IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION

YOUR TOWNE BUILDERS, INC., COOPER CUSTOM HOMES, INC., HESS HOME BUILDERS, INC., C&F, INC., HORST & SON, INC., COSTELLO BUILDERS, INC., and KEYSTONE CUSTOM HOMES, INC., on behalf of themselves and all other similarly situated

v.

MANHEIM TOWNSHIP, MANHEIM TOWNSHIP GENERAL MUNICIPAL AUTHORITY, C. MATTHEW BROWN, P.E. and ARRO CONSULTING, INC.

No. CI-14-07663

FINDINGS OF FACT, CONCLUSIONS OF LAW AND VERDICT

BY: ASHWORTH, P.J., MARCH 7, 2022

I. Procedural Background

This is a class action suit filed by Your Towne Builders, Inc., Cooper Custom Homes, Inc., Hess Home Builders, Inc., C&F, Inc., Horst & Son, Inc., Costello Builders, Inc., and Keystone Custom Homes, Inc., on behalf of themselves and all other similarly situated (Plaintiffs), against Manheim Township (the Township), Manheim Township General Municipal Authority (the Authority), C. Matthew Brown, P.E., and Arro Consulting, Inc. Plaintiffs initiated the action by filing an original complaint on August 22, 2014. In response to preliminary objections filed by all Defendants, a first amended complaint was filed on October 2, 2014, followed by a second amended complaint on November 3, 2014.

The following claims were asserted by the Plaintiffs: (1) the Township and the Authority (the Municipal Defendants) violated the Pennsylvania Municipal Authorities Act of 1945, re-enacted and codified at 53 Pa.C.S.A. §§ 5601-5623 (MAA), by imposing water tapping fees during a period when the Authority did not own the water distribution system (Count I); (2) the Municipal Defendants violated the MAA by miscalculating water tapping fees during the class period (Count II); (3) the Municipal Defendants violated Article III, Section 31 of the Pennsylvania Constitution[1] by assessing tapping fees for the general welfare, not for a specific benefit to Plaintiffs, which thereby constitutes an impermissible tax (Count III); (4) the Municipal Defendants violated the Fourteenth Amendment of the United States Constitution[2] by refusing to allow construction of improvements to Plaintiffs' properties unless Plaintiffs paid tapping fees to connect to a water distribution system which the Authority does not own (Count IV); (5) all Defendants conspired to violate the MAA (Count V); (6) the Municipal Defendants conspired to violate the Pennsylvania Constitution (Count VI); and (7) all Defendants conspired to violate Plaintiffs' right to substantive due process imposed by the Fourteenth Amendment to the United States Constitution (Count VII). These claims arise from two alleged courses of action by

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[1] Section 31 of Article III of the Pennsylvania Constitution provides in relevant part:

> The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever. . . .

PA Const Art. III, § 31.

[2] Section 1 of the Fourteenth Amendment provides in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const Amend. XIV, § 1.

Defendants: (1) the Municipal Defendants forfeited their right to impose water tapping fees when they dedicated the water infrastructure improvements in the Township to the City of Lancaster and, even if they had a right to charge the fees, they miscalculated them; and (2) the Municipal Defendants conspired with Brown and Arro Consulting to miscalculate water tapping fees intentionally or recklessly in violation of state and federal law.

The seven counts in the Second Amended Complaint seek the following relief from the Municipal Defendants: (1) a refund of water tapping fees paid; (2) an injunction against the imposition of tapping fees until recalculated; (3) an injunction compelling the recalculation of the water tapping fees; (4) an injunction against the Township from conditioning the issuance of building permits on the payment of water tapping fees; and (5) an injunction against the Township from conditioning the issuance of building permits on the payment of water tapping fees until the Authority recalculates the fees. Plaintiffs seek judgment against Brown and Arro Consulting in the amount of the water tapping fees paid by Plaintiffs.

Defendants filed answers with new matter to the Second Amended Complaint on November 24, 2014. Following the filing of Plaintiffs' reply to Defendants' new matter on December 10, 2014, the pleadings were closed. Thereafter, the Court granted an unopposed motion to extend the time for Plaintiffs to file a motion for class certification to January 23, 2015.[3] The motion for class certification was timely filed by Plaintiffs, and briefs were exchanged and oral argument by the parties heard on April 1, 2015. Following a class action certification hearing on July 15, 2015, and the subsequent filing of proposed

[3] Pennsylvania Rule of Civil Procedure No. 1707(a) requires a plaintiff to file a class certification motion within 30 days of the close of the pleadings.

findings of fact and conclusions of law, an opinion and order were entered on May 5, 2016, granting Plaintiffs' motion for class certification.

A motion to amend the Second Amended Complaint was thereafter filed by Plaintiffs on February 3, 2017. Following the filing of briefs, the motion to amend was granted on March 21, 2017. Plaintiffs' third amended complaint was filed on March 27, 2017. The pleadings were closed on May 10, 2017.

Plaintiffs' motion for partial summary judgment filed on August 15, 2017, was denied by order of Court dated January 10, 2018, following the filing of briefs. On January 9, 2019, the Municipal Defendants filed a motion for partial summary judgment. By order dated May 7, 2019, the motion was granted in part and denied in part, as follows: (1) the motion was granted as to Counts I (violation of MAA), III (violation of Article III, Section 31 of the Pennsylvania Constitution) and IV (violation of the Fourteenth Amendment to the U.S. Constitution); (2) Plaintiffs' claims for fees paid between 2004 and August 21, 2012, were barred by the statute of limitations; and (3) Defendants' request for clarification as to Plaintiffs' potential damages arising from the miscalculation of the Authority's water tapping fee was denied without prejudice.

Defendants Arro Consulting and Brown filed a motion for summary judgment on January 11, 2019, which was granted in part and denied in part on May 7, 2019, as follows: (1) the motion with respect to Count V (conspiracy to violate the MAA) was denied in part as to claims arising on or after August 21, 2012, and granted as to any claims prior to that date as they were barred by the statute of limitations; and (2) the motion with respect to Count VII (conspiracy to violate Plaintiffs' substantive due process imposed by the Fourteenth Amendment) was denied. In response to a May 16, 2019, request for

clarification/reconsideration filed by Defendants Arro Consulting and Brown, the Court entered an order on June 28, 2019, granting summary judgment in favor of all Defendants on Count VI (conspiracy to violate the Pennsylvania Constitution) and Count VII (conspiracy to violate Plaintiffs' substantive due process rights imposed by the Fourteenth Amendment).

A non-jury trial was ultimately held on February 10, 2020. At the close of Plaintiffs' case-in-chief, an uncontested motion for compulsory non-suit as to the conspiracy claims against Manheim Township with respect to the Authority was granted. Notes of Testimony (N.T.), Bench Trial at 236-37. A motion for compulsory non-suit as to the remaining conspiracy claim against Arro Consulting and Brown was also granted and these parties were dismissed from the action. Id. at 243. Findings of fact, conclusions of law and briefs were ordered and subsequently filed by the remaining parties on March 3, 2020.

During a conference call on April 8, 2020, the Court notified the parties that it had found Plaintiffs' evidence at trial sufficient to establish liability but, with respect to the damages, the Court had an insufficient understanding of the highly technical evidence to render a fair and impartial verdict with specific tapping fee calculations for three previous dates and one prospective date. Therefore, counsel were informed of the Court's intention to reopen the record and appoint (at the parties' expense) an expert to serve as a judicial tutor and to provide an independent report as to the relevant tapping fee calculations. The Municipal Defendants submitted a letter to the Court on May 1, 2020, objecting to the reopening of the record. Municipal Defendants' Petition for Decision Based on Trial Evidence, Ex. B; Plaintiffs' Answer to Municipal Defendants' Petition, Ex. B (May 1, 2020, letter from Plaintiffs' counsel in response to Defendants' May 1, 2020, letter).

In an Order dated May 5, 2020, this Court held that the Authority "did not calculate the tapping fees it imposed on Plaintiffs in accordance with the [MAA] at any point during the period relevant to this action." Order of May 5, 2020, at ¶ 1. The May 5th Court Order further reopened the record for the limited purpose of developing supplemental expert testimony by a witness to be designated by the Court in accordance with Pennsylvania Rule of Evidence No. 706. Id. at ¶ 2. Specifically, the Court determined that it would appoint an expert "for the purpose of providing an opinion as to the calculations of the water tapping fee the Authority was/is permitted to charge as of each of these dates: a. January 16, 2009; b. November 9, 2012; c. February 5, 2016; and d. the date of entry of this Order [May 5, 2020]." Id. at ¶ 8.

On June 1, 2020, the Court appointed Constance E. Heppenstall of Gannett Fleming Valuation and Rate Consultants, LLC, as the Court's expert, on the joint recommendation of the parties. Order of June 1, 2020. Pursuant to the Court's Order of May 5, 2020, Plaintiffs submitted a letter to Ms. Heppenstall on June 19, 2020, containing the information they wished for Ms. Heppenstall to consider in her capacity as a court-appointed expert. Municipal Defendants' Petition for Decision Based on Trial Evidence, Ex. C. Similarly, on June 20, 2020, Municipal Defendants presented Ms. Heppenstall with a letter which included the relevant information for her consideration, and which further clarified their understanding of the limited scope of Ms. Heppenstall's authority as a court-appointed expert witness to solely address the design capacity of the Authority's water distribution system. Id., Ex. D. On June 22, 2020, Plaintiffs submitted correspondence to the Court requesting clarification from the Court regarding Ms. Heppenstall's role and the scope of her authority. Id., Ex. E. In a conference call on June 24, 2020, it was reiterated

by the Court that Ms. Heppenstall was tasked with calculating the water tapping fees in their entirety, for each of the four dates specified in the May 5, 2020, Order.

Thereafter, at the direction of the Court, the parties prepared and submitted to Ms. Heppenstall a "Joint Submission to the Court Appointed Expert," which included 43 exhibits. Municipal Defendants' Petition for Decision Based on Trial Evidence, Ex. F. On July 17, 2020, Ms. Heppenstall contacted the Court and requested additional information. Id. Ex. G. On July 23, 2020, the parties submitted the documents requested by Ms. Heppenstall that were available to the parties at that time. Id., Ex. H. Ms. Heppenstall subsequently requested clarification as to whether the Authority has a list of the water system's fixed assets and requested that the Authority provide the "underlying documents" for several of its projects to assist her in determining the total cost component of the Authority's tapping fee calculation. On August 5, 2020, counsel for the Municipal Defendants emailed the Court requesting its assistance in determining what, if any documents, should be provided to Ms. Heppenstall.[4] Id., Ex. I. Attached to the email were "supporting documents" that Municipal Defendants wished to submit to Ms. Heppenstall in response to her request. Id., Ex. J. On August 5, 2020, counsel for Plaintiffs responded to Municipal Defendants' email objecting to submission of the "supporting documents." Id., Ex. K.

Counsel for the parties further conferred about what documents and information should be submitted to Ms. Heppenstall but could not agree. Counsel submitted a Summary of Responses to Ms. Heppenstall's requests, which was submitted to the Court

[4] Due to the COVID-19 pandemic and the resulting limited access to the Lancaster County Courthouse, the parties and the Court utilized email as an efficient and trusted method of communication for the remainder of 2020.

with a request for an opportunity to provide an argument regarding the parties' respective positions. Municipal Defendants' Petition for Decision Based on Trial Evidence, Ex. M. After conferring with the Court on September 10, 2020, the parties attempted to resolve the dispute regarding the provision of the "supporting documents" and sought direction from the Court by way of a letter to the Court dated October 9, 2020. Id., Ex. N. Another teleconference was conducted on October 21, 2020, during which the Court directed counsel for the Municipal Defendants to analyze whether the values identified in the "supporting documents" were accurately documented in the Authority's audited financial statements. In response, on December 2, 2020, Municipal Defendants provided a "Memorandum Regarding Comparison of Financial Reports and System Values Used at Trial." Plaintiffs' Answer to Municipal Defendants' Petition for Decision Based on Trial Evidence, Ex. H.

Further emails were exchanged and on December 23, 2020, at the direction of the Court, the parties submitted a jointly prepared letter addressing certain questions raised by the Court regarding the total cost basis component of the tapping fee calculations. Municipal Defendants' Petition for Decision Based on Trial Evidence, Ex. O. On January 15, 2021, the Court directed Ms. Heppenstall to prepare her expert report based on the documents previously provided by the parties and informed her that no other documents would be provided.[5] Id., Ex. P.

[5] Municipal Defendants conceded that the disputed "supporting documents" had limited probative value, and that the audited financial statements provided to Ms. Heppenstall supported more than 98.6% of the expenditures identified on Mr. Brown's tapping fee calculations. Municipal Defendants' Petition for Decision Based on Trial Evidence, Ex. N at 2; Plaintiffs' Answer to Defendants' Petition, Ex. H at 6.

On April 6, 2021, Ms. Heppenstall delivered her Tapping Fee Study (the Expert Report) to the Court. The Court forwarded it to counsel for the parties on April 14, 2021. On June 21, 2021, the Court conducted a hearing to provide the parties with an opportunity to examine Ms. Heppenstall and her engineer, Scott Hughes, who assisted in preparing the Expert Report. *See* Pa.R.E. 706. The Expert Report was admitted into evidence during the hearing. N.T., June 21, 2021, Hearing at 3, 48; Court Ex. 1.

II. Factual Background

For more than 40 years, Municipal Defendants have worked in conjunction with the City of Lancaster (the City) to provide residents of Manheim Township with access to the public water distribution system. Originally, the City solely constructed, owned, and operated the water distribution system that served the Township. *Merchant Square LP v. Manheim Township et al.,* No. CI-11-00616 (C.C.P. Lanc. Co.), Complaint, Exhibit B.[6] In 1984, the Township desired to expand the water distribution system, but the City was not in a position to undertake construction of the necessary extensions. Id., Complaint at ¶¶ 5, 6; Defendants' Answer at ¶¶ 5, 6.

To accomplish this expansion, the City entered into a "Municipal Connector's Agreement" with the Township on December 18, 1984 (1984 Agreement). *Merchant Square* Complaint at ¶ 7, Ex. A; *Merchant Square* Defendants' Responses to Plaintiff's Second Request for Admissions at ¶ 1. The stated purpose of the 1984 Agreement was as

[6] *Merchant Square* was a related action which challenged the authority of the Municipal Defendants to impose tapping fees to connect to the water distribution system, the owner of which was disputed.

follows:

> [Township] desires to have a public water supply system available to certain lands [situated in the Township] and it is willing to construct and pay for the distribution system and the City is willing to supply and sell the water after the lines are hooked up.

