



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DELAWAREANS FOR EDUCATIONAL
OPPORTUNITY & NAACP DELAWARE
STATE CONFERENCE OF BRANCHES

C.A. No.: 2018-0029-JTL

Plaintiffs,

v.

JOHN CARNEY, SUSAN BUNTING,
KENNETH A. SIMPLER, SUSAN
DURHAM, BRIAN MAXWELL, and
GINA JENNINGS,

Defendants.

**DEFENDANT SUSAN DURHAM'S REPLY BRIEF IN SUPPORT OF HER
MOTION TO DISMISS**

SCHMITTINGER AND RODRIGUEZ, P.A.
William W. Pepper Sr., Esquire
Bar ID #2400
Gary E. Junge, Esquire
Bar ID #6169
P.O. Box 497
Dover DE 19903
Voice: 302.674.0140
Fax: 302.678.6585
Attorneys for Defendant Susan Durham

July 18, 2018

TABLE OF CONTENTS

TABLE OF CITATIONSii

ARGUMENT1

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO PROVIDE THE RELIEF REQUESTED1

A. Counts I and II do not implicate Susan Durham1

B. Durham has no duty to perform a reassessment2

C. Susan Durham has no authority to perform a reassessment10

D. The collection of taxes cannot be enjoined10

E. Respect for separation of powers counsels against a Chancery-ordered reassessment14

CONCLUSION15

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Board of Assessment Review v. Stewart</i> , 378 A.2d 113 (Del. 1977).....	7
<i>Commerce Associates LP v. New Castle County Office of Assessment</i> , 159 A.3d 1206, 1208 (Del. 2017).....	9
<i>Delaware Bankers Assoc. v. Div. of Revenue of Dep’t of Finance</i> , 298 A.2d 352 (Del. Ch. 1972).....	11
<i>McComb v. Robelen</i> , 116 A. 745 (Del. Ch. 1922).....	11
<i>New Castle County Dep’t of Fin. v. Teachers Ins. & Annuity Ass’n</i> , 669 A.2d 100 (Del. 1995).....	8
<i>New Castle County v. New Castle County Bd. of Assessment Review</i> , 2009 Del. LEXIS 150 (Del. Mar. 26, 2009).....	9
<i>New Castle County v. New Castle Bd. of Assessment</i> , 2008 Del. Super. LEXIS 162 (Del. Super. Apr. 30, 2008)	9
<i>Oceanport Industries v. Wilmington Stevedores, Inc.</i> , 636 A.2d 892 (Del. 1994).....	6
<i>Seaford Associates, L.P. v. Board of Assessment Review</i> , 539 A.2d 1045 (Del. 1988)	8
<i>State ex rel. Oberly v. Troise</i> , Del. Supr., 526 A.2d 898 (1986).....	8
<i>State ex rel. Gebelein v. Killen</i> , 454 A.2d 737, 744 (1982).....	8

<i>Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review</i> , 642 A.2d 1251 (Del. Super. 1993)	7
<i>Young v. Red Clay Consol. Sch. Dist.</i> , 159 A.3d 713 (Del. Ch. 2017)	13

<u>Constitutions, Statutes, and Rules</u>	<u>Page</u>
Delaware Constitution article X, §1	14
9 Del. C. §8002(a).....	6
Del. C. 1915 §1133.....	5
Del. C. 1935 §§ 1280, 1294, 1333.....	5
9 Del. C. 1953 §8002.....	6
13 Del. Laws ch. 394 (1869)	5
<i>Del. C. 1852</i> , ch. 11, §2	5
Court of Chancery Civil Rule 8(a).....	2
Court of Chancery Rule 15(aaa).....	1

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO PROVIDE THE RELIEF REQUESTED.

A. Counts I and II do not implicate Susan Durham

Count I of plaintiffs' complaint alleges that the State violates the Education Clause of the Delaware. Complaint, ¶¶173-180. Count II alleges that the State's "system for funding schools is unconstitutional because it places an unreasonably heavy burden on taxpayers residing in school districts with low property values to provide sufficient resources to children in those districts." Complaint, ¶183. The factual allegations supporting both counts attack the manner in which the State allocates school funding. The Kent County Director of Finance has no role in deciding how state funds are allocated. Plaintiffs' answering brief does not address Durham's argument. Plaintiffs' response to the other County defendants' arguments is that the collection of insufficient taxes contributes to the inadequacy of educational support. Such a response muddles the distinction between Counts I and II and Count III and appears to be an impermissible attempt to amend the complaint in violation of Chancery Rule 15(aaa).¹ Plaintiff also suggests that, because the

¹ Ct. Ch. R. 15(aaa) states in pertinent part:

Notwithstanding subsection (a) of this Rule, a party that wishes to respond to a motion to dismiss under Rules 12(b)(6) or 23.1 by

county finance directors might have an interest in possible relief entered against the State defendants, they should remain defendants. Because Counts I and II do not make a short and plain statement of a claim against Durham,² those counts should be dismissed as against her.

