

IN THE SUPREME COURT OF PENNSYLVANIA

THE BOROUGH OF WEST)
CHESTER,)

Appellant)

No. 9 MAP 2023

vs.)

PENNSYLVANIA STATE)
SYSTEM OF HIGHER)
EDUCATION AND WEST)
CHESTER UNIVERSITY OF)
PENNSYLVANIA OF THE)
STATE SYSTEM OF HIGHER)
EDUCATION,)

Appellee)

BRIEF OF *AMICUS CURIAE*

LEHIGH-NORTHAMPTON AIRPORT AUTHORITY

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

FLORIO PERRUCCI STEINHARDT

CAPPELLI & TIPTON LLC

Elizabeth H. Marcon, Esquire

I.D. No. 313149

emarcon@floriolaw.com

Robert M. Donchez, Esquire

I.D. No. 209505

rdonchez@floriolaw.com

91 Larry Holmes Drive, Suite 200

Easton, PA 18042

Telephone: 610-691-7900

Attorneys for Lehigh-Northampton

Airport Authority

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT	3
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

Boro. of West Chester v. Pa. State Sys. of Higher Ed., 291 A.3d 455 (Pa. Commw. Ct. 2023) 4

Lehigh-Northampton Airport Auth. v. City of Allentown, No. 2018-C-1713 1

Dekalb County v. United States, 108 Fed. Cl. 681 (Fed. Cl. 2013)..... 3

STATEMENT OF INTEREST OF
LEHIGH-NORTHAMPTON AIRPORT AUTHORITY

Amicus Lehigh-Northampton Airport Authority submits this Brief in support of the position advanced by Appellees. The Lehigh-Northampton Airport Authority, with offices at 3311 Airport Road, Allentown, Lehigh County, Pennsylvania 18109, is a Pennsylvania Municipal Authority created pursuant to the Municipality Authorities Act of 1945, 53 Pa. C. S. § 5601 *et seq.* It owns and operates the Queen City Airport, 1730 Vultee Street, located within the City of Allentown, as well as Lehigh Valley International Airport and Braden Airpark.

The Lehigh-Northampton Airport Authority has commenced a declaratory action in the Court of Common Pleas of Lehigh County, captioned *Lehigh-Northampton Airport Authority v. City of Allentown*, Civil Action No. 2018-C-1713. The action was filed as a result of Allentown Ordinance 15417, effective January 1, 2018, imposing what Allentown refers to as the “Stormwater Utility Fee.” Allentown is a third-class city. The Allentown stormwater ordinance taxes the Queen City Airport located in Allentown, at a rate per billing unit of Twenty Dollars (\$20.00) per 500 square feet of impervious surface. The total annual charge is \$71,200.00. The Lehigh-Northampton Airport Authority has been paying the “Stormwater Utility Fee” annually but under protest.

The Lehigh-Northampton Airport Authority is paying in whole for the preparation of this *Amicus Curiae* Brief, which is prepared in whole by its Solicitor, Florio Perrucci Steinhardt Cappelli & Tipton LLC.

SUMMARY OF THE ARGUMENT

The Commonwealth Court correctly determined that the “fee” charged by the Borough of West Chester amounts to a tax, which Commonwealth entities are immune from paying. The Court based its determination on the fact that the Borough failed to demonstrate that West Chester University received a discrete benefit in exchange for payment of the stormwater charge imposed by the Borough on all property owners (“Stormwater Charge”). The Court further stated that by calculating the charge based upon impervious surface area on a given property, there is no direct correlation between the charge imposed—which is based on the burden that a particular property presumably places on the stormwater management system—and the benefit derived by the payor of the charge. Because such a system operates like a tax rather than a fee-for-service, the Court ruled in favor of West Chester University/PASSHE.

Amici on behalf of Appellant, the Borough of West Chester, elaborate on the importance of municipalities’ ability to fund stormwater management to comply with the requirements of the federal government and Clean Water Act. The question before the Commonwealth Court, and now this Honorable Court, however, is

whether the Stormwater Charge, as implemented, amounts to a user fee or a tax. The Commonwealth Court correctly held that the Stormwater Charge in this case operates as a tax, from which Commonwealth entities are undisputedly immune.

ARGUMENT

I. The Commonwealth Court Correctly Held that Stormwater Annual Charge Is a Tax from Which Commonwealth Agencies Are Immune Rather Than A “User Fee”

The Stormwater Charge imposed by the Borough on the Commonwealth agency is a tax. It is a payment of money compelled by the municipal legislative branch. It is based on the features of the real estate, and it funds environmental benefits to the entire community rather than a benefit exclusive to the subject real estate or the owner of the property.