Id. at Recitals. Pursuant to the 1984 Agreement, the Township would construct water lines in accordance with the plans and specifications of the City and would "pay all costs and expenses incurred in the construction of said water main[s]." Id., Ex. A at ¶ 2. The City would permit the Township to connect these lines to the City's existing water distribution system to allow the City to provide public water service to both present and future owners of property located in the Township. Id. at ¶¶ 4, 7.

Pursuant to the 1984 Agreement, the Township constructed, at its expense, mains, laterals, hydrants and pumping stations and, specifically, a large water main located under a section of Fruitville Pike located within the Township, which connected to the existing water distribution system. *Merchant Square* Complaint, Ex. A at ¶ 1. To enable the Township to recover the costs incurred with this expansion to the water distribution system, the 1984 Agreement authorized the Township to impose a water tapping fee on those connecting to the system. Id. at ¶ 8.

Upon the Township's and the City's certification that the new water distribution system had been placed into service, the 1984 Agreement leased the Township water distribution system to the City. *Merchant Square* Complaint, Ex. A at ¶ 6. Pursuant to the 1984 Agreement, the City would "operate [the Township water distribution system] as part of [the City's] water supply system and serve water to all consumers connected thereto" and "pay all costs of maintaining, repairing, and replacing [the water distribution system] under the term of the lease." Id. at ¶ 7.

The lease of the Township water distribution system to the City was to terminate at the earlier of 20 years from when it was placed into service or upon the Township's collection of sufficient water tapping fees to recoup the costs associated with the water distribution system. Specifically, the 1984 Agreement stated:

> If the total cost [of the water distribution system] has been recovered prior to 20 years from the date when the line was placed in service, the lease shall terminate at the recovery of such cost. If the said total cost has not been recovered prior to 20 years from the date when the line was placed in service, it shall terminate in all events, at the end of said 20 year period and the right of the [Township] to recover any more costs shall cease.

Merchant Square Complaint, Ex. A at ¶ 9. The 1984 Agreement further provided that, upon the termination of the lease, "the [Township] shall dedicate the [water distribution system] to the [City] and it shall thereupon become a part of the water distribution system owned by [the City]." Id. at ¶¶ 6, 10. The Township water distribution system was placed into service sometime prior to April 18, 1988.

On September 17, 1985, the Authority[7] adopted "A Resolution Establishing and Providing for the Imposition and Collection of Tapping Fees Upon and From Owners of Properties Connected or to be Connected to Water Lines Acquired or Constructed by the Authority" that imposed water tapping fees on property owners connecting to the water distribution system. Ex. P-13 (*Merchant Square* January 15, 2016, Opinion) at 3.[8] The

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[7] Sometime between December 18, 1984, and September 17, 1985, the Township assigned its rights and duties existing under the 1984 Agreement to the Authority which had been created in 1983 by the Manheim Township Board of Commissioners. *Merchant Square* Complaint at ¶ 19; Defendants' Amended Answer at ¶ 19.

[8] On September 30, 1985, the Authority and the City executed a second "Municipal Connector's Agreement" (1985 Agreement) that provided for the construction of additional water lines not encompassed by the scope of the 1984 Agreement. *Merchant Square* Defendants' Amended Answer, Ex. A. The stated purpose of the 1985 Agreement is identical to the 1984 Agreement, and, like that Agreement, the Township would "pay all costs and expenses incurred in the construction of said water main[s]" and the City would permit the Township to connect these lines to the City's

original 1985 tapping fee was amended by resolution in 1985, 1987, 1990, and 1991. *Merchant Square* Plaintiff's Second Motion for Summary Judgment, Ex. C.

In 1993, the Authority authorized the imposition of a water tapping fee in the amount of $4,011.00 per equivalent dwelling unit (EDU)[9] by way of "A Resolution Amending the Resolution Adopted by The General Municipal Authority of The Township of Manheim On September 17, 1985, As Previously Amended by Resolutions Of November 9, 1985, August 21, 1987, February 16, 1990, And June 17, 1991" (1993 Resolution). *Merchant Square* Plaintiff's Second Motion for Summary Judgment, Ex. C. Attached as an exhibit to the 1993 Resolution is a copy of a water tapping fee calculation (1993 Calculation) showing how the Authority derived the $4,011.00 fee. Id.

On June 28, 2004, the Township, the Authority, and the City executed the "Extension of Municipal Connector's Agreement" (2004 Extension Agreement). *Merchant Square* Complaint, Ex. B. This Agreement purported to extend the terms of the 1984 Agreement for a period of 90 days from the date of execution of the 2004 Extension Agreement to September 26, 2004. Id. at ¶ 3. The parties did not extend the 1984

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existing water system. Id. at Recitals, and ¶¶ 2, 3, 6. Pursuant to the 1985 Agreement, the Township constructed mains, laterals, hydrants and pumping stations within the Township (collectively, the 1985 Lines). Id. at ¶ 1. Upon the Township's and the City's certification that the 1985 Lines had been placed into service, the 1985 Agreement leased the 1985 Lines to the City. Id. at ¶ 5. Pursuant to the Agreement, the City would "operate [the 1985 Lines] as a part of [the City's] water supply system and serve water to all consumers connected thereto," and further "pay all costs of maintaining, repairing, and replacing [the 1985 Lines] during the term of the lease." Id. at ¶ 6. The lease of the 1985 Lines to the City was to terminate at the earlier of 25 years from when they were placed into service or upon the Township's collection of sufficient water tapping fees to recoup the costs associated with the 1985 Lines. Id. at ¶ 8. These additional water lines were not the subject of the *Merchant Square* litigation.

[9] An equivalent dwelling unit or EDU is a standard unit of water demand in gallons per day for one average single-family residence. *See* **The Ainjar Trust v. Department of Environmental Protection**, 806 A.2d 482, 484 (Pa. Cmwlth. 2002).

Agreement prior to the expiration of the 2004 Extension Agreement. *Merchant Square* Defendants' Response to Plaintiff's Second Request for Admissions at ¶ 7.

Between 1993 and 2008, the Authority imposed a water tapping fee in the amount of $4,011.00 per EDU on all property owners connecting to the water distribution system. In March 2008, Merchant Square purchased two lots in the Township for the purpose of developing a group of multi-family residences consisting of 92 units. To obtain building permits from the Township to develop this real estate, Merchant Square was advised it would be assessed water tapping fees by the Authority.

During discussions with the City and the Township, Merchant Square uncovered conflicting information regarding the ownership of the water distribution system and the ability of the Township to impose water tapping fees on Merchant Square.[10] Accordingly, on March 18, 2008, Merchant Square's counsel wrote to the Township solicitor in an effort to resolve the discrepancy informally. *Merchant Square* Plaintiff's Motion for Summary Judgment, Ex. G. The letter identified the 1984 Agreement and suggested that its termination ended the Authority's ability to impose tapping fees. Id.

One month later, on April 18, 2008, the Township executed the "Extension of Municipal Connector's Agreement" (2008 Extension Agreement). *Merchant Square* Complaint, Ex. C. This Agreement purported to "confirm" that the "[1984 Agreement] remained in effect beyond [its] initially stated duration [term]," thereby allowing the

[10] In a March 13, 2008, email exchange between Merchant Square's representative and the City's Director of Public Works, the City's Director stated that "[the water distribution system] was installed by [Manheim Township] under the [1984 Agreement]. This agreement ran for 20 years . . . so since 2004 the [C]ity has owned and maintained this main." *Merchant Square* Plaintiff's Motion for Summary Judgment, Ex. F.

Authority to impose a water tapping fee on those wishing to connect to the water distribution system. Id. at ¶ D. In exchange for the City entering into the 2008 Extension Agreement, the Township agreed to undertake significant improvements to City-operated water distribution system. Id. at ¶¶ E, 5. Thereafter, the Authority proceeded to impose water tapping fees on Merchant Square.

During this period, the City and the Municipal Defendants entered into another "Extension of Municipal Connector's Agreement" with the City (Second 2008 Extension Agreement). *Merchant Square* Plaintiff's Motion for Summary Judgment, Ex. H. This Agreement of December 4, 2008, identified the specific improvements that the Municipal Defendants would make and dedicated the water distribution system back to the Authority at no cost and extended their relationship for an additional 20 years. Ex. P-12 (*Merchant Square* November 19, 2014, Opinion) at 22. The plans were for a booster pumping station and related 24-inch main (Northwest Pumping Station Project) designed to improve the multi-township water distribution system for existing customers, many of whom were located outside of the Township.[11] *Merchant Square* Plaintiff's Motion for Summary Judgment, Ex. H at ¶ F. The estimated cost of this project was $4,265,000.00. Id. at Attachment. In 2009, the Authority passed a motion increasing the water tapping fee from

[11] In addition to providing water service to customers connected to the Authority-owned system, the City provides service to municipalities adjacent to the Authority's service area, including West Earl Township and Penn Township. The City provides this service by flowing water through the Authority-owned system and out of the Authority's service area to surrounding municipalities. The City, the Authority and the adjacent municipalities have entered into agreements regarding the provision of water service through the Authority-owned system to the adjacent municipalities. *See* Plaintiffs' Answer to Municipal Defendants' Petition for Decision Based on Trial Evidence, Ex. D (Joint Submission to the Court Appointed Expert) at Exs. 39 (1997 Agreement regarding bulk sales of water to the West Earl Water Authority), 42 (Amendment to the 1997 West Earl Agreement dated October 12, 2009), and 43 (Agreement dated September 10, 2009, regarding the bulk water sales agreement for the Northwestern Lancaster County Authority).

$4,011.00 to $5,372.00 per EDU. Ex. J-4 at 2. Thereafter, Merchant Square paid under protest the water tapping fees to the Authority for each apartment unit.

On January 24, 2011, Merchant Square commenced legal action challenging the authority of the Municipal Defendants to impose tapping fees on Merchant Square to connect to the water distribution system. This litigation resulted in two opinions. In the first opinion filed on November 19, 2014, this Court addressed the ownership of the water distribution system in Manheim Township and the Authority's right to charge tapping fees. It concluded that, upon the termination of the 20-year lease contained in the 1984 Agreement, the water distribution system was automatically offered for dedication to the City in 2004, and the City made an unconditional acceptance of the offer of dedication. *See* Ex. P-12. A second opinion was filed on January 15, 2016, which determined that the Authority failed to follow the MAA's statutorily mandated procedure for adoption of the 2006 and 2009 water tapping fees.[12] *See* Ex. P-13. In response to the 2016 Opinion, the Authority adopted a new resolution authorizing water-tapping fees on February 5, 2016. Thereafter, the *Merchant Square* litigation was settled.

On August 22, 2014, during the pendency of the *Merchant Square* litigation, Plaintiffs initiated the instant action against Defendants challenging the 2009 and 2012 water tapping fees imposed on Plaintiffs. The application of the doctrine of collateral estoppel prevents the Municipal Defendants from re-litigating in this case those issues resolved by the Court in the 2014 and 2016 *Merchant Square* Opinions. **J.S. v. Bethlehem Area School District,** 794 A.2d 936, 939 (Pa. Cmwlth. 2002) ("collateral estoppel bars a

[12] The Authority did not impose the 2012 Fee on Merchant Square, so this Court did not address it in the 2016 *Merchant Square* opinion.

subsequent lawsuit where (1) an issue decided in a prior action is identical to one presented in a later action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action, and (4), the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action"). *See also* **Municipal Authority of Hazle Township v. Lagana Enterprises, Inc.**, 2008 WL 9408020, at *3 (Pa. Cmwlth. July 24, 2008) (finding that, based on collateral estoppel, the authority was barred from re-litigating before the trial court the issue of the reasonable-ness, uniformity, and lawfulness of the authority's connection and tapping fees which had been considered and decided in prior action involving the same parties and the same legal issues, after a full and fair litigation of the issue, and where action resulted in a final judgment on the merits).

The Municipal Defendants apparently agree with this legal conclusion relative to *Merchant Square* as they affirmatively argued the doctrine of collateral estoppel in opposition to Plaintiffs' motion for class certification in the instant case:

> [T]he related *Merchant Square* litigation addresses precisely the same issue present in this case. As a result, *any precedent set in the Merchant Square litigation will undoubtedly resolve most, if not all, of the claims in the present action*. For example, if *Merchant* Square successfully establishes that the Authority's water tapping fee calculation was performed in an unlawful manner, that result would preclude the Authority from continuing such a line of defense in the present action.... By operation of law, preclusion will...ensure that inconsistent results are not reached [in cases pursued by different plaintiffs].

Municipal Defendants' Class Certification Opposing Brief at 10-11 (emphasis added). The Municipal Defendants cannot credibly argue otherwise at this stage of the proceedings. Thus, this Court's decisions in *Merchant Square* regarding the Authority's ownership of

portions of the water distribution system and the Authority's failure to follow the MAA's statutorily mandated procedure for adoption of the 2006 and 2009 water tapping fees are barred from further litigation.[13]

III. Statutory Background for Charging Tapping Fees

Before presenting the findings of fact and conclusions of law, it is necessary to understand the statutory framework of the MAA, and the appellate courts' interpretations of and pronouncements on this statute. The purpose and intent of the MAA is "to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety and prosperity. . . ." 53 Pa.C.S.A. § 5607(b)(2). *See also* **Northern Tier Solid Waste Authority v. Commonwealth**, 825 A.2d 793, 795-96 (Pa. Cmwlth. 2003). The MAA, therefore, authorizes the creation of authorities precisely to "perform[ ] essential governmental functions in effectuating these [broader] purposes." Id.

The Manheim Township Authority is a municipal authority organized and existing under the MAA. Section 5607 of the MAA defines the powers provided to authorities and municipalities covered by the MAA. 53 Pa.C.S.A. § 5607. Subsection (d) details the rights and powers specific to water and sewer authorities and provides, in pertinent part:

> (d) Powers. -- Every authority may exercise all powers necessary or convenient for the carrying out of the purposes set forth in this section, including, but without limiting the generality of the foregoing, the following rights and powers:
>
> . . .
>
> (9) to fix, alter, charge and collect rates and other charges in the area served by its facilities at reasonable and uniform rates to be determined exclusively by it for the purpose of providing for the payment of the

[13] Although the Court did not specifically address the Authority's adoption of the 2012 water tapping fee in the *Merchant Square* litigation, the legal issues and factual underpinnings are identical with respect to the 2006 and 2009 fees.

