IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

The City of Wilmington,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N12C-10-275 JRJ CCLD
	)	
Diamond State Port Corporation,	)	
	)	
Defendant.	)	

Submitted: May 19, 2014
Decided: August 15, 2014

OPINION

Upon Defendant Diamond State Port Corporation's Motion for Summary Judgment: **GRANTED IN PART, DENIED IN PART**

C. Malcolm Cochran, IV, Esquire (argued), Christine D. Haynes, Esquire (argued), Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, Delaware, 19801. Attorneys for Plaintiff.

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Jurden, J.

INTRODUCTION

In 1995, the City of Wilmington ("City") sold the Port of Wilmington ("Port") to the State of Delaware ("State").[1] The State created the Diamond State Port Corporation ("DSPC") in conjunction with the Port of Wilmington Acquisition Agreement ("Agreement") to own and operate the Port.[2] Later, the City began to charge stormwater fees to property owners in the City to support its stormwater management plan.[3] After DSPC refused to pay, the City brought this action, asking the Court for a declaratory judgment against DSPC that DSPC's obligation to pay the stormwater fees and a judgment for unpaid charges[4] DSPC counterclaimed, alleging breach of contract and asking for a declaratory judgment against the City that the City may not charge DSPC for stormwater management.[5] DSPC now moves for summary judgment.[6]

BACKGROUND

In 2006, the City created a stormwater utility[7] pursuant to state statute.[8] Stormwater utility fees fund the City's stormwater management program, which the City describes as an ongoing investment that includes "storage, transport,

[1] Wilmington's Answering Br. in Opp'n to Mot. for Summ. J, App. Vol. II Ex. 15 [hereinafter Agreement].
[2] *See* 29 *Del. C.* § 8781.
[3] Compl. ¶¶ 1-5 (Trans. ID 47474504).
[4] Compl. ¶¶ 29-101.
[5] Answer and Countercls. ¶¶ 5-66 (Trans. ID 48565547).
[6] Diamond State Port Corporation's Mot. For Summ. J. (Trans. ID 54851892) [hereinafter Op. Br.].
[7] Compl. ¶ 19; Wilm. Code § 25-53.
[8] 7 *Del. C.* § 4005(c) ("Authority is also granted to the Department, conservation districts, counties or municipalities to establish a stormwater utility as an alternative to total funding under the fee system.").

control[,] and monitoring systems that are bringing . . . the City into compliance with national 'CSO' (combined sewer overflow) policies and [Delaware Department of Natural Resources and Environmental Control's ("DNREC")] 'TMDL' (total maximum daily load) requirements.[9] Ultimately, the City notes that the Federal Water Pollution Control Act,[10] as implemented by the Environmental Protection Agency ("EPA") as well as DNREC, is the source of its obligation to control and treat stormwater.[11]

In accordance with the statutory requirement that utility fees "be reasonable and equitable,"[12] the City's stormwater fees are intended to be "proportionate [to the] burden that each non-exempt City property places on the City's stormwater management system."[13] While the City's storm sewers and combined sewers are part of managing stormwater,[14] the City also considers the Delaware and the Christina Rivers to be part of its stormwater system, which DSPC makes "use" of by allowing untreated stormwater to run off the Port property and into those water bodies.[15] Almost all stormwater at the Port directly discharges into the Christina

[9] Answering Br. 10 (Trans. ID 55225814). The City also cites compliance with other EPA/DNREC requirements, a Long Term Control Plan and the Municipal Separate Storm Sewer System program, as reason for implementing a stormwater management program. *Id.* 5.
[10] 33 U.S.C. §§ 1251-1387.
[11] Compl. ¶ 2; Answering Br. 4-5.
[12] 7 *Del. C.* § 4005(c).
[13] Answering Br. 1.
[14] *See* Compl. ¶ 5 (explaining that at the time the stormwater utility was created, to address stormwater discharge and pollution, already existing stormwater costs were separated out from sanitary sewer costs and charged as part of the stormwater utility fee).
[15] Answering Br. 2-3.

