Received 11/1/2021 3:29:25 PM Supreme Court Middle District

Filed 11/1/2021 3:29:00 PM Supreme Court Middle District
569 MAL 2021 and additional consolidated case(s)

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

Nos. 569-572 MAL 2021, 519 MAL 2021, 520 MAL 2021, 521 MAL 2021, 522 MAL 2021
(Consolidated)

CHESTER WATER AUTHORITY,
Petitioner;

v.

AQUA PENNSYLVANIA, INC., CITY OF CHESTER, WELLS FARGO BANK,NA, DELAWARE COUNTY, CHESTER COUNTY, SUSQUEHANNA RIVER BASIN COMMISSION, DELAWARE RIVER BASIN COMMISSION, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, TRUSTEES OF CHESTER WATER AUTHORITY, NICOLE WHITAKER, WANDA MANN, MICHELLE CONTE, TYLER THERRIAULT, KATHRYN A.TOWNSEND, VICTOR S. MANTEGNA, AND WOLF EQUITY L.P.;
Respondents.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF COUNTY OF CHESTER'S CROSS-PETITION FOR ALLOWANCE OF APPEAL

ON CONSIDERATION FROM THE COMMONWEALTH COURT OF PENNSYLVANIA, DATED SEPTEMBER 16, 2021
CASE NOS. 489 CD 2020, 504 CD 2020, 514 CD 2020, 685 CD 2020

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Pursuant to Pa. R. App. P. 531(b)(1), Proposed *Amicus Curiae*, Food & Water Watch, ("FWW"), a national, non-profit organization that has an active presence in Pennsylvania and a substantial membership in Chester and Delaware Counties, respectfully seeks leave to file the accompanying *amicus curiae* brief for the Court's consideration in addressing the County of Chester's Cross-petition for Allowance of Appeal in the above-captioned case. Proposed *Amicus* provides the following in support of this motion:

1. On September 16, 2021, the Commonwealth Court issued an *en banc* opinion addressing 53 Pa. Cons. Stat. §§ 5622(a) and 5610(a.1) (2021) of the Municipality Authorities Act ("MAA").

2. The Chester Water Authority ("CWA") filed a Petition for Permission to Appeal the Commonwealth Court's decision to this Court on September 17, 2021.

3. On October 18, 2021, Chester County filed a Cross-petition for Allowance of Appeal.

4. The petitioners seek to prevent the City of Chester ("City") from repossessing the CWA water system, which the Commonwealth Court's decision sanctioned under the MAA.

5. Pa. R. App. P. 531(b)(1) provides that an *amicus curiae* may file a petition in support of the allowance of appeal upon obtaining leave from the Court.

6. FWW supports managing water supplies as a public trust, improving our public water systems, and making water service safe and affordable for all. FWW has a very active presence is the state of Pennsylvania, with several full-time Pennsylvania-based staff and over 10,000 dues-paying members here. It has close to 1,200 members in Chester and Delaware Counties alone. FWW thus submits this motion on behalf of its members and public in support of the CWA's continued control over the water system.

7. Proposed *Amicus* submits that the attached brief, at Exh. A, would assist this Court in its consideration of Chester County's Cross-petition for Allowance of Appeal. It details how the Commonwealth Court's majority opinion in this case fails to effectuate the public trust purposes of the water system, merely treating it as the private property of the City, and without liberally construing the MAA for the benefit of the public. The decision also vitiates the statute by impermissibly nullifying key language of § 5622(a) that requires the CWA's consent for such an acquisition. The lower court also undermined the legislative intent behind § 5610(a.1) that established the CWA as a new, more representative authority whose water system the City could not unilaterally repossess. Because the Commonwealth Court was thus in error, FWW urges the Court to hear Chester County's and the CWA's appeals in order to reverse the decision below.