> expenses of the authority, the construction, improvement, repair, maintenance and operation of its facilities and properties. . . .
>
> . . .
>
> (24) To charge enumerated fees to property owners who desire to or are required to connect to the authority's sewer or water system.
>
> . . .
>
> (i) The fees may include any of the following if they are separately set forth in a resolution adopted by the authority:
>
> . . .
>
> (C) Tapping fee.

53 Pa.C.S.A. § 5607(d)(9), (24).[14] Thus,

> [w]hen a new residential or commercial customer desires (or is required) to connect to a municipal authority's water system, the municipal authority is authorized, pursuant to the MAA, to charge a 'tapping fee' to recoup its capital costs incurred in constructing the particular facilities required to provide service to a new customer. The tapping fee is a one-time charge for access to the water system; it is not to be confused with a user fee, which is a separate ongoing charge for actual use of the system.

J. Buchanan Associates, LLC v. University Area Joint Authority, 231 A.3d 1089, 1091 (Pa. Cmwlth. 2020).

In December 2003, the MAA was amended by the Act of December 30, 2003, P.L. 404, No. 57 (Act 57). Act 57 made several changes. It established that any authority charging a tapping fee may only do so pursuant to a resolution adopted at a public meeting, that the authority have available for public inspection a detailed itemization of all tapping fee calculations, and that the detailed itemization be made part of the resolution. Section 5607(d)(24)(ii) of the MAA now reads:

> Every authority charging a tapping, customer facilities or connection fee shall do so *only pursuant to a resolution adopted at a public meeting of the authority. The authority shall have available for public inspection a detailed itemization of all calculations, clearly showing the maximum fees allowable for each part of the tapping fee and the manner in which*

[14] Permissible fees also include a connection fee and a customer facilities fee. 53 Pa.C.S.A. § 5607(d)(24)(i)(A), (B). Only the tapping fee is relevant to this action.

> *the fees were determined, which shall be made a part of any resolution imposing such fees.* A tapping, customer facilities or connection fee may be revised and imposed upon those who (sic) subsequently connect to the system, subject to the provisions and limitations of the act.

53 Pa.C.S.A. § 5607(d)(24)(ii) (emphasis added).[15] *See also* Id. at § 5607(d)(24)(i) ("The fees may include any of the following if they are separately set forth in a *resolution* adopted by the authority. . . .") (emphasis added).

Following the Act 57 amendments, "[a] tapping fee shall not exceed an amount based upon some or all of [four] parts which shall be separately set forth in the resolution adopted by the authority to establish these fees." 53 Pa.C.S.A. § 5607(d)(24)(i)(C). The following component "parts" which may form a permissible tapping fee are: (a) the "capacity part"; (b) the "distribution or collection part"; (c) the "special purpose part"; and (d) the "reimbursement part." Id. at § 5607(d)(24)(i)(C)(I)-(IV). The only component part that is relevant in this action is the "distribution/collection part."[16]

Act 57 added language to expressly limit this tapping fee component. "The distribution . . . part [of a tapping fee] may not exceed an amount based upon the cost of

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[15] The highlighted portions were added by Act 57. However, the basis for the requirement that municipalities adopt tapping fees at a public meeting and make available for public inspection a detailed itemization of all calculations showing the way the fee is calculated is not new. It can be traced back to the Act of December 19, 1990, P.L. 1227, No. 203, as amended (Act 203 of 1990), which amended the former MAA. *See generally* **West v. Hampton Township Sanitary Authority**, 661 A.2d 459 (Pa. Cmwlth. 1995). *See also* **Norristown Municipal Waste Authority v. 200 E. Airy, LLC and Commerce Bank NA**, 2011 WL 10857856, at *3 (Pa. Cmwlth. Nov. 30, 2011) (providing concise history of the introduction of municipal authorities' obligation to adopt tapping fee by resolution).

[16] The parties stipulate that the Authority's tapping fees consist exclusively of a "distribution/ collection part," and do not contain a "capacity part," "special purpose part" or "reimbursement part," as those terms are defined in the MAA. Ex. J-1, ¶ U. The capacity part includes supply and treatment. Since the Authority does not have facilities related to supply and treatment, the calculation of the tapping fee includes only facilities related to distribution/collection, such as system pumping, transmission, storage, and other distribution facilities.

the distribution ... facilities required to provide service, such as mains, hydrants and pumping stations." 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II). The MAA is specific about what costs may be included (and which must be excluded) when calculating the "total cost basis" of a system. The total cost basis component of the fee may *not* include "facilities *contributed to the authority* by any person, government or agency, or *portion of facilities paid for with contributions* or grants other than tapping fees." Id. (emphasis added). An authority must also subtract any outstanding debt associated with the system from the total cost basis component. Id. Moreover, the distribution/collection part of the tapping fee "shall not exceed the cost of the facilities divided by the *design capacity*." Id. (emphasis added).

Consistent with the new provisions limiting the tapping fee components, the following definitions for "design capacity" and "system design capacity" were also added to the MAA tapping fee provisions:

> 'Design capacity.' For residential customers, the permitted or rated capacity of facilities expressed in million gallons per day. . . . The units of measurement used to express design capacity shall be the same units of measurement used to express the system design capacity. Except as otherwise provided for special purpose facilities, *design capacity may not be expressed in terms of equivalent dwelling units.*
>
> . . .
>
> 'System design capacity.' The design capacity of the system for which the tapping fee is being calculated which represents the total design capacity of the treatment facility or water sources.

53 Pa.C.S.A. § 5607(d)(24)(i)(C)(VII) (emphasis added). *See also* **J. Buchanan Associates**, 231 A.3d at 1094, 1094 n.5 ("'Design capacity' refers to the wastewater requirements of a customer," while "the Authority's system design capacity [is] . . . how much wastewater its facilities can handle.")

This concept of "design capacity" of a water distribution system was added to the MAA to allocate the cost of a water system to all those using the system or that will use the system in the future. N.T., Bench Trial at 163-65. It is the amount of "equity" in a water distribution system available for sale to users. Id. at 165. Act 57 established the maximum "design capacity" that a municipal authority may allot to a new residential customer when calculating that customer's tapping fee:

> [T]he design capacity required by a new residential customer used in calculating sewer or water tapping fees shall not exceed an amount established by multiplying 65 gallons per capita per day for water capacity . . . times the average number of persons per household as established by the most recent census data provided by the United States Census Bureau. . . .

53 Pa.C.S.A. § 5607(d)(24)(i)(C)(V)(e).

Section 5607(d)(24)(iii) of the MAA explicitly prohibits an authority from imposing a tapping fee in contravention of these specific provisions of the MAA. 53 Pa.C.S.A. § 5607(d)(24)(iii) ("No authority shall have the power to impose a . . . tapping fee . . . except as provided *specifically* under this section [of the Act]." (emphasis added)). As our Commonwealth Court has recognized:

> The General Assembly, through its careful crafting of the MAA's extraordinarily detailed provisions for determining the component parts, *limited the amounts that municipal authorities could charge for tapping fees*. . . . The General Assembly also specifically permitted municipal authorities to be sued and for the reasonableness of their rates to be challenged. Rates charged in excess of those permitted by statute are not reasonable rates. . . . [*A*] [*d*]*eveloper's cause of action, if successful, merely makes the Authority adhere to the MAA by returning monies it obtained in violation thereof, along with accrued interest.*

Hidden Creek, L.P. v. Lower Salford Township Authority, 129 A.3d 602, 612 (Pa. Cmwlth. 2015) (emphasis added). Plaintiffs in this case contend the Municipal Defendants did not set the tapping fees in conformity with the MAA and, consequently, are seeking,

inter alia, the return of their own funds that the Authority allegedly improperly charged and collected,[17] plus interest for the time it was deprived of those funds.[18]

IV. Tapping Fee Calculation

As noted above, the MAA provides a detailed methodology for the calculation of tapping fees.[19] *See* 53 Pa.C.S.A. § 5607(d)(24). The MAA's procedure for calculating a tapping fee embodies a financing concept known as the "equity buy-in" model that is used in the water industry to allocate the cost of investments in water and sewer systems among all those using the capacity of the systems. N.T., Bench Trial at 163-65.

To calculate the tapping fee associated with its water distribution system, an authority is required to determine: (1) the total cost basis of the system, less adjustments for dedicated facilities and outstanding debt; (2) the design capacity of the system; and (3) the capacity required by a new customer. *See* 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II); **Hampton Township Sanitary Authority**, 661 A.2d at 464-65.[20] Once an authority

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[17] Plaintiffs have paid tapping fees to the Authority totaling $2,589,991.75 since August of 2012. Exs. J-1, ¶¶ M, N, O & J-10.

[18] An award of interest is particularly appropriate in tapping fee cases. Property owners have no practical alternative to paying tapping fees: "[A] municipal authority can adopt a fee that is in violation of the statute and can then use its power to withhold needed permits, thereby placing a developer in a squeeze where the developer has to choose between: [a] economic loss by refusing to pay the excessive fees and not getting the needed permit and, instead, spending years in litigation with the municipal authority trying to get the permits without paying the excessive fee, or [b] paying the fee and never be able to secure a refund of its own funds that the legislature decided could not be charged." **Hidden Creek, L.P.**, 129 A.3d at 612.

[19] The MAA provides different methodologies for calculating tapping fees depending on the type of infrastructure involved. The Authority's water system consists of only "distribution facilities." N.T., June 21, 2021, Hearing at 7.

[20] In **Hampton Township Sanitary Authority**, the Commonwealth Court provides a detailed and helpful analysis of the relevant sections of a previous version of the MAA. 661 A.2d at 464-65. Although there have been significant revisions to the Act with respect to how an authority must

identifies these amounts, it must divide the total cost basis by the design capacity and multiply the quotient by the amount of capacity required by a new user. 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II) ("The distribution or collection part of the tapping fee per unit of design capacity of said facilities required by the new customer shall not exceed the cost of the facilities divided by the design capacity."); **Hampton Township Sanitary Authority**, 661 A.2d at 464-65.

Thus, there are three steps that are necessary for any authority to properly calculate its tapping fee. 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II). The first step is to calculate the authority's total cost basis in its water distribution system. Id. The purpose of the total cost basis component of the tapping fee calculation is to determine the amount of equity in a water distribution system that can be recovered from those connecting to the system in the future. N.T., Bench Trial at 166.

The MAA allows the Authority to include only the cost of facilities that have been constructed, have not been contributed, and are currently in use in the total cost basis component of a distribution-part fee calculation. 53 Pa.C.S.A. §5607(d)(24)(i)(C)(II) ("Facilities may only include those that provide existing service."). *See* Id. at §§ 5607(d)(24)(i)(C)(I) (in contrast, an authority may include the cost of yet-to-be constructed facilities for the "capacity part" of a tapping fee if several requirements are satisfied). An authority must exclude the cost of facilities paid for with contributions or grants from third parties from the cost basis component of the tapping fee. Id. at § 5607(d)(24)(i)(C)(II) (The cost basis component of the fee may not include "facilities contributed to the authority by

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calculate the component parts, the structure of the calculation remains the same and **Hampton Township Sanitary Authority** remains relevant.

any person, government or agency, or portion of facilities paid for with contributions or grants other than tapping fees."[21]). *See also* N.T., Bench Trial at 78-80, 166; N.T., June 21, 2021, Hearing at 27-28. An authority must also subtract any outstanding debt associated with the water distribution system from the total cost basis component. Id. at § 5607(d)(24)(i)(C)(II) ("Outstanding debt related to the facilities shall be subtracted from the cost *except when calculating the initial tapping fee imposed for connection to facilities exclusively serving new customers.*" (emphasis added)).

Once an authority determines its original cost basis in its water distribution system, it must convert that cost into current dollars to account for the passage of time. The MAA includes two alternative statutory methods for adjusting the original cost basis: (1) "trending" using published cost indices which measure inflation; or (2) historical cost plus interest and financing fees.[22] *See* 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II) ("The cost of distribution or collections facilities . . . shall be based upon historical cost trended to current cost using published cost indexes *or* upon the historical cost plus interest and other financing fees paid on debt financing such facilities." (emphasis added)); *see also* **Hampton Township Sanitary Authority**, 661 A.2d at 465; N.T., Bench Trial at 166-67.

After determining the authority's trended original or historical cost basis in its water distribution system, the authority's second step in calculating the tapping fee is to

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[21] In Ms. Heppenstall's professional experience, contributed facilities include those that are dedicated. N.T., June 21, 2021, Hearing at 27-28.

[22] In this case, all parties used the historic cost trended to current costs. Plaintiffs' trial expert, Gary Shambaugh, and the Court's expert, Ms. Heppenstall, used the Handy-Whitman Cost Index for the North Atlantic Region. N.T., Bench Trial at 209; N.T., June 21, 2021, Hearing at 8, 24-25. Brown used the Engineering News Record (ENR) Index. Id. at 104, 178-79. Use of the Handy-Whitman Index yielded a higher tapping fee than the ENR Index, which is less generous. Id. at 104, 178-79, 209.

identify the design capacity of the authority's water distribution system. 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II). The MAA defines "design capacity" for residential customers as "the permitted or rated capacity of facilities expressed in million gallons per day." Id. at § 5607(d)(24)(i)(C)(VII). Distribution-only systems do not have a "permitted" capacity. N.T., Bench Trial at 106, 108; N.T., June 21, 2021, Hearing at 19. Therefore, only "rated" capacity is relevant to the tapping fee calculations in this action.

The MAA does not define the term "rated capacity." As used in the water industry, the term "rated capacity" refers to the maximum amount of water that a system is safely capable of transporting. N.T., Bench Trial at 167-68 ("[Design capacity] is the total capacity that is available in that system to serve customers. . . . It's a physical determination."); 181 ("Rated capacity can be developed based on calculation of the facilities that are involved.). *See also* N.T., June 21, 2021, Hearing at 21 (a design capacity figure must reflect a system's maximum capacity for safely delivering water to residents, expressed in gallons per day).

The third step in establishing a distribution/collection part water tapping fee is to calculate the service being provided to new customers only on an equivalent dwelling unit, or EDU, basis. 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II). *See also* N.T., Bench Trial at 168. Average daily household flow is estimated at 65 gallons per person per day multiplied by the average number of persons per household or 2.44, as determined by the U.S. Census Bureau. 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(V)(e). The resulting average daily household flow of 158.6 gallons is defined as an EDU.