B. Durham has no duty to perform a reassessment

Plaintiff's complaint expounded upon the need for more funding to address the inadequacies of educational support for disadvantaged students. As it related to the counties, the complaint attacked the collection of school taxes based on something other than a property's current. The complaint's prayer for relief contained an amorphous request for a declaratory judgment, a request for permanent injunctions compelling defendants to establish, fund, and maintain a general and efficient system of free public schools, a request that this Court maintain jurisdiction until the defendants have complied with any orders the Court may issue, a request for costs and fees, and such other relief as the Court deemed just and proper.³

amending its pleading must file an amended complaint, or a motion to amend in conformity with this Rule, no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed.

² Ct. Ch. R. 8(a)(1).

³ Complaint at pp. 54-55.

A fair reading of the complaint indicated that plaintiffs were requesting this Court to order a general reassessment of all property within the state. The complaint aggressively attacked the counties' methods of assessing school taxes and complained that schools were not receiving proper funding because such taxes were not based on a property's true value in money. Count III stated that "Plaintiffs are entitled to an order that will require compliance with 9 Del. C. § 8306(a)."⁴ Paragraph 187 of the complaint states that "[t]his failure to collect the appropriate amount of property taxes for schools results in less tax revenue available for schools."⁵ The only logical inference from plaintiff's complaint was that they were requesting this Court to order a reassessment. At no point did the plaintiffs request that this Court enjoin the collection of county and school taxes. Now, in its Answering Brief in Opposition to County Defendant's Motion to Dismiss, plaintiffs state they are not seeking an order requiring reassessment,⁶ but rather are asking this Court to enjoin the collection of property taxes because they are not based on the property's true value in money.⁷

⁴ Complaint, ¶189.

⁵ Complaint, ¶187 (emphasis added).

⁶ Plaintiffs' Answering Brief in Opposition to County Defendants' Motion to Dismiss, at 10 [hereinafter Answering Brief].

⁷ *Id.* at 10-11.

As it pertains to the counties, plaintiffs appear to have abandoned any claim that they were seeking an order for a general reassessment.⁸ Plaintiffs recognize that county finance directors “cannot implement a general reassessment or decide when one will be performed.”⁹ Plaintiffs appear to then ask this Court to order a general reassessment under its clean-up or ancillary jurisdiction.¹⁰ Plaintiffs specifically note:

A judgment from this Court obligating the State to comply with its duty under the Education Clause could declare that a general reassessment is necessary. It is proper and efficient for this Court to consider the independent legal duties of the County Defendants under 9 *Del. C.* § 8306(a) in the same action.¹¹

However, as Plaintiffs have already recognized, the county finance directors do not have the power to order a general reassessment. If the Court were to exercise its ancillary jurisdiction in this matter, the order as contemplated by the Plaintiffs would apparently either order the General Assembly to act by way of passing legislation requiring a periodic general reassessment or order the county finance directors to perform an act for which they have no statutory power.

⁸ Answering Brief at 10 (“Their arguments are wrong because Plaintiffs do not seek an order requiring reassessment.”).

⁹ *Id.* at 11.

¹⁰ *Id.* at 18.

¹¹ *Id.* at 19.

Durham's opening brief details the legislative history relating to the duty to conduct reassessments. Plaintiffs do not challenge that legislative history. Instead, they argue that the duty to conduct regular reassessments is implied by the requirement imposed by 9 Del. C. §8306(a) that all property be assessed at its true value in money. Plaintiffs' argument is without merit.

The statute that is now codified as 9 Del. C. §8306(a) has existed in virtually the same form since the 1852 version of the Delaware Code. That code provided: "All property, real and personal, subject to assessment, shall be valued at its true value in money." Del. C. 1852, ch. 10, §11. The section was carried forward unchanged into the 1915 Revised Code of Delaware. See Del. C. 1915, §1133. See also Code 1935, §§ 1280, 1294, 1333; 9 Del. C. 1953, § 8307.

