IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MR. KLEEN, LLC, a Delaware limited liability company, doing business as MR. KLEEN, and BRACKENVILLE ENTERPRISES, L.P., a Delaware limited partnership, doing business as NEWPORT LAUNDRY,	:	
Plaintiffs,	:	Case No. N13C-10-180 CEB
V.	:	
NEW CASTLE COUNTY DEPARTMENT OF SPECIAL SERVICES and NEW CASTLE COUNTY, a political subdivision of the State of Delaware,	:	
Defendants.	:	

Date Submitted: June 11, 2014
Date Decided: August 19, 2014

MEMORANDUM OPINION.

Upon Consideration of
Defendants' Motion to Dismiss.
GRANTED.

William J. Rhodunda, Jr., Esquire, RHODUNDA & WILLIAMS, Wilmington, Delaware. Attorney for Plaintiffs.

Aleine M. Porterfield, Esquire, NEW CASTLE COUNTY OFFICE OF LAW, New Castle, Delaware. Attorney for Defendants.

BUTLER, J.

INTRODUCTION

Mr. Kleen, LLC and Brackenville Enterprises, doing business as Newport Laundry ("Plaintiffs") have filed suit against New Castle County and the New Castle County Department of Special Services ("County") for overbilling for sewer services. The County has responded with a Motion to Dismiss for Failure to State a Claim on each count of Plaintiffs' complaint. For the following reasons, the County's Motion to Dismiss is **GRANTED.**

FACTUAL AND PROCEDURAL BACKGROUND

The County charges all landowners for the use and maintenance of the County sewer system. These expenses are recovered via sewer fees levied against the landowners.

Just how these fees are calculated is tied to historical facts not easily discernable in this record. The relevant section of the County Code is the less than clear in Section 38.02.503. This section is important enough to our discussion that some dissection is worthwhile. Section A states that sewer service charges are to be "based upon the consumption of water and the measured or estimated constituents and characteristics of the sewage." So far, so good: sewer service fees should be correlated to sewer service usage. Section B states that user fees "shall be classified by a user classification category according to the principal activity conducted on the user's premises." Again, we can at least surmise that these user

classification categories will relate to certain assumptions about what the typical user in a particular classification will consume in sewer services.

Section B goes on to provide that "[f]or general industrial and commercial users, the standard industrial classifications (SIC) as established by the Standard Industrial Classification Manual, 1972 . . . shall be used."[1] Here our problems begin: exactly how is the SIC to be "used?" And then there is the fact that the SIC manual of 1972 has not only been revised several times since then, it has been superseded by the North American Industry Classification System ("NAICS"). As far as we can see, the County Code has not been updated to reflect these changes.

We then come to section C: "categories enumerated." This section breaks down "general industrial/commercial" users into subclasses. While the exact formula for computing sewer fees need not concern us here, suffice it to say the lower one's "subclass," the lower one's sewer bill. The fee for a subclass "B1" is substantially less than the fee for a subclass "B14." If we dig through the Code,

[1] STANDARD INDUSTRIAL CLASSIFICATION SYSTEM (SIC), http://www.referenceforbusiness.com/encyclopedia/Sel-Str/Standard-Industrial-Classification-System-SIC.html, (the Standard Industrial Classification Manual was published by the Executive Office of the President, Office of Management and Budget. It is a "hierarchical coding structure developed by the U.S. government and used widely in government and private sector data. It attempts to classify all forms of economic activity – including government and nonprofit entities – in order to provide a common statistical and conceptual framework for data collection and analysis)."

we can learn that the "BOD" is an acronym for "biochemical oxygen demand."[2] And it is interesting even to those of us less mathematically inclined to understand that only the "BOD" is directly related to the subclassification. The higher one's BOD, the higher one's subclass, and therefore the higher one's sewer bills.