In sum, the total cost of the facilities is derived by adding the trended original or historical cost of the distribution-related facilities, excluding contributed and dedicated

facilities, and subtracting outstanding debt associated with the system from that cost. This net cost of the facilities is divided by the design capacity of the water distribution system to arrive at the unit capacity cost per gallon. The unit capacity cost per gallon is multiplied by the average daily household flow or EDU to arrive at the tapping fee. *See* Court Ex. 1 at 1-7, 1-8; N.T., June 21, 2021, Hearing at 7-8, 27-28. The calculation can be expressed as follows:

$$\frac{\text{Total Cost Basis of the Fixed Assets (in dollars)}}{\text{Design Capacity (in gallons per day)}} \times \text{EDU (in gallons per day)}$$

Ex. P-5; N.T., Bench Trial at 234-35 (admitting Ex. P-5 into evidence); 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II).

Plaintiffs in this case dispute the figures associated with the design capacity of the water distribution system and the total cost basis component of the system used by the Authority to calculate the water-tapping fees.

V. Authority for Court-Appointed Expert

As the Court has relied in some measure upon Ms. Heppenstall's expert report and testimony in this case to support the findings of fact and conclusions of law which follow, the Court must, preliminarily, address the issue of whether in this bench trial the Court had the authority to *sua sponte* reopen the record and appoint an expert to serve as a judicial tutor and to provide an independent report as to the relevant tapping fee calculations. Like the Court's esteemed colleague, the Honorable R. Stanton Wettick, Jr. (now retired), in the matter **Warren v. Eckert Seamans Cherin & Mellot**, 45 Pa.D.&C.4th 75 (Allegh. Co. 2000), this Court believed that the parties could not receive a fair trial result without the

assistance of a competent and unbiased expert. After presiding over the one-day bench trial, and spending considerable time reviewing the trial exhibits, the parties' proposed findings of fact and conclusions of law, and their respective briefs, this Court recognized that the large disparity in the valuations of the parties suggested possible undue partisanship and that the Court had an insufficient understanding of the highly technical evidence to render a fair and impartial verdict with specific tapping fee calculations for the four dates in question.

In Pennsylvania, there is no statute or procedural rule of general application authorizing trial courts to appoint independent expert witnesses. *See* **Poltorak v. Sandy**, 236 Pa. Super. 355, 345 A.2d 201 (1975) (Spaeth, J., dissenting); Pa.R.E. 706 (Court-Appointed Expert Witnesses),[23] Comment.[24] There does, however, appear to be inherent power in the courts to appoint expert witnesses. *See* **Galente v. West Penn Power Co.**, 349 Pa. 616, 37 A.2d 548 (1944) (trial court appointed impartial physician to make an examination of the plaintiff); **Commonwealth v. Correa**, 437 Pa. Super. 1, 648 A.2d 1199, 1203 n.2 (1994), *abrogated on other grounds by* **Commonwealth v. Weston**, 561 Pa. 199, 749 A.2d 458 (2000) (court appointed its own expert in a bench trial to opine as to cause of death). *See also* **In re Jessie A. Kirby Dormitory, Lafayette College**, 1993 WL

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[23] "Where the court has appointed an expert witness, the witness appointed must advise the parties of the witness's findings, if any. The witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by any party, including a party calling the witness. In civil cases, the witness's deposition may be taken by any party." Pa.R.E. 706.

[24] The 1998 Comment to Pa.R.E. 706 includes the disclaimer that "Pa.R.E. 706 provides only the procedures for obtaining the testimony of experts *after* the court has appointed them." Pa.R.E. Comment (emphasis added). It further notes that, unlike Fed.R.E. 706, the Pennsylvania Rule "does not affect the scope of the trial court's power to appoint experts."

485138 (Northampton Co. Sept. 22, 1993) (court exercised equitable powers to appoint experts on the issues of tax-exempt financing, student assistance, and architecture).

Indeed, under certain circumstances, it is necessary and imperative for a court to appoint an expert. *See* **In re Appeal of the Board of Auditors of McKean Township**, 201 A.3d 252, 263-64 (Pa. Cmwlth. 2018) (holding it was necessary for the court to appoint a neutral expert in the field of compensation, payroll, and benefit packages). A trial court need not accept, however, the recommendation or conclusions of a court-appointed expert. Id. at 264 (*citing* **Nomland v. Nomland**, 813 A.2d 850, 854 (Pa. Super. 2002)). Likewise, there is no trial court error in a court crediting the appointed expert's testimony to support the court's findings of fact and conclusions of law. Id.

In the instant case, counsel's views of the evidence, the issues, and the law are very divergent. This Court determined that it could not competently perform its responsibilities as a trial judge unless it was assisted by a neutral and competent expert. Pennsylvania case law establishes that it was wholly within the Court's discretion to (a) appoint an independent expert to assist the Court in understanding and evaluating the highly technical evidence in this bench trial, and (b) allow that expert to offer an opinion on the disputed and future tapping fee calculations. *See* **McKean Township**, *supra*; **Warren**, *supra*.

With respect to reopening the record in a bench trial after the parties have rested, the Pennsylvania Supreme Court has recently held, in a matter of first impression, that trial courts acting as the factfinder have the inherent discretion to reopen the record at this late stage in the proceeding to prevent a miscarriage of justice if there is no prejudice to either party. **Commonwealth v. Safka**, 636 Pa. 169, 186-87, 141 A.3d 1239, 1249-50 (2016)

(finding the trial court sitting in a bench trial had the discretion to reopen the record *sua sponte* to receive additional testimony concerning a vehicle's Event Data Recorder to avoid a miscarriage of justice). *See also* **In re J.E.F.**, 487 Pa. 455, 459, 409 A.2d 1165, 1166 (1979) ("a case may be reopened where it is desirable that further testimony be taken in the interest of a more accurate adjudication . . . and where an honest purpose would be justly served without unfair disadvantage"); **Bretz v. Central Bucks School District**, 86 A.3d 306, 314-15 (Pa. Cmwlth. 2014) (trial court properly "received additional [post-trial] evidence to secure an accurate depiction of the case's current state of facts and to assist it in obtaining a fair disposition").

Here, there is no evidence that the Court's decision to reopen the case after the parties rested prejudiced the parties in any way. As in Justice Donohue's dissent in **Safka**, Municipal Defendants argued against the Court's exercise of discretion to open the record based on the premise that the party with the burden of proof is obligated to present in its case-in-chief all relevant evidence in support of such burden. Specifically, Municipal Defendants claimed that by reopening the record and appointing an expert witness, "the Court absolved Plaintiffs of their burden of proof as to damages despite Plaintiffs' failure to furnish a basis for the legal assessment of damages." *See* Municipal Defendants' Petition for a Decision Based on Trial Evidence at ¶ 33. This position was rejected by the majority of the Supreme Court in **Safka** because "the same concern . . . would apply prior to the parties' closing and trial courts are permitted at this stage to call witnesses, including expert witnesses, on their own." **Safka**, 636 Pa. at 186-87 n.16, 141 A.3d at 1249-50 n.16. Thus, the Supreme Court saw "no basis to preclude a [trial] court from exercising its discretion in this regard at this later stage of the proceeding." Id.

This Court has not prejudiced Defendants because it has not relieved Plaintiffs of their burden of proof in this case, which is "to prove that the Authority abused its discretion by establishing a rate system which was either unreasonable or lacking in uniformity" pursuant to the specific mandates of the MAA. **Hampton Township Sanitary Authority**, 661 A.2d at 463 (*quoting* **Life Services, Inc. v. Chalfont–New Britain Township Joint Sewage Authority**, 107 Pa. Cmwlth. 484, 488, 528 A.2d 1038, 1040 (1987)). By Order entered on May 5, 2020, this Court found Plaintiffs' evidence presented during its case-in-chief sufficient to prove liability. *See* Order of May 5, 2020, at ¶ 1 (holding that the Authority "did not calculate the tapping fees it imposed on Plaintiffs in accordance with the [MAA] at any point during the period relevant to this action"). Inherent in this Court's finding that Plaintiffs carried their burden of proof on liability is a finding that damages had been sustained. What remained was the methodology to be utilized in the calculation of the damages which warranted the assistance of an unbiased expert.[25]

This Court was not sufficiently convinced by either Plaintiffs' qualified expert, Mr. Shambaugh, or Municipal Defendants' conflicted lay witness and co-defendant, Mr. Brown, as to the specific damages resulting from the established liability, particularly considering the Court's responsibility to specify a future water-tapping fee for the purpose of fashioning injunctive relief. Indeed, Defendants have conceded their miscalculation of certain tapping fees, thus demonstrating an inability to establish the fees in accordance with a very

[25] This situation is analogous to a factfinder seeking clarification from the trial court judge during deliberations as to the methodology for calculating damages. "Where a jury returns on its own motion and indicates confusion, the court has a duty to give such additional instructions on the law, as the court may deem necessary to clarify the jury's doubt or confusion." **Grove v. Port Authority of Allegheny County**, 178 A.3d 239, 248 (Pa. Cmwlth. 2018) (*quoting* **Chicchi v. Southeastern Pennsylvania Transportation Authority**, 727 A.2d 604, 609 (Pa. Cmwlth. 1999)), *rev'd on other grounds*, 655 Pa. 535, 218 A.3d 877 (2019). As the factfinder in this case, the Court was seeking to clarify the confusion regarding the statutory water tapping fee calculations.

technical and exacting statute despite their expertise, which far exceeds the Court's knowledge and experience.

As the factfinder in this case, the Court has confidence that the appointed expert testified free from the influence of interest in favor of either side. The potential for a miscarriage of justice warranted the reopening of the record and the submission of an independent expert report.

VI. Findings of Fact

The following findings of fact are established by the record in this case, which includes, *inter alia*, the evidence presented at the bench trial on February 10, 2020, the Stipulation of Facts, this Court's *Merchant Square* Opinions of November 19, 2014, and January 15, 2016, the depositions of J. Michael Flanagan, Esquire, and Mr. Brown, the joint exhibits submitted by the parties to the Court's expert, the expert report of Gannett Fleming with supporting documentation, and the evidence presented at the hearing on June 21, 2021.

1. Manheim Township is a Pennsylvania township of the First Class in Lancaster County existing under The First Class Township Code, 53 P.S. §§ 55101-58501, with a principal office at 1840 Municipal Drive, Lancaster, Pennsylvania.

2. The General Municipal Authority of the Township of Manheim is a municipal authority organized and existing under the MAA, with a principal office at 1840 Municipal Drive, Lancaster, Pennsylvania.

3. The public water for Manheim Township is supplied by the City of Lancaster – Bureau of Water. N.T., Bench Trial at 146-47; *Merchant Square* Complaint at

¶¶ 4, 6; Defendants' Amended Answer to *Merchant Square* Complaint at ¶¶ 4, 6.

4. The City constructed, owns, and operates water lines within the Township. Ex. J-13; N.T., June 21, 2021, Hearing at 15-17; N.T. Bench Trial at 134, 148.

5. The Authority also owns parts of the water distribution system in Manheim Township. Ex. J-13; N.T., Bench Trial at 146.

6. The Authority paid to construct a portion of the water distribution system it owns. N.T., Bench Trial at 81, 84-85.

7. The Authority charges a tapping fee to recover its construction costs for some portions of the water distribution system it owns. N.T., Bench Trial at 67.

8. The tapping fee is collected by Manheim Township as part of the building permit process. N.T., Bench Trial at 244-45.

9. Plaintiffs are a collection of individuals and businesses who have paid tapping fees to the Authority. Ex. J-10.[26]

10. The Authority hires an engineering firm to calculate its tapping fee. N.T., Bench Trial at 44.

11. Mr. Brown, an owner of Arro Consulting, performed the Authority's tapping fee calculations in 2006, 2009, 2012, and 2016. N.T., Bench Trial at 35-36, 60-61, 77, 80, 142-43. Arro Consulting also performed the calculation for the 1993 tapping fee. Id. at 139.

12. The Authority relied on Mr. Brown and/or Arro Consulting to calculate the tapping fees at issue in this case. N.T., Bench Trial at 44.

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[26] Exhibit J-10 is a true, correct, and complete record of the tapping fees collected between August 21, 2012, and October 23, 2019. Ex. J-1, ¶ S.

13. At a public board meeting on April 16, 1993, the Authority adopted a water tapping fee of $4,011 per EDU (1993 Fee), pursuant to a written resolution dated April 16, 1993 (1993 Resolution). Exs. J-1, ¶ A & J-2.

14. Attached to the 1993 Resolution is the calculation (1993 Calculation) showing how Arro Consulting calculated the 1993 Fee. Exs. J-1, ¶ B & J-2.

15. The 1993 Calculation identifies 844,000 gallons per day as the design capacity of the Authority's water distribution system. Ex. J-2. It purports to base this assumption on the maximum usage of the water distribution system in 1992. Id.

16. Arro Consulting prepared the 1993 Calculation pursuant to an earlier version of the MAA, generally referenced as "Act 203." N.T., Bench Trial at 140.

17. In 2003, the Legislature amended the MAA to change the method for calculating tapping fees. Ex. J-1, ¶ C; N.T., Bench Trial at 140. These amendments to the MAA are generally referenced as "Act 57" or "2003 Amendments."

18. The 1993 Calculation was not consistent with the new procedure and, therefore, did not comply with the MAA after the 2003 Amendments became effective. Ex. J-1, ¶ D; N.T., Bench Trial at 140. *See* 53 Pa.C.S.A. § 5607(d)(24)(ii) (any authority charging a tapping fee may do so only pursuant to a resolution adopted at a public meeting and must have available for public inspection a detailed itemization of all tapping fee calculations, and must make the detailed itemization part of the resolution).

19. After the adoption of Act 57, the Authority was not permitted to impose the 1993 Fee. N.T., Bench Trial at 140-41; *see also* Deposition of C. Matthew Brown, conducted January 10, 2018 (Brown Dep.) at 95-96.[27]

[27] The trial transcript does not include the portions of Mr. Brown's deposition testimony used at

20. The adoption of Act 57 required the Authority to recalculate its water tapping fee, and Arro Consulting advised the Authority that it was required to recalculate its tapping fee to comply with the amended version of the MAA. N.T., Bench Trial at 140.