and the Delaware Rivers, carrying pollutants with it.[16] The City does not achieve its water quality goals for water bodies around the City by capturing and treating the runoff from the Port, but by compensating for the Port runoff through treatment of the water that the City does control.[17]

Unlike water consumption, which can be directly measured through meters, the City maintains that there is no feasible way currently available to determine exactly how much stormwater runoff a property produces.[18] So, the fee charged to each non-exempt property in the City is derived from an estimation of the impervious surface area of the property.[19] However, fees can be modified if evidence of actual property conditions is submitted to the City's stormwater appeals system.[20] As characterized by the City, stormwater charges represent an equitable allocation of the costs of the City's stormwater management program based on "the actual burden placed on the City's stormwater management system [inclusive of water bodies] by each participating property (relative to all others in the City)."[21] The cost of stormwater management includes, among other things,

[16] *Id.* 2.
[17] *Id.* 1.
[18] Op. Br., Ex. 39, Storm Water Charge Credits and Fee Adjustments Appeals Manual ("[I] it not feasible for the City to measure the actual storm water runoff that occurs from a parcel.") (Trans. ID 54851892).
[19] Answering Br. 11-13.
[20] *Id.* 13-14.
[21] *Id.* 13.

maintenance of the combined sewer system, water quality monitoring, regulatory compliance, and watershed planning.[22]

The City maintains that, historically, it recovered its stormwater management costs through the City's sewer service charge.[23] DSPC paid, without objection, what the City billed as sewer service charges[24] until the establishment of the City's stormwater utility.[25] Since the establishment of the utility, the City has changed its stormwater fee structure several times.[26] Each time the City attempted to charge DSPC the stormwater utility fee, DSPC protested the City's property classification of the Port, and, twice, the Port received a favorable reclassification of the Port property, such that DSPC's fees were significantly reduced.[27] Nevertheless, the dispute over stormwater charges continued, and, eventually, DSPC settled with the City to satisfy their disputes up to that point.[28] In 2009, the City once again changed its fee structure for the stormwater utility, eliminating the property classification that favored the Port and resulting in much higher bills for

[22] "[S]torm water management[] include[s] but [is] not limited to: capital improvements including debt service; operation and maintenance costs including routine replacements; combined sewer overflow mitigation and long term control plan creation and implementation; compliance with all current and future storm water and surface water regulatory requirements; surface water quality monitoring, inspection, management and improvement projects; flooding mitigation; inspections of storm water management facilities; billing and administration; plan review and inspection of sediment control and storm water management plans and practices; acquisition of interests in land including easements; and watershed planning and protection initiatives." Wilm. Code § 25-53(d).
[23] Answering Br. 5.
[24] Compl. ¶ 4 ("For many years, the cost associated with both sanitary sewer and stormwater were assessed and collected via a 'sewer service charge,' with the fees collected into a general sewer fund and used to fund sanitary and stormwater program costs.").
[25] Op. Br. 8.
[26] *Id.* 8-12.
[27] *See id.*
[28] *See id.* 11-12.

DSPC.[29] Once DSPC received the City's bills under the revised stormwater utility fee structure, it refused to pay, precipitating the current litigation.[30]

STANDARD OF REVIEW

To obtain a ruling in its favor on a motion for summary judgment, the moving party must demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[31] All facts must be viewed in the light most favorable to the non-moving party.[32]

DISCUSSION

The City identifies six disputed issues of material fact which it claims preclude summary judgment: (1) whether DSPC "use[s] the City's stormwater system;" (2) whether the City has ever charged a stormwater fee; (3) whether DSPC "knowingly paid the City's stormwater charge;" (4) whether DSPC "objected previously to the City's stormwater charge;" (5) whether the stormwater charge is based on "actual consumption or use;" and (6) "if [DSPC] must pay, [whether] the amount of the City's fee request is wrong."[33] These issues may be in

[29] *See id.*
[30] *See id.*
[31] Super. Ct. Civ. R. 56(c).
[32] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. 2005) (citing *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver Inc.*, 312 A.2d 322, 325 (Del. Super. 1973)).
[33] Answering Br. 3-4.