Thus, from at least 1852 until 1959, Delaware statutory law required real property to be assessed at its true value in money and that reassessments be conducted every four years or so.¹² Plaintiffs' apparent argument that the statutory requirement to assess property at its true value in money means that it must be assessed at its current fair market value renders the statutory requirement of periodic

¹² The 1852 Code required reassessment of real property every eight years. *Del. C. 1852*, ch. 11, §2. The frequency of reassessment was changed to every four years in 1869. 13 Del. Laws ch. 394 (1869).

reassessments meaningless. Where the General Assembly has passed the pertinent statutes as a whole, each part should be read in light of every other part to produce a harmonious result.¹³ Moreover, in 1953, the General Assembly adopted a statute requiring that the county tax rate be “based on the most recent assessment made” by the county governing bodies. See 9 Del. C. 1953, §8002(a) and 9 Del. C. §8002(a). That enactment is yet another torpedo in the sinking ship of plaintiffs’ argument concerning the meaning of §8306(a) as it requires ignoring another statute to reach plaintiffs’ interpretation. Plaintiffs’ argument transforms all the legislative changes made regarding the frequency of reassessments since at least 1852 into mere legislative housekeeping.

Plaintiffs’ claims against the counties presume that the property taxes being collected are illegal because the taxes are based upon properties that are not valued at their true value in money. However, Delaware law is well settled that the counties are assessing properties at their true value in money and that the Counties’ use of a base year to determine the tax due is constitutional. In 1977, the Delaware Supreme Court held “that the County may use the ‘base year’ formula as a method of

¹³ *Oceanport Industries v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994).

implementing the constitutional mandate of tax uniformity.”¹⁴ The Court so found because “every system of assessment will incorporate both the preference for present market value and the requirement of uniformity into its general scheme; but, when these two concepts cannot be accommodated under the facts of a specific case, the former must give way to the latter as the true measure of assessment.”¹⁵ The Court noted that then, as now, “Delaware law does not now require that there be periodic general reassessments.”¹⁶ Admittedly the Court, in dicta, noted that an unreasonable period of time had not passed since the general assessment made previous to that case and the time of the opinion in 1977. However, the Court did not define an unreasonable period of time and has had the opportunity to revisit the “base year” argument numerous times. Nor did the Court seem to undertake any analysis of the history underpinning reassessments in Delaware. The dicta in *Stewart* should not be followed for the same reason that the Supreme Court in *State ex rel. Oberly v. Troise*,

¹⁴ *Board of Assessment Review v. Stewart*, 378 A.2d 113, 116 (Del. 1977). *See also Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review*, 642 A.2d 1251, 1254 n.1 (Del. Super. 1993) (“In compliance with the state constitutional mandate of uniform taxation, New Castle County takes present-day property values and factors them back to a base year, currently established as 1983. This method of assessment has been declared to be constitutional by the Delaware Supreme Court.) (internal citations omitted).

¹⁵ *Stewart*, 378 A.2d at 115-16.

¹⁶ *Id.* at 116.

Del. Supr., 526 A.2d 898 (1986) declined to follow its prior dicta in *State ex rel. Gebelein v. Killen*, 454 A.2d 737, 744 (1982), suggesting that the state senate's willful and prolonged avoidance of its constitutional duty to confirm a qualified nominee may be deemed . . . the equivalent of confirmation:" close consideration of the history underpinning the relevant provisions leads to a different conclusion. 526 A.2d at 902-904.

Although most cases addressing the use of a base year did not specifically address the issue of time between assessments, the base year being used was specifically noted and no issues were raised. In 1988, the Delaware Supreme Court noted Sussex County's use of a 1974 base year and stated, "[u]niformity merely requires that present market value be factored back to a base tax year."¹⁷ In 1995, the Court noted that New Castle County used a base year then set at July 1, 1983.¹⁸ In 2008, the Superior Court of the State of Delaware noted that

New Castle County has opted to use the base year method of assessment for purposes of uniformity. Under this method, the true value in money, that is, fair market value, is determined for each property, then that value is factored back to 1983 values, the year of the last general reassessment. A fixed rate of taxation is then applied to the base year assessment to reach a uniform result.