21. At its July 21, 2006, meeting (2006 Meeting), the Authority purported to adopt a water tapping fee of $4,011 per EDU (2006 Fee) pursuant to an oral motion made at the meeting (2006 Motion). Exs. J-1, ¶ E & J-3.

22. The 2006 Motion is referenced in the minutes of the July 21, 2006, meeting (2006 Minutes), which contain the following entry:

> Jerri McClune reviewed the Township tapping fees with the Authority. After general discussion, Mr. Flanagan moved and Mrs. Krissinger seconded, to leave the tapping fee at its present rate of $4011, but with EDU = 161 GPD, and to review it annually. Motion carried unanimously.

Ex. J-3. *See also* Ex. J-1, ¶ F.

23. The 2006 Minutes do not include a calculation supporting the 2006 Fee, nor do they identify the component parts of the 2006 Fee, such that anyone paying the fee could evaluate its accuracy. Ex. J-3.

24. Contrary to the procedure the Authority used in adopting the 1993 Fee, which it adopted by resolution, the Authority used an oral motion at the 2006 Meeting and attached nothing to the 2006 Minutes. *See* Ex. J-1, ¶ A.

25. At its January 16, 2009, meeting (2009 Meeting), the Authority purported to adopt a water tapping fee of $5,372.00 per EDU (2009 Fee) pursuant to an oral motion made at the meeting (2009 Motion). Ex. J-1, ¶ G.

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trial. The relevant pages of the deposition testimony are attached to Plaintiffs' Post Trial Brief as Exhibit A.

26. The 2009 Motion is referenced in the minutes of the January 16, 2009 meeting (2009 Minutes), which contain the following entry:

> Next the Authority discussed the tapping fee, which was a carry-over from the October meeting, to pay for the water line extension. The engineer was asked to update the Authority on the tapping fee. Matt Brown brought to the Authority's attention that the calculations show that the old tapping fee of $4,011 should be increased for this water extension to $5,372. After general discussion, Mr. Flanagan moved and Mr. Plakans seconded to proceed with the change in the tapping fee. Motion carried unanimously. Bill McCarty brought to the attention of the Authority that the tapping fee should go into effect immediately.

Ex. J-4. *See also* Ex. J-1, ¶ H.

27. The 2009 Minutes do not include a calculation supporting the 2009 Fee, nor do they identify the component parts of the 2009 Fee, such that anyone paying the fee could evaluate its accuracy. Ex. J-4.

28. Contrary to the procedure the Authority used in adopting the 1993 Fee, which it adopted by resolution, the Authority used an oral motion at the 2009 Meeting and attached nothing to the 2009 Minutes. *See* Ex. J-1, ¶ A.

29. On January 15, 2016, the Court issued an opinion in *Merchant Square* holding that the 2006 and 2009 Fees were invalid because the Authority failed to comply with the Act's procedure for adopting tapping fees. Ex. P-13.

30. The Authority learned as a result of the *Merchant Square* litigation that the 2009 Fee was calculated incorrectly. N.T., Bench Trial at 44-45; *see also* Deposition of J. Michael Flanagan, conducted December 12, 2017 (Flanagan Dep.) at 57-58.[28]

[28] The trial transcript does not record the portions of Mr. Flanagan's deposition testimony used at trial. The relevant pages of the deposition testimony are attached to Plaintiffs' Post Trial Brief as Exhibit B.

31. The Authority admits that the 2009 Fee was calculated incorrectly. Second Amended Complaint at ¶¶ 106, 108; Municipal Defendants' Answer to Second Amended Complaint at ¶¶ 106, 108.

32. Between August 21, 2012, and July 23, 2013, Plaintiffs and members of the class paid the Authority $397,528.00 in water tapping fees on 74 permits pursuant to the illegal 2009 Fee. Exs. J-1, ¶ M & J-10.[29]

33. At its November 9, 2012, meeting (2012 Meeting), the Authority purported to adopt a water tapping fee of $5,693.43 per EDU (2012 Fee) pursuant to an oral motion made at the 2012 meeting (2012 Motion). Ex. J-1, ¶ I.

34. This 2012 Motion was based upon a calculation dated November 6, 2012, performed by the Authority's engineer, Mr. Brown. Exs. J-6 & J-12.

35. The 2012 Motion is referenced in the minutes of the 2012 Meeting (2012 Minutes), which contain the following entry:

> Mr. Brown handed out two sets of documents regarding project delineation and discussed them. Tapping fee calculations were discussed, using Manheim Township census information (not Lancaster County information or Pennsylvania State information). The revised tapping fee calculations include actual costs for the most recent project – the Northwest Pumping Station and extending the date from 2008 to current (10-31-12). Mr. Plakans had to leave at this time. Mr. Brown continued that he will provide final copies to the Authority members.
> After further discussion, Mr. Lombardo moved that the Authority revise the tapping fee to reflect $5,693.43 per EDU. Seconded by Mr. Johnson. Motion carried unanimously.

Ex. J-5 at 2. *See also* Ex. J-1, ¶ J.

[29] The parties have stipulated that Exhibit J-10 is a true, correct, and complete record of the tapping fees collected by the Authority between August 21, 2012, and October 23, 2019. Ex. J-1, ¶ S.

36. The 2012 Minutes do not include a calculation supporting the 2012 Fee, nor do they identify the component parts of the 2012 Fee, such that anyone paying the fee could evaluate its accuracy. Ex. J-5.

37. The 2012 Minutes state that Mr. Brown would provide the Authority members with final copies of the calculation after the meeting but are silent as to what changes were necessary to make the calculation "final." Ex. J-5.

38. There is no way to determine from the 2012 Minutes whether a calculation purporting to be "final" was, in fact, the one considered by the Authority. Ex. J-5.

39. The Authority voted to adopt the 2012 Fee without reviewing a final version of the calculation supporting it and without recording what changes were necessary to make the calculation "final."[30]

40. Contrary to the procedure the Authority used in adopting the 1993 Fee, which it adopted by resolution, the Authority used an oral motion at the 2012 Meeting and attached nothing to the 2012 Minutes. *See* Ex. J-1, ¶ A.

41. Between July 23, 2013, and March 28, 2016, Plaintiffs and members of the class paid the Authority $1,400,583.78 in water tapping fees on 246 permits pursuant to the illegal 2012 Fee. Exs. J-1, ¶ N & J-10.

42. On February 5, 2016, the Authority adopted a water tapping fee in the amount of $5,079.26 per EDU (2016 Fee) pursuant to a written resolution (2016 Resolution), which was authorized and adopted at its meeting on February 5, 2016 (2016

[30] Mr. Flanagan suggested at trial that the calculations before the Authority at the 2012 meeting might have been identical to those in the "final" version of the calculations. N.T., Bench Trial at 39-40. However, because there are *no* calculations appended to the minutes of that meeting – as required by the MAA – there is no way of confirming that, and Mr. Flanagan's speculative testimony is at best nothing more than self-serving.

Meeting). Exs. J-1, ¶ K & J-6.

43. Attached to the 2016 Resolution is the calculation (2016 Calculation) reflecting how the Authority calculated the 2016 Fee. Ex. J-6 at 3-4. Mr. Brown, acting on behalf of Arro Consulting, calculated the 2016 Fee. N.T., Bench Trial at 77.

44. Mr. Brown purported to calculate the 2016 Fee pursuant to the requirements of the MAA as modified by the 2003 Amendments. N.T., Bench Trial at 90.

45. Between March 4, 2016, and October 23, 2019, Plaintiffs and class members paid the Authority $791,805.85 using the 2016 Fee. Ex. J-1, ¶ O.

46. The Authority continues to impose the 2016 Fee on class members who connect to the Authority's water distribution system. Ex. J-1, ¶ P.

47. The Authority's water distribution system consists entirely of distribution/ collection facilities. Ex. J-1, ¶ T; N.T., Bench Trial at 78.

48. The Authority's tapping fees consist exclusively of a "distribution/collection part." Ex. J-1, ¶ U.

49. The average daily household flow applicable to the Authority's fee calculation is 158.6 gallons. Court Ex. 1 at 1-8, 1-11, 1-16, 1-20 (the average daily household flow of 65 gallons per person per day multiplied by the average number of persons per household of 2.44 based upon the U.S. Census, 2015-2019).

50. Mr. Brown agreed with Plaintiffs' trial expert, Gary Shambaugh,[31] that the MAA required the Authority to deduct the value of dedicated facilities, contributions in aid

[31] Mr. Shambaugh was properly qualified "as an expert on the calculation of water tapping fees in Pennsylvania." N.T., Bench Trial at 160, 163. Although Mr. Flanagan testified that the Authority relied upon the expertise of Mr. Brown to calculate its tapping fees, the Authority did not offer Mr. Brown as an expert on any subject at trial. Mr. Brown's testimony is limited to describing what he did to calculate the tapping fees.

of construction, and outstanding debt from the total cost component of a tapping fee calculation. N.T., Bench Trial at 79 (subtraction of value of dedicated facilities), 79-80 (subtraction of contributions in aid of construction), 80 (subtraction of outstanding debt associated with the system). *See also* N.T., June 21, 2021, Hearing at 27-28.

51. The 2016 Calculation included the full cost of the "Authority Constructed Facilities (1984-1998)" in the total cost basis component of the 2016 Calculation. Ex. J-1, ¶ W; N.T., Bench Trial at 81.

52. The facilities described in the Authority's calculations as the "Authority Constructed Facilities (1984-1998)" are the subject of this Court's *Merchant Square* 2014 Opinion. Ex. J-1 ¶ V; Ex. P-12.

53. This Court held in the *Merchant Square* 2014 Opinion that the Township originally paid $7,686,908 for mains, laterals, hydrants and pumping stations constructed in 1984 and 1986, which were then dedicated to the City in 2004 pursuant to a 1984 Municipal Connector's Agreement (1984 Agreement). Ex. P-12; Ex. J-1, ¶ V (stipulating that the "Authority Constructed Facilities (1984-1998) are the subject of the 2014 Opinion); N.T., Bench Trial at 173.

54. The City subsequently dedicated the "Authority Constructed Facilities (1984-1998)" back to the Authority in 2008 at no cost. Ex. P-12.

55. The Authority failed to present any evidence that it had any remaining equity in the "Authority Constructed Facilities (1984-1998)" after their dedication to the City in 2004 pursuant to the 1984 Agreement. N.T., Bench Trial at 173.

56. To the contrary, the Authority's 2015 and 2016 audited financial statements do not identify any equity associated with the "Authority Constructed Facilities (1984-

1998)." Ex. J-8, p. 1, 8; Ex. J-9, p. 1, 8.

57. If the Authority had any equity in the "Authority Constructed Facilities (1984-1998)," the Authority's dedication of these facilities to the City at the conclusion of the 20-year lease negated any such equity at the time of the dedication.[32] N.T., Bench Trial at 173.

58. Similarly, the City's dedication of the "Authority Constructed Facilities (1984-1998)" back to the Authority at no cost did not create equity in these facilities for the Authority. N.T., Bench Trial at 173.

59. When Mr. Brown performed the 2016 Calculation, he was not aware of the Court's *Merchant Square* 2014 Opinion or its holding that the Authority dedicated the "Authority Constructed Facilities (1984-1998)" to the City or that the City then dedicated these facilities back to the Authority. N.T., Bench Trial at 81-82, 264-65.

60. Mr. Brown testified, in response to questioning by the Court, that if he had known about the *Merchant Square* 2014 Opinion, it would have affected his treatment of the "Authority Constructed Facilities (1984-1998)" in the total cost basis component of the 2016 Calculation but claimed he did not know how. N.T., Bench Trial at 264-65.

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[32] Despite her understanding that the MAA required exclusion of the cost of dedicated facilities, Ms. Heppenstall included the cost of the Authority Constructed Facilities (1984-1998) in her 2016 calculation because she viewed the Court's holding in *Merchant Square* as "a sort of legal construct." N.T., June 21, 2021, Hearing at 28. Specifically, Ms. Heppenstall felt that just because the facilities technically qualified as "dedicated facilities" under the MAA, they had originally been built and paid for by the Authority and she believed the Authority was entitled to earn tapping fees on them. Id. The Authority, in fact, did earn tapping fees on these facilities for 20 years before the facilities were dedicated to the City pursuant to the 1984 Agreement, a term of years the parties determined was sufficient to fully recover the costs associated with the construction of the facilities. *See Merchant Square* Complaint, Ex. A at ¶ 9. Ms. Heppenstall conceded that this distinction that she was making between dedicated facilities that the Authority originally paid for and dedicated facilities that others paid for was not contemplated by the MAA. N.T., June 21, 2021, Hearing at 30. Her analysis is contrary to the language of the MAA which requires the exclusion of "dedicated facilities."

61. Neither Mr. Brown nor the Authority presented any evidence to justify the inclusion of the "Authority Constructed Facilities (1984-1998)" in the 2016 Calculation.

62. Given Mr. Shambaugh's expert testimony that the Authority could not include the "Authority Constructed Facilities (1984-1998)" in the 2016 Calculation,[33] as well as the plain language of the MAA itself which requires the Authority to exclude dedicated facilities, the Authority was not permitted to include the "Authority Constructed Facilities (1984-1998)" in the 2016 Calculation. N.T., Bench Trial at 173.

63. The Authority's inclusion of the "Authority Constructed Facilities (1984-1998)" in the total cost basis component of the 2016 Calculation significantly and improperly increased the amount of the 2016 Fee. N.T., Bench Trial at 173-74. It also violated the MAA. Id. at 172-77.

64. Likewise, it was improper for the Authority to include the cost of the "Authority Constructed Facilities (1984-1998)" in the total cost basis component of the 2009 and 2012 tapping fee calculations. *See* Exs. J-11 & J-12.

65. The Authority's inclusion of the "Authority Constructed Facilities (1984-1998)" in the total cost basis component of the 2009 and 2012 tapping fee calculations significantly and improperly increased the amount of the fees and violated the MAA.

66. The Authority deducted the "City of Lancaster (prior to 1999)" facilities and "Dedicated Facilities (through 1999)" from the total cost basis component of the 2009

[33] Mr. Shambaugh's analysis was limited to the 2016 Calculation. Plaintiffs asserted at trial that the Authority was not permitted to impose the 2009 or 2012 Fees in any amount because it failed to adopt them in accordance with the law. Nevertheless, Plaintiffs contend the errors Mr. Shambaugh identified in the calculation of the 2016 Fee also compromised the calculation of the 2009 and 2012 Fees. Plaintiffs further argue the 2009 and 2012 Calculations contain additional errors that Mr. Shambaugh had no occasion to address in his report.

tapping fee calculation. Ex. J-11.