dispute, but they are only material if the Agreement does not bar the City from assessing the stormwater fees on DSPC altogether.[34]

Two provisions of the Agreement are central to this motion: Section 10.13 and Section 5.22. Section 5.22 generally prohibits the City from imposing any kind of charges on the Port,[35] while Section 10.13 provides that DSPC will pay for water and sewer service to the Port.[36] DSPC argues that the City's stormwater charges cannot qualify as "sewer service charges" under Section 10.13 and, therefore, they are prohibited by Section 5.22.[37] In response, the City maintains that the stormwater charges are "sewer service charges" under Section 10.13[38] and that, even if the stormwater charges are not "sewer service charges," the Agreement does not bar their imposition because stormwater "utility fees" fall outside Section 5.22's prohibition on "taxes or assessments or charges . . . upon any of the [DSPC] property."[39]

I. Contract Interpretation.

Construction of a contract is a question of law.[40] "Contracts must be construed as a whole, to give effect to the intentions of the parties."[41] "Where the

[34] The City has not argued that DSPC waived its contractual rights under the Agreement. *See* Diamond State Port Corporation's reply Br. 1-2 n.1 (Trans. ID 55362405) [hereinafter Reply Br.].
[35] *See* Agreement § 5.22 ("[DSPC] is not required to pay any taxes or assessments or charges of any character levied by the City.").
[36] *See id.* § 10.13 ("[DSPC] agrees to pay water and sewer service charges.").
[37] *See* Reply 9-19.
[38] *See* Answering Br. 26-32.
[39] *See id.* 18-26.
[40] *Christiana Medical Grp., P.A. v. Ford*, 2008 WL 162829 (Del. Super. Jan. 16, 2008) (citing *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 612 A.2d 1192, 1195 (Del. 1992)).

contract language is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning."[42] "Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty."[43] "If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."[44] "A contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[45]

II. Section 5.22 Bars Any Part of the Stormwater Charge That Is Not a Sewer Service Charge Under Section 10.13.

Section 5.22 states: "[DSPC] is not required to pay any taxes or assessments or charges of any character levied by the City, including without limitation, Property Taxes . . . , upon any of the property owned by it."[46] The Agreement broadly defines charges as "all taxes, assessments, . . . and the like or any payment in lieu of any of the foregoing, whether general or special, ordinary or extraordinary, foreseen or unforeseen, of any kind and nature whatsoever."[47] Furthermore, "Property Tax" is defined as "any state, county, city, school,

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[41] *Nw. Nat. Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996) (citing *E.I. DuPont de Nemours & Co. v. Shell Oil. Co.*, 498 A.2d 1108, 1113 (Del. 1985)).
[42] *Id.* (citing *Rhone-Poulenc*, 612 A.2d at 1195).
[43] *Rhone-Poulenc*, 616 A.2d at 1196 (citing *Zullo v. Smith*, 427 A.2d 409 (Conn. 1980)).
[44] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (citing *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991)).
[45] *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 295 (Del. 1996) (citing *Rhone-Poulenc*, 616 A.2d at 1196).
[46] Agreement § 5.22.
[47] *Id.*, Schedule 1 ¶ 16.

municipal or other tax, levy, or assessment on, related to or based on the ownership of any interest in real or personal property (including, without limitation, fixtures)."[48]

DSPC argues that Section 5.22, in general, prohibits the imposition of the stormwater charge on DSPC,[49] but, more specifically, DSPC argues that the stormwater charge fits the definition of a "charge" and of a "Property Tax" under the terms of the Agreement.[50] The City maintains that Section 5.22 does not bar the City from imposing stormwater charges because the stormwater charges are "utility fees"—a service or user fee as opposed to a tax, assessment, or charge[51]—that are not "upon" DSPC property but upon the burden DSPC places on the City's stormwater management system through DSPC's "use" of the Port property.[52]

Much of the City's briefing on the subject of Section 5.22 focuses on distinguishing its stormwater fee from a "tax" or an "assessment."[53] In particular, the City draws a distinction between "a tax, which is not voluntary in nature, entitling the taxpayer to nothing in return," and a "fee" which is charged "based on

