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Municipal Stormwater Management Charge is a Tax... Or is It? - Cozen O'Connor

A municipal stormwater charge imposed by the Borough of West Chester (Borough) was determined to be a tax, and not a fee, by the Pennsylvania Supreme Court. *The Borough of West Chester v. Pennsylvania State System of Higher Education, et al.*, No. 9 MAP 2023 (Pa. 2026). The case diverges from analysis in other jurisdictions that have treated similar charges as fees, not taxes.

The Borough imposed a stream protection fee upon the owners of all developed properties that the Borough deemed benefited by the Borough's stormwater management system. This charge was calculated based on the amount of impervious area on a particular property. The charge was enacted by the Borough to comply with the Commonwealth's Storm Water Management Act, which was enacted by the General Assembly to comply with the federal Clean Water Act. The Pennsylvania State System of Higher Education and West Chester University (collectively the University), both being tax-exempt entities, refused to pay said charge on the grounds that they believed that it constituted a tax.

There is over a century of Pennsylvania jurisprudence treating charges imposed by state or local government to support their general public burdens as taxes, opposed to fees for services. The Court described "taxes" as charges imposed by the legislature upon many, or all, citizens, to raise money that is spent for the benefit of the entire jurisdiction, and summarized the test that a municipal charge must meet to constitute a fee. Under this test, a court must first determine whether the municipality is performing the service in a quasi-private or public capacity; if the municipality is acting in its public capacity, the inquiry ends because the charge is a tax. However, if it is determined that the municipality is acting in its quasi-private capacity, then a court must determine whether the associated charge is measured by the service rendered. If there is no connection between the amount of the charge and the actual service being rendered, the charge is considered a tax. Here, the Court looked to the stated purpose of the Borough ordinance - imposing the fee as prompted by federal and state mandates to fund its expenses in complying with federal law, and to benefit the public safety, health, and welfare - and concluded that the Borough was acting in its public capacity for the general welfare of the community, not pursuant to a contractual relationship. Accordingly, the Court held that the charge was a tax and the University was exempt from payment.

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