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Pennsylvania Commonwealth Court Finds Local Stormwater Charge Constitutes A Tax.

In a case which will have major implications throughout Pennsylvania, on January 4, 2023, the Pennsylvania Commonwealth Court ruled that the school system defendants, which are immune from taxation, were not required to pay the Borough of West Chester's stormwater charge because "the Stormwater Charge constitutes a local tax". *Borough of West Chester v. Pa. State System of Higher Education and West Chester University of Pa. of the State System of Higher Education*, No. 260 M.D. 2018 (Pa. Cmwlth. Jan. 4, 2023). The Court held that the stormwater charge constituted a tax and not a fee or special assessment because the charge provided benefits enjoyed by the general public, rather than individualized services provided to particular customers.

The Borough of West Chester (the "Borough") operates a small municipal separate storm sewer system ("MS4"). The Borough imposes a charge (the "Stormwater Charge") on owners of developed properties within the Borough that are benefitted by the MS4. The Borough then deposits these charges into a stormwater management fund for maintenance and improvement of stormwater projects as well as pollution remediation measures. The Pennsylvania State System of Higher Education and West Chester University of Pennsylvania (the "Schools") were assessed charges of about \$132,000 annually which they refused to pay, arguing the Stormwater Charge constituted a tax and the Schools were immune from taxation. The Borough argued the Stormwater Charge constitutes a fee for service rather than a tax and filed a declaratory judgment petition in the Commonwealth Court. The Schools then filed a motion for summary relief.

The Court discussed the differences between a tax and a fee for service, holding that while a tax is imposed on many or all citizens, is contributed to a general fund, and is spent for the benefit of the entire community, a fee is paid to a public agency for bestowing a benefit not shared by general members of the community and is paid voluntarily. Additionally, the Court held "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 payments."

The Court held the Stormwater Charge was a tax, not a fee. The Court noted that the Borough Counsel Code expressly stated that "a comprehensive program of stormwater management is fundamental to the public health, safety, and general welfare of the residents of the Borough." The Court further noted that a Borough witness had testified that managing stormwater provides a general benefit to the community, and owners of both developed and undeveloped properties receive the same benefits from the projects funded by the Stormwater Charge. The Court found that the Borough had failed to "point to any evidence that [the Schools] receive discrete benefits through payment of the Stormwater Charge."

Additionally, the Schools argued that they did not benefit from the MS4 system because they had their own stormwater system in place, while the Borough argued that even though the Schools had their own stormwater system, they would incur expenses in the absence of the MS4 system and therefore benefitted from it. While the Borough argued there is a direct relationship between the amount of impervious surface area and the extent of stormwater related issues for a property, the

Court found that there was no way to measure the Schools' purported use of the Stormwater System. The Court further agreed with the Schools that "the impervious surface area of a property does not correlate to the level of benefit accorded the owner of that property." The Court cited extensively to *DeKalb County, Georgia v. U.S.*, 108 Fed. Cl. 681 (Fed. Cl. 2013), in which a federal court found that a county ordinance that also imposed a charge based on impervious surface area of developed properties qualified as a tax. The Court cited *DeKalb* for its holding that a stormwater charge provides benefits enjoyed by the general public as opposed to individualized services provided to particular customers, as the benefit of the collection and diverting of stormwater runoff "is shared with nearly every other member of the community. In short, flood control is a public benefit, and charges to pay for that benefit are typically viewed as taxes." The Court further agreed with *DeKalb* that "[w]hile user fees are generally based on the quantum of services that are provided, the assessments in this case are not necessarily based on the benefits provided to each owner of the developed property [because] they are based not on the benefits derived by the payor, but [on] the anticipated burden that its property imposes on the stormwater system. However, the burden imposed on the system by the runoff from the property, and the benefits conferred upon that property by the system are not the same thing."

Finally, the Court held the Stormwater Charge is not a fee because it is not paid "by choice." Despite the existence of an appeals process through which owners could apply for credits, the Borough could not show it entered into "voluntary, contractual relationship[s]" with property owners subject to Stormwater Charge assessments.

The Court went on to similarly hold that the Stormwater Charge was not an assessment because the Stormwater Charge was not "subsidizing a particular project of limited duration." Rather, because the work funded by the Stormwater Charge yields a common benefit shared by Borough residents generally rather than benefit individual properties, the Stormwater Charge constituted a general tax. Accordingly, the Court granted the Schools' motion for summary relief.

This holding will have widespread implications. Similar stormwater charges will be vulnerable to challenges on multiple grounds, including whether the customer has been provided with a particular and/or proportional value in return for payment and if not, whether the authority imposing the charges has the necessary authority to levy taxes. While this decision will likely be appealed, in the meantime it will have substantial implications across Pennsylvania.

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