AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration
Under AAA Commercial Rules and Mediation Procedures
Amended and effective June 1, 2013

In the Matter of Arbitration Between

Case No. 01-14-0000-0401

Borough of Kutztown and Kutztown Municipal Authority

Claimant

Represented by George Werner, Eaq. and Matt Hennesy, Esq., Barley Snyder

And

Maxatawny Township Municipal Authority and Township of Maxatawny

Respondent

Represented by Sean Summers, Esq. and Jill Nagy, Esq., Summers Naggy

I. Arbitration Agreement

The undersigned arbitrators have been designated and have served in accordance with terms of agreement set forth in Article XI of the Intermunicipal Sanitary Sewage Service and Treatment Agreement, entered into by the parties and dated May 4, 2006.[1] The obligation of the parties to arbitrate the issues in dispute between them was confirmed by orders of the Commonwealth Court of Pennsylvania, and the Common Pleas Court of Berks County, and the undersigned were thereupon designated to serve and having been duly sworn, and having duly heard the proofs and allegations of the parties, does hereby FIND, HOLD, ORDER AND AWARD as follows:[2]

[1] The May 4, 2006 Agreement was materially amended on August 25, 2010, and is hereafter referred to as the "Agreement."

[2] Arbitrator Yoder was appointed to serve by the Kutztown parties and Arbitrator Alexander was appointed by the Maxatawny parties. Chairman Lehman was then appointed to serve as the neutral third arbitrator and Chairman. It should be noted that the party-appointed arbitrators serve as non-neutral, "Canon X" arbitrators. Under the AAA Code of Ethics for Arbitrators, these party-appointed arbitrators "are not held to the standards of neutrality and independence applicable to other arbitrators...[and] are not expected to meet the standards of neutrality" otherwise applicable to tripartite arbitration panels. See, Canon IX(B) of the AAA "Code of Ethics for Arbitrators in Commercial Arbitrations."

II. Procedural History

Two prior decisions of the arbitrators have made substantive rulings on parties' claims. The first decision was the Arbitrators' Opinion and Order dated July 1, 2016. In brief summary, that Opinion and Order dismissed the affirmative defense asserted by the Respondent Maxatawny parties that the Claimant Kutztown parties' claims were time-barred.[3] We incorporate that adjudication herein by reference as though set forth fully here. The claims of the Kutztown parties – that the Maxatawny parties were in breach of obligations under the Agreement and that the Kutztown parties were entitled to appropriate remedies – were thereafter subject to pre-hearing discovery and then to hearing.

The second substantive decision of the arbitrators was made in connection with motions in limine from the Maxatawny parties seeking to foreclose any claim from the Kutztown parties for recovery of litigation fees and costs.[4] The Motion from Maxatawny was submitted November 21, 2016, and the issue of recoverability of fees and costs was thereafter fully briefed by the parties. The arbitrators issued their written decision on the matter under date of January 11, 2017. In brief summary, that decision interpreted the language of Article X, and section 10.01(c) of the Agreement to permit Kutztown to assert a claim for certain litigation related expenses. We incorporate that decision[5] by reference as though set forth fully here.

Hearing was held on the Kutztown remedies claims on the dates of December 19 and 20, 2016, and on March 28, 2017. Testimony from fact and expert witnesses was received; numerous exhibits were marked and received into evidence; evidentiary rulings on the admissibility of evidence were made during the course of the hearing. Presentation of oral testimony and exhibits was completed at the close of the day on March 28, 2017. The parties submitted written closing arguments on April 10, 2017, closing the record of the proceedings. The parties agreed that the date for issuance of this Final Decision and Award might be extended to May 31, 2017.

III. Kutztown's Remedies and Damages Claims

At the outset of this discussion it should be noted that this decision is premised on a specific finding that Maxatawny has breached obligations under the

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[3] Prior to issuance of the July 1, 2016 Opinion and Order, a hearing was held on June 8, 2016, at which hearing four witnesses testified, numerous exhibits were identified and received into evidence. Hearing memoranda were supplemented by oral argument from counsel at the close of the hearing.

[4] For convenience in this opinion, the parties will be collectively referred to by their municipal surnames. Accordingly, "Kutztown" will refer to both the Borough and its Authority, and "Maxatawny" will refer to both the Township and its Authority. If the text requires differentiation, the full entity name will be used.

[5] I.e., the "Arbitrators Decision Regarding Maxatawny's Motion in Limine on Kutztown Parties Claims for Attorneys' Fees and Costs," issued January 11, 2017.

Agreement. Maxatawny has not disputed the Kutztown claim of breach. Rather, it has disputed substantive bases for measuring or for assessing damages or other relief sought by Kutztown, to diminish – if not avoid – the damages claimed and relief sought.