8. This motion is timely. The Proposed *Amicus*'s motion for leave is being submitted at the beginning of this Court's consideration of the matter, as the County of Chester submitted its cross-petition only two weeks ago. FWW is unaware of any Appellate Rule of Procedure dictating the timing of a motion for leave to file an *amicus* brief in support of a petition for the allowance of appeal. Pa. R. App. P. 531(b)(1)(4), by its terms is aimed only at briefs submitted "in support of affirmance or reversal[,]" not allocator petitions, and thus does not preclude the Court from granting leave to FWW for the filing of this brief.

9. No other person or entity other than the Proposed *Amicus* or the undersigned counsel have aided in whole or in part in the preparation or authorship of the proposed brief.

10. WHEREFORE, FWW respectfully requests that the Court grant it leave to file the proposed *amicus curiae* brief attached as Exh. A.

Respectfully submitted,

Dated: November 1, 2021

/s/ *Zachary B. Corrigan*

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CERTIFICATE OF COMPLIANCE WITH PA. R. APP. P. 127

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 1, 2021

/s/ *Zachary B. Corrigan*
Zachary B. Corrigan

CERTIFICATION OF SERVICE

I hereby certify that I caused the foregoing to be served by filing it with the Court's electronic filing system on all counsel of record

Dated: November 1, 2021

/s/ *Zachary B. Corrigan*
Zachary B. Corrigan

Exhibit A

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

Nos. 569-572 MAL 2021, 519 MAL 2021, 520 MAL 2021, 521 MAL 2021, 522 MAL 2021
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Respondents.

BRIEF OF *AMICUS CURIAE* FOOD & WATER WATCH

ON CONSIDERATION FROM THE COMMONWEALTH COURT OF PENNSYLVANIA, DATED SEPTEMBER 16, 2021
CASE NOS. 489 CD 2020, 504 CD 2020, 514 CD 2020, 685 CD 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTRODUCTION

Food & Water Watch ("FWW"), a national, non-profit organization that has an active presence in Pennsylvania and a substantial membership in Chester and Delaware Counties, submits this brief in support of Chester County's cross-petition for allowance of appeal in the above-captioned case.

An appeal is warranted because the questions at issue are of the utmost importance and demand this Court's definitive resolution. This is not a mere property dispute. Rather, this case involves a large water system (serving 200,000 customers in 33 separate municipalities and straddling several counties) that is ultimately a public trust resource. The private company Aqua Pennsylvania ("Aqua"), a subsidiary of Essential Utilities, Inc., has sought to wrest the system from the Chester Water Authority ("CWA" or "Authority") for its own pecuniary gain. But, after initially failing to do so, the company and the City of Chester ("City") now seek an end-run around the Authority by relying on an antiquated provision of the Municipality Authorities Act ("MAA") that they argue gives those municipalities that incorporated a water authority the unilateral and unfettered power to repossess its projects. The majority decision below sanctioned this hostile takeover. In doing so, the Commonwealth Court not only failed to effectuate the public trust purposes of the water system, but it also vitiated the statute by

impermissibly nullifying key language in 53 Pa. Cons. Stat. § 5622(a) (2021) that requires the CWA's consent for such an acquisition. The lower court also subverted the legislative intent of 53 Pa. Cons. Stat. § 5610(a.1) (2021). This 2012 amendment established the CWA as a new, more representative authority whose water system the City could not unilaterally repossess.

Because the Commonwealth Court's majority opinion was thus in error, FWW urges this Court to hear Chester County's and the CWA's appeals in order to reverse the decision below.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

No person or entity other than FWW, its members, or counsel, have paid in whole or in part for the preparation of this brief, or authored in whole or in part this brief.

FWW is a non-profit advocacy organization that advocates for safe food, clean water, and a livable climate and believes that water is a human right, as an essential, priceless resource for drinking and sanitation. It supports managing water supplies as a public trust, improving our public water systems, and making water service safe and affordable for all. FWW has a very active presence is the Commonwealth, with several full-time Pennsylvania-based staff and over 10,000 dues-paying members here.

