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9 MAP 2023

IN THE 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.

BRIEF OF *AMICI CURIAE* CONSOLIDATED SCRAP RESOURCES, INC. and DURA BOND PIPE LLC

Appeal from the Commonwealth Court decision dated January 4, 2023 at No. 260 MD 2018

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Dated: October 16, 2023

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I. STATEMENT OF INTEREST

Consolidated Scrap Resources, Inc. ("CSR") owns property and operates a scrap recycling facility in Harrisburg along Paxton Creek. CSR is regulated by the Pennsylvania Department of Environmental Protection ("PADEP") under a National Pollutant Discharge Elimination System ("NPDES") stormwater permit. Yet, Capital Region Water—which owns and operates the local municipal separate storm sewer system ("MS4")—levied stormwater charges against CSR. The initial bills total over $65,000 per year (before a maximum 50% "credit").

Dura Bond Pipe LLC ("Dura-Bond") owns property and operates a steel-pipe manufacturing facility in Steelton along the Susquehanna River. Dura-Bond is regulated by PADEP under an NPDES stormwater permit. Yet, the Borough of Steelton (which owns the local MS4) and Steelton Borough Stormwater Authority (which operates the MS4) levied stormwater charges against Dura-Bond. The initial bills total over $161,000 per year (before a maximum 25% "credit").

Similar to other industrial stormwater permittees across the Commonwealth, and non-municipal stormwater permittees like *amicus* Susquehanna Area Regional Airport Authority ("SARAA"), CSR and Dura-Bond were hit with significant municipal stormwater charges despite

already being directly regulated by PADEP’s stormwater permitting regime; having parcels that do not discharge to MS4 infrastructure; and owning properties that actually enable municipal entities to achieve compliance. Like CSR and Dura-Bond, Appellees in this case (the “University”) must comply with stormwater requirements imposed by PADEP at significant cost.

This brief supports affirming the Commonwealth Court’s decision. Other than CSR, Dura-Bond, and their counsel, no other person or entity paid for or authored this brief in whole or in part.

II. SUMMARY OF ARGUMENT

This Honorable Court will decide the contours of the tax-versus-fee distinction for the first time in the context of stormwater charges, and should affirm the Commonwealth Court for two primary reasons.

First, the distinction is not new, and existing Pennsylvania caselaw should guide this Court to affirm the decision. The Commonwealth Court correctly held that the Borough's stormwater charges ("Charges") are an unlawful "tax"—not a "fee"—because a true "fee" is transactional and requires special services (discrete benefits) in exchange for payment.

Second, evaluation of PADEP's regulatory program should lead this Court to find that the Borough does not provide such services to the University. The University is a regulated entity with a stormwater permit just like the Borough. When viewed in this context and the requirements PADEP imposed upon the Borough for sediment reductions, the Charges are an unlawful tax.

The Borough and its supporting *amici* invite this Court to overlook the transactional nature of a true "fee," relying on PADEP's stormwater regulatory scheme because municipal entities need money to comply. But PADEP's regulatory program is not a reason to depart from existing Pennsylvania caselaw. This Court should continue to hold that a true "fee"

requires special services to the payor, rather than a municipal entity's compliance with its own permits. It is important for this Court to acknowledge that property owners' rights do not yield to municipal entities' expediency in administrating stormwater programs.

III. ARGUMENT

A. The Commonwealth Court Properly Reasoned that a "Fee" Is Transactional and Requires Special Services (Discrete Benefits in Exchange for Payment).

The Commonwealth Court correctly reasoned that a true fee "is incident to a voluntary act" or "voluntary, contractual relationship," such that there is "value or benefit received in return for its payment." *Borough of W. Chester v. Pa. State Sys. of Higher Educ.*, 291 A.3d 455, 463, 466 (Pa. Cmwlth. 2023). The transactional nature of a "fee"—and the ability to challenge purported "fees" as invalid "taxes"—is rooted in constitutional principles. *Am. Aniline Prods., Inc. v. Lock Haven,* 135 A. 726, 727 (Pa. 1927) (in context of purported water fees, explaining that the "relation to the public created by [municipalities'] ordinances are, in such cases, not legislative, but contractual," and to accept fees as legislatively conclusive "would be unconstitutional, because it denies to the party affected due process of law, and, by depriving it of the lawful use of its property, it in

substance and effect deprives it of the property itself, and of the equal protection of the laws") (citation omitted).

A fee's transactional nature is embedded in the test used to distinguish it from a tax: "[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*." *W. Chester*, 291 A.3d at 463 (emphasis added). This is consistent with a long line of Pennsylvania cases, and caselaw in other jurisdictions, regarding both (1) a "fee for service" or "user fee" ("Service Fee"); and (2) a "regulatory" or "license" fee ("License Fee").