67. The Authority deducted the "City of Lancaster (prior to 1999)" facilities and "Dedicated Facilities (through 1999)" from the total cost basis component of the 2012 tapping fee calculation. Ex. J-12.

68. The Authority deducted the "City of Lancaster (prior to 1999)" facilities and "Dedicated Facilities (through 2010)" from the total cost basis component of the 2016 Calculation. Ex. J-6. *See also* N.T., Bench Trial at 83-84, 174-75.

69. These deductions were proper because the Authority paid for those facilities using money contributed by third parties. N.T., Bench Trial at 83-84, 174-75.

70. The calculations at issue include the "West Earl Water Authority Extension (1999)." Exs. J-6, J-11 & J-12. *See also* N.T., Bench Trial at 84-85, 175-76.

71. The "West Earl Water Authority Extension (1999)" was constructed pursuant to an agreement dated May 19, 1997, among the City, the Metropolitan Lancaster Authority, West Earl, the West Earl Water Authority, the Township and the Authority (West Earl Agreement). *See* Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 39.

72. Pursuant to the West Earl Agreement, West Earl would construct a water line at its own expense that connected its water distribution system to the Authority's water distribution system, the purpose of which was to allow the City to provide additional water to the residents of West Earl using the Authority's system as a conduit. Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 39 at ¶¶ 8-9.

73. West Earl agreed to dedicate the West Earl Water Authority Extension to the Authority "in lieu of making a capital payment to [the Authority] to purchase transmission capacity" in the Authority's water distribution system and the parties agreed that the

"dedication of the [West Earl Water Authority Extension] to [the Authority] constitutes payment in kind to Manheim for the acquisition of a capital asset from Manheim by West Earl."[34] Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 39 at ¶ 16.

74. The Authority acknowledged this dedication of the extension by West Earl in a resolution of May 28, 1997 (1997 Resolution), which states: "In lieu of making a capital contribution to the Authority, West Earl and/or the West Earl Authority shall dedicate the [West Earl Water Authority Extension] to the Authority following construction, in order to obtain, and in consideration for, transmission capacity within the Authority Water System." Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 40 at Preamble.

75. The Authority's audited financial statements show no capital expenditures on water infrastructure during the relevant time period. Plaintiffs' Answer to Petition for Decision, Ex. D, Exs. 19-22.

76. Notwithstanding the plain language of the MAA requiring exclusion of dedicated facilities, the Authority included the "West Earl Water Authority Extension (1999)" facilities in the total cost basis component of its tapping fee calculations. *See* Exs. J-6, J-11 & J-12.

77. The Authority's inclusion of the "West Earl Water Authority Extension (1999)" in the total cost basis component of the 2009, 2012 and 2016 Calculations violated the MAA and improperly increased the amount of the tapping fees.[35]

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[34] West Earl further noted that "[a]ll costs incurred by West Earl with respect to the [West Earl Water Authority Extension] shall be included as costs incurred by West Earl in the calculation of any tapping fees which may be charged by West Earl with respect to the West Earl Water System." Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 39 at ¶ 16.

[35] In evaluating the 2016 Calculation, Plaintiffs' expert assumed, based upon the testimony of Mr. Brown, that the Authority properly included the "West Earl Water Authority Extension (1999)" in the total cost basis because it was represented that "the Authority paid for those facilities." N.T.,

78. The Authority properly included the "Wright Avenue Extension (2000)," "Martha Ave/Blossom Hill Contract (2003)," "Fruitville Pike Extension (2003)," facilities in the total cost basis component of the 2016 Calculation. N.T., Bench Trial at 84-85, 175-76[36]; Ex. J-6.

79. Likewise, the Authority properly included the "Wright Avenue Extension (2000)," "Martha Ave/Blossom Hill Contract (2003)," "Fruitville Pike Extension (2003)," facilities in the total cost basis component of the 2009 and 2012 tapping fee calculations. Exs. J-11 & J-12.

80. The "Northwest Booster Pumping Station (2010)" and "24-inch Water Main Extension (2010)" are part of the same project (Northwest Pumping Station Project). N.T., Bench Trial at 85-86.

81. Construction of the Northwest Pumping Station Project began in 2011, and the facility was in service as of November 9, 2012. N.T., June 21, 2021, Hearing at 13; Court Ex. 1 at 1-18.

82. It was improper for the Authority to include the costs associated with the construction of the Northwest Pumping Station Project in the total cost basis component of

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Bench Trial at 84-85, 175-76. The documents provided by the Authority to the Court's expert refute that representation. *See* Plaintiffs' Answer to Petition for Decision, Ex. D, Exs. 39 & 40.

[36] The testimony at trial by Mr. Brown was that he included these facilities in his total cost basis calculations because he "believed the Authority constructed them using its own funds." N.T., Bench Trial at 84-85. Plaintiffs' expert relied upon Mr. Brown's representation and included the cost of these three projects in the total cost basis portion of his 2016 tapping fee calculation. Id. at 175-76. There were no documents to explicitly refute Mr. Brown's representation as to these three facilities, unlike the "West Earl Water Authority Extension (1999)." *See* Plaintiffs' Answer to Petition for Decision, Ex. D, Exs. 39 & 40. Although the audited financial statements do not show any capital expenditure or associated cost basis for these projects, Ms. Heppenstall was unwilling to exclude them from the total cost basis. N.T., June 21, 2021, Hearing at 26-27.

the 2009 tapping fee calculation because those facilities were not constructed as of January 16, 2009 – the date the tapping fee was authorized by the Authority. *See* Ex. J-1, ¶ G.

83. Gannett Fleming's calculation of the trended original cost with respect to the 2009 tapping fee does not include the costs associated with construction of the Northwest Pumping Station Project because those facilities were not constructed as of January 16, 2009. N.T., June 21, 2021, Hearing at 13; Court Ex. 1 at 1-13.

84. The Authority funded the Northwest Pumping Station Project with money from Manheim Township, specifically $4,045,788.15 (Township Funding), with the remainder coming from the Authority.[37] N.T., Bench Trial at 88; Ex. J-1, ¶ X.

85. The full cost of the Northwest Pumping Station Project was included in the total cost basis component of the 2012, 2016 and 2020 tapping fees. Court Ex. 1 at 1-18, 1-22, 1-26. *See also* Exs. J-1, ¶ Y, J-6 & J-12.

86. The 2016 Calculation identifies the original (*i.e.*, untrended) cost of the Northwest Pumping Station Project as $5,012,088. Ex. J-6 at 3; N.T., Bench Trial at 88.

87. The Authority's 2012 audited financial statements show $3,620,000 in outstanding debt associated with the Northwest Pumping Station Project as of December 31, 2012. *See* Plaintiffs' Answer to Petition for Decision Based on Trial Evidence, Ex. D,

[37] On July 17, 2009, the Authority adopted a "Resolution Acknowledging the Financing by Manheim Township of a Water System Improvement Project of the Authority, and Confirming Obligations of the Authority with Respect Thereto" (Funding Resolution). *See* Plaintiffs' Answer to Petition for Decision Based on Trial Evidence, Ex. D, Ex. 41. The Funding Resolution provides that the Township will provide the Township Funding for the Authority to "undertake an improvement project to the water system of the Authority." Id. The Funding Resolution further states that the "Authority wishes to confirm its obligation to provide funds, to the extent possible, to the Township for the payment of the debt service" associated with the bond issue the Township made to provide the Township funding. Id. Notably, the Funding Resolution refers to the Township Funding as the "Township Contribution," suggesting that the Authority considered the Township Funding to be a contribution rather than a debt. Id.

Ex. 34 at GMATM-YT-000589.

88. The Authority's 2015 audited financial statements show $3,230,000 in outstanding debt associated with the Northwest Pumping Station Project as of December 31, 2015. Ex. J-8 at GMATM-YT-000634; *see also* N.T., Bench Trial at 176.

89. The Authority's 2016 audited financial statements show $3,265,000 in outstanding debt associated with the Northwest Pumping Station Project as of December 31, 2016. Ex. J-9 at GMATM-YT-000650; *see also* N.T., Bench Trial at 176.

90. Notwithstanding what is reflected in its audited financial statements, the Authority has admitted in its pleadings that the Township Funding of the Northwest Pumping Station Project is a contribution. *See* Second Amended Complaint at ¶ 102; Municipal Defendants' Answer to Second Amended Complaint at ¶ 102; *see also* N.T., Bench Trial at 97.

91. Regardless of whether the Authority characterized the Township Funding of the Northwest Pumping Station Project as a debt or a contribution in aid of construction, the MAA required the Authority to subtract it from the total cost basis component of the 2012 and 2016 tapping fee calculations. *See* 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II) (The cost basis component of the fee may not include "facilities contributed to the authority by any person, government or agency, or portion of facilities paid for with contributions or grants other than tapping fees."); Id. ("Outstanding debt related to the facilities shall be subtracted from the cost *except when calculating the initial tapping fee imposed for connection to facilities exclusively serving new customers.*" (emphasis added)[38]). *See also* N.T., Bench

[38] The Northwest Pumping Station Project did not provide service for exclusively new customers. Ex. J-1, ¶ AA.

Trial at 176-78; *see also* Id. at 100.

92. When Mr. Brown initially performed the 2016 Calculation, he determined that the Township Funding of the Northwest Pumping Station Project was a debt of the Authority. N.T., Bench Trial at 90.

93. *Mr.* Brown initially subtracted the amount of the Township Funding for the Northwest Pumping Station Project from the total cost basis component of the 2016 Calculation because the Act required debt associated with the construction of the Authority's water infrastructure to be subtracted from the total cost basis component of the calculation. N.T., Bench Trial at 90.

94. On advice of the Authority's solicitor, Mr. Brown subsequently *did not* subtract out these "debts" for the Northwest Pumping Station Project although these amounts were treated by the Authority's accountants as long-term debts on its financial statements. Ex. J-8 at GMATM-YT-000633; N.T., Bench Trial at 90-91.

95. Outstanding debt associated with the Northwest Pumping Station Project, or $3,230,000 as reflected in the Authority's 2015 audited financial statement, must be subtracted from the total cost basis for the 2016 calculation. N.T., Bench Trial at 176-77; *see also* Id. at 90.

96. Outstanding debt associated with the Northwest Pumping Station Project, or $3,620,000 as reflected in the Authority's 2012 audited financial statement, must be subtracted from the total cost basis for the 2012 calculation.

97. Gannett Fleming properly subtracted the outstanding debt associated with the Northwest Pumping Station Project from the cost basis component for each of the calculations for the 2012, 2016, and 2020 tapping fees. Court Ex. 1 at 1-6, 1-8, 1-17, 1-21,

1-25.

98. The 2009 Calculation by the Authority adjusts the total cost basis component of the tapping fee by *both* "trending" using the ENR Index and adding $5,503,711 of "Interest Paid to Date." Ex. J-11.

99. The 2012 Calculation by the Authority adjusts the total cost basis component of the tapping fee by *both* "trending" using the ENR Index and adding $4,075,703 of "Interest Paid." Ex. J-12.

100. It was improper for the Authority to use both methods to adjust the total cost basis of the water distribution system to account for the passage of time in the 2009 and 2012 Calculations. *See* 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II) ("The cost of distribution or collections facilities ... shall be based upon historical cost trended to current cost using published cost indexes *or* upon the historical cost plus interest and other financing fees paid on debt financing such facilities." (emphasis added)).

101. The Authority remedied its double-adjustment violation in the 2016 Calculation, which adjusts the total cost basis component of the tapping fee exclusively by trending using the ENR Index. *See* Ex. J-6.

102. The Authority's water distribution system does not have a "permitted or rated capacity" for purposes of deriving design capacity pursuant to the MAA. *See* 53 Pa.C.S.A. §5607(d)(24)(i)(C)(VII) (the MAA defines "design capacity" for residential customers as "the permitted or rated capacity of the facilities expressed in millions of gallons per day"). *See also* N.T., Bench Trial at 105, 167-68; N.T., June 21, 2021, Hearing at 19[39], 21.

[39] The Court Reporter mistakenly transcribed the term "permitted" as "permanent" in the cited portion of the transcript.

103. It is not possible to use "permitted" capacity to derive design capacity in the tapping fee calculation because the Authority's system, which is a distribution system only, does not have a "permitted" capacity. N.T., Bench Trial at 106, 108. *See also* N.T., June 21, 2021, Hearing at 19.

104. Although not defined in the MAA, the term "rated capacity," as used in the water industry, refers to the maximum amount of water that a system is safely capable of transporting. N.T., Bench Trial at 167-68 ("[Design capacity] is the total capacity that is available in that system to serve customers. . . . It's a physical determination."); 181 ("Rated capacity can be developed based on calculation of the facilities that are involved.").

105. Mr. Brown testified that the Authority's water distribution system has no "rated" capacity as that term is used in the MAA. N.T., Bench Trial at 108.

106. The Authority's water distribution system, in fact, has a rated capacity which can be assessed based on the physical parameters of the system. N.T., Bench Trial at 167-68, 180-81.

107. In calculating the design capacity of the Authority's facilities, neither Mr. Shambaugh nor Ms. Heppenstall was able to use the true rated design capacity of the water distribution system because, although that information is typically within the knowledge of an engineer responsible for the system (*see* N.T., Bench Trial at 167-68, 181), Mr. Brown did not do the necessary engineering calculations.[40] N.T., June 21, 2021, Hearing at 19 (Gannett Fleming "actually asked the Authority what is the capacity of the

[40] The MAA requires that "[a]ll data and other information considered or obtained by an authority in connection with determining capacity under this subsection ["Calculation of tapping fee"] shall be made available to the public upon request." 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(V)(e)(iii).

system and they were told they didn't have that information.").

108. Because the Authority's system does not have a permitted or rated capacity, Gannett Fleming had to improvise an alternative means to calculate the design capacity of the system, which was unlike any tapping fee calculation Ms. Heppenstall had previously *done.* N.T., June 21, 2021, Hearing at 11, 21.

109. Gannett Fleming relied on data from the City Bureau of Water reflecting the average flow of water through the Authority's water distribution system in a "conservative" attempt to determine design capacity. Court Ex. 1 at 1-8, 1-14; N.T., June 21, 2021, Hearing at 21, 23, 46.