Kutztown's Closing Argument Brief presents the arbitrators with "Two Scenarios" for evaluating its damage and remedy claims. Scenario 1 is constructed on the premise that "Kutztown is Awarded the Escrowed Documents." Scenario 2 is premised on the outcome that "Kutztown is not Awarded the Escrowed Documents." The reference to "release of the escrowed documents" is an abbreviated but apt introduction to an issue on which the arbitrators have a majority, but not a unanimous decision. That issue concerns disposition of the "escrowed documents."

A. The Escrowed Documents

The parties fully understand the issue. Kutztown has pursued a separate lawsuit in the Berks County Court of Common Pleas, at Civil Action No. 15-16511, against the escrow agent, First American Title Insurance Company, and docketed on August 17, 2015. Maxatawny intervened in the action; the escrowed documents were tendered into the Court. As we understand it, the Court has declined to act with respect to Kutztown's several applications for judicial relief, and instead awaits the decision of the arbitrators in this action. The escrow agent is no longer a party in interest as it has delivered the documents to the Court, to abide the outcome of the proceedings.

Arbitrators Lehman and Alexander find that the disposition of Kutztown's demand for relief under the escrow agreement cannot be decided in isolation from our decision on the merits of Kutztown's other damage claims. Our task is to determine from the evidence what damages Kutztown has incurred because of Maxatawny's breach of the Agreement, and to award Kutztown compensation for those damages.

Arbitrators Lehman and Alexander find that the damages sustained by Kutztown can and should be fully addressed by the monetary reliefs awarded below. We find that the release of the escrowed documents to Kutztown would constitute a windfall to Kutztown entirely out of proportion to any loss, damage or harm resulting from Maxatawny's failure to proceed with formation of SACRA and to convey the newly constructed plant to that authority.

In this aspect of the case we respectfully disagree with Arbitrator Yoder, who would give effect to the escrow agreement without regard to consideration of Kutztown's damages, while acknowledging – as does Kutztown – that it is a harsh outcome. We recognize that the escrow arrangement, as constructed in 2010, was intended to serve as triggering device (a) to return ownership of the land to Kutztown if the plant was never built, and (b) if the plant were built, to

assure that Maxatawny would move ahead with transfer of the new plant to ownership of the jointly controlled SACRA entity. In that latter eventuality, the escrow arrangement clearly sought to impose a precipitous and highly disruptive consequence that would impel Maxatawny to complete the transfer rather than to risk its loss.[6]

According to Maxatawny's testimony, it was Kutztown's decision not to assist in the financing of the construction of the facilities – by providing its municipal guarantee – that led to the modifications in the 2010 Amendment. Maxatawny then arranged financing without the Kutztown guarantee, but in order to meet the security requirements of its funder(s), had to hold title to the land where the facility was to be constructed. We have been told multiple times that this facility – located within the geographic confines of Maxatawny Township – was financed entirely by Maxatawny, and solely serves customers based in the Township.

Arbitrators Lehman and Alexander find the provisions of the escrow agreement, under the circumstances presented here, to be an unenforceable penalty provision. We find applicable the principles stated in Pennsylvania authorities:

> "Where the breach of agreement admits of compensation, the recovery may be limited to the loss actually sustained, notwithstanding a stipulation for a penalty. [This rule] is founded upon the principle that one party should not be allowed to profit by the default of the other, and that *compensation* and not forfeiture is the equitable rule. Kerry & Jordan v. Wherry, 189 Pa. 198, 201, 42 A. 112 (1899)....*see generally* Restatement (Second) of Contracts, Sec. 356 comment a. (noting centrality of the principle of compensation.). Where stipulated damages clause is intended as a form of punishment with the purpose, in terrorem, to secure compliance, the principles of compensation are subordinated and the provision must fail as an unenforceable penalty."

Holt's Cigar Co. v. 222 Liberty Assoc, 591 A.2d 743 (Pa. Super. Ct. 1991).

Clearly the provisions of the escrow agreement in this case – under the circumstance presented – served the purpose "in terrorem, to secure compliance...." We find that forfeiture of title to the new sewer plant (and related disruptions) is an unenforceable penalty and not required to compensate Kutztown reasonably for the loss and damage sustained from and caused by Maxatawny's breach. We direct that Kutztown release any further claim on the escrowed documents and direct that the documents be returned to Maxatawny.

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[6] We made the same observation in our July 1, 2016 Opinion and Order, where (on page 5) we noted that "[g]iven the structure of the Agreement and the escrow provisions, Kutztown did not need arbitrable or court intervention to invoke the self-implementing remedies of the Escrow Agreement." The documents sought to deter Maxatawny from a breach by holding a "nuclear option" over its head – to use a current idiom. We did not decide in our preliminary opinion what remedies and damages might flow from Maxatawny's breach.