The quote of *Dekalb County v. United States*,¹ in the Commonwealth Court’s opinion is illustrative of the fact that there are no discrete benefits derived by the property owner for paying the Stormwater Charge. Specifically, the quoted passage reads:

There may be properties, for example, that impose significant burdens on the stormwater system while deriving no substantial benefit from that system (e.g., a property with extensive impervious coverage that is located on the top of a hill). Similarly, there may be properties that have little impact on the stormwater system that receive substantial benefits from that system (e.g., a small home on a large, otherwise undeveloped lot that is located downhill from extensive development).

¹ *Dekalb County v. United States*, 108 Fed. Cl. 681 (Fed. Cl. 2013).

Borough of West Chester v. PASSHE, 291 A.3d 455, 465 (Pa. Commw. 2023) (quoting *Dekalb*, 108 Fed. Cl. at 701-03). In the absence of stormwater charges, property owners are not generally required to mitigate runoff. Take suburban homeowners—runoff control is not imposed upon the property owner at the bottom of the hill, nor is it imposed upon the property at the top of the hill. This is true even though the homeowner at the bottom of the hill would receive more benefits from the management and mitigation of stormwater runoff. Prior 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 paying stormwater charges. This scheme sounds a lot like a tax—it is 100% mandatory for all developed properties and is based upon the property’s existing within the municipality’s limits. While the amount of the charge varies depending upon the expected amount of runoff generated by a property based upon its impervious surface area, the charges are not proportional to the benefit received by each user. This was an important consideration of the Commonwealth Court in reaching its decision for good reason.

Focusing attention on discrete benefit to the “user” was not the Commonwealth Court’s only consideration. The Court also determined that benefits provided to individual property owners are benefits provided to everyone in the community. In the same vein, the benefits received by any particular property are

not proportional to the Stormwater Charge because, as Appellant admits, there is no way to determine the amount of runoff generated by a particular property. Importantly, in developed areas and communities, impervious surfaces are unavoidable, and furthermore each property is so intertwined with its neighbors that it would be impossible to determine the marginal contribution to stormwater runoff of any given property in most cases. Accordingly, and relying on case law distinguishing taxes from user fees, the Commonwealth Court concluded that these factors all weigh in favor of the Stormwater Charge being a tax.

Amici make clear that they disagree with the case law relied upon by the Commonwealth Court, but they do not explain how, from a legal standpoint, the cases are wrong. While a pragmatic approach is encouraged by some amici, with an emphasis on public policy and the consequences of having exempt/immune entities excused from paying stormwater charges, the question before the Court is whether the Stormwater Charge is designed as a tax or a user fee. This case was brought before the Commonwealth Court in its original jurisdiction and therefore the Commonwealth Court was responsible for making its own findings of fact, which is discretely different from reviewing the decision of a trial court in its appellate jurisdiction.

The Commonwealth Court properly found that the Stormwater Charge is not a “user fee.” In the case of stormwater charges, there is no contractual relationship

between the municipality and the property owner. Nor is there a service being provided to a property owner in a quasi-private capacity. Unlike the driver who chooses to use a toll road or a citizen who chooses to use the municipal golf course, the Commonwealth agencies in the instant matter (and Lehigh-Northampton Airport Authority in the Lehigh County case) do not opt to use the municipality's stormwater program. It is compelled upon them and the charge is calculated based upon an estimate. The Commonwealth Court conducted an analysis regarding the "tax versus fee" question before it and ultimately was persuaded by the reasoning in *DeKalb*. Amici are critical of the Commonwealth Court for following the logic of *DeKalb*, but fail to point to a controlling decision that the court must follow.

The ultimate issue from a practical standpoint is a question of where the money comes from to fund stormwater management. The issue before the Commonwealth Court and now this Honorable Court, however, is whether the Stormwater Charge is being implemented within the legal framework under Pennsylvania law. Appellant states² that the Stormwater Charge is designed to "curb unwanted conduct," and that treating the charge as a tax would ignore this underlying purpose of the Stormwater Charge. But what unwanted conduct is encouraged or discouraged by the charges in the case of, for example, existing runways at a municipal airport? As noted above, one day there was no charge for stormwater

² Appellant's Br., 28.

management and the next day there was—with all else being equal. Furthermore, the ability of a user fee to discourage unwanted conduct is no different from a tax designed to do the same thing. The public policy argument that everyone must pay to implement the stormwater management systems distorts the question before the Court. The question before the Court is whether the charge operates as a tax or operates as a user fee. The Commonwealth Court has correctly concluded that the Stormwater Charge operates as a tax.

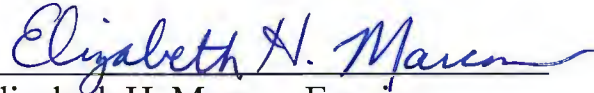
The Stormwater Charge raises funds (even if reserved only for stormwater management) to provide a benefit for the entire community. It is a tax and is collectible from those whom the General Assembly did not make immune. The statutes granting immunity cannot be ignored by calling a tax something which it is not.