With close to 1,200 members in Chester and Delaware Counties alone, FWW has long been concerned about the fate of the CWA water system because of what its almost-certain private acquisition will mean for rates, service, and transparency for its more than 200,000 ratepayers.

FWW has conducted extensive analysis of municipal water and sewer system sales and leases to for-profit corporations around the country and in Pennsylvania, and this research shows that such acquisitions invariably lead to worse service and higher rates. *See, generally,* Food & Water Watch, Borrowing Trouble, Water Privatization Is a False Solution for Municipal Budget Shortfalls (Apr. 2013).[1] Municipalities that seek to address their fiscal challenges by obtaining sizable upfront payments from those private companies that buy or lease essential public services do a great disservice for ratepayers, as residents and local businesses end up repaying this money with interest through their water bills. Investor-owned water utilities that use single-tariff pricing, or consolidated rates, also seek to bring newly acquired customer rates up to the level in their main service areas over time.

Privatizing water and sewer systems can also lead to considerable rate increases because investor-owned utilities add the value of system acquisitions into their rates. The Commonwealth greatly incentivized this in 2016 when it passed Act

[1] https://foodandwaterwatch.org/wp-content/uploads/2021/03/Borrowing-Trouble-Report-April-2013.pdf.

12, which allows private utilities to pay an appraised fair-market value for an acquired system, rather than its lower depreciated cost, and then to add that potentially inflated value to its rate base to recoup it with rate increases. "For example, Pennsylvania state advocate officials told [the Government Accountability Office that] fair market value has ranged from one-and-one-half to two times the value of water infrastructure assets, the cost of which is then passed on to ratepayers." U.S. Gov't Accountability Office, Actions Needed to Enhance Ownership Data, GAO-21-291, at 39 (Mar. 26, 2021).

As a result of privatization, household water bills on average have more than tripled after accounting for inflation in the five largest privatized water systems in Pennsylvania. Food & Water Watch, Reading's Water Lease and the Costs of Privatization (May 2014).[2] The organization's most recent analysis of four of Aqua's largest Pennsylvania acquisitions alone reveals that rates have increased by an average of 280% after adjusting for inflation. Rates on average have increased at a rate of 8 percent per year since privatization.

The situation with the City and the CWA follows suit. It is perhaps not surprising that Aqua, the state's second largest investor-owned water utility, Aqua sought to acquire the CWA water system, given the water authority's solid financial

[2] https://www.scribd.com/document/226839634/Reading-s-Water-Lease-and-the-Costs-of-Privatization.

condition and the company's potential to profit greatly from such an acquisition. But after the CWA board unanimously rejected the company's offer in 2017, the company bypassed the Authority and sought to take the system over from the City, offering $400 million as a quick upfront payment to entice the financially distressed city in receivership. The City has recently approved a resolution asking its receiver to allow it to enter into an acquisition deal with Aqua, notwithstanding the threat of higher rates, lost public jobs, and loss of 642 acres of recreational property surrounding the CWA's Octoraro Reservoir. Kathleen E Karey, *Chester Asks Receiver to Approve Purchase Agreement with Aqua for Chester Water Authority*, Delcotimes.com, Oct. 14, 2021;[3] Ad Crable, *Residents Fear Loss of Public Use of 2,000-Acre Octoraro Reservoir Property*, Lancasteronline.com, May 24, 2021.[4]

This acquisition significantly enhances Aqua's control of vital drinking water resources at the expense of all CWA customers, including FWW members. Especially injured will be those City residents least able to afford rate increases. One third of the City's 34,000 people live below the poverty level.[5] According to the CWA, the typical household's annual water bill (assuming a monthly usage of 4,500 gallons) in the City is close to $400, but should Aqua take over the system, rates will

[3] https://www.delcotimes.com/2021/10/14/chester-asks-receiver-to-approve-purchase-agreement-with-aqua/.