B. The Interceptor Use Claim

Kutztown claims damages for Maxatawny's breach of its obligations arising under Section 2.05 of the Agreeement, pertaining to "Interceptor Main Maintenance." Briefly stated, that section of the Agreement obligates Maxatawny to pay a per gallon fee for sewage flows through the 20" Interceptor line. Maxatawny did not dispute the calculation of sewage flows, nor that it has failed to make the requisite payments since 2012. We accept the testimony and calculations presented through Kutztown's engineering witness, Darryl Jenkins, P.E., and find that the obligation of Maxatawny, as accrued through the end of December 2016, stands at $41,073.00.

Flows have continued through the Interceptor, and apparently will continue into the indefinite future, subject to potential construction by Maxatawny of an alternate service line that would circumnavigate the Interceptor. We hold that Maxatawny is subject to the ongoing obligation to make the payments called for under the Agreement for its ongoing use of the Interceptor, for the duration of time of its use to transport Maxatawny customers' sewage output. We accept Mr. Jenkins testimony and hold that the contract rate of payment shall be subject to a reasonable percentage increase established by the ENR Index, and adjusted at year end 2017, 2022, and at five year intervals thereafter, so long as the useage continues. We find no basis to accelerate future payments, and thus make no present award with respect to future flows.

C. The Loss of Reserved Capacity Claim

Kutztown claims damages for Maxatawny's breach of its obligations arising under Article II, Section 2.02, *et seq.* Briefly stated, that section assured Kutztown that the new plant, when constructed, would have a portion of its capacity reserved to the use of Kutztown Municipal Authority (more precisely, to certain geographic areas within the Township as to which KMA would be the designated provider of sewage services.) The Agreement attached as its "Exhibit C" a calculation sheet which demonstrated the basis on which the two municipal parties allocated the plant capacity. Clearly, that allocation was based on the economic values assigned to the "Service Contributions" made respectively by the Borough (stated at $150,000 for the site/land plus use of the 20" pipe), and by the Township (stated at $250,000, for four categories of costs contributed by the Township.) That allocation formula was thereafter subject to application of aggregate costs to construct the sewer plant, and its capacity when finally constructed. We received testimony from Kutztown's expert, presenting the final, confirmed capacity for KMA to be at 24,682 GPD (gallons per day.)

Mr. Jenkins, Kutztown's engineer, has provided to us an analysis of the project costs. By his analysis, the cost to construct the plant, when prorated across the plant output capacity, results in a value of $18.83/gallon of capacity. That unit

value, when multiplied against KMA's reserved capacity figure of 24,682 GPD, yields an total claim value of $464,842.

It is Kutztown's claim that, if the ownership and control of the plant remains with Maxatawny, and Maxatawny is in breach of the Agreement, then Kutztown has necessarily lost its claim on the Reserved Capacity. Maxatawny's witnesses – both its engineering and official representatives - stated that the monetary claim should be rejected because "the capacity is still there; it is reserved to and available to KMA." Implicit in Kutztown's economic claim is the assumption that it will be unable to gain access to the reserved capacity.

The arbitrators must adjudicate this matter now, and will not have any ongoing authority or capacity to administer the parties' behavior toward each other. We decline to order specific relief to enforce the Reserved Capacity, and, accordingly, we award to Kutztown as damages the value of its Reserved Capacity, in the amount of $464,842.00.

D. The Land and Easements Claim

Kutztown claims damages for loss of the land, easements, and right-of-way agreements that were contributed by Kutztown in connection with the planning, financing, and construction of the new plant. Its contributions were evidenced by a deed, easement and other legal documents. (The documents placed into the escrow, were contra-conveyances which – if delivered – would have cancelled out the Kutztown contributions.) As noted above, the contributions by Kutztown were assigned a monetary equivalence of $150,000, in the Agreement's Exhibit C contribution analysis. Kutztown presented competent expert testimony offering the opinion that those contributed real estate interests had an aggregate value of $284.000. Kutztown seeks recovery of that sum, if it cannot take delivery of the escrow documents.

We accept the valuation analysis as presented by Kutztown and find that it is a fair appraisal. However, as to entitlement to recovery, we find a legal impediment. Kutztown's contributions to the project – whether valued at $150,000, as on the profoma Exhibit C basis, or at the $284,000 appraisal figure, were contributions made in exchange for the guaranteed capacity in the new plant – see discussion C immediately above. Our adjudication awards to Kutztown the performance it was promised under the Agreement. Return of the Kutztown contribution – if added to the recovery of the value of the Reserved Capacity would provide a windfall to Kutztown. It should not recover both its investment and the promised return from the investment. Our award under section C above gives Kutztown its fully calculated value of its investment, and we are not willing to award an additional sum reflecting Kutztown's initial contributions. Stated differently, perhaps, the Kutztown contributions to the project are not an item of "damage" to Kutztown resulting from Maxatawny's breach, in light of the recovery awarded in "C" above.

