdens on the stormwater system while deriving no substantial benefit from that system . . . ." DeKalb, 108 Fed. Cl. at 703. Lehigh

ignores the fact that, simply by relieving individual property owners of the duty to manage stormwater runoff, a municipality which owns and operates a stormwater collection and conveyance system provides a discrete service to those property owners.

In particular, Lehigh writes that "[i]n the absence of stormwater charges, property owners are not generally required to mitigate runoff." Lehigh Br. at 4. Continuing, Lehigh asserts that "[p]rior to the imposition of stormwater charges, homeowners did not worry about stormwater management, until one day when the charges were imposed and they suddenly had to start payment stormwater charges." Lehigh Br. at 4. Each of those claims is wrong.

As the Borough noted in its First Brief, landowners in Pennsylvania cannot simply ignore the discharge of stormwater from their properties. Borough's Br. at 37-38. Indeed, Lehigh's own fellow *Amici Curiae* Pennsylvania Aggregates and Concrete Association ("PACA") and Pennsylvania Chamber of Business and Industry ("PCBI") agree. They wrote

> a municipality may actually provide direct benefits to property owners that directly discharge stormwater runoff to the MS4. Such property owners receive discrete benefits because, in the absence of the MS4, they would face both common law and statutory obligations to adequately control and safely discharge stormwater runoff themselves.

PACA & PCBI Br. at 7.

Lehigh clearly mistakes the facts of this case and incorrectly assumes that the University does not discharge stormwater to the Borough System. There is no dispute, though, that the University does actually utilize the Borough System. See supra n.5.

Lehigh suggests, though, that the State System use of the Borough System is involuntary. That is also incorrect. As the Borough noted in its First Brief, every property owner makes a voluntary choice to either (A) use the Borough System or (B) otherwise manage the stormwater which flows from their parcel.[7] Borough's Br. at 41-46; 59-60. That choice . . . the fact that one can use one's property as much or as little as they'd like without ever sending flow to the Borough System . . . is also one reason why characterization of the Stream Protection Fee as an excise tax is altogether incorrect.

C. *AMICUS CURIAE* INCORRECTLY ASSERT THAT THE STREAM PROTECTION FEE IS AN EXCISE TAX.

SARAA suggests that the Stream Protection Fee is an excise tax. SARAA Br. at 6-13. SARAA cites cases which define an excise tax as taxing the "use or enjoyment" of property or a commodity. See, e.g., Williams v. City of Phila., 164 A.3d 576, 588 n.19 (Pa. Commw. Ct. 2017) ("A tax is an 'excise' or 'transfer' tax if

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[7] This choice, and the exclusion from the definition of "Developed property" which applies to any property which drains outside of the Borough, are just two (2) reasons why the arguments of *Amici Curiae* Consolidated Scrap Resources, Inc. and Dura Bond Pipe LLC must fail. See Borough's Br. at 43-44.

the government is taxing 'a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.'") (citation omitted); Blair Candy Co. v. Altoona Area Sch. Dist., 613 A.2d 159, 161 (Pa. Commw. Ct. 1992) ("An excise tax is defined as a tax on the enjoyment of a privilege or tax on the manufacture, sale or consumption of a commodity.").

In framing the Stream Protection Fee as a tax on the privilege of "the use of real property," SARAA mischaracterizes the very nature of the Stream Protection Fee. SARAA Br. at 10. Importantly, the Borough **does not** charge the Stream Protection Fee for the privilege of the use of real property. Rather, the Stream Protection Fee is a charge for the service of collecting and conveying away stormwater regardless of how a property is used. R. 41a.

As noted, each owner of a Developed property must manage stormwater flow from that property one way or another. The Borough built, and now maintains, the Borough System and that system collects and conveys that stormwater so that individual property owners need not worry about doing so. As noted here and in the Borough's First Brief, there is no dispute that the State System takes advantage of that service without the Borough ever inquiring about the use of the University Properties.

The Stream Protection Fee, therefore, is akin to sewer and trash collection fees – both of which are charged in connection with services provided even though those services would be unnecessary without some activity at the subject properties. Under SARAA's reasoning, both sewer and trash collection fees might qualify as excise taxes. Both, though, are routinely treated as fees for service.

The Stream Protection Fee is no different!

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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: November 14, 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: November 14, 2023

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CERTIFICATION OF WORD COUNT

Based on the word count of the word processing system used to prepare this Reply Brief, we hereby certify that the filing contains less than 7,000 words, exclusive of supplementary matter as defined in Pa.R.A.P. 2135.

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