[48] *Id.*, Schedule 1 ¶ 62.
[49] In its opening brief, DSPC refers to the stormwater utility fee as an "environmental property charge." *See* Op. Br. 21-22.
[50] *See* Reply 9-12.
[51] *See* Answering Br.19-25.
[52] *See* Tr. Oral Arg. On Mot. For Summ. J. 27:11-18 (Trans. ID 55807114) [hereinafter Tr.].
[53] *See* Answering Br. 19-25.

participation or use."[54] Additionally, the City cites case law from jurisdictions that have dealt with the issue of stormwater utilities as authority for the proposition that the stormwater charge cannot properly be considered a property tax or a special assessment.[55] While the City makes a valiant effort to convince the Court that its stormwater fees should not be considered a tax or special assessment, it is clear that if Section 5.22 does prohibit the City's stormwater utility fees, it is because, as DSPC argues, the fees are "charges" upon DSPC property or a "Property Tax," prohibited under the terms of the Agreement.[56]

Section 5.22 neither explicitly exempts nor includes "utility fees" from its prohibition of "taxes or assessments or charges" levied by the City against DSPC. However, the intent of Section 5.22, conveyed through the plain language, is that the City may not assess "charges *of any character*" against DSPC.[57] This intent is bolstered by the Agreement's broad definitions of "charges" and of "Property Tax."[58] Between Section 5.22 and the Agreement's sub-definitions, the parties' underlying intent is clear—DSPC will pay the City only what it has agreed to pay

[54] *See id.* 19-20 (citing 84 C.J.S. Taxation § 3(2001)).
[55] *See, e.g.*, Answering Br. 22 ("Most cases found by the City from outside Delaware characterize similar fees as 'service,' 'use' or 'utility' fees and not as property taxes."); *id.* 23 ("[C]ourts in Florida considering similar municipal utilities have held that (i) the imposition of a fee for the use of a municipal utility system is neither a tax nor the levy of a special assessment, even where the stormwater fee was not entirely voluntary.") (internal citations omitted).
[56] DSPC does not seriously dispute the City's contention that the stormwater fees are not a tax or special assessment. *See* Reply Br. 2-3 (emphasizing that Section 5.22 "prohibits not only taxes, but 'assessments and charges of any character.'").
[57] Agreement § 5.22 (emphasis added).
[58] *See id.*, Schedule 1 ¶ 16 ("'Charges' means all taxes, assessments, . . . and the like or an payment in lieu of any of the foregoing . . . *of any kind or nature whatsoever*.") (emphasis added); *id.* ¶ 62 ("'Property Tax' means any state, county, city, school, municipal or other tax, levy, or assessment *on, related to or based on the ownership of* . . . real property.") (emphasis added).

and the City may not thwart this intent through artful characterization. Were the City to offer DSPC other types of services, like an electric utility, DSPC would have the opportunity to consent to the City's terms for providing the service, but here, however equitably the City has apportioned the costs of its efforts, the City has imposed stormwater fees on DSPC.

In defense of its characterization of its stormwater charge as a fee for a service, the City disclaims the import of the fact the charges for its "service" are not voluntary,[59] citing cases where courts have accepted municipalities' characterization of stormwater utility fees as service fees rather than as a taxes.[60] These arguments might be persuasive if the issue was whether the City could impose stormwater utility fees as a matter of municipal authority, but the City's authority to establish a stormwater utility for the City, in general, is not at issue.[61] The issue here is whether the City may assess charges for its stormwater program against DSPC specifically, given the constraints on the City's authority contained in the Agreement.

[59] Answering Br. 23-24.

[60] Whether a stormwater utility fee can properly be considered a service or a user fee, as opposed to a tax or an assessment, is often contested in cases involving the establishment of stormwater utilities because "most municipalities have the legal authority to assess fees for public services, [but] few have the ability to assess taxes." Avi Brisman, *Considerations in Establishing a Stormwater Utility*, 26 S. Ill. U. L.J. 505, 520 (2002) (citing Peter H. Lehner et al., *Stormwater Strategies: Community Responses to Runoff Pollution*23 (Natural Resources Defense Council 1999)). *See, e.g.*, *City of Lewiston v. Gladu*, 40 A.3d 964 (Me. 2012) (holding that stormwater charge was a fee and a tax).