CONCLUSION

For the foregoing reasons, the Lehigh-Northampton Airport Authority advocates in support of the position advanced by Appellees, Pennsylvania State System of Higher Education and West Chester University of Pennsylvania of the State System of Higher Education, that the annual Stormwater Charge imposed by the municipality is a tax rather than a user fee. This Honorable Court should affirm the judgment below.

Respectfully submitted,

***FLORIO PERRUCCI STEINHARDT
CAPPELLI & TIPTON LLC***




Elizabeth H. Marcon, Esquire
Robert M. Donchez, Esquire
Counsel for Amicus,
Lehigh-Northampton Airport Authority

Dated: October 16, 2023

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I 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.


Elizabeth H. Marcon, Esquire

Dated: October 16, 2023

CERTIFICATE OF SERVICE

I, Elizabeth H. Marcon, Esquire, hereby certify that on the 16th day of October, 2023, a true and correct copy of the AMICUS CURIAE BRIEF on behalf of The Lehigh-Northampton Airport Authority was served, via e-filing and email, on counsel of record as follows:

Michael S. Gill, Esquire
Kristin S. Camp, Esquire
Warren E. Kampf, Esquire
Alexandra Y. Roberts, Esquire
Buckley Brion McGuire & Morris LLP
118 W. Market Street, Suite 300
West Chester, PA 19382-2902
gillm@buckleyllp.com
kcamp@buckleyllp.com
wkampf@buckleyllp.com
aroberts@buckleyllp.com

Attorneys for Appellant

Stephen R. Kovatis, Esquire
Jeffrey Mozdziock, Esquire
Claudia M. Tesoro, Esquire
PA Office of Attorney General
1600 Arch Street
Philadelphia, PA 19103
skovatis@attorneygeneral.gov
jmozdziock@attorneygeneral.gov
ctesoro@attorneygeneral.gov

Attorneys for Appellees

Karen M. Romano, Esquire
PA Office of Attorney General
Strawberry Square, Fl. 15
Harrisburg, P 17120
kromano@attorneygeneral.gov
Attorney for Appellees

Emma H. Bast, Esquire
PennFuture
1429 Walnut Street, Suite 400
Philadelphia, PA 19102
bast@pennfuture.org
Attorney for Citizens for Pennsylvania's Future (Amicus Curiae)

Louis A. DePaul, Jr., Esquire
Eckert Seamans Cherin & Mellott, LLC
1619 Watterson Ct
600 Grant St., 44th Fl.
Pittsburgh, PA 15219
ldepaul@eckertseamans.com
Attorney for The Pittsburgh Water and Sewer Authority (Amicus Curiae)

Peter H. Nelson, Esquire
Grim, Biehn & Thatcher, P.C.
104 S. 6th Street
P. O. Box 215
Perkasie, PA 18944
pnelson@grimlaw.com
Attorney for Radnor Township (Amicus Curiae)

James A. Salemme, Esquire
Tucker Arensberg, PC
1500 One PPG Place
Pittsburgh, PA 15222
asalemme@tuckerlaw.com
*Attorney for Lower Swatara Township and Lower Swatara Township
Municipal Authority (Amicus Curiae)*

Kevin L. Hall, Esquire
Brian J. Murren, Esquire
Tucker Arensberg, PC
300 Corporate Center Dr., Suite 200
Camp Hill, PA 17011
khall@tuckerlaw.com
bmurren@tuckerlaw.com
*Attorneys for Lower Swatara Township and Lower Swatara Township
Municipal Authority (Amicus Curiae)*

Paul W. Smail, Esquire
Chesapeake Bay Foundation, Inc.
6 Herndon Avenue
Annapolis, MD 21403
psmail@cbf.org

Attorney for Chesapeake Bay Foundation, Inc. (Amicus Curiae)

Edward L. Stinnett, II, Esquire
Salzmann Hughes, PC
1801 Market Street, Suite 300
Camp Hill, PA 17011
lstinnett@salzmannhughes.com

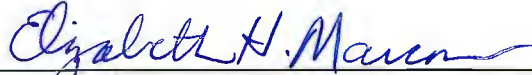
Attorney for PA Municipal Authorities Association, et al. (Amicus Curiae)

Vincent A. Tucceri, Esquire
Gaitens, Tucceri & Nicholas, PC
519 Court Place
Pittsburgh, PA 15219-2002
vtucceri@gtlaw.com

Attorney for The Township of Hampton, et al. (Amicus Curiae)

Michael W. Winfield, Esquire
Post & Schell, PC
17 N. Second Street, Fl. 12
Harrisburg, PA 17101
mwinfield@postschell.com

Attorney for Susquehanna Area Regional Airport Authority (Amicus Curiae)


Elizabeth H. Marcon, Esquire