[4] https://lancasteronline.com/sports/residents-fear-loss-of-public-use-of-2-000-acre-octoraro-reservoir-property/article_06cc2860-95eb-11ea-9fbf-df93cc7907bd.html.

[5] WorldPopulationReview.com, Chester Pennsylvania Population 2021, https://worldpopulationreview.com/us-cities/chester-pa-population.

be 168% higher, at $1,072 per year, under the company's latest proposed rate increase. Chester Water Authority, Comparing Drop to Drop, 2019.[6] Those ratepayers outside of the City limits will also greatly suffer, as they not only will face rate increases but also will not receive benefits from the upfront payment to the City.

Aqua and the City's attempt to acquire the water system from the Authority implicates critical public policy issues and undermines FWW's mission. And, as detailed more fully below, their attempt to do so over the CWA's objections is not authorized under Pennsylvania law.

FWW therefore submits this brief in support of the Court granting Chester County's cross-petition so that it can review and reverse the Commonwealth Court's decision.

REASONS SUPPORTING ALLOWANCE OF APPEAL

Pursuant to Pa. R. App. P. 1114(b)(4), a petition for allowance of appeal may be granted where "the question presented is one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court." For the following reasons, the issues raised in the CWA's petition and Chester County's cross-petition meet this standard.

[6] https://chesterwater.com/map/.

I. An Appeal Is Merited to Effectuate the Public Trust Purposes of the Chester Water Authority Water System.

The CWA's petition and Chester County's cross-petition raise a fundamental question under Pennsylvania law of who can ultimately control and dispose of large drinking water system—the municipality that originally incorporated the water authority, or the authority itself.

This is no mere property dispute, however. At issue is the fate of the drinking water supplies themselves, which are neither the City's nor CWA's private property. Rather, they are a public trust resource. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 959 (2013) (indicating that the public trust extends to "consumable resources such as water . . . .") *See also, Mayor & Mun. Council of City of Clifton v. Passaic Valley Water Com'n*, 224 N.J. Super. 53, 64 (N.J. Super. Ct. 1987) ("[T]he public trust doctrine applies with equal impact upon the control of our drinking water reserves[]"), *aff'd on other grounds sub nom*., *Mayor & Mun. Council of the City of Clifton v. Passaic Valley Water Comm'n*, 115 N.J. 126 (N.J. 1989).

Since the water supplies are such a resource, both the City and the CWA are merely trustees, holding them in trust for people who depend upon and are served by the water system. *See Shirk v. Lancaster*, 169 A. 557, 560 (1933) (finding that utilities provide water to their inhabitants in their proprietary function, as "trustee[s] for the inhabitants of the territory embraced within [their] limits[,]" and the profits from such sales are for these public beneficiaries); *Tranter v. Allegheny Cty. Auth.*,

173 A. 289, 295 (1934) (finding that municipal authorities are not contrary to Pennsylvania's constitutional bar on private ownership of and interference with municipal functions, but only to the extent that they are public, "created for the purpose by the State," "deal[] *not* with property owned by the municipality . . . [,]" and "are formed for the limited purpose of collecting fees, improving, and returning properties" that had been "had formerly been *entrusted* by the state[]") (emphases added).

That this case's resolution will ultimately determine the fate of the people's public trust drinking water resources is alone sufficient grounds for this Court to allow an appeal. But the Commonwealth Court's decision also failed to effectuate the public trust purposes of the CWA water system. Its foundational error was concluding that the "City presumptively 'owns' the Authority . . ." because it incorporated CWA. *In re Chester Water Auth. Tr.*, __ A.3d __, 2021 Pa. Commw. LEXIS 544, at *24 n.10 (Commw. Ct. Sept. 16, 2021). But effectuating the public trust purposes of the statute requires recognizing that the CWA "is not the creature, agent or representative of the municipality organizing it." *Simon Appeal*, 184 A.2d 695, 697 (1962). Rather, authorities are "independent agencies of the Commonwealth, and part of its sovereignty." *Whitemarsh Twp. Auth. v. Elwert*, 96 A.2d 843, 845 (1964). And as part of the sovereign, it has an independent power over the Commonwealth's common property and right of regulating, improving, and

securing it for the common benefit of every individual citizen. *See Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 305 (N.J. 1972) (citing *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821)).