[61] *See* 7 *Del. C.* § 4005(c) ("Authority is also granted to the Department, conservation districts, counties or municipalities to establish a stormwater utility as an alternative to total funding under the fee system.").

During oral argument, the City maintained that, because Section 5.22 prohibits "taxes or assessments or charges . . . *upon any of the property*," the stormwater charge could not be barred by Section 5.22 because it is "based on the burden placed . . . on the City stormwater system by the *use that is made of the property*," rather than the stormwater charge being "upon" the property itself.[62] In short, the City argues, because the operation of the Port results in stormwater runoff, DSPC is burdening the City's system by allowing runoff to discharge into the Christina and the Delaware Rivers.[63] Thus, the charge is on a *use* of the property, and the Agreement only prohibits charges *upon* the property itself.[64]

The City argues a neat distinction, but not one that can get around the language of the Agreement. DSPC correctly argues[65] that the stormwater fee qualifies as a "Property Tax" under the Agreement. Section 5.22 links its ban of "taxes or assessments or charges" to those upon the property, but Section 5.22 also explicitly bars the City from imposing "Property Taxes" on DSPC.[66] The Agreement defines a "Property Tax" as a "tax, levy, or assessment *on, related to or based on* the ownership of any interest in real or personal property (*including,*

[62] *See* Tr. 27-28.
[63] *Id.* 30.
[64] *Id.*
[65] *See* Reply Br. 9-10.
[66] *See* Agreement § 5.22 ("[DSPC] is not required to pay any . . . charges of any character levied by the City, including without limitation, Property Taxes or head taxes levied upon employers, upon any of the property owned by it.").

without limitation, fixtures)."[67] The stormwater charge is clearly "related to or based on [DSPC's] ownership" of the Port property and its fixtures. It is the owner, not the user, of a property that is liable to the City for its stormwater fees,[68] and there is no "use" that can be made of a property that does not oblige the property owner to pay a stormwater fee, even vacant tax parcels pay.[69]

Because the stormwater charge is a Property Tax under the Agreement, the City breaches the Agreement by assessing the stormwater charges upon DSPC, except for any part of the stormwater charge that constitutes a "sewer service charge" under the Agreement.

III. Parts of the Stormwater Charge May be "Sewer Service Charges" Under Section 10.13.

Section 10.13 states: "[DSPC] agrees to pay water and sewer service charges for all of the accounts transferred to [DSPC] by the City in connection with Closing or which are subsequently the responsibility of [DSPC], based on the actual amount of consumption or use."[70] The Agreement's broad definition of "charges" applies here as well: "'Charges' means all taxes, assessments, water rents, sewer rents license fees, permit fees, levies, and the like or any payment

[67] *Id.*, Schedule 1 ¶ 62 (emphasis added).
[68] Wilm. C. § 45-53(d) ("In the event that the owner of a parcel and the user of a parcel are not the same, the owner shall be liable for the storm water charge.").
[69] *See Id.* § 45-53 (d), § 45-53 Table 2 (explaining that all tax parcels are assigned a property class and assessed a charge based on that classes assigned runoff coefficient and the parcel's size).
[70] Agreement § 10.13

made in lieu of any of the foregoing, whether general or special, ordinary or extraordinary, foreseen or unforeseen, of any kind and nature whatsoever."[71]

DSPC argues that the City's stormwater fees cannot constitute "sewer service charges," that DSPC is required to pay, because the charges are not based on "the actual amount of consumption or use" of a sewer service.[72] Rather, DSPC argues, the City is attempting to charge DSPC fees based on stormwater runoff that is never treated by the City and "that discharges into the [Christina and Delaware] Rivers without ever using a City sewer."[73]