E. Attorneys' Fees and Costs

As noted in the Procedural History above, the Arbitrators' decision of January 11, 2017, determined that Kutztown has the right under section 10.01(c) of the Agreement to pursue a claim for certain litigation fees and expenses. We have incorporated that decision by reference. We heard testimony, together with animated cross-examination and argument concerning the claim and the evidence offered in support of the claim. Kutztown's claim, as presented at the March 28, 2017 hearing, set forth an aggregate amount of $231,189.29, in attorneys' fees and costs incurred by the Kutztown parties in connection with the legal actions defined by our prior decision. A number of questions concerning specific entries in the attorneys' time records were raised in cross-examination by Maxatawny counsel, and in countering factual testimony from Maxatawny's solicitor. Thereafter, Kutztown refined its claim, and reduced it to the sum of $220,152.29.

The arbitrators all agree that some downward adjustment on the claim amount is in order. The time record entries from the law firm are consistent with staffing of the Kutztown litigation matters by a team of professionals, with varying disciplines and specializations. That is entirely consistent with law firm practice in representing clients in substantial matters calling for specialized knowledge and experience in various legal practice areas. Inherent in "team" staffing is the need to keep the team members informed on the progress of matters, and to have consultations on an on-going basis, as action steps are planned and then taken in the cases. For that reason, there are many date entries that show various professionals conferring with each other, attending meetings on the same occasion, and the like. The extent to which that sort of overlap is critical and unavoidable, or could be characterized as unnecessary and "duplicative" is not for us to determine precisely. But we are prepared to rule that a percentage deduction should be applied as we call upon the adverse party to reimburse the legal costs. Under the terms of the Agreement we are to award an amount we find to be "reasonable." To that end, we apply a 10% reduction, with rounding to an even number, and award to Kutztown the sum of $198,000 in recoverable fees and costs.[7]

IV. Arbitration Fees and Arbitrator Compensation

Article XI, Section 11.06 states The parties shall share equally all costs of arbitration excepting their own attorneys' fees and individual costs associated with the preparation and presentation of their case. The Parties mutually agreed this clause will only apply to the Compensation of the Neutral Chair and the AAA

[7] These comments and findings are solely for purposes of the fee-shifting determination. We intend no criticism of the billing practices or billed amounts from the firm to its clients. We note that Maxatawny's answering analyses of the fee claim did not proffer evidence of its own legal billings. Without knowing further details, we are confident that the expense of these litigation matters has been crushing for both municipalities.

administrative fees and that the Compensation of the Party Appointed Non-Neutral Arbitrators shall be borne by the appointing Party as incurred. The administrative fees and expenses of the American Arbitration Association totaling $11,450.00 shall be borne Equally, and the compensation and expenses of the arbitrator totaling $29,325.00 shall be borne Equally. Therefore, Maxatawny Township Municipal Authority and Township of Maxatawny shall reimburse the sum of $5725.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Borough of Kutztown and Kutztown Municipal Authority.

V. Conclusion

This Final Decision and Award resolve all issues, claims and matters submitted to this arbitration. Any claim not expressly granted herein is hereby denied.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

The Chairman and Arbitrator Alexander join in and sign this Final Decision and Award. Arbitrator Yoder files a dissenting opinion.

May 25, 2017

David E. Lehman, Arbitrator and Panel Chairman

Stephen J. Alexander, Arbitrator

DISSENTING OPINION OF ARBITRATOR YODER

I. Introduction

For the reasons more fully set forth below, I dissent to sections III.A (Escrowed Documents); III.B (Interceptor Use Claim); and III.D (Land and Easements Claim) of the Arbitrators' Final Decision and Award (the "Decision"). I join sections III.C (Loss of Reserved Capacity Claim) and III.E (Attorney's Fees and Costs) of the Decision.

II. Background

On May 5, 2006, Maxatawny Township and Maxatawny Township Municipal Authority (collectively "Maxatawny") and Kutztown Borough and the Kutztown Municipal Authority (collectively "Kutztown") entered into an "Intermunicipal Sanitary Sewage Service and Treatment Agreement" ("Agreement") for the purpose of creating a new joint municipal authority named the Saucony Creek Regional Authority ("SCRA"). The Agreement was detailed and comprehensive, setting forth the terms and provisions for constructing a new sewer treatment plant that would be owned and operated by SCRA. As an inter-municipal authority, Maxatawny and Kutztown would each have representation on the governing board for SCRA. SCRA would only have two bulk customers consisting of Kutztown Municipal Authority ("KMA") and Maxatawny Township Municipal Authority ("MTMA"). The Agreement addressed terms that would be "in effect during the existence of SCRA" and addressed many specific items, including capacity, service areas and transmission facilities. Of particular importance to the issue at hand is the fact that Kutztown owned the land upon which the new sewer treatment plant was to be constructed. Pursuant to the Agreement, Kutztown was to convey the land to SCRA in fee simple to accommodate the new regional sewer treatment plant, and Maxatawny was responsible for the construction of the treatment plant.