The City has argued that two provisions of the MAA gave it the authority to repossess its water system, § 5622(a), which details an incorporating municipality's powers over projects in relation to a municipal authority, and § 5610(a.1), which defines such an authority's structure. The lower court should have been liberally construed these for the benefit of the public. *See Mayor & Mun. Council of City of Clifton*, 224 N.J. Super. at 67 ("Public entities are created for the purpose of all the people they serve and not the governmental bodies that create or own them[;]") *Colberg, Inc. v. State*, 67 Cal. 2d 408, 417 (Cal. 1967) ("The courts have construed the purposes of the trust with liberality to the end of benefiting all the people of the state[;]") *Walnut & Quince Sts. Corp. v. Mills*, 154 A. 29, 32 (1931) ("Whatever rights or title the city or town may have over its streets, its powers are those of a trustee for the benefit of a *cestui que trust* (the public) to be liberally construed for its benefit, strictly construed to its detriment.") (Internal quotation marks and citation omitted).

Instead, and as discussed further below, the lower court interpreted these provisions to the detriment of the public. It first eliminated the ability of the majority of the CWA's customers to have any say whatsoever in the fate of their water supply through the CWA, writing the authority's required consent out of § 5622(a). And, second, the lower court's opinion ignored the will of the legislature, which unanimously passed § 5610(a.1) in 2012, to create a new, representative body politic for the management of certain water and sewage authorities such as CWA.

Because the Commonwealth Court's opinion interprets these provisions of the MAA to only inure to the benefit of the City and at the expense of the public, it should be reviewed and ultimately reversed as undermining the public trust nature of the drinking water resource.

II. The Commonwealth Court's Decision Vitiates § 5622(a) by Eliminating the Authority's Required Consent to the City of Chester's Repossession of the Water System.

The Commonwealth Court's decision giving the City of Chester the unliteral ability to repossess the CWA water system also impermissibly renders as inoperable a critical provision of § 5622(a) that requires authorities to first consent to a project's acquisition. Its interpretation heavily relies on its prior decision in *Clearfield Borough v. Clearfield Borough Park Authority* ("*Clearfield*"), 285 A.2d 532 (Pa. Cmwlth. 1971), *aff'd*, 301 A.2d 372 (1973). But just because the *Clearfield* decision

is well-aged does not mean it is correct. And the present case shows just how unworkable the decision has become.

The *Clearfield* court interpreted the prior, nearly identical version of § 5622(a) as allowing a nonconsensual takeover by concluding that the term "it," (bolded below) to only reference the term, "municipality" (also bolded) as opposed to the term "Authorities" (italicized), used twice subsequently in the statute:

> If a project shall have been established under this act by a board appointed by a municipality . . . , which project is of a character which the municipality . . . ha[s]power to establish, maintain or operate, and such **municipality** . . . desire[s] to acquire the same, **it** . . . may by appropriate resolution or ordinance adopted by the proper *Authorities*, signify its or their desire to do so, and thereupon *the Authorities* shall convey by appropriate instrument said project to such municipality or municipalities, upon the assumption by the latter of all the obligations incurred by the Authorities with respect to that project.