The City argues that, because, historically, the City's stormwater management efforts were funded by the City's sewer service fees, the current stormwater management charge is merely a "payment in lieu of" the "sewer service charges" that DSPC agreed to pay in the Agreement.[74] It is undisputed that DSPC paid what the City billed as sewer services charges without objection until the City began assessing separate stormwater fees.[75] So, the City points to the language, "any payment made in lieu of any of the foregoing" as well as "foreseen or unforeseen," in the Agreement's definition of "charges," as evidence that its stormwater fees are properly considered part of the sewer services that DSPC

[71] *Id.*, Schedule 1 ¶ 16.
[72] *See* Op. Br. 16-18; Reply Br. 14-17.
[73] Reply Br.15.
[74] Answering Br. 9-10.
[75] Op. Br. 1-2; Answering Br. 6. Whether the City charged DSPC for stormwater management and whether DSPC knew that the sewer service charges included the stormwater charge is disputed. *See* Op. Br.. 1; Answering Br. 3.

agreed to pay for because the stormwater charges are merely a separating out of the stormwater component of the historical sewer service charge.[76]

The persuasiveness of the City's argument turns on whether the language of the contract is ambiguous. Much of the City's evidence—specifically, its assertions about what the historical sewer service fee actually paid for and evidence of DSPC's payment of those sewer service fees—is extrinsic, so it may only be considered in construing the language of the Agreement if there is an ambiguity.[77] The City asserts that Section 10.13 is ambiguous because "[i]t fails to define 'sewer service charge' or the term 'sewer' (whether 'sanitary,' 'storm' or both), or to state just how the 'actual amount of . . . use' of the sewer (whether 'sanitary' or storm') must be determined."[78]

"Contract language is ambiguous if it is 'reasonably susceptible of two or more interpretations or may have two or more different meanings.'"[79] Moreover, ambiguity should be determined "from the perspective of a reasonable third party."[80] It is true that the Agreement neither explicitly defines "sewer service" nor mandates a particular method for determining "actual amount of consumption

[76] Answering Br. 27.
[77] *See Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982) ("[W]hen the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.").
[78] Answering Br. 29.
[79] *Christiana Med.*, 2008 WL 162829, at *2 (quoting *Rhone-Poulenc*, 612 A.2d at 1196) (emphasis added).
[80] *State, Dept. of Transp. v. Figg Bridge Engineers, Inc.*, 79 A.2d 259, 268 (Del. Super. 2013) (citing *Shiftan v. Morgan Joseph Holdings, Inc.*, 57 A.3d 928 (Del. Ch. 2012)).

or use." However, looking at the Agreement as a whole, from the perspective of a reasonable third party, it is clear that there is no ambiguity in either of the clauses identified as ambiguous by the City.

The Agreement does not define "sewer service," but Section 10.12 states: "The City will be responsible for maintenance of existing water and sewer lines to the Port . . . [and DSPC] will be responsible for maintenance of water and sewer lines within the Port." There are both sanitary sewer and storm sewer lines in the Port.[81] It follows that the sewers DSPC must pay for its actual use of under Section 10.13 are the same ones that it is required to maintain under Section 10.12.

The City has made clear in its briefing and at oral argument that it considers the Christina and the Delaware Rivers to be part of its stormwater management system—and thus part of "sewer services"—which the Port burdens by allowing stormwater runoff to flow into.[82] The Court accepts that the City considers itself obliged under federal law to control and treat stormwater, sufficient to maintain the water quality of the entire system.[83] While the Agreement's definition of "charges" anticipates and allows for some evolution of the nature of "sewer services," that elasticity is limited by the fact that the Agreement must be

[81] *See* Tr. 6:1-6.
[82] *See, e.g.*, Answering Br. 11 ("[T]he City's Stormwater Utility Ordinance assesses the relative burden placed on the City's stormwater management system (*inclusive of water bodies*) based on the actual use of a particular parcel.") (emphasis added); Tr. 39:3-9 ("We consider the rivers to be part of the [stormwater management] system.").
[83] *See* Tr. 39:3-9 ("The federal government imposes on the City the obligation to maintain certain pollutant levels at the point where the Christina and the Delaware meet. And that's what the stormwater management system does.").

construed as a whole.[84] In particular, Section 5.22's broad prohibition on the imposition of charges against DSPC and the fact that stormwater is addressed, at least in part, in other provisions of the Agreement, support the conclusion that "sewer service" means "*sewer* service" and that there is no ambiguity as to whether that includes the diverse range of activities the City takes in its efforts to control the effects of stormwater.