1. Service Fees Are Transactional and Require Actual Service to the Property.

It is axiomatic that Service Fees are transactional and require actual service in exchange for payment. In *East Taylor Municipal Authority v. Finnigan*, 195 A.2d 821, 822-23 (Pa. Super. 1963), the Superior Court held that a municipal authority cannot lien a property for the owner's failure to pay water charges because there was no evidence that water services were actually rendered and no water meters were ever installed to measure the level of service (through use of water). *See also Windber Area Auth. v. Bottorff*, 38 Pa. D. & C.3d 323, 324-27 (Pa. C.C.P. 1983) (holding that defendants were charged "without receiving any water," so they were "not liable for a commodity which they have not received"). In such cases, the

courts acknowledged the transactional nature of service and that property owners have a right to discontinue service (*i.e.*, its voluntary nature). *See id.* (quoting *Cent. Iron & Steel Co. v. City of Harrisburg*, 114 A. 258, 260 (Pa. 1921) ("No obligation existed on [plaintiff's] part to continue the use of the water for any period of time, and its right to discontinue the service cannot be challenged.").

These cases illustrate the truism that municipal entities cannot charge Service Fees if no service is actually provided. And it is equally true for License Fees.

2. License Fees Are Transactional and Require Special Services to the Payor.

Like Service Fees, License Fees are transactional. Instead of a commodity, the municipal entity provides "special services" in the form of granting a privilege to the payor that involves regulation, supervision, and enforcement. *See, e.g.*, *Olan Mills, Inc. v. City of Sharon*, 92 A.2d 222, 223 (Pa. 1952). If no special services are provided, the charge is not a License Fee. *Warner Bros. Theatres v. Borough of Pottstown*, 63 A.2d 101, 103 (Pa. Super. 1949) ("The terms of the ordinance do not provide for any special services and none are supplied; the license fee, therefore, cannot be justified on the ground that it will repay the borough for the cost of special services rendered.").

In *Olan Mills*, this Court held that a city's charge imposed upon transient businesses was an invalid tax because the city collected "revenue which is not used or needed in the enforcement of the ordinance." *Olan Mills*, 92 A.2d at 612-14. The ordinance aimed to protect local business by requiring a one-year residency, or the license. The Court held that the license charge was a tax because the ordinance did not actually regulate transient businesses. *Id.* The year after *Olan*, this Court's opinion in *National Biscuit Co. v. City of Philadelphia*, 98 A.2d 182, 188 (Pa. 1953), set forth the "distinguishing features of a license fee," which also illustrates that License Fees must be for the municipal entity's own regulation of the payor. The features are:

> (1) that it is applicable only to a type of business or occupation which is subject to *supervision and regulation by the licensing authority under its police power*;
>
> (2) that such supervision and regulation are in fact *conducted by the licensing authority*;
>
> (3) that the payment of the fee is *a condition upon which the licensee is permitted to transact his business* or pursue his occupation; and
>
> (4) that the legislative purpose in exacting the charge is to *reimburse the licensing authority for the expense of the supervision and regulation conducted by it*.

Id. (emphasis added). Since these cases*,* several themes emerged in caselaw for License Fees.

First, courts decide based on "special services" to the payors, not the burden to municipal entities. *Talley v. Commonwealth*, 553 A.2d 518, 520 (Pa. Cmwlth. 1989). In *Talley*, the borough imposed a charge on automobile shops, but failed to show it either had a "special burden" or provided "special services" to them through administration and enforcement of its ordinance. *Id.* at 520-21. The *Talley* opinion mentioned there was no municipal burden, simply to highlight the lack of services. *Id.* The court focused on "special services" and held that the charge was invalid, distinguishing several cases where License Fees were upheld—because in all of those cases "evidence was presented as to the 'special' services provided or as to the cost incurred by the municipality in providing these 'special' services." *Id.* The requirement for special services (not just a burden) is thus essential. *Id.* at 521; *Bucks Cove Rod & Gun Club, Inc. v. Texas Twp. Zoning Hearing Bd.*, No. 2666 C.D. 2010, 2011 WL 10878954, at *4 (Pa. Cmwlth. 2011) (explaining that charges will be invalid if "the municipality provides no additional services to permittees, even if [the permittee] does not produce evidence on the overall costs of administering and enforcing the ordinance").

Second, Pennsylvania courts have consistently rejected attempts by municipal entities to use License Fees to fund costs unrelated to their regulation or enforcement. *See, e.g.*, *Martin Media v. Hempfield Twp. Zoning Hearing Bd.*, 671 A.2d 1211, 1216 (Pa. Cmwlth. 1996), *app. denied*, 683 A.2d 887 (Pa. 1996) (holding that costs to operate municipal office has "no relation to actual cost" for regulation of payor involving billboard inspections); *Raum v. Bd. of Sup'rs of Tredyffrin Twp.*, 370 A.2d 777, 801 (Pa. Cmwlth. 1976) (holding that fee schedules adopted by municipal entity for land development applications were unlawful because they established "fees bearing no relation to the costs of the Township in reviewing and otherwise processing the plans"); *Cty. of Northumberland v. Twp. of Coal*, 288 A.3d 138, 2022 WL 10766760, at *8-10 (Pa. Cmwlth. 2022), *rearg. denied* (Dec. 16, 2022), *app. granted on other grounds*, 297 A.3d 399 (Pa. 2023) (holding that township's charge was invalid because it did not fund any regulation by the township, and the only evidence suggested funding typical office administration).