Id. at 532, 534-35 (emphasis and alterations added) (referencing Section 18 of the MAA of 1945, 53 P.S. 321). But this interpretation singularly exalts a rule of grammar, while reading the phrase "adopted by the proper Authorities" completely out of the statute—inexplicably giving such authorities no role whatsoever in consenting to the acquisition. Thus, the court read the statute as follows:

> If a project shall have been established under this act by a board appointed by a municipality . . . , which project is of a character which the municipality . . . ha[s] power to establish, maintain or operate, and such municipality . . . desire[s] to acquire the same, **it [*i.e.,* the municipality that incorporated the authority and only that municipality] . . . may by appropriate resolution or ordinance ~~adopted by the proper Authorities,~~ signify [the municipality's] . . . desire to do so**, and thereupon the Authorities shall convey by appropriate instrument said project to such municipality or

> municipalities, upon the assumption by the latter of all the obligations incurred by the Authorities with respect to that project.

See id. at 533; *In re Chester Water Auth. Tr.*, 2021 Pa. Commw. LEXIS 544, at *12.

By completely eliminating the role of "the proper Authorities" in a project's acquisition, this interpretation violates a bedrock canon of statutory construction that "courts must presume that the legislature did not intend any statutory language to exist as mere surplusage; consequently, courts must construe a statute so as to give effect to every word." *Commonwealth v. Golden Gate Nat'l Senior Care LLC*, 94 A.3d 1010, 1034 (2018) (citations omitted). It further places undue reliance on a grammatical rule, contrary to the edict of Pennsylvania's statutory-construction rules that that such rules must not "vitiate a statute." 1 Pa. Cons. Stat. § 1923(a) (2021); *see also*, *Fourney's License*, 28 Pa. Super. 71, 74 (Pa. Super. Ct. 1905) ("The grammatical construction of a statute is not the only mode, and not always the true mode of interpretation[.]") (citing *Fisher v. Connard*, 100 Pa. 63, 69 (1882)).

Perhaps to reconcile the obvious surplus language created by its statutory construction, the *Clearfield* court errantly suggested that the "proper Authorities" refers to the previously mentioned incorporating "municipalities" (and only such municipalities), because these words were "part of the same phrase" and "must also refer to those governmental bodies which can pass the resolution or ordinance." 285 A.2d at 534. But the *Clearfield* court overlooked that this language was *actually not contained in the same phrase* in amendatory language in 1937 (and at the time

the City incorporated the CWA). Instead, it was part of the *immediately following phrase*, which was set off by a comma after the word "ordinance." *Id.* (referencing the Pamphlet Laws of 1937, Vol. 1 at 750).

While far from a perfect picture of grammar, the statute read with this inserted comma gives force and effect to every word of the statute, as the "adopted by the proper Authorities" clause is read as qualifying that any municipality's repossession power is dependent on securing the proper authorities' approval. The statute reads as follows:

> If a project shall have been established under this act by a board appointed by a municipality . . . , which project is of a character which the municipality . . . ha[s] power to establish, maintain or operate, and such **municipality** . . . desire[s] to acquire the same, **it** [*i.e.,* the municipality that incorporated the authority and only that municipality]. . . may by appropriate resolution or ordinance**[,] adopted by the proper Authorities**, signify [the municipality's] . . . desire to do so, and thereupon the Authorities shall convey by appropriate instrument said project to such municipality or municipalities, upon the assumption by the latter of all the obligations incurred by the Authorities with respect to that project.

Accord, Burke v. N. Huntingdon Twp., 136 A.2d 310, 313 (1957).

With this construction, any incoherence in the statute is easily explained by a missing comma, which must have been deleted in the 1945 version of the statute. A missing comma alone cannot upset a commonsense reading of a statute, as punctuation has "no legislative sanction" in older statutory provisions in

Pennsylvania.[7] *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 489 (3d Cir. 1965). Indeed, "[*i*]*n no case* shall the punctuation of a statute control *or affect* the intention of the General Assembly in the enactment thereof . . . in a pre-1964 statute. 1 Pa. Cons. Stat. § 1923(b) (2021) (emphasis added).