The Agreement specifically addresses environmental liabilities and stormwater management under Section 10.5. It reads, in relevant part: "City will be responsible for all liabilities under Environmental Laws that arise out of, or result from, any condition or activity created or conducted at the Port on or before the Closing date, including without limitation costs and expenses of preparation and implementation of a comprehensive storm water management plan for existing activities and conditions at the Port."[85] This provision clearly recognizes the fact that, once DSPC took over operation of the Port from the City, it would be responsible for compliance with standards set for the Port by DNREC and the EPA under state and federal environmental statutes.[86] This is consistent with the fact that DSPC's discharge of stormwater into the Delaware and the Christina Rivers is

[84] *Nw. Nat. Ins.*, 672 A.2d at 43 (citing *E.I. DuPont de Nemours & Co. v. Shell Oil. Co.*, 498 A.2d 1108, 1113 (Del. 1985)).
[85] The Agreement defines "Environmental Law" as "any and all applicable federal, state, local or other laws, regulations, rules, ordinances and orders relating to air, soil, water or noise pollution . . ." Agreement, Schedule 1 ¶ 36.
[86] *See also id.* § 2.1(k); Schedule 5.15 (conveying DNREC permits to DSPC).

subject to the requirements of its stormwater management plan, which must be approved by DNREC.[87] The City was in the process of obtaining this approval when the Agreement was written,[88] and the fact that the DNREC had not yet approved a stormwater management plan for the Port was expressly recognized in the Agreement.[89]

Were it the case that stormwater management at the Port was functionally synonymous with sewer services at the time of contracting between the parties, the Court might be persuaded that it was the party's intent, given the broad definition of "charges" in the Agreement, to hold DSPC accountable for costs associated with any future stormwater management practices. However, the Agreement's express acknowledgment that the Port is subject to environmental controls and that the owner of the Port is obligated to keep the Port compliant with relevant environmental laws, including those regulating stormwater runoff, support the plain reading of Section 10.13 that limits "sewer services" to the constructed sewer system.[90] Considering the Agreement as a whole, the Court does not find that the phrase "sewer service" is ambiguous.

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[87] *See* Op. Br. 13.
[88] *See* Answering Br. 34 ("At the time of the closing in 1995, the Port did not have the stormwater management plan that was required in order to obtain its '[National Pollutant Discharge Elimination Permit]' permit.").
[89] Agreement, Schedule 5.9 (addressing the City's compliance with local laws affecting the Port property); *see* Agreement § 5.9(f) "To the City's knowledge (and *except as may be necessary for implementation of a comprehensive [stormwater] management plan*) there are available at the Port all necessary utilities.").
[90] *See* Agreement § 10.5.

Similarly, the Court is not persuaded that the phrase "actual amount of consumption or use" is ambiguous as to how the actual amount of consumption or use will be determined. The Agreement does not specify a particular technology or method for determining the "actual amount of consumption or use;" however, the Agreement clearly identifies water meters as an acceptable method to make that determination. Section 10.13 states that the City will be "solely responsible for *water consumption and sewer usage* prior to the date of Closing" and that "meters will be read on the date of Closing establishing the City's responsibility for such charges prior to the transfer of the account to [DSPC]."[91] Any reasonable third party would understand that, at the time of Closing, both parties saw metering as a technology that satisfactorily determined "the actual amount of consumption or use" of the water and sewer services. To the extent that there is any ambiguity in how the "actual amount of consumption or use" should be determined, it is dispelled by Section 10.13's discussion of water meters. Section 10.13 does not mandate that actual amount of consumption or use be determined by water meters, but meters are clearly an example of an acceptable method under the parties' Agreement. For these reasons, the Court does not find Section 10.13 ambiguous.