On August 25, 2010, the parties entered into a "First Amendment" to the Agreement. The First Amendment included specific provisions for "3. Escrow Arrangements" because Maxatawny "requested that the Borough convey to MTMA title to the SCRA site and to certain related rights-of-way, with such ownership by the MTMA to continue only during the period of construction and initial testing of the Treatment facility." Para. 3 (a) (emphasis added), p.2. This was a fundamental change to the Agreement, which called for Kutztown to convey its land to SCRA, not to MTMA.

The First Amendment at para. 3 (b), p.2. stated the following:

> In order to assure the Borough that the Treatment Facility, SCRA Site, related rights-of-way, lease, rights and agreements will be conveyed to the SCRA at the conclusion of the construction and

> initial testing of the Treatment Facility, or, failing that, reconveyed to the Borough, the parties have agreed that documents reconveying ownership to the Borough of the Treatment Facility, SCRA site, related rights-of-way, lease, rights and agreements shall be executed by MTMA and delivered to an escrow agent ("Escrowed Documents").

This paragraph concludes by stating "The parties acknowledge, accept and agree upon the terms of escrow and release of the Escrowed Documents as set forth in the Escrow Agreement."

On that same date, the parties entered into the "Saucony Creek Regional Authority Project Escrow Agreement" ("Escrow Agreement") pursuant to which Maxatawny delivered to a third party escrow agent fully executed copies of a Deed to Borough of Kutztown, an Assignment of Flow Splitter Lease, a Termination of Agreement for Use and Maintenance of 20 Inch Main and a Bill of Sale and Assignment Agreement ("Escrowed Documents"). The Escrowed Documents were to be released pursuant to express conditions set forth in the Escrow Agreement.

On August 5, 2010, prior to entering into the First Amendment and Escrow Agreement, the Maxatawny Township Board of Supervisors adopted resolution 2010-9 at a public meeting approving the First Amendment and the Escrow Agreement. Throughout the preparation, negotiations and execution of the Agreement, the First Amendment and the Escrow Agreement, Maxatawny was represented by legal counsel experienced in municipal law.

Thereafter, pursuant to the First Amendment and the Escrow Agreement, Kutztown conveyed the land to Maxatawny. Maxatawny proceeded with constructing the treatment plant on Kutztown's property, fully aware of the consequences to which Maxatawny agreed should it decide not to comply with the Agreement.

After completing the construction of the treatment plant on Kutztown's land, Maxatawny refused to form SCRA, refused to convey the land with the completed treatment plant to SCRA and otherwise intentionally breached the Agreement and First Amendment. Maxatawny's breach constituted a triggering event under the Escrow Agreement, but instead of releasing and recording the deed and related documents, the Escrow Agent deposited the documents into the Berks County Court of Common Pleas for "disposition in accordance with the instructions of such court." Escrow Agreement at para. 9 (b). The Court then delayed action on the Escrow Agreement until after the arbitration panel rendered its final decision.

In the present matter, Maxatawny never contested it breached the Agreement and First Amendment. Instead, it raised an affirmative defense that Kutztown's

claims were time-barred. On July 1, 2016, the arbitration panel denied Maxatawny's defense. Thereafter, this matter proceeded to a hearing on the remedies and damages Kutztown was entitled to receive as a result of Maxatawny's breach of the Agreement and First Amendment.

III. Escrowed Documents

A. Jurisdiction

As previously indicated in a prior ruling, it is my opinion that the arbitration panel does not have jurisdiction to consider the Escrow Agreement, and by agreeing to do so, it exceeded its authority.

The scope of an arbitration clause is construed according to black letter contract law. A tribunal is guided by "the intention of the parties as ascertained in accordance with the rules governing contracts generally. . . . In determining the parties' intent, a court must first look to the express language as found inside the four corners of the agreement. . . . As with all contracts, agreements to arbitrate must be construed strictly and should not be extended by implication." *Noyes v. Phoenixville Area Sch. Dist., No. 77 C.C. 2010,* 2010 Pa. Commw. Unpub. LEXIS 738, *13 -14 (Pa. Commw. 2010) (internal citation omitted).