Third, revenue collected from the License Fee must be used for the municipal entity's costs incurred for *its own regulation of the payor*—not for general welfare (*i.e.*, "special," not ordinary, services). *See, e.g.*, *Talley*, 553 A.2d at 520; *McKee v. Upper Darby Twp.*, 33 Pa. D. & C.3d 222, 224

(Pa. C.C.P. 1982), *aff'd*, 488 A.2d 1216 (Pa. Cmwlth. 1985) ("The services for which a [License Fee] may be charged must be 'special' or unusual in the sense that it is furnished specially under the ordinance for which the fee is required and *only to the licensee[s]," and not "'otherwise furnished or required'* by the municipality supplying the special services.") (emphasis added); *Dufour v. Maize*, No. 1721, 1946 WL 2056107, at *3 (Pa. C.C.P. 1946) (holding that registration charge was a tax because, while Department of Mines was responsible for registration and collection, Department of Forests and Waters administered the fund that contained the revenue and—instead of using it for inspection or enforcement for the registrant—used it for reclamation of "any land affected by strip mining of bituminous coal, at anytime, anywhere in the State" as "revenue to reclaim or to forest land as a conservation measure"); *Univ. Park Cinemas, Inc. v. Borough of Windber*, 59 Pa. D. & C.2d 726, 743 (Pa. C.C.P. 1972) ("'It is only for supervising one's own business that one must pay in the form of a license.'").

This body of Pennsylvania law is consistent with caselaw in other jurisdictions holding that stormwater charges are unlawful taxes where they are based on general environmental benefits, rather than benefits particularized to the payor. *See, e.g.*, *Bolt v. City of Lansing*, 587 N.W.2d

264, 266, 271 (Mich. 1998) (holding that stormwater charge was an unlawful tax where primary purpose was to fund separation of combined sewer system, which constituted "an investment in infrastructure," in contrast to a true "fee" that "is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed"); *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 227-28, 236 (Mo. 2013) (holding that stormwater charge was an unlawful tax because it was for availability of stormwater system for the entire district, rather than "in exchange for an individual's actual use of those services").

In *County of Jackson v. City of Jackson,* 836 N.W.2d 903, 912-14 (Mich. Ct. App. 2013), the court rejected the city's argument that the stormwater charge was a "fee" simply because it was to protect public health and safety by reducing flooding, land erosion, and sewer overflows. The court held that these general environmental benefits demonstrated the charge was a tax, reasoning:

> We do not doubt that a well-maintained storm water management system provides such benefits. Nevertheless, these concerns addressed by the city's ordinance, like the environmental concerns addressed by Lansing's ordinance in *Bolt,* benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway or across a city bridge, everyone who uses the Grand River for

> recreational purposes downriver from the city, and everyone in the Grand River watershed. This lack of a correspondence between the management charge and a particularized benefit conferred to the parcels supports our conclusion that the management charge is a tax.

Id. In the instant case, the Commonwealth Court properly relied upon the transactional principles in established Pennsylvania caselaw—and similar persuasive authority—to require special services (*i.e.*, discrete, particularized benefits) (hereinafter, "Special Services").

B. When Viewed in Context of PADEP's Requirements, the Stormwater Charges are an Unlawful Tax, and Holding Otherwise Is a Slippery Slope.

Having established that "fees" are transactional and require Special Services, the first question becomes: Does the Borough provide Special Services to the University in exchange for payment? For this question, the purpose of the Charges is critical.[1] And the record is abundantly clear—the answer is no.

The Borough's planned, primary purpose for the Charges is to fund infrastructure projects to demonstrate sediment reductions for its MS4

[1] The Borough may speculate about potential uses in its Ordinance No. 10-2016. But the Ordinance is merely to implement the Charges (not provide services underlying them), and does not speak to actual use of revenue. R. 49a-60a. And mere placement of revenue into a separate fund is not material. *In re Petition of City of Philadelphia*, 16 A.2d 32, 36 (Pa. 1940) (special fund is "of no importance").

permitting changes that PADEP implemented in 2016. *See* Borough Br. at 6; R. 49a, 95a, 577a-584a, 1193a-1194a, 1364a, 1617a-1620a, 1624a-1625a, 1639a, 1645a-1647a. With this purpose evident, the Charges are not for Special Services and constitute an unlawful tax, for several reasons.

First, the Borough is not the regulator, and is not providing sediment reductions to the University. Second, the University is a regulated entity and actually offers the Borough sediment reductions. Third, enabling the Borough to levy Charges for use of stormwater pipes is a pretext for funding sediment reductions and a slippery slope.

1. The Borough Is a Regulated Entity Like the University—Not the Regulator—and Is Not Providing Sediment Reductions to the University.

The Charges cannot be a "fee" because the Borough is acting as an entity regulated by PADEP, not providing Special Services as the regulator. Neither the Borough nor its supporting *amici* have cited any Pennsylvania case that would enable municipal entities to charge a "fee" against the payor to fund the municipal entity's own compliance obligations or another entity's compliance program. And they cannot.

PADEP's stormwater program is instructive. As the regulator of water quality, PADEP issues permits to authorize the discharge of stormwater to surface waters by MS4 permittees, including both the Borough and

University.[2] In 2015, PADEP proposed a draft MS4 permit that included changes in comparison to the prior version, including requiring a Pollutant Reduction Plan ("PRP") to reduce the pollutant loading to "impaired" waters from the MS4 "planning area" (basically, requiring sediment reductions). 45 Pa. Bull. 2581, 2674 (May 30, 2015). PADEP finalized this change in 2016. 46 Pa. Bull. 2847, 2910 (June 4, 2016).