Reading "the proper Authorities" so as to not exclusively mean the originally incorporating municipality addresses yet another problem with the lower court's interpretation. The statute uses the precise same "authorities" term in the immediately following clause, as a command—not to the incorporating entity or entities—but to the undeniably distinct and separate "authorit[y]" entities in control of the project. § 5622(a) (saying that upon adoption of the ordinance or resolution, "the authorities shall convey by appropriate instrument the project to the municipality"). It makes little sense to interpret the identical term "authorities" to have two dramatically different meanings when used only eight words apart, in the same section of the same statute. *See Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (saying that courts generally read "identical words used in different parts of the same act . . . to have the same meaning.")

The above problems with the *Clearfield* court's statutory interpretation cannot be absolved simply by pointing to legislature's 2001 re-enactment of this section.

[7] This reason behind this historical anomaly was that the printer formerly deleted all punctuation in bills considered and passed. Punctuation marks were later inserted by the office of the Secretary of the Commonwealth. *Pritchard*, 350 F.2d at 489.

The Commonwealth Court decision attempts to do so, relying on the statement that "decisions which were made under the [1945 MAA] shall remain in full force and effect until revoked, vacated or modified." 2021 Pa. Commw. LEXIS 544, at *12 (quoting the § 2 of the MAA of June 19, 2001, P.L. 287).

But it is far too great of a logical leap to conclude that just because the legislature did not intend to *revoke* all prior court decisions the 2001 MAA, that it also sought to *ratify all prior decisions*, including those decisions of the Commonwealth Court. After all, Pennsylvania's rules of statutory construction only provide that "when a *court of last resort* has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language." 1 Pa. Cons. Stat. § 1922(4) (2021) (emphasis added). In this case, the string of Commonwealth Court decisions that the lower court contends ratified the *Clearfield* decision have never in fact been adopted by this Court.[8] Rather, this Court said quite the opposite in it *Burke* decision: "where a municipality—the Authority's creator—desires to acquire a project of the Authority; it must be accomplished by an appropriate resolution or ordinance adopted by the Authority." 136 A.2d at 313.

[8] This Court only affirmed the *order* in *Clearfield*, thus indicating this Court found the disposition proper. It did not approve its rationale. *See In re Benninghoff*, 852 A.2d 1182, 1190-91 (2004).

At bottom, the Commonwealth Court's interpretation errs by completely vitiating the CWA's statutory power to consent to the City's acquisition of the water system. The interpretation contravenes bedrock principles of statutory construction, and this is a sufficient basis for the Court to allow an appeal and reverse.

III. The Commonwealth Court's Interpretation Upends § 5610(a.1), Which Established the Authority as a New, Representative "Body Politic And Corporate" Whose Water System the City Cannot Unilaterally Repossess.

The lower court's decision further erred by undermining the legislature's decision in 2012 to alter the boards of water authorities such as the CWA.

Under the MAA, a municipal authority has extensive powers, including "[t]o enter into contracts to supply water . . . to and for municipalities that are not members of the authority or to and for the Commonwealth, municipalities, school districts, persons or authorities and fix the amount to be paid . . . ." 53 Pa. Cons. Stat. § 5607(d)(19) (2021). The CWA used this authority to grow from a mere 67 customers in the City of Chester to over 200,000 customers in 33 separate municipalities located in Chester and Delaware County. *In re Chester Water Auth. Tr.*, 2021 Pa. Commw. LEXIS 544, at *3. Presently, 79% of the CWA's customers reside outside of the City. *See id.* Prior to 2012, the City alone appointed the CWA's governing body. *See* MAA of 1935, P.L. 463, No. 191, § 71.

Recognizing the severe imbalance in power with authorities such as the CWA, the legislature amended the law in 2012 to provide that when an authority operates in multiple counties whose populations are a combined five times greater than the incorporating municipality, these non-incorporating counties are to have municipal representatives on its governing body. § 5610(a-1).