Here, the arbitration clause in the Agreement limits the application of the clause to "disputes arising out of or concerning the interpretation or application of this Agreement." Agreement para. 11.01 (emphasis added).

The Escrow Agreement, however, is a separate agreement that involves another party (the escrow agent) and does not include an arbitration provision for resolving disputes. As the Pennsylvania Supreme Court stated: "We note that in a transaction involving an escrow, two separate contracts are consummated. First, the parties agree to the terms of the underlying contract. Thereafter, because they have agreed to the underlying contract, they enter into a separate agreement with the escrow agent. Indeed, the escrow agreement is entirely separate from the underlying contract." *Umani v. Reber*, 155 A.2d 634, 637 (Pa. Super. 1959) (quoting *Angelcyk v. Angelcyk*, 80 A.2d 753, 756 (Pa. 1951)).

Furthermore, the Escrow Agreement explicitly contemplates that disputes arising under the Escrow Agreement should be addressed via "petition . . . [to] any court of competent jurisdiction in the Commonwealth of Pennsylvania." Escrow Agreement ¶ 9(b). The Escrow Agreement states that it "supersedes all . . . agreements . . . among the parties with respect to the subject matter" and contains an integration clause. ¶ 16. Accordingly, the plain terms of the Escrow Agreement do not contemplate arbitration but instead direct the parties into court.

In addition, the AAA Rules of Commercial Arbitration, to which the Agreement is subject, *see* § 11.01, bestow the arbitrator with authority to "determine the existence or validity of a contract of which an arbitration clause forms a part." AAA Commercial Rules, R-7(b) (emphasis added) (attached). By corollary, an arbitrator would not have authority over a contract that does not include an arbitration clause.

Accordingly, in my opinion this arbitration panel does not have the jurisdiction to consider the Escrow Agreement and, by doing so, exceeded its authority.

B. Application of Escrow Agreement

While I do not think the panel has jurisdiction to consider the Escrow Agreement, having decided to consider it, the panel should apply the provisions of the Escrow Agreement according to well established Pennsylvania law governing the execution, delivery and release of deeds pursuant to escrow agreements.

It needs to be initially noted that conveyance of property in Pennsylvania requires two steps: (1) the signing of the deed by the grantor; and (2) delivery of the deed to the grantee. Delivery need not be absolute; it may be in escrow. Once the deed is signed and delivered, the conveyance is complete.

The Pennsylvania Supreme Court has explained how delivery of a deed is accomplished using an escrow agreement:

> An escrow is a deed or other instrument importing an obligation deposited with a third party to be held by that party until the performance of a condition or the happening of a certain event and then delivered to take effect: *Murphey v. Greybill* , 34 Pa. Superior Ct. 339, 353. The condition or the contingency upon which the escrow shall be delivered must, of course, be expressed by an agreement of the parties termed the "escrow agreement." Such agreement is entirely separate and apart from the instrument deposited. The terms of an escrow agreement may be incorporated in the deed or instrument deposited but need not be. They may be and usually are incorporated in an entirely separate agreement which may be in writing or oral or partly in writing and partly oral: 19 American Jurisprudence, Escrow § 6, p. 422; 21 C.J. p. 868.

Angelcyk 80 A.2d at 756.

Moreover, "[u]nder the usual escrow agreement, the depositor loses control of the instrument or money placed in escrow, although he still retains legal title thereto until performance of the condition or the happening of the specific event upon which delivery is to be made by the depositary." *Paul v. Kennedy*, 102 A.2d 158, 159 (Pa. 1954). An escrow agent is bound to follow the terms of the escrow

agreement. Id. at 159; *Mursor Builders, Inc. v. Roddy Realty, Inc.*, 459 F.Supp. 1317, 1322 (M.D. Pa.1978). Further, the powers of an escrow agent are limited to those enumerated in the escrow agreement. *In re Dolly Madison Industries, Inc.,* 351 F. Supp. 1038, 1042 (E.D. Pa.1972). *See generally Angelcyk* 80 A.2d 753.

In this case, there is no dispute that on August 25, 2010, Maxatawny executed and sealed a deed (and signed a bill of sale, an assignment of flow splitter and a termination of agreement) conveying the property from Maxatawny to Kutztown. Maxatawny then delivered the executed deed (and related instruments) to the escrow agent pursuant to the Escrow Agreement. Paragraph 4 of the Escrow Agreement requires release of the Escrowed Documents if certain conditions are not met by a certain date, including forming SCRA by October 1, 2013. There is no dispute that this condition was not met because Maxatawny refused to form SCRA.