We then consider the SIC classification, a topic that concerns us greatly here. The discerning reader of the Code will notice that "major group" 72 ("personal services" according to the SIC) appears in both subclass B5 and subclass B14. A footnote in the county code tells us that we are to consult the "SIC land use correlation list" for further clarification. The "SIC land use correlation list" is an attempt to cross reference the county "Land Use Code" and the SIC manual in order to arrive at a subclass designation for purposes of assessing sewer fees.[3] When we consult the County's "SIC land use correlation list" we can see that most of the original SIC "personal service" classifications

[2] "The laboratory determination of the quantity of oxygen by weight, expressed in milligrams per liter, utilized in the biochemical oxidation of organic matter under standard laboratory conditions of incubation for five (5) days at a temperature of twenty (20) degrees Celsius." NCCC §38.02.701. The "SS," or "suspended solids," run from .4170 at subclass 1 to 1.2510 at subclass 2 and back to .6255 at subclass 3. There thus does not appear to be any particular pattern emergent for suspended solids.

[3] The County has appended a copy of the SIC Land Use correlation list to its briefing papers, thank goodness, because the list was apparently prepared internally by the Department of Public Works in 1976, is still in use today, and copies are – the County tells us – available through the Freedom of Information Act. Thus, a commercial or industrial user that works in the area of personal services who wants to understand the arcane formulae that made their sewer rate what it is must file a FOIA request to even see the list from which the classification was derived. Our affirmation of the County's position in this litigation should not be read as an endorsement of opacity in government.

were transferred from the SIC manual to the land use correlation list. So barber shops, beauty parlors, undertakers, wearing apparel repair and maintenance shops, health clubs and consumer goods repair shops are all SIC "personal service" categories and are on the SIC land use correlation list, classified at subclass B14, and paying the higher rates. All other SIC "personal service" classifications in the 1972 SIC manual – including virtually all types of laundry services – were grouped together as "undifferentiated consumer services" on the county's land use correlation list, classified at the cheaper subclass B5.

One would think the plot would end there, with laundromats – which are not specifically enumerated on the "land use correlation list" (but are specifically enumerated in the SIC) – therefore receiving the "undifferentiated" designation and thus the less expensive subclass B5, but that would be too easy. Instead, a 1976 internal County memorandum regarding "User Class Descriptions" describes that "the following list identifies the new user class for the most common type of land use."[4] There follows the subclass B14 with all of the entities previously identified in the SIC Land Use Correlation List – barber shops, beauty shops, funeral homes, tailor shops – and then, handwritten, by someone, at some point, is the word "Laundry." The record as developed thus far fails to provide any explanation for how the word "Laundry" came to be handwritten beneath the

[4] Exhibit 1, *Memorandum from Stephen Kowalchuk, Jr., P.E. to Joah Taylor* (June 15, 1976), submitted in support of Defendant's Mot. to Dismiss.

groups to be classified in subclass B14. Neither party offers any explanation – devious or otherwise – as to how this word came to be on this internal document. It may have been that the County realized that while most or all SIC "personal service" businesses had been covered in subclass B14, none of the nine laundry sub-classifications in the SIC manual had been correlated to a county sewer subclass and simply added "Laundry" for consistency. Or, it may have come by way of the assiduous study of the "BOD" of laundromats generally. Plaintiffs have not alleged, and we do not presume, that "Laundry" was added merely to harass or "tax" plaintiffs out of some spite or ill motive.

But that notation is apparently how plaintiff laundromats came to be classified at subclass B14. There are obviously significant ramifications for any business to be labeled "Laundry" as it requires such businesses, at least initially, to pay about twice as much in sewer service fees as some other "undifferentiated" service business that would otherwise be classified at subclass B5.

One final piece of the County Code must be discussed preliminarily. Section 38.02.503.B finally provides that "any appeal from a classification category shall be taken to the General Manager of the Department of Special Services . . . [a] user who is granted a reclassification shall be charged at the rate for the new classification beginning with the quarterly billing during which the appeal was taken." Thus, while a classification may well be in error, or arbitrarily

assigned (or at least arguably so) a mechanism is provided by which review may be had and things set aright.

One of the many puzzling features of this lawsuit is that the Plaintiffs did just that and succeeded. Plaintiffs are laundromats and were initially classified at subclass B14. They understandably wanted subclass B5 because it is less expensive. In due course, the County's General Manager agreed to review the water generated by Plaintiffs' laundromats. After testing, the County ultimately concluded that the levels of suspended solids and biodegradable matter in the water from their laundromats merited reclassification to the cheaper subclass B5 rate. Thus Plaintiffs have been set at subclass B5 and, we would presume, all is right in the world once again.