Since then, the Borough and other municipal entities did not appeal the PADEP decision. Instead, they reacted with Stormwater Charges. The Borough had choices. This case is fundamentally about the Borough's choices in how it structured Charges, informed by PADEP's PRP requirement for sediment reductions.

The Borough and its supporting *amici* argue for broad collection and use of the Charges for ostensibly anything related to the PADEP permit or stormwater, and contend it is immaterial that PADEP is the regulator instead of the Borough. *See* Br. of Citizens for Pennsylvania's Future, at 16-17, 21. For this proposition, the only cited Pennsylvania decision that bears mentioning is the Commonwealth Court's opinion in *White v. Commonwealth*, 571 A.2d 9 (Pa. Cmwlth. 1990). In *White*, a doctor

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[2] *See, e.g.*, PADEP, PAG-13 Sample Permit, Doc. No. 3800-PM-BCW0100d, at 2 (May 2016), available at: http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3686.

challenged a surcharge for a professional liability fund as a condition to his medical license. *Id.* at 9-10. The surcharge financed the fund to cover malpractice claims, and failure to pay was subject to license revocation. *Id.* at 10. In *White*, the Commonwealth Court held that the surcharge satisfied the four *National Biscuit* requirements for a fee (*supra* at 7), but *White* is distinguishable for several reasons.

First, the *White* opinion reasoned "that the surcharge is not a tax as its purpose is not to raise revenues for public purposes or to defray the necessary expenses of government." *Id.* at 11. In contrast, here, the Borough's purpose is to do precisely that—defray costs of PADEP's requirements that serve general public purposes for water quality.

Second, in *White*, it was undisputed that the surcharge was a licensing condition and "that the Commonwealth has the authority to police the medical profession and the insurance industry and that it does in fact do so." *Id.* In contrast here, PADEP (not the Borough) is the regulator for sediment reductions and there is no licensing condition in exchange for the Borough's Charges. None of the *National Biscuit* requirements are satisfied.

Third, in response to the doctor's argument that the fund does not supervise or regulate doctors, the *White* court reasoned that the fund does

regulate doctors "to the extent that it demands his participation and contribution in the program designed by the General Assembly to alleviate what was perceived to be a shortage of available medical malpractice coverage." *Id.* at 12. The court agreed with the Commonwealth "that when viewed in the context of the total legislative scheme," the second and fourth requirements in *National Biscuit* were met. *Id.* Thus, with respect to these *National Biscuit* requirements, *White* stands for the proposition that a legislative scheme which directly imposed a surcharge on licensed doctors, by the regulator as a condition to hold that license, inured to the benefit of doctors to cover claims against them. *Id.* That is, the court viewed the Commonwealth as the regulator and licensor, and the regulation was the license together with payment of malpractice claims—both of which were direct benefits to doctors (*i.e.*, Special Services). In contrast, here, the Borough does not grant any license or regulate in terms of sediment reductions or otherwise in exchange for payment. And, unlike *White* where the Commonwealth was the united regulator, it would be both flawed and ironic for the Borough to now claim that the Borough is also the regulator

with PADEP—the very Commonwealth entity that the Borough claims is pushing the so-called “unfunded mandate” against it.[3]

To further distinguish *White*, the legislative structure in that case was mandatory. The Commonwealth required a license and could revoke it for failure to pay for discrete benefits as a license condition. In contrast, the Borough’s Charges are not *required* at the Commonwealth level. PADEP’s program is the reason for the Charges, not a mandate to charge them. There is no requirement to impose Charges as a legislative scheme, either in the federal Clean Water Act or any Pennsylvania statute. *See Oneida Tribe of Indians of Wisconsin v. Vill. of Hobart*, 891 F. Supp. 2d 1058, 1067 (E.D. Wis. 2012), *aff'd*, 732 F.3d 837 (7th Cir. 2013), *cert. denied*, 572 U.S. 1135 (2014) (rejecting argument that Clean Water Act provision applicable only to federal government facilities would enable municipal entity to levy stormwater charges against tribes, and holding that the charge was an unlawful tax because, “like property taxes used to pay for schools, the [charges] confer a benefit on the public generally, as opposed to only those

[3] Municipal actions to comply with the Storm Water Management Act are for planning and reducing flooding from new land development. Act of Oct. 4, 1978, P.L. 864, 32 P.S. §§ 680.1-680.17. They do not make the Borough a regulator for sediment reductions. *See* § 680.13.

who pay"). In sum, *White*'s statement about a mandatory "legislative scheme" should not be taken out of that limited context.

The Borough and its supporting *amici* also rely on similarly broad statements in a federal case which held that stormwater charges were a "fee" in context of Virigina laws. *Norfolk S. Ry. Co. v. City of Roanoke*, 916 F.3d 315, 322 (4th Cir. 2019). The *Norfolk* court acknowledged that the city did not directly regulate the payor for stormwater, and that "the charge primarily defrays the City's costs of complying with regulations imposed upon it." *Id.* at 322. Relying on *Norfolk*, the Borough's supporting *amici* seize upon the word "defraying," and posit that "defraying" the Borough's cost of PADEP compliance indicates that the Charges are more like a true "fee." Br. of Pennsylvania Municipal Authorities Association ("PMAA"), at 18-19. But that is not so, even according to *White*, 571 A.2d at 11. As this Court recognized, a *tax* is commonly used "to defray the necessary expenses of government." *Woodward v. City of Philadelphia*, 3 A.2d 167, 170 (Pa. 1938).