110. Gannett Fleming had no choice but to use actual flow data instead of design capacity because it was "impossible" to determine the design capacity of the Authority's water distribution system given the "hundred or 200 miles of pipe in different sizes." N.T., June 21, 2021, Hearing at 46-47.

111. The actual average flow of water through the Authority's water distribution system is necessarily less than the design capacity of the system, as it is not the maximum amount of water the system can safely handle.[41] N.T., June 21, 2021, Hearing at 21-22, 44-45.

112. The design capacity of a water distribution system is typically more than the actual flows through a system. N.T., June 21, 2021, Hearing at 45.

113. Gannett Fleming determined that an average of 2,969,470 gallons of water per day were flowing through the Authority's water distribution system as of January 16,

[41] Municipal Defendants have proffered no evidence tending to reflect that their water distribution system has ever operated at unsafe levels.

2009. Court Ex. 1 at 1-12, 1-14.

114. The Northwest Pumping Station Project was placed in service as of November 9, 2012. Court Ex. 1 at 1-18; N.T., June 21, 2021, Hearing at 13.

115. One purpose of the Northwest Pumping Station Project was to create additional capacity in the Authority's water distribution system. N.T., Bench Trial at 87.

116. Gannett Fleming determined that averages of 3,951,484 gallons, 3,619,990 gallons, and 4,476,061 gallons per day were flowing through the Authority's water distribution system as of November 9, 2012, February 5, 2016, and May 5, 2020, respectively. Court Ex. 1 at 1-17, 1-21, 1-25.

117. The Authority did not add or remove facilities from its tapping fee calculations between November 9, 2012, and May 5, 2020. Compare Court Ex. 1 at 1-18 with 1-22 with 1-26.

118. Gannett Fleming's analysis of water flows in 2020 confirms that the water distribution system was capable of safely delivering at least 4,476,061 gallons per day between November 9, 2012, and May 5, 2020. Court Ex. 1, Schedule "D."

119. There is currently additional capacity in the Authority's water distribution system. N.T., June 21, 2021, Hearing at 46-47.

120. Mr. Brown admits that he did not use either the permitted or rated capacity of the Authority's water distribution system to derive the design capacity in the tapping fee calculations. N.T., Bench Trial at 108.

121. Mr. Brown instead developed a new method that, by his own admission, is not authorized by the MAA. N.T., Bench Trial at 107-08, 114-16.

122. Mr. Brown identified the areas within the Township that would be served by Authority-owned facilities, counted the number of users only within the Authority's service area as of 2016 and then, based on information obtained from the Manheim Township planning department, added an estimate of 200 future users. N.T., Bench Trial at 107, 114-17.

123. Once Mr. Brown identified the existing and future in-Township users of the Authority-owned portions of the water distribution system, he multiplied that figure by the number of gallons in an EDU. N.T., Bench Trial at 118, 120.

124. Per Act 57's formula for calculating EDUs that uses U.S. census Data, an EDU in the Authority's service area is 158.6 gallons per day. N.T., Bench Trial at 111-12, 168.

125. Mr. Brown's calculation yielded a design capacity of 644,937 gallons per day for the Authority's water distribution system. N.T., Bench Trial at 105, 118.

126. Mr. Brown's method for calculating design capacity did not account for the capacity flowing to City-owned portions of the water distribution system, or to surrounding townships that have connected to the Authority system because he derived design capacity based only on users within the Township who were connected to the Authority-owned portions of the system. N.T., Bench Trial at 116-17; N.T., June 21, 2021, Hearing at 18.

127. The MAA provides no support for this approach by Mr. Brown in determining design capacity. *See* N.T., Bench Trial at 180. 138.

128. Although Mr. Brown derives design capacity based only on users located within the Authority's service area, he does not similarly limit the total cost basis

component to include only the cost of facilities necessary to serve such users.[42]

129. By ignoring the capacity that is being used to serve customers outside of the Authority's service area, Mr. Brown artificially understated the design capacity of the water distribution system.

130. A smaller design capacity over which to spread the total cost of the facilities results in artificially higher tapping fees for property owners. *See* N.T., June 21, 2021, Hearing at 24. *See also* N.T. Bench Trial at 214.

131. Mr. Brown's use of an understated design capacity of 644,937, while maintaining the total costs of Authority-owned infrastructure, without adjustment, resulted in higher tapping fees. *See* N.T., June 21, 2021, Hearing at 24. *See also* N.T., Bench Trial at 139, 211-12.

132. Mr. Brown's failure to account for the water leaving the Authority's service area, including water that flowed to other townships' water distribution systems, has the effect of forcing users within the Authority's service area to bear the cost of facilities benefiting out-of-Township users that are using the capacity of the Authority's water distribution system for free. *See* N.T., Bench Trial at 211-12.

133. Mr. Shambaugh's and Ms. Heppenstall's testimony on this point was unrefuted. N.T., Bench Trial at 210-212; N.T., June 21, 2021, Hearing at 18.

134. As Ms. Heppenstall explained, it would be inappropriate to calculate the Authority's design capacity based only on flows to customers connected to Authority-owned lines:

[42] This approach would also not comport with the MAA's requirements, but it would provide consistency within Mr. Brown's framework.

> [T]he whole system is interconnected. Water flows through. And we're trying to figure out what capacity of this system is. And because it's interconnected it wouldn't just be the lines of the City.
>
> These are large lines that the Authority built that would have much more water going through them. It wouldn't just be servicing the customers on those lines. It would serve customers beyond what they've built.

N.T., June 21, 2021, Hearing at 18. *See also* Id. at 38-39, 42.

135. The Authority's water distribution system is fully integrated with the City's lines and other lines owned by surrounding Townships. N.T., June 21, 2021, Hearing at 18. 142.

136. The interconnection of the Authority's water distribution system with the larger City system required the Authority to construct large lines capable of supporting many more users than could connect to the Authority-owned lines. *See* N.T., June 21, 2021, Hearing at 18, 34-35.

137. Users connecting to City-owned lines and lines owned by surrounding municipalities derive a benefit from the facilities the Authority constructed. N.T. Bench Trial at 211-14; N.T., June 21, 2021, Hearing at 18, 34-35.

138. The Authority could have recovered the cost of constructing those lines by requiring surrounding water systems to contribute to the Authority's cost of construction of its facilities. N.T. Bench Trial at 213-14; N.T., June 21, 2021, Hearing at 32, 35.

139. The Authority chose not to require contributions from surrounding water systems. N.T., Bench Trial at 213-14; N.T., June 21, 2021, Hearing at 32, 35.

140. In 2009, during the construction of the Northwest Pumping Station Project, the Authority and the Township entered into an agreement with Penn Township, its authority, the Northwestern Lancaster County Authority, and the City, which requires the

City to provide water to Penn Township by transporting it through the Authority's water distribution system (Penn Township Agreement). Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 43.

141. The Penn Township Agreement requires the City to provide as much as 50,000 gallons per day to the Northwestern Lancaster County Authority through the Authority's water distribution system. Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 43 at ¶ 3.

142. The Authority approved the Northwestern Lancaster County Authority to tap into its water distribution system and use its transmission capacity without paying a tapping fee or making a contribution in aid of construction toward the Northwest Pumping Station Project. Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 43.

143. The West Earl Extension Agreement required the City to sell West Earl up to 700,000 gallons per day that would be transported to West Earl through the Authority's water distribution system.[43] Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 39 at ¶ 3.

144. In 2009, the Authority executed an amendment to the West Earl Extension Agreement and increased the amount of capacity the Authority provided to West Earl from 700,000 gallons per day to 945,000 gallons per day (2009 West Earl Amendment). Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 42 at ¶ 2.

145. This increase in capacity pursuant to the 2009 West Earl Amendment, at no cost to West Earl, was "conditioned upon [the Township and the Authority] completing

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[43] The City's and Authority's commitment to provide 700,000 gallons per day of capacity through the Authority's water distribution system exceeds the entire stated design capacity of the Authority's system, as calculated by Mr. Brown and stated in the 2009, 2012 and 2016 Calculations. N.T., Bench Trial at 105, 118; Exs. J-6, J-11 & J-12.

construction and placing into service [the Northwest Pumping Station Project]." Plaintiffs' Answer to Petition for Decision, Ex. D, Ex. 42 at ¶ 4.

146. For the equity buy-in model underlying the tapping fee calculation to be applied properly, a design capacity figure must reflect a water distribution system's maximum capacity for safely delivering water to residents connecting to the system. N.T., June 21, 2021, Hearing at 21-22.

147. The design capacity of the Authority's water distribution system must include actual flows through the Authority-owned facilities. *See* N.T., June 21, 2021, Hearing at 17-18.

148. Ms. Heppenstall, therefore, calculated the design capacity component of the calculations by considering City Bureau of Water billing records and Department of Environmental Protection (DEP) reports showing flows to all retail users within the Township, as well as to West Earl Authority and Northwestern Lancaster County Authority, whose usage is conveyed through the Authority's water distribution system. Court Ex. 1 at 1-14, Schedules A-1, A-2, A-3 & A-4; N.T., June 21, 2021, Hearing at 9, 19-20.

149. Ms. Heppenstall used "total billed water sales" and "non-revenue water (based on 15% of water sales)"[44] to arrive at design capacity figures of 2,969,470 gallons in 2009, 3,951,484 gallons in 2012, 3,619,990 gallons in 2016 and 4,476,061 gallons in 2019. *See* Court Ex. 1, Schedule "D."

150. Mr. Brown acknowledged that there are more than 3,000,000 gallons per day flowing through the Authority-owned facilities identified on the 2016 Calculation. N.T.,

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[44] Every water system is porous. N.T., June 21, 2021, Hearing at 10. "Nonrevenue water" is typically measured on the value of water "lost" through leaks and broken pipes as a share of net water produced. Id. at 10-11, 22-23.

Bench Trial at 129-30, 137-38, 139, 148, 150.

151. Mr. Brown made clear that the 3,000,000 gallons per day figure only included water flowing through the Authority-owned portions of the system. N.T., Bench Trial at 149-50.

152. Ms. Heppenstall proposed a calculated tapping fee for the Authority's water distribution system as of January 16, 2009, November 9, 2012, February 5, 2016, and May 5, 2020. *See* Court Ex. 1, Schedules A-1, A-2, A-3 & A-4.

153. As set forth in the Expert Report, Ms. Heppenstall calculated the design capacity component of her calculations by including flows to all retail customers within the Township, as well as to West Earl Authority and Northwestern Lancaster County Authority, whose usage is conveyed through the Authority's water distribution system. *See* Court Ex. 1, Schedules A-1, A-2, A-3 & A-4.

154. As set forth in the Expert Report, Ms. Heppenstall calculated the cost basis component of her calculations by: (1) including the "Authority Constructed Facilities (1984-1998)," because, although they qualified as "dedicated facilities" under the MAA, they were originally paid for by the Authority and are currently owned by the Authority (N.T., June 21, 2021, Hearing at 28); (2) excluding the Township contribution towards the Northwest Pumping Station Project (Id. at 207-08); (3) excluding assets that were either contributed by another party, such as the West Earl Authority Extension, or dedicated by another party and not paid for by the Authority; and (4) including all the other facilities and costs identified in the tapping fee calculations. Court Ex. 1, Schedules A-1, A-2, A-3 & A-4.

155. Ms. Heppenstall's proposed water tapping fees are as follows:

(a) As of January 16, 2009 $826.31 per EDU

(b)	As of November 9, 2012	$834.24 per EDU
(c)	As of February 5, 2016	$989.66 per EDU
(d)	As of May 5, 2020	$957.94 per EDU

Court Ex. 1 at 1-9.

156. Mr. Shambaugh proposed a calculated tapping fee for the Authority's system as of December 31, 2015, and December 31, 2016, respectively. Exs. P-3 & P-4; N.T., Bench Trial at 205-06.

157. Mr. Shambaugh prepared two tapping fees because the Authority's 2015 and 2016 audited financial statements from which he took the outstanding debt amounts were prepared as of year-end. N.T., Bench Trial at 207.

158. Mr. Shambaugh also prepared two tapping fees because the trending indexes he used provide trending factors as of year-end. N.T., Bench Trial at 207.

159. As set forth in Exhibits P-3 and P-4, Mr. Shambaugh calculated the total cost basis component of his calculations by: (1) excluding the "Authority Constructed Facilities (1984-1998)," because they were dedicated by and back to the Authority and, as such, the Authority had no equity in them, N.T., Bench Trial at 207-08; (2) excluding the outstanding debt associated with the Northwest Pumping Station Project,[45] Id. at 207-08; and (3) including all the other facilities and costs identified in the 2016 Calculation. Id. at 209.

[45] As stated above, the Authority admitted in its pleadings that the Township contributed the Township Funding. It is appropriate, therefore, to deduct the full amount of the Township Funding from the Northwest Pumping Station Project. Mr. Shambaugh nevertheless construed any ambiguity regarding the characterization of the Township Funding in favor of the Authority and treated the Township Funding as a debt of the Authority, rather than a contribution.

160. As there was no rated design capacity, Mr. Shambaugh relied on Mr. Brown's testimony that the Authority-owned facilities actually pass between 3,000,000 and 4,000,000 gallons per day. N.T., Bench Trial at 209-10; *see also* Id. at 139 (Authority-owned facilities can pass more than 3,000,000 gallons per day); Id. at 150 (Authority-owned facilities pass at least 3,000,000 gallons per day); Id. at 148 (same).[46]

161. Mr. Shambaugh's calculations yield the following water tapping fees:

(a) As of December 31, 2015 $189.95 per EDU

(b) As of December 31, 2016 $194.70 per EDU

Exs. P-3 & P-4.

162. Both Ms. Heppenstall's and Mr. Shambaugh's use of the actual flow through the Authority-owned water distribution system understates the rated capacity of the Authority-owned facilities because rated capacity refers to the amount of water the system can physically transport. N.T., Bench Trial at 209; *see also* Id. at 167; N.T., June 21, 2021, Hearing at 21-22, 44-45.

163. Because Ms. Heppenstall and Mr. Shambaugh used actual flow rather than true rated capacity, their calculations necessarily *overstate* the tapping fee.

164. The Authority has charged at least 155 tapping fees to people who connected to the system since the adoption of the 2016 Fee on February 5, 2016. Exs. J-1, ¶ K & J-10.