Therefore, as a matter of Pennsylvania property law, Maxatawny's execution of the deed (and related documents) conveying the property to Kutztown, and Maxatawny's actual delivery of the executed deed to the escrow agent pursuant to the Escrow Agreement, resulted in Maxatawny losing control over the Property. At that point, Maxatawny completed all of the steps necessary for conveyance of the property to Kutztown. That conveyance was then complete when Maxatawny refused to form SCRA and transfer the land to SCRA, thereby triggering the condition in the Escrow Agreement that required release of the documents. The escrow agent had no discretion regarding the release of the deed, nor, in my opinion, does this arbitration panel.

Thus, the only remaining step is for the executed deed (and instruments) to be released so they can be recorded. There simply is no other issue to address. The panel does not get to evaluate if Maxatawny's execution and delivery of a deed was a good decision, and certainly the panel does not get to rewrite the Escrow Agreement because Maxatawny now is faced with the known and voluntarily chosen consequences of its breach. Indeed, under Pennsylvania law, Maxatawny no longer has any control or right to the property—once it signed the deed and delivered it to the escrow agent, the legal effect was complete.

C. Liquidated Damages / Penalty

Rather than applying Pennsylvania law to the clear and unambiguous provisions of the Escrow Agreement, the majority of the panel decided to unilaterally declare the Escrow Agreement unenforceable, relying upon case law governing liquidated damages. It is with this part of the majority's decision that I most strenuously disagree, because in my opinion, it so clearly contradicts well established Pennsylvania law. In my opinion, and with all due respect to my colleagues, the panel simply does not have the authority to invalidate the Escrow

Agreement and summarily declare that the Escrowed Documents have no further legal effect and must be returned to Maxatawny.

The majority claims that the Escrow Agreement is unenforceable because it represents improper liquidated or stipulated damages that result in an unfair or "harsh" penalty to Maxatawny. However, case law evaluating the enforceability of a liquidated damages clause simply is not applicable to the Escrow Agreement at issue. The Escrow Agreement deals with conditions controlling when a fully executed and tendered deed (and other documents) must be released by the escrow agent. This involves a property transaction while liquidated damages refer to a monetary sum "a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable . . . if the breach occurs." *Pantuso Motors, Inc. v. CoreStates Bank, N.A.*, 798 A.2d 1277, 1282 (Pa. 2002) (citation and internal quotation marks omitted).

The Escrow Agreement has no liquidated damages clause and does not involve setting a monetary sum of money as damages that a tribunal could determine is unreasonable and unenforceable. In fact, the parties did not place any monetary value on the harm that would be caused in the event of a breach. Rather, the Escrow Agreement embodies conditions and contingencies that, if unfulfilled, require the escrow agent to release the Escrowed Documents. The Escrow Agreement is a contract that should be interpreted according to the basic principles of contract law. It is horn book contract law that "[c]ontracting parties are normally bound by their agreements, . . . irrespective of whether the agreements embodied reasonable or good bargains." *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990) (emphasis added).

In this case, Maxatawny admits (and the panel found) that it breached the SCRA agreement. Because that breach undisputedly triggered the conditions in the Escrow Agreement to release the Escrowed Documents, that is the only relief that this panel can order. The arbitration panel can not, and should not, go behind the agreement to try to rewrite it—to do so would violate the most basic rules of contract interpretation.

We should be mindful that the reason the Escrow Agreement was put in place was because Maxatawny wanted Kutztown to convey Kutztown's property to Maxatawny before SCRA was formed. Of course, that represented a significant risk to Kutztown. In order to convince Kutztown, Maxatawny agreed to provide absolute legal assurances to Kutztown that if Maxatawny failed to form SCRA, the land (and all improvements) would be conveyed back to Kutztown. Importantly, this did not involve money, but specific land owned by Kutztown that Kutztown had no obligation whatsoever to convey to Maxatawny (and would not have done so absent the Escrow Agreement).

Maxatawny entered the Escrow Agreement with its "eyes wide open" and pursuant to the advice of very experienced municipal legal counsel. By executing the deed and the associated documents (including a bill of sale for the treatment plant) and delivering them to the escrow agent, Maxatawny by its actions fully understood and appreciated the risks it was taking in constructing the treatment plant on Kutztown's property. Maxatawny readily assumed that risk by deciding to construct the treatment plant having already delivered the executed deed and related documents to the escrow agent. Maxatawny's decision to breach the SCRA agreement came with the full knowledge that by doing so it would trigger the provisions of the Escrow Agreement, pursuant to which the escrow agent would release the deed and related documents to Kutztown. None of this was a surprise, and the result is not unfair.

The irony of the panel unilaterally invalidating a freely executed escrow agreement in which both parties were represented by experienced counsel and both fully understood the consequences and the risk, is that it would reward the breaching party by effectively allowing Maxatawny to keep Kutztown's property! The majority's result is exactly opposite of the entire purpose of the Escrow Agreement and ends up punishing Kutztown for Maxatawny's intentional breach. There simply is no legal or logical basis that Maxatawny, as the breaching party, gets to keep Kutztown's land, particularly when the only reason Kutztown conveyed it to Maxatawny in the first place is that Maxatawny delivered a fully executed deed to an escrow agent thereby insuring that it would be conveyed back to Kutztown if there was a breach.