They also seize upon reasoning in *Norfolk* that "the charge's purpose is more consistent with that of a fee than a tax, because the charge forms part of a comprehensive regulatory scheme"; that "a classic regulatory fee is designed to address harmful impacts of otherwise permissible activities";

and that "the charge is part of a regulatory scheme, rooted in the Clean Water Act, whose purpose is to remedy the environmental harms associated with stormwater runoff and to hold stormwater dischargers responsible for footing the bill." *Norfolk*, 916 F.3d at 321-22.

The *Norfolk* reasoning, however, breaks down when applied in context of Pennsylvania's caselaw and PADEP's regulatory program, for several reasons. First, the court's reasoning that License Fees are "designed to address harmful impacts of otherwise permissible activities" is too broad and inconsistent with Pennsylvania caselaw. The design of License Fees is transactional—not just "to address harmful impacts" or focus on some municipal burden, but to provide Special Services in exchange for payment. *See, e.g.*, *Talley*, 553 A.2d at 520; *Bucks Cove*, No. 2666 C.D. 2010, 2011 WL 10878954, at *4. Courts in other jurisdictions, which are consistent with Pennsylvania caselaw (unlike *Norfolk*), have held that Special Services are required for valid stormwater fees. *See, e.g.*, *Bolt*, 587 N.W.2d at 271; *Zweig*, 412 S.W.3d at 236; *Jackson,* 836 N.W.2d at 913-14.

Second, *Norfolk*'s conclusion that the city is "a participant in a comprehensive scheme" was based on specific Virigina laws in that case,[4] and fails to recognize other permittees in the regulatory scheme. It would recognize the Borough is a participant, but ignore the same is true for the University under the very same MS4 program as the Borough. The University is a non-municipal MS4 permittee and must comply with its own NPDES permit. R. 383a-407a, 577a-584a, 1396a-1400a, 1615a-1620a. In fact, the University is regulated as a participant in the scheme twice over—as both an MS4 permittee and for construction stormwater. *See id.*

Being a "participant" in PADEP's regulatory program does not transform an entity into the regulator. Nor does it create Special Services required to levy Charges under Pennsylvania law. If it did, the University and other permittees who reduce sediment would be able to bill the Borough and residents for sediment reductions accomplished as participants in the regulatory scheme. Just as compliance has a price tag

[4] In *Norfolk*, a statute restricted funds to specific uses and required credits, among other requirements that "removed much of the legislative discretion that was traditionally associated with stormwater management." *Id.* at 322. In Pennsylvania, legislation cannot make Charges conclusive, *Am. Aniline*, 135 A. at 727, and there is no similar authorizing statute as detailed or comprehensive. Another case within the Fourth Circuit distinguished *Norfolk* on that basis. *Cashwell v. Town of Oak Island*, 383 F. Supp. 3d 584, 593 (E.D.N.C. 2019).

for the Borough, it has a price tag for the University and other stormwater permittees, who are already paying it apart from the Charges.

Third, the *Norfolk* opinion relies on the premise that License Fees are designed "to ensure that the actors responsible for those impacts bear the costs of addressing them," meaning "owners of impervious surfaces bear the cost of managing stormwater runoff." *Norfolk*, 916 F.3d at 322. But it is flawed to assume that all owners of impervious area are equally "responsible." The University's impervious area is not the same as others' impervious surface. The University controls its stormwater discharges to reduce sediment not only under its MS4 permit, but also as a participant in PADEP's construction stormwater program that regulates stormwater discharges for sediment during and after construction. *See* 25 Pa. Code Chapter 102; R. 577a-584a.

Norfolk is also contrary to Pennsylvania caselaw because it focuses on burdens rather than discrete benefits, which was addressed by the Commonwealth Court. *W. Chester*, 291 A.3d at 465. Even focusing on the burdens, however, the *Norfolk* court's reasoning unravels in context of PADEP's regulatory program. As explained below, the Charges constitute taxes, whether focusing on either burdens or benefits in terms of sediment reductions.

2. The University Does Not Burden the Borough in Complying with Sediment Reductions, and Actually Offers the Borough Sediment Reductions.

Assuming arguendo the Court would focus on the PADEP-imposed *burden* of sediment reductions, PADEP made clear that the Borough is not responsible for MS4 compliance on the University's properties because the properties are not part of the regulated area of the Borough's MS4. PADEP instructs municipal MS4 permittees (like the Borough) that they should not count non-municipal MS4 permittees' land area (like the University's) as part of their compliance burdens. For example, PADEP's guidance document states:

> **FAQ #9: My municipality is an MS4 permittee, and there is a non-municipal MS4 permittee (like PENNDOT or a university campus) within my municipality. Is my municipality responsible for MS4 permit compliance on the non-municipal MS4 lands?**
>
> No. The non-municipal permittee's land is not part of the regulated area of the municipal MS4. . . .