Far from merely "reconfigur[ing] the numerical and geographical organization of a 'governing body' or 'board' of a water authority," as the Commonwealth Court said, *In re Chester Water Auth. Tr.*, 2021 Pa. Commw. LEXIS 544, at *23, the legislature's passage of § 5610(a-1) abolished the old CWA board and created a new one, so that surrounding municipalities could actually have representation within the CWA.

The CWA became a new "Authority," as this term is defined by MAA, 53 Pa. Cons. Stat. § 5602 (2021), since it became a new "body politic and corporate." *See also* Black's Law Dictionary 167 (7th Ed. 1999) ("Body politic. A group of people regarded in a political (rather than private) sense and organized under a single governmental authority"): *see In re Hazleton City Auth.*, 68 Pa. D. & C. 171, 174 (C.P. 1949) ("In order to define [body politic] we refer to Black's Law Dictionary in which [it] is [defined as] 'the collective body of a nation or state as politically organized or as exercising political functions . . . .'")

Accordingly, it follows that the water system serving these customers became a "project" of the new Authority, since it became a "structure, facility or undertaking which *an authority* is authorized to acquire, construct, finance, improve, maintain or operate." § 5602 (emphasis added). And, under § 5622(a), the system became a "project established by a board appointed by" not one, but three municipalities, the City of Chester, Delaware County, and Chester County.[9] Therefore, to the extent that City of Chester could unilaterally acquire the water system prior to § 5610(a.1)'s passage, such power was eliminated by the legislature afterwards, as the system was no longer a project established solely by the City.

The lower court's contrary reading further undermines the purposes of § 5610(a.1). *Contra* 1 Pa. Cons. Stat. § 1922(1) (2021) ("[T]he General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.") The legislature passed this provision to give representation to municipalities outside of the incorporating municipalities' borders. The lower court's decision undoes this, re-anointing the incorporating municipalities with the sole power to acquire and dispose of authorities over any neighboring municipality's objections.

The decision is also contrary to the purposes of the MAA, itself which is "to permit the authority to benefit the people of this Commonwealth, . . . while not *unnecessarily burdening or interfering* with any municipality which has not

[9] MAA § 5602 defines "Municipality" to include counties as well as cities.

incorporated or joined that authority." 53 Pa. Cons. Stat. § 5607(b)(3) (2021) (emphasis added). Non-incorporating municipalities, such as Chester and Delaware Counties, are concretized as second-class citizens in the authority. When it comes to deals involving private companies, the customers of such non-incorporating municipalities are harmed from having to pay increased rates even though the municipalities themselves receive nothing from the takeover. Ultimately, the Commonwealth Court's decision will undermine an authority's provision of essential services "in an efficient and economical manner and for the benefit and health of *all the people of this Commonwealth*." *Simon Appeal*, 184 A.2d at 698 (emphasis added).

CONCLUSION

The Commonwealth Court's decision failed to effectuate the public trust purposes of the CWA's water system, the language of § 5622(a), and the purposes of § 5610(a.1) and the MAA itself. Therefore, FWW respectfully requests that this grant Chester County's and CWA's motion for allowance of appeal and reverse the decision below.

Respectfully submitted,

Dated: November 1, 2021

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CERTIFICATE OF COMPLIANCE WITH PA. R. APP. P. 127

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 1, 2021

/s/ *Zachary B. Corrigan*
Zachary B. Corrigan

CERTIFICATION OF WORD COUNT

Pursuant to Pa. R. App. P. 531, I certify that the word count feature of the Microsoft Word program used to prepare this brief states indicates that it contains 4,476 words.

Dated: November 1, 2021

/s/ *Zachary B. Corrigan*
Zachary B. Corrigan

CERTIFICATION OF SERVICE

I hereby certify that I caused the foregoing to be served by filing it with the Court's electronic filing system on all counsel of record

Dated: November 1, 2021

/s/ *Zachary B. Corrigan*
Zachary B. Corrigan