To allow Maxatawny to keep Kutztown's property, when Maxatawny breached the SCRA agreement, not only violates well established law but represents a serious miscarriage of justice. Maxatawny's suggestion that enforcing the escrow agreement would be "unfair" or "harsh" to Maxatawny because it invested millions of dollars in constructing the sewer treatment plant completely ignores the fact that Maxatawny had a choice—comply with the SCRA agreement and not lose the land (and improvements) or breach the SCRA agreement, thereby triggering the Escrow Agreement. Moreover, Maxatawny entered into the Escrow Agreement before any funds were spent on the construction of the treatment plant. It was Maxatawny's decision to enter the Escrow Agreement and to undertake construction of the treatment plant knowing the risk. There is no reason that Maxatawny should not live with the consequences of its actions. There certainly is no basis to penalize Kutztown by unilaterally depriving it of its land based on Maxatawny's breach. Of course, Pennsylvania Courts have recognized the uniqueness of real property and routinely order specific performance in the transfer of real property (rather than awarding damages based on fair market value). So in addition to the existence of the Escrow Agreement that requires release of the executed and delivered deed as a matter of property law, the argument that Kutztown can somehow be adequately compensated in money for the loss of its real property is contrary to Pennsylvania law.

Accordingly, I dissent from the majority's decision to unilaterally invalidate the clear and unambiguous Escrow Agreement and, instead, order that the deed and related documents that were executed by Maxatawny and delivered to the escrow agent be returned to Maxatawny.

IV. Damages for the Land and Easements

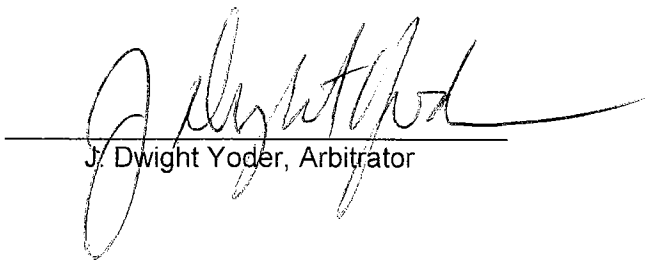
I note my dissent to the panel's calculation of damages under II.B (Interceptor Use Claim). Kutztown is entitled to the benefit of the Agreement had it not been breached by Maxatawny. In this case, the Agreement required Maxatawny to pay for the use of Kutztown's Intercepter until 2052, and therefore, Kutztown is entitled to recover damages through 2052 regardless if Maxatawny actually uses it for that entire period or not.

I also note my dissent to the majority's decision not to award any damages to Kutztown for the value of its land under III.D (Land and Easements Claim). Not only does the majority ratify and affirm Maxatawny's breach by allowing it to keep Kutztown's land, it then refuses to award any damages to Kutztown for the value of its land. In my opinion, the initial numbers attributed to each party in Exhibit "C" of the Agreement as their "service contributions" does not reflect or include the actual fair market value of the land and easements due to Kutztown. The testimony was clear that these figures did not actually reflect the value of the land and were essentially negotiated amounts in order to come up with the allocation of the future capacity for the plant. The parties were free to negotiate whatever allocation amounts or formula they wanted to negotiate. The majority's analysis actually results in a windfall to Maxatawny by allowing Maxatawny to keep Kutztown's land for free when the land was supposed to be owned by SCRA. If Maxatawny had not breached the agreement, then SCRA would own the property and plant and Kutztown would have had a reserved capacity of 24,682 gpd from SCRA. However, when Maxatawny breached the agreement, it literally took Kutztown's land that was supposed to be owned by SCRA and assumed complete control of the land and plant (and future use of this property). By refusing to transfer the property to SCRA, Maxatawny denied Kutztown any future right or control over the property, which it would have had if SCRA owned it. Maxatawny cannot simply take Kutztown's property, refuse to establish SCRA and then pay no compensation for Kutztown's land just because the SCRA agreement happened to utilize a $50,000 land value as part of negotiating the allocation of future capacity. Maxatawny should be required to pay the fair market value of the land to Kutztown as a separate measure of damages from the negotiated allocation of future capacity damages.

V. Conclusion

For the foregoing reasons, I respectfully dissent to sections III.A (Escrowed Documents); III.B (Interceptor Use Claim); and III.D (Land and Easements Claim) of the Arbitrators' Final Decision and Award.

May 30, 2017



J. Dwight Yoder, Arbitrator