But not content with their success before the General Manager, Plaintiffs brought this lawsuit against the County seeking retroactive reimbursement for the four years in which they operated their businesses and were allegedly misclassified. Plaintiffs also claim their equal protection rights were violated by the incorrect classification. Finally, Plaintiffs seek a declaratory judgment that they should have been billed for sewer charges under the subclass B5 classification from the dates on which they began to operate their businesses. In response, the County has filed a Motion to Dismiss under Rule 12(b)(6).

STANDARD OF REVIEW

When analyzing a Motion to Dismiss under Rule 12(b)(6), the Court will limit its review to the well-pleaded allegations in the complaint, but will draw all reasonable factual inferences in favor of the non-moving party.[5] The Court will not grant a motion to dismiss "unless it appears to a certainty that the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[6] However, the Court "will not consider conclusory allegations that lack specific supporting factual allegations," nor will it "accept every strained interpretation of the allegations."[7]

DISCUSSION

The County sets forth several arguments to support its position that Plaintiffs' complaint should be dismissed.[8] After careful review, the Court concludes that every count of the complaint must be dismissed as it fails to state a claim upon which relief can be granted.

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[5] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

[6] *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952).

[7] *See Nieves v. All Star Title, Inc.*, 2010 WL 4227057, at *4 (Del. Super. Ct. Oct. 22, 2010)(citing *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)), *aff'd*, 21 A.3d 597 (Del. 2011).

[8] In addition to the arguments referenced below, the County also asserted that the complaint is time-barred and the Department Special Services is not a separate suable entity. Because the Court dismisses all three counts of the complaint on their merit, the remaining arguments are moot.

I. Count One For "Inappropriate Classification" Fails To State A Claim

Count One of Plaintiffs" complaint alleges that they are entitled to reimbursement for a four year period in which they were classified at the subclass B14 rate. The County contends that Count One must be dismissed because there is no legal action for "Inappropriate Classification."

County Code § 38.02.503 governs the relationship between the County and Plaintiffs. That Code section explicitly states that "[a] user who is granted a reclassification shall be charged at the rate for the new classification beginning with the quarterly billing during which the appeal was taken." Because § 38.02.503 requires any rate adjustment for a reclassification be applied from the appeal time forward, the Code does not provide for retroactive computation of sewer rates. The Code also does not provide a cause of action for misclassification, nor does it equate a reclassification as a misclassification. Therefore, at least as far as the Code is concerned, Plaintiffs' exclusive remedy is to be charged at the rate of the new classification from the date of a successful appeal forward. There is no right under the Code to receive retroactive reimbursement.

Plaintiffs' argue that their cause of action is based on the "contractual relationship" between themselves and the County. This somewhat novel argument is predicated on the supposition that every rate payer is, by reason of paying the

fees, a party to a contract between the rate payer and the County. But that is about where the analogy to contract ends. There is no "offer" and no "acceptance," no bargained for terms, no signed document or any other indicia of a "contract." Indeed, the county collects its sewer fees by legislative enactment and landowners have no choice but to pay it. Instead of a "bargained for exchange," this is a legal demand placed on all county landowners. It is not a contract. What sparse case law we have consulted supports the view that paying one's sewer fees is not a contractual undertaking.[9]

Proceeding from this exceedingly weak premise, Plaintiffs urge that the Court should find in the alternative that the County was unjustly enriched and that they deserve some quasi-contractual remedy in the absence of a formal contract.[10]

The short answer to this argument is that the relationship between Plaintiffs and the County is not only not contractual, it is not quasi-contractual. The County Code represents a legislative/administrative judgment by elected officials as to the duties of its citizens. With due respect for the noble seventeenth century concepts of "The Social Contract,"[11] the County has expansive remedial rights against

[9] *See Lincoln Prop., Ltd v. Higgins*, 823 F.Supp. 1528 (E.D. Cal. 1992).

[10] *Alltrista Plastics, LLC v. Rockline Indus., Inc.*, 2013 WL 5210255, at *11 (Del. Super. Ct. Sept. 4, 2013).