PADEP, MS4 NPDES Permits Frequently Asked Questions, FAQ #9, at 4-5 (Sept. 1, 2023) ("PADEP FAQ").[5]

[5] Available at: https://files.dep.state.pa.us/Water/BPNPSM/StormwaterManagement/MunicipalStormwater/MS4_FAQ.pdf.

PADEP also enables municipal entities to minimize their compliance burdens for sediment reductions, in multiple ways on paper, including relying on other permittees to obviate the need for expensive projects. To explain, some background is helpful. The Borough demonstrates sediment reductions through the PRP process in its permit and sediment-reduction projects called best management practices ("BMPs"). R. 26a-29a. To simplify, the following are the primary steps that the Borough takes in its Plum Run PRP to meet the requirement for a 10% sediment reduction (see R. 94a, 1364a):

- Define the MS4 "Planning Area."
- Calculate the Existing Sediment Load (the Baseline from the Planning Area).
- Calculate the Required Sediment Reduction (10% Reduction in Comparison to the Baseline).
- Identify BMP Projects that Will Meet the Required Sediment Reduction (Based on Effectiveness Values for Reducing Sediment).
- Implement BMP Projects to Demonstrate Compliance with the 10% Sediment Reduction.

See R. 72a-137a; PAG-13 Sample Permit, *supra* n.2, Part C.II.B., at 24-25 & App. E (PRP requirement).

In the first step, when calculating the planning area, the Borough can "parse"—or completely exclude—all University properties from the Borough's regulated planning area. PADEP allows this precisely because

the University has its own stormwater permit. PADEP, Pollutant Reduction Plan (PRP) Instructions, Doc. No. 3800-PM-BCW0100k, at 10, Attachment A (March 2017).[6]

In the second step, when calculating the existing sediment load, the Borough also can reduce its sediment baseline by counting existing BMPs that the University already implemented on University property. *Id.* at 2.

Thus, rather than burden the Borough, the University offers the Borough sediment reductions within PADEP's permitting process, which obviates the need for the Borough to pay more for BMP projects. Whether or not the Borough chooses to take advantage of all opportunities to minimize the compliance burdens in these ways,[7] it does not change the fundamental point. That is, PADEP's permitting scheme recognizes that the University properties fall outside the Borough's MS4 burdens and regulated MS4 planning area. The Borough's burdens should not be attributed to the University. Stormwater permittees like the University are

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[6] Available at: http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3686. Among other areas, the Borough can also parse all "areas in which stormwater runoff does not enter the MS4" infrastructure. *Id.*

[7] Instead of costly projects, parsing simply requires mapping the sewershed, which is already required. PAG-13 Sample Permit, *supra* n.2, at 19. In its PRP, the Borough chose to parse a small area that drains directly to Plum Run outside the University's property, but questionably failed to parse any of the University's property. R. 82a, 89a-94a, 116a.

already doing their part. More to the point, where the true purpose of Stormwater Charges is for a municipal entity's PADEP stormwater compliance, other stormwater permittees like the University should not be subject to the Charges.

3. The Borough's Claim that the Charges Are for Use of Stormwater Pipes Is a Pretext for Funding Sediment Reductions and a Slippery Slope.

The Borough argues it provides specific service to the University, relying on availability of its MS4 pipes. Borough Br. at 26-30, 57-61. Accepting this reasoning would be folly because it is both a pretext and a slippery slope.

First, the Borough focuses on pipes as the "hook" to survive summary judgment—distracting from the primary purpose to levy Charges to fund infrastructure projects for sediment reductions. The Commonwealth Court astutely saw through this pretext to hold that the Borough relies on general benefits—not Special Services. *W. Chester*, 291 A.3d at 465. Accepting the Borough's approach would be contrary to Pennsylvania caselaw, which requires "'special' or unusual services provided as opposed to services otherwise furnished or required." *Talley*, 553 A.2d at 520. Pennsylvania law also prohibits furnishing one thing to the payor (pipes as a general benefit), and then billing for another that is not specifically provided

(sediment-reduction projects). *Martin Media*, 671 A.2d at 1216; *Dufour*, 1946 WL 2056107, at *3. Even assuming connection to a pipe, that is not what the funding is for. R. 1639a.[8] *See Univ. Park Cinemas*, 59 Pa. D. & C.2d at 744-45 (explaining that charges for traffic were pretextual for regulating theater and "readily suggest the mischief which can be visited upon any legitimate business activity" by the approach, because "to conclude otherwise, it would be equally logical, and equally ludicrous, to contend that plaintiff must pay for the additional stop lights required, or for a needed municipal parking lot for his patrons, or for extra street cleaning. . . . These collateral consequences of doing business are not encompassed within the regulation of a business in the exercise of the police power and may not be included in a license fee").