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[46]Mr. Shambaugh also testified that he reviewed Geographic Information System (GIS) data from the City showing the amount of flow through the Authority's water distribution system. N.T., Bench Trial at 170, 210. This data indicated that 3,265,000 gallons per day flow through the Authority's system. Id. at 210; *see also* Exs. P-3 & P-4. This data is consistent with Mr. Brown's testimony that the actual flow is more than 3,000,000 gallons per day.

165. The Authority's ability to connect an additional 155 connections to its system since the 2016 Calculation confirms that the system had additional unused capacity at the time of the 2016 Calculation.

166. The Authority continues to impose tapping fees to connect to its water distribution system, confirming that the system has additional capacity to serve new users. Ex. J-1, ¶ P.

167. If the water distribution system is still able to accommodate new connections, the true rated capacity is higher than the actual flow amounts.

VII. CONCLUSIONS OF LAW

1. The oral motion procedure the Authority used to adopt the 2006 Fee does not comply with the MAA's requirements for adopting a tapping fee only by resolution at a public meeting, with the calculation supporting the fee available for public inspection and attached to the resolution. 53 Pa.C.S.A. § 5607(d)(24)(ii).

2. The oral motion procedure the Authority used to adopt the 2009 Fee does not comply with the MAA's requirements for adopting a tapping fee only by resolution at a public meeting, with the calculation supporting the fee available for public inspection and attached to the resolution. 53 Pa.C.S.A. § 5607(d)(24)(ii).

3. This Court has already determined in *Merchant Square* that the Authority's failure to comply with the MAA's procedure for adopting the 2006 and 2009 Fees renders them invalid, and of no effect. *See* P-12 (2016 *Merchant Square* Opinion) at 17, 20.

4. The application of the doctrine of collateral estoppel prevents the Authority from re-litigating the propriety of the adoption of the 2006 and 2009 Fees in this case.

Municipal Authority of Hazle Township, 2008 WL 9408020, at *3.

5. The Authority employed the same non-compliant oral motion procedure to adopt the 2012 Fee that it used to adopt the 2006 and 2009 Fees, and further failed to attach written calculations to the 2012 Minutes, thus rendering the 2012 Fee also invalid. *See* Exs. J-1, ¶ A & J-5.

6. Prior to the 2006 Fee, the Authority imposed the 1993 Fee pursuant to a resolution procedure compliant with the then-existing MAA. The 2003 Amendments to the MAA rendered the 1993 Fee invalid. The Authority has stipulated as much, and Mr. Brown specifically testified that the Authority was not permitted to charge the 1993 Fee at any time after the 2003 Amendments to the MAA.

7. The result is that the Authority did not have a legally compliant fee during the entirety of the period from 2003 through February 5, 2016 – the date the Authority adopted a water tapping fee in compliance with the MAA's requirements for adopting a fee only by resolution at a public meeting, with the calculation supporting the fee available for public inspection and attached to the resolution. 53 Pa.C.S.A. § 5607(d)(24)(ii).

8. The Authority further miscalculated the 2006, 2009, 2012 and 2016 Fees both by: (a) overstating the total cost basis of its water distribution system (*i.e.*, its equity in the system) by including facilities that were dedicated to it at no cost and by including facilities that were paid for by the Township; and (b) understating the amount of capacity in the system by considering only the capacity that could be purchased by lot owners located within the Authority's service area, rather than by all of those connected to the Authority's water distribution system who are served by those facilities.

9. The effect of these misstatements has been to charge Plaintiffs and class members for facilities in which the Authority has no equity, and that provide no benefit to them.

10. The Authority's inclusion of the "Authority Constructed Facilities (1984-1998)" in the total cost basis component of the 2006, 2009, 2012 and 2016 Calculations violates the MAA, which requires the Authority to exclude dedicated facilities. 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II). *See also* Ex. J-1, ¶ V.

11. The Authority's inclusion of the cost of the Northwest Pumping Station Project in the total cost basis component of the 2009 Calculation violates the MAA because construction of those facilities did not begin until 2011, and the facilities were not in service until 2012. *See* 53 Pa.C.S.A. §5607(d)(24)(i)(C)(II) ("Facilities may only include those that provide existing service."). *See also* N.T., June 21, 2021, Hearing at 13; Court Ex. 1 at 1-18.

12. The Authority's inclusion of the full cost of the Northwest Pumping Station Project in the total cost basis component of the 2012 and 2016 Calculations violates the MAA, which requires the Authority to subtract both contributions and outstanding debt from the total cost basis. Ex. J-1, ¶¶ X, Y.; N.T., Bench Trial at 176-78.

13. The Authority's inclusion of the cost of the West Earl Water Authority Extension in the total cost basis component of the 2009, 2012, and 2016 Calculations violates the MAA, which requires the Authority to exclude dedicated facilities from the total cost basis.

14. The Authority's double adjustment of the total cost basis component of the 2009 Calculation by *both* "trending" using the ENR Index and adding $5,503,711 of

"Interest Paid to Date" violates the MAA. *See* 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II) ("The cost of distribution or collections facilities . . . shall be based upon historical cost trended to current cost using published cost indexes *or* upon the historical cost plus interest and other financing fees paid on debt financing such facilities." (emphasis added)); Ex. J-11.

15. The Authority's double adjustment of the total cost basis component of the 2012 Calculation by *both* "trending" using the ENR Index and adding $4,075,703 of "Interest Paid" violates the MAA. *See* 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(II); Ex. J-12.

16. The Authority's 2009, 2012, and 2016 Calculations improperly used a design capacity of 644,937 gallons per day.

17. The Authority violated the MAA by failing to maintain "[a]ll data and other information considered or obtained by an authority in connection with determining capacity under [the MAA]." 53 Pa.C.S.A. § 5607(d)(24)(i)(C)(V)(e)(iii).

18. Gannett Fleming was able to calculate the actual capacity of the Authority's water distribution system as follows: (a) 2,969,470 gallons per day as of January 16, 2009; (b) 3,951,484 gallons per day as of November 9, 2012; (c) 3,619,990 gallons per day as of February 5, 2016; and (d) 4,476,061 gallons per day as of May 5, 2020.

19. Since the Authority has not added facilities to its water distribution system since the construction of the Northwest Booster Pumping Station in 2011, Gannett Fleming's analysis of flows in 2020 confirms that the water distribution system was capable of safely delivering a minimum of 4,476,061 gallons per day in 2012 and 2016.

20. Gannett Fleming's proposed water tapping fees (as set forth above in Finding of Fact No. 155) are modified to: (a) exclude the costs of the "Authority Constructed Facilities (1984-1998)" in the total cost basis of the water distribution system; and (b), with

respect to the 2012 and 2016 Fees, include a design capacity of 4,476,061 gallons per day.

21. The correct value for the January 16, 2009, Fee is $34.89:

$$\frac{\$662,096}{2,969,470} \times 158.6 = \$34.89$$

22. The correct value for the November 9, 2012, Fee is $110.00:

$$\frac{\$3,104,689}{4,476,061} \times 158.6 = \$110.00$$

23. The correct value for the February 5, 2016, Fee is $142.74:

$$\frac{\$4,028,342}{4,476,061} \times 158.6 = \$142.74$$

24. The value for the May 5, 2020, Fee is $202.09:

$$\frac{\$5,703,338}{4,476,061} \times 158.6 = \$202.09$$

25. The damages in an action challenging an authority's tapping fee is a return of the funds an authority collected in excess of a lawfully permitted fee, plus accrued interest.[47]

26. Plaintiffs' claims for water tapping fees paid between 2004 and August, 21, 2012, are barred by the statute of limitations.

27. Between August 23, 2012, and July 23, 2013, Plaintiffs and members of the class paid the Authority $397,528.00 in water tapping fees pursuant to the illegal 2009 Fee. Exs. J-1, ¶ M & J-10.

[47] By statute, where interest is due a plaintiff, it is simple interest at a rate of six percent. 41 P.S. § 202.

28. The Authority is liable for the refund of amounts collected above the corrected 2009 Fee, plus interest accruing from the date each water tapping fee was paid.

29. Between July 23, 2013, and March 28, 2016, Plaintiffs and members of the class paid the Authority $1,400,583.78 in water tapping fees pursuant to the illegal 2012 Fee. Exs. J-1, ¶ N & J-10.

30. The Authority is liable for the refund of amounts collected above the corrected 2012 Fee, plus interest accruing from the date each water tapping fee was paid.

31. Between March 28, 2016, and October 23, 2019, Plaintiffs and class members paid the Authority $791,805.85 in water tapping fees pursuant to the illegal 2016 Fee. Exs. J-1, ¶ O & J-10.

32. The Authority is liable for the refund of amounts collected above the corrected 2016 Fee for the period between March 28, 2016, and October 23, 2019, plus interest accruing from the date each water tapping fee was paid.

33. Plaintiffs are entitled to a refund of the amounts collected above the corrected 2016 Fee for water tapping fees paid between October 23, 2019, the date of the last accounting of fees paid by the class that the Authority provided, and May 4, 2020, plus interest accruing from the date each water tapping fee was paid.

34. Plaintiffs are entitled to a refund of the amounts collected above the 2020 Fee for water tapping fees paid between May 5, 2020, and the date of judgment, plus interest accruing from the date each water tapping fee was paid.

35. Plaintiffs and class members are entitled to an injunction requiring the Authority to recalculate its fee in accordance with the law.

36. The Authority has stipulated that the Township acts as the Authority's agent for the purpose of collecting the tapping fee. Ex. J-1, ¶ BB. *See also* P-13 (*Merchant Square* 2016 Opinion) at 12.

37. "An agent is not liable for the acts of a disclosed principal, unless he takes some active part in violating some duty the principal owes to a third person." Ex. P-13 (*Merchant Square* 2016 Opinion) at 13 (*citing* **Roberts v. Estate of Barbagallo**, 531 A.2d 1125, 1130 (Pa. Super. 1987)).

38. The Township took an active role in violating the MAA through the actions of the elected members of the Township's Board of Commissioners who served on the Board of the Authority as the Township's designee and voted to adopt the tapping fees. *See* Ex. J-1, ¶ CC.

39. Mr. Brown also relied upon information provided by the Township's planning department to develop the improper design capacity component of the 2009, 2012, and 2016 Calculations and information provided by the Township's finance director to develop the total cost basis component of the Calculations.

40. The Township's continued involvement with the process of setting and collecting tapping fees more than meets the standard necessary to impose liability on an agent.

41. For the reasons stated above, judgment is entered against the Township and the Authority, jointly and severally.

42. The conspiracy claims against Manheim Township with respect to the Authority, and against Arro Consulting and Brown were dismissed by compulsory non-suit at the conclusion of the bench trial. N.T., Bench Trial at 236-37, 243.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION

YOUR TOWNE BUILDERS, INC., :
COOPER CUSTOM HOMES, INC., :
HESS HOME BUILDERS, INC., :
C&F, INC., HORST & SON, INC., :
COSTELLO BUILDERS, INC., and :
KEYSTONE CUSTOM HOMES, INC., :
on behalf of themselves and all other :
similarly situated :

v. : No. CI-14-07663

MANHEIM TOWNSHIP, MANHEIM :
TOWNSHIP GENERAL MUNICIPAL :
AUTHORITY, C. MATTHEW BROWN, :
P.E. and ARRO CONSULTING, INC. :

VERDICT

AND NOW, this 7th day of March, 2022, after consideration of the evidence presented at the bench trial conducted on February 10, 2020, the parties post-trial briefs and proposed findings of fact and conclusions of law, the miscellaneous hearing on June 21, 2021, and the parties' supplemental findings of fact, conclusions of law and briefs, it is hereby ORDERED as follows:

1. Defendant General Municipal Authority of the Township of Manheim (the Authority) did not calculate the water tapping fees it imposed on Plaintiffs and class members in accordance with the Municipal Authorities Act (MAA), 53 Pa.C.S.A. §§ 5601-5623, at any point during the period relevant to this class action;

2. The Court finds the Authority was permitted to charge the following water tapping fees:

a. $34.89 as of January 16, 2009;

b. $110.00 as of November 9, 2012;

c. $142.74 as of February 5, 2016; and

d. $202.09 as of May 5, 2020;

3. Judgment as to liability is entered against Defendants Manheim Township and the Authority, jointly and severally;

4. Within 30 days of the date of this Order, the parties shall jointly submit an accounting for the purposes of assessing damages. The accounting shall include the following:

a. A statement of the water tapping fees paid by Plaintiffs between the beginning of the relevant period and the present;

b. A statement of the refund due to Plaintiffs for each fee paid, calculated by taking the difference between the fee paid and the permissible fee (as set forth herein) for the relevant time period;

c. A statement of the interest accruing on the refund amount, calculated as simple interest at the rate of six percent (6%) per year; and

d. A proposed order entering a supplemental judgment against the Authority and the Township, jointly and severally, in the amount of such refunds and interest;

5. If the parties are unable to agree on the accounting of damages, the parties shall submit separate analyses with briefs, not to exceed five pages, explaining their respective positions;

6. Defendants shall pay all costs associated with the independent consultant's study. Plaintiffs' counsel shall submit a statement of the amount Plaintiffs paid to Gannett Fleming Valuation and Rate Consultants, LLC, within 20 days of the date of this Order;

7. Defendants are hereby enjoined from imposing a water tapping fee to connect to the Authority's water distribution system in excess of $ 202.09 per equivalent dwelling unit; and

8. The Authority is directed to adopt an amended tapping fee within 90 days of the date of this Order based upon the above findings.[48]

BY THE COURT:

DAVID L. ASHWORTH
PRESIDENT JUDGE

COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

ATTEST:

Copies to: Edward S. Robson, Esquire, Robson & Robson, LLC, 2200 Renaissance Blvd., Suite 270, King of Prussia, PA 19406 - marked

Bart D. Cohen, Esquire, Law Office of Bart D. Cohen, 1210 Prospect Hill Road, Villanova, PA 19085 - marked

Brandon S. Harter, Esquire, Russell, Krafft & Gruber, LLP, Hempfield Center, Suite 300, 930 Red Rose Court, Lancaster, PA 17601 - marked

Kathryn Lease Simpson, Esquire, Mette, Evans & Woodside, 3401 North Front Street, P.O. Box 5950, Harrisburg, PA 17110 - marked

[48] This is consistent with the Authority's proposed verdict slip.