[11] John B. Mitchell, *My Father, John Locke, and Assisted Suicide: The Real Constitutional Right*, 3 IND. HEALTH L. REV. 45, 86 (2006) (stating that "a primary motivation for entering into [a] contract was to obtain physical security not available in a world where the state of nature tended

landowners who do not pay their sewer bills. Landowners can appeal to the General Manager of Special Services or they can vote out the rascals that levied the fees, but little else is available to them. Any "injustice" in the County's "enrichment" must be remedied by the means available under the Code or the ballot box. The Court is not even tempted to fashion some hitherto unrecognized right to recover prior assessments paid, regardless of the wisdom of those assessments.

Moreover, there is no evidence that the actual "BOD" or "Suspended Solids" ("SS") loadings between 2008 and the time of their appeal and concomitant water testing would have yielded wastewater samplings within the subclass B5 limits. Rather, Plaintiffs ask the Court to speculate that had wastewater testing taken place between those dates, it would have revealed contaminants justifying the subclass B5 classification. Lacking such evidence, Plaintiffs lack any evidence that the County was "unjustly" enriched.[12]

There being no "contract," no cognizable claim for "unjust enrichment," no statutory or regulatory means to obtain a refund for a rate classification, nor any evidence that Plaintiffs were improperly classified prior to the wastewater testing,

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to degenerate into a 'state of war'); It is unlikely that John Locke envisioned that the chaos of nature or 'state of war' would be secured by a proper subclass B5 sewage classification.

[12] We are constrained to note that when the County agreed to the water testing and decided to resolve their dispute with plaintiffs, they advised that "[t]he data from the sampling study yields an average BOD of 3.239356 and a TSS of 1.031158." A BOD level of 3.2 should yield a subclass of B11 or subclass B12, not subclass B5.

Count One for "Inappropriate Classification" must be dismissed for failure to state a claim upon which relief may be granted.

II. Count Two For "Denial of Equal Protection" Fails To State A Claim

In Count Two of their complaint, Plaintiffs allege that the County infringed on their equal protection rights due to the alleged misclassification, violating both the Equal Protection Clause of the U.S. Constitution and Article VIII of the Delaware Constitution, requiring uniform taxation among classes.

As to Article VIII of the Delaware Constitution, that provision requires that all state taxes be uniform among the same class of subjects. The supposition underlying Plaintiffs' argument is, of course, that sewer assessments are a "tax" subject to Article VIII of the Delaware Constitution. In *Green v. Sussex County*[13] the Court reviewed the propriety of Sussex County's sewer assessments on the expanded sanitary sewer districts around Bethany Beach. Rates in some of the districts were different from rates in other districts, giving rise to an Article VIII/equal protection challenge similar to that raised by Plaintiffs here. Tracing the origins of home rule charters by the General Assembly, the Court ruled that counties are free to levy sewer assessments along any lines permissible under the grant of home rule authority. Thus, while *Green* might represent a concession that sewer fees are a "tax" subject to the Article VIII proscription on uniformity, it also

[13] 668 A.2d 770 (Del. Super. Ct. 1995).

finds that compliance with the sewer code itself provides the "rational basis" for differentiation required even under the uniformity requirement of the Constitution. Thus, even if we agree that a sewer assessment is a "tax" – a conclusion about which we remain somewhat dubious – Article VIII provides cold comfort to Plaintiffs.

Section 2209 of Title 9 of the Delaware Code authorizes a county to assess sewer service charges "as near as the County Council deems practicable and equitable" and may be based or computed on any number of different theoretical computations, all to the effect that heavier users may be required to pay more "or on any combination of any such factors."[14] Clearly, the General Assembly intended to give the counties broad leeway to assess sewer fees however the county saw fit. While the Code certainly does suggest that there be some rational basis for differentiating among sewer users, it also suggests that a county is free to adopt any rationale it may for making such distinctions. Here, the County did indeed make certain assumptions as to sewer usage and categorized users accordingly. Because the County's classification system complies with 9 Del. C. §2209, it complies with Article VIII of the Delaware Constitution.

[14] 9 *Del. C.* § 2207.

An equal protection challenge that does not involve a fundamental right or a suspect class is analyzed under the rational basis standard.[15] Under this highly deferential standard, a statute is presumed constitutional, and the moving party must demonstrate that "there is [no] reasonably conceivable state of facts that could provide a rational basis for the classification."[16] The State has "no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.'"[17] Rational basis review does not permit the Court "to judge the wisdom, fairness, or logic of legislative choices."[18] Therefore, the statutory classification will only fail rational basis review when it "rests on grounds wholly irrelevant to the achievement of the State's objective."[19]

Although Plaintiffs allege that there is no rational basis for the County's sewer charge system because it results in disparate treatment, the Equal Protection

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[15] *Stratton v. Travis*, 380 A.2d 985, 987 (Del. Super. Ct. 1977).