¹⁷ *Seaford Associates, L.P. v. Board of Assessment Review*, 539 A.2d 1045, 1049-50 (Del. 1988).

¹⁸ *New Castle County Dep't of Fin. v. Teachers Ins. & Annuity Ass'n*, 669 A.2d 100, 102 n.2 (Del. 1995).

* * *

Fair market value, or true value in money, is a statutory requirement for making a tax assessment, and is the value which is factored back to base year values for uniformity.¹⁹

On appeal, the Delaware Supreme Court noted that “[t]he Superior Court judge cited case law to support his conclusion that when the property value is discounted back to the 1983 value base year, uniformity results” and that “he correctly found that the Board did not err as a matter of law by factoring the property value back to 1983 and then using a fairer, more accurate, depreciation rate.”²⁰ Most recently, in 2017, the Delaware Supreme Court again implicitly approved of the ‘base year’ method when it noted that “[a]lthough New Castle County is permitted to use the base year approach, it must then consider what the value of the units—in their current conditions—would have been in 1983, and so must the Board.”²¹

Plaintiffs’ assertion that property is not being assessed at its true value in money is contrary to decades of established case law. As numerous courts have noted, properties are being valued at their “true value in money” and then factored

¹⁹ *New Castle County v. New Castle Bd. of Assessment*, 2008 Del. Super. LEXIS 162, at *8-10 (Del. Super. Apr. 30, 2008).

²⁰ *New Castle County v. New Castle County Bd. of Assessment Review*, 2009 Del. LEXIS 150, at *8 (Del. Mar. 26, 2009).

²¹ *Commerce Assocs. LP v. New Castle County Office of Assessment*, 159 A.3d 1206, 1208 (Del. 2017).

back to a set base year. As the practice of factoring a properties current true value in money back to a set base year has been held to be constitutional by this State's highest court, Plaintiff's argument that the county finance directors are collecting taxes based upon an unlawful assessment must fail.

C. Susan Durham has no authority to perform a reassessment

In seeking such injunctive relief, Plaintiffs admit that Susan Durham and other County Defendants do not have the power to implement a general reassessment.²² Plaintiffs further state that they are not asking this Court to order County Defendants to implement a general reassessment.²³ Based on the Plaintiff's argument, any request for an order of a general reassessment has either been abandoned or has not been requested.

D. The collection of taxes cannot be enjoined

In their Answering Brief, plaintiffs for the first time state that the requested relief is an injunction preventing the counties from collecting property taxes based upon the premise that the tax is illegal because it is not based upon a property's true value in money.

²² Answering Brief at 11.

²³ *Id.*

The legality of the county’s assessment procedures was discussed *supra*, but, assuming this Court were to find that the county’s assessment procedures were illegal because property is not being assessed at its true value in money, an injunction would be an improper remedy. “The mere fact that a tax is illegal and void is not in itself enough to invoke the aid of the extraordinary powers of equity for its suppression.”²⁴ This is true even when the challenge to the taxing statute is based solely on the ground that the statute is unconstitutional.²⁵ In order to maintain jurisdiction, Plaintiff’s action must fall under one of the recognized heads of equity jurisdiction.²⁶

As the *McComb v. Robelen* Court noted:

If by reason of the tax and its threatened collection a cloud is cast upon the title to real estate, or irreparable injury, or a multiplicity of suits is threatened, or . . . possibly if the complainant’s title is purely an equitable one and not cognizable in a court of law, then cases are presented over which equity, following the beaten path of its precedents, may take jurisdiction.²⁷

²⁴ *McComb v. Robelen*, 116 A. 745, 749 (Del. Ch. 1922).

²⁵ *Delaware Bankers Assoc. v. Div. of Revenue of Dep’t of Finance*, 298 A.2d 352, 356 (Del. Ch. 1972) (citing *Equitable Guarantee & Trust Co. v. Donahoe*, 45 A. 583 (Del. Ch. 1899)).

²⁶ *McComb*, 116 A. at 749 (citing *Murphy v. City of Wilmington*, 11 Del. 108 (Del. 1880)).

²⁷ *Id.*

Thus, unless Plaintiff's suit alleges a claim under one of the foregoing scenarios, jurisdiction is not proper.

This is not a case where the collection an allegedly illegal school tax will cause a cloud to be cast upon the title to real estate. This simply is not a case where a taxpayer is refusing or is unable to pay the levied tax. In fact, Plaintiffs seek to increase the amount of property tax to be paid.