Second, the purported limits in the Borough's Ordinance are too broad to tether the Charges to Special Services. The Ordinance claims the Charges will be for infrastructure and several broad uses, including "a program to manage stormwater" and "[d]ebt service for financing stormwater capital projects." R. 58a. To illustrate the overbreadth, a federal court that expressly distinguished the *Norfolk* case (and is similarly

[8] Assuming there is some Special Service (there is not), the Court may also affirm the Commonwealth Court because the Charges are not reasonably proportional to any Special Services rendered.

within the Fourth Circuit) held that sewer charges were a tax, including because revenue financed debt service for projects without any related regulation by the municipal entity. *Cashwell*, 383 F. Supp. 3d at 592. The court reasoned that "paying to service a municipality's debt for a sewer system and making a sewer system generally available are benefits shared by the community." *Id.* The court explained:

> Solvency is not a guarantee for state and local governments. Therefore, revenue raising measures for debt service, like the sewer district treatment charge in the present case, are fairly said to "sustain the essential flow of revenue to state (or local) government." . . . Revenue raised for the "availability of sewer service" does not provide an individualized benefit, and is not meant to regulate or punish.

Id. Cashwell further illustrates that the Ordinance's intent to fund "debt service" and broad "stormwater" projects is divorced from Special Services. In charging based on impervious area, the Borough is elevating convenience over Special Services to fund availability of the MS4 and anything conceivably "stormwater-related." *See Zweig*, 412 S.W.3d at 227-28 (holding that a charge for availability of stormwater system was a tax, and rejecting as "irrelevant" that impervious area is "fairer and more easily understood" because "[a] charge based on contributing to the need for (rather than the actual use of) a service might be fair and easily understood, but it cannot be a user fee").

Third, the Borough's attempt to fund its compliance with PADEP's regulatory scheme is too broad, and would enable municipal entities to expand use of funding even further from Special Services. *Nat'l Cable Television Association, Inc. v. United States*, 415 U.S. 336, 341 (1974) (allowing government to use public policy considerations to manipulate charge's application is characteristic of a tax). Geographically, PADEP's program expressly allows sediment-reduction projects to occur "outside of the MS4 planning area," including outside of municipal boundaries. *See* PADEP FAQ, *supra* n.5, FAQ #69, at 25-27. Substantively, the concept of a "stormwater" project is exceedingly broad, ranging from tree planting to stream restoration, all of which may be just one component of larger projects wholly deemed "stormwater-related." It is problematic for municipal entities to hold such a broad brush that can blur the lines where a so-called "stormwater" project ends and another project—like for "beautification" or "wastewater"—begins.

This is not hypothetical. *Amicus* Dura-Bond found that Steelton is charging property owners while engaging in a stream restoration project well outside of its borders (in Londonderry Township) that requires funding

for participation.[9] *Amicus* CSR has alleged in pending litigation that *amicus* Capital Region Water ("CRW") does not define "stormwater facilities," and apparently allows funds collected from properties discharging only to the MS4 or Paxton Creek (like CSR's) to be used for improvements to a different system for combined wastewater that flows to a wastewater treatment facility.[10] CRW has broadly labeled its stormwater/wastewater projects "beautification," including projects ranging from green infrastructure to separating sewers to reduce combined sewer overflows (estimated $315 million over the first 20 years). PMAA Br., at 10, 28-30. *Cf. Bolt*, 587 N.W.2d at 272-73 (holding that charge funding separation of combined sewer at $176 million over thirty years was unlawful tax, and "[t]o conclude otherwise would permit municipalities to supplement existing revenues by redefining various government activities as 'services' and enacting a myriad of 'fees' for those services" and "effectively abrogate the

[9] *See* Steelton Borough, Chesapeake Bay Pollutant Reduction Plan, Amendment 1, at 5 (Feb. 2023), http://www.steeltonpa.com/wp-content/uploads/2023/02/Steelton-Borough-CBPRP-Addendum-1-Reduced.pdf (proposing to meet Steelton's MS4 permit requirements with "a joint stream restoration project [that] will be completed on the Conewago Creek in Londonderry Township"); Londonderry Township, Conewago Creek Restoration Project, https://storymaps.arcgis.com/stories/c3a1e7e257f54ad59b237e1d40417fa9.

[10] *See* CRW, Stormwater Management, https://capitalregionwater.com/what-we-do/stormwater-management/ (stating that 60% of Harrisburg drains to combined sewer, while 40% drains to MS4); Am. Compl. ¶ 131, *Consolidated Scrap Resources, Inc. v. Capital Region Water*, No. 2020-CV-9996-CV (Pa. C.C.P. Dauphin Cty., Dec. 31, 2020).

constitutional limitations on taxation and public spending”). Without the critical tie to Special Services in Pennsylvania law, municipal entities will continue to fund projects outside of municipal boundaries and in different service territories—or for different services altogether (like wastewater)—with money collected from constituents who will never realize the projects’ benefits.

Fourth, the problem is at its worst when the program expands bureaucracy to fund administration of the program itself—including staffing and administrative costs—rather than any benefit to the payor. *Northumberland*, 2022 WL 10766760, at *8-10 (holding that a permit charge was an invalid tax where the disputed “amount was assessed to cover general administrative costs” and “the usual expenses attendant to running the office”). This is evident in the Borough’s so-called “credit” system and insistence to recover “programmatic” costs, which is characteristic of programs throughout the Commonwealth. R. 1929a (maximum credit of 60% “because the Borough needs to fund programmatic elements”). And it is the type of expanding bureaucracy and spending that this Court has warned against. *See Price v. Philadelphia Parking Auth.*, 221 A.2d 138, 145 (Pa. 1966) (cautioning that “mushrooming of authorities at all levels of government and the frequent

complaint that such bodies act in an arbitrary and capricious manner in violation of existing law dictate that a check rein be kept upon them"); *Ridley Arms, Inc. v. Ridley Twp.*, 531 A.2d 414, 418 (Pa. 1987) ("[G]overnment in this Commonwealth and this nation has always been conceived of as the provider of safe and efficient service, not as a repository for exorbitant costs.").