For these same reasons, the Court rejects DSPC's argument that the City has breached the Agreement solely because the stormwater charges are based on

[91] Agreement § 10.13 (emphasis added).

estimations of stormwater runoff, instead of metered readings.[92] Section 10.13 does not require that water and sewer service charges be calculated by meter; it requires only that such charges be based on "actual amount of consumption or use."[93]

The only reasonable construction of Section 10.13, based on its unambiguous language, is that "sewer service charges" only includes fees that are based on DSPC's actual use of the City's sanitary sewers and storm sewers. At oral argument, the City specifically denied that DSPC was currently paying anything for its actual use of the storm sewers that are located on the Port property.[94] Accordingly, DSPC is obligated to pay that portion of the stormwater charge that represents DSPC's actual use of the City's sewer system. Because this amount is unknown, the Court cannot grant DSPC summary judgment on this issue.

DSPC also argues that the City's stormwater charges are prohibited by DSPC's Enabling Act,[95] which also contains a bar to the imposition of "taxes or

[92] "The absence of meters from DSPC's [stormwater] system and Section 10.13's limitation of sewer usage charges to those based on metered water consumption reflects the parties' shared intent when contracting that DSPC would not pay charges to the City for [stormwater]." Op. Br. 17.

[93] The references in Section 10.13 to meters are explicitly linked to actions that the City is required to perform before Closing. Specifically, the Agreement requires the City to read the meters at the Port prior to Closing and to be responsible for any charges for water and sewer usage accrued up until DSPC took over. It reads: "City agrees that it shall be solely responsible for water consumption and sewer usage prior to the date of Closing and (i) that meters will be examined by City and, if necessary, repaired prior to Closing at City's expense and (ii) that meters will be read on the date of Closing establishing the City's responsibility for such charges prior to the transfer of the account to [DSPC] effective on the date of Closing." Agreement § 10.13

[94] Tr. 36:13-22.

[95] "To this end, the Corporation shall not be required to pay any taxes or assessments or charges of any character, including, without limitation, real property taxes or head taxes levied upon employers, upon any of the property used

assessments or charges of any character" on DSPC.[96] Because the Court has resolved the Motion on the basis of the parties' contractual arguments, the Court declines to consider DSPC's statutory arguments.

IV. DSPC's Section 10.12 Breach of Contract Claim.

DSPC also argues that the City has breached Section 10.12 of the Agreement by "attempt[ing] to assess against DSPC the costs of maintaining and replacing water and sewer lines that are not on Port property by incorporating those expenses into the purportedly due storm water charges."[97] Section 10.12 of the Agreement states: "The City will be responsible for the maintenance of existing water and sewer lines to the Port including all necessary replacement thereof. [DSPC] will be responsible for maintenance of water and sewer lines within the Port."[98]

The City is attempting to charge DSPC for the costs of maintaining water and sewer lines not "within" the Port, arguing that "Section 10.12 address only who maintains what, not who pays what."[99] In essence, the City argues that Section 10.12 only determines who is responsible for arranging the maintenance, not who pays for the maintenance. This argument does not square with the plain language of the Agreement. The ordinary and usual meaning of the use of the

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by it or leased to third parties in connection with the exercise of its powers, or any income or revenue therefrom, including, without limitation, any profit from any sale or exchange." 29 *Del. C.* § 8787.

[96] *See* Reply Br. 4-8.

[97] Op. Br. 22-23.

[98] Agreement § 10.12.

[99] Answering Br. 32-33; *see also* Compl. ¶ 19 ("The stormwater management program includes maintenance of the City's combined sewer system . . . ").

phrase "responsible for maintenance of" is that the party who is responsible will both arrange for the work and pay for it. Nothing in Section 10.12 is ambiguous and the Court sees nothing in the Agreement as a whole that undermines the intent, conveyed through the plain language of Section 10.12, that the City be responsible for the cost of maintaining the sewer system outside the Port. Therefore, to the extent that the City has charged DSPC for maintenance of water and sewer lines outside of the Port, it has breached the Agreement.

CONCLUSION

For the foregoing reasons, DSPC's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**.

IT IS SO ORDERED.

Jan R. Jurden, Judge