This is not a case where the collection of a tax will cause irreparable injury. In fact, quite the opposite is true. Plaintiffs seek to employ a nuclear option wherein they ask this Court to enjoin the collection of property taxes in the hopes that such action will force a political solution.²⁸ Enjoining the collection of taxes *in hopes* that the General Assembly or County governments would act could create a stalemate

²⁸ See Answering Brief at 11 (“An order preventing county tax collection because of the counties’ failures to comply with § 8306(a) might lead to decisions by Kent County Levy Court, New Castle County Council and Sussex County Council to implement general reassessments, . . .). See also Answering Brief at 12 (“What Plaintiffs seek to gain in this action through Count III is an order that will prevent the counties from basing tax collection on stale assessments. It would be up to the political branches whether to remedy the problem through reassessment, creating a new source of funding, or any other approach that complies with both the Counties’ statutory obligations and the State’s constitutional obligations.”).

wherein schools and local governments²⁹ are significantly underfunded by virtue of a Court order.

This is not a case where there is a legitimate threat of a multiplicity of suits.

As this Court noted in *Young v. Red Clay Consolidated School District*:

One reason for the lack of a county-wide challenge might be the absence of a motivated plaintiff. A successful challenge that generates a new general assessment almost certainly would cause most assessed property values to increase, subject to the 10% statutory cap. Few people like paying higher taxes. Even fewer are motivated to file suit to fix a dysfunctional system where success means higher taxes for everyone.³⁰

The lack of incentive to bring a lawsuit that would result in higher taxes reduces the threat of a multiplicity of lawsuits to near zero.

Finally, this is not a case where complainant's title is merely an equitable title. In fact, Plaintiffs are not property owners seeking to enjoin the collection of a property tax on property in which they have any interest, equitable or otherwise.

To the extent Plaintiffs may argue that this case does fall under one of the heads of equity because they have no relief at law, that argument must fail. Plaintiffs

²⁹ Most local governments in Kent County, other than the City of Dover, use the Kent County assessment list for municipal taxation purposes. Enjoining the use of the Kent County assessment list could cause a cascading failure of local government services, including police protection, in Kent County.

³⁰ *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 722 n.32 (Del. Ch. 2017).

argue that the educational system is underfunded and point to the collection of property taxes based on values less than a property's true value in money as one of the causes. Although many may argue that the alternative supplied by the General Assembly is inefficient, the fact remains that school districts are allowed to increase the amount of money collected based on the Counties' property assessments via referendum. The argument that the referendum process is costly and inefficient supposes that requiring the counties to reassess property values on a regular basis is not costly and is somehow more efficient. Plaintiffs' argument that property must be reassessed on a regular basis can be readily interpreted as an argument that the counties must bear the financial burden whenever school districts require more revenue.

E. Respect for separation of powers counsels against a Chancery-ordered reassessment

Plaintiffs' response to Durham's separation of powers argument misses the point of the argument. The Delaware Constitution imposes a duty on the General Assembly "to provide for the establishment and maintenance of a general and efficient system of free public schools."³¹ The General Assembly has developed a

³¹ Del. Const. art. X, §1.

complex set of funding mechanisms to fulfill that obligation. The collection of school taxes based on the counties' real property assessments is a portion of that complex funding mechanism. Respect for separation of powers counsels that the judiciary should not wade into the quagmire of reassessment because there is at least a 166-year history of periodic tinkering with the reassessment machinery by the elected branches of state government. There are no judicially-discoverable or manageable standards to determine when a reassessment should occur. The judiciary is not equipped to fashion a method for paying for the cost of the reassessment; the courts cannot appropriate funds to pay for the assessment or allow the counties to delay the roll-back of the tax rate for some period of time.

CONCLUSION

For the reasons expressed herein and in the opening brief, Susan Durham respectfully requests that this Court dismiss the claims against her.

SCHMITTINGER AND RODRIGUEZ, P.A.

BY: /s/ Gary E. Junge

WILLIAM W. PEPPER SR., ESQUIRE (#2400)

GARY E. JUNGE, ESQUIRE (#6169)

414 S. State Street

P.O. Box 497

Dover, Delaware 19903-0497

Voice: 302.674.0140

Fax: 302.678.6580

Attorneys for Defendant Susan Durham

Words: 3,404

DATED: July 18, 2018