In addition, such credit systems are flawed for several reasons:

- Capping credits (at less than 100%) reveals that the Charges are a tax, disconnected from true cost of service to the payor. R. 1929a. Credit caps appear arbitrary to "back into" the amount of revenue needed, capped only based on "programmatic" need. R. 1930a, 1936a (maximum 15% credit for "fully-compliant NPDES stormwater permit").
- Credits assume impervious area is—in itself—the service or privilege granted, pretending to convey benefits unless and until the property owner proves otherwise (at the owner's expense). If the owner never applies for credit, the municipal entity collects revenue without providing service, which illustrates the Charge is a tax. R. 1937a-1938a.

- The timing matters. If municipal entities do not apply the credit to every billing period, starting with the first billing period, then the Charge is a tax for each such billing period. Similarly, municipal entities attach conditions and can revoke credits or require reapplication, to start back at square one (more expense to the property owner). *Id.*
- Such credit systems are flawed and inconsistent with Special Services because they put the cart before the horse. They require the owner to meet conditions and spend money to prove what municipal entities should know before implementing the Charges—whether and to what extent they provide Special Services. For example, PADEP requires municipal entities to map their MS4 sewersheds (including BMPs on private property), so they already know sediment reductions are available from other permittees like the University. *Supra* n.7.

The credit system as structured cannot save the Borough's Charges. It is evidence of the problem, not the cure.

Finally, accepting the Borough's approach would incentivize other municipal entities to target large landowners to subsidize stormwater programs—even landowners covered by their own PADEP stormwater

permits. Instead of excluding the University from its MS4 planning area and relying on the University's sediment reductions for PADEP permitting, the Borough relied on the University's large land area to fund its program that is based solely on impervious area. This approach is discriminatory. Choosing the "fee" methodology based on impervious area (instead of an overt "tax") becomes a self-fulfilling prophecy. The Borough chose this method to drive down residential costs and generate the most revenue from the largest landowners with the most impervious area (*i.e.*, commercial/industrial properties)—irrespective of any Special Services. R. 1369a-1370a. As *amicus* Dura-Bond discovered, Steelton publicly admits this approach targeting non-residential properties based solely on impervious area because, if Steelton had overtly taxed instead, residential homeowners would pay "over twice as much if by tax."[11] *Cf. Duffield House Assocs., L.P. v. City of Philadelphia*, 260 A.3d 329, 342-46 (Pa. Cmwlth. 2021), *rearg. denied* (Sept. 28, 2021), *app. denied*, 279 A.3d 1185 (Pa. 2022) ("By singling out Taxpayers' properties for reassessment based solely on their commercial nature, the City engaged in disparate treatment

[11] Steelton Borough, Stormwater Authority, *Stormwater Management Program Presentation*, Slide 12, at 6, http://www.steeltonpa.com/wp-content/uploads/2023/02/Stormwater-Public-Meeting-Presentation.pdf.

of sub-classes of properties within a taxing district [and] violated the Uniformity Clause.”).

The approach is no less discriminatory just because Stormwater Charges are mislabeled a “fee.” *Mastrangelo v. Buckley*, 250 A.2d 447, 464 (Pa. 1969) (“[I]t is inequitable for a municipality to raise revenues for general purposes by imposing a larger license fee on a certain class of people who must pay the fee to secure the privilege or license.”).

Accordingly, it is especially important for this Court to acknowledge that stormwater permittees are already paying their share, and that their rights do not yield to a municipal entity’s convenience in administrating a stormwater program. The Borough had and still has choices, including other opportunities for funding. The Borough has other ways to structure the Charges consistent with Pennsylvania caselaw—but not this way.

IV. CONCLUSION

This Court should affirm the Commonwealth Court's decision.

Respectfully submitted,

SAXTON & STUMP, LLC

Dated: October 16, 2023

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CERTIFICATE OF COMPLIANCE

I, Stephen J. Matzura, certify that the foregoing Brief of *Amicus Curiae* Consolidated Scrap Resources, Inc., and Dura Bond Pipe LLC, excluding the cover page, table of contents, table of authorities, proof of service, signature block, and appendices, contains 6,984 words, as calculated by the word count function of the word processing system used to prepare the Brief, and complies with Pa. R.A.P. 2135(d).

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PUBLIC ACCESS POLICY CERTIFICATION

I, Stephen J. Matzura, hereby certify that the foregoing Brief of *Amicus Curiae* Consolidated Scrap Resources, Inc. and Dura Bond Pipe LLC, 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 requires the filing of confidential information and documents to be performed differently than nonconfidential information and documents.

Dated: October 16, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2023, a true and correct copy of the foregoing Brief of *Amicus Curiae* Consolidated Scrap Resources, Inc. and Dura Bond Pipe LLC was served upon all parties via PACFile.

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