[16] *Heller v. Doe by Doe*, 509 U.S. 312, 320-21 (1993) (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

[17] *Id.* at 320 (citing *Beach Commc'ns, Inc.*, 508 U.S. at 315).

[18] *Salem Church (Delaware) Assoc. v. New Castle Cnty.*, 2006 WL 2873745 (Del. Ch. Oct. 6, 2006) (citing *Acierno v. New Castle Cnty.*, 2000 WL 718346, at *5 (D. Del. May 23, 2000) (citing *Beach Commc'ns, Inc.*, 508 U.S. at 313)).

[19] *Heller*, 509 U.S. at 324 (citing *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978)).

Clause is not violated solely because a classification "is not made with mathematical nicety, or because in practice it results in some inequality."[20] While we think we have laid out that the County's sewer classification system is, at least, confusing and not altogether logical, that is not the stuff of an equal protection violation. The County has made certain assumptions as to the uses to which the land is put, assumed certain "BOD" on the sewer system as a result of those uses, and directed fees be paid pursuant to those assumptions. The County's assumptions may indeed be incorrect, but they are rebuttable through the appellate process spelled out in the Code and those mere incorrect assumptions do not rise to "arbitrary and capricious" rule making.

Plaintiffs argue that they were treated differently from "other similarly situated commercial properties," but the "similarly situated properties" to which Plaintiffs refer are laundromats located in shopping centers as opposed to free standing establishments. Recalling our discussion above, while "laundries" ended up at the more expensive subclass B14, "shopping centers" are not found in the SIC and therefore they (and their constituent shops) are subclassified at the less expensive subclass B5 rate. If one such shop happens to be a laundromat, it enjoys the less expensive subclass B5 rate. Thus, the classification of which Plaintiffs complain is not a differentiation among laundromats but as between personal

[20] *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

service business leasing space in a shopping center and those that are free standing. While the basis for such a differentiation may be somewhat attenuated, it is quite plausible that the county determined that the collective load of "BOD" and the "SS" as a percentage of all wastewater produced by all stores in a shopping center deserves different treatment from the same waste produced, as a percentage of all wastewater, from a free standing facility. Discriminating between personal service business located in shopping centers and those located on free standing property is not irrational.

Because Plaintiffs have failed to refute the County's rational basis for its sewer charge classification system, Count Two must be dismissed for failure to state a claim.

III. Plaintiffs Claims Are Barred By Governmental Immunity

We think this fairly ends the matter but are compelled to make one final point. 10 *Del. C.* § 4011 provides counties and municipalities in Delaware with broad tort immunity from suit for damages resulting from any legislative, judicial or quasi-judicial act, including the grant or denial of any administrative approval or the performance or failure to perform a discretionary act. Indeed, the act is so broad as to provide that the specific immunities are only examples and "shall not be interpreted to limit the general immunity provided by this section."[21] It is

[21] 10 *Del. C.* § 4011(b).

certainly to be noted that the Code provision grants counties immunity "from suit on any and all tort claims" and, it has been argued, this is a contract claim or a constitutional claim, or any claim except a tort claim. Indeed, in light of the broad tort immunity, we can see why Plaintiffs would attempt to fashion their complaint as they have. But regardless of Plaintiffs' characterization of their complaint, the Court is free to look past the nomenclature[22] and see that Plaintiffs are seeking money damages for a harm brought about as a result of government action (or inaction). The action was, in Plaintiffs' view, at least negligent – a hallmark of suits in tort. We have no difficulty concluding that this is the type of harm that sounds in tort notwithstanding Plaintiffs' characterization of their suit. We therefore further hold that Plaintiffs' suit is barred by the County's broad immunity.

IV. The Court Will Decline To Exercise Its Equitable Powers By Granting A "Declaratory Judgment"

Finally, Count Three of Plaintiffs' complaint requests a declaratory judgment that Plaintiffs should have been billed for sewer service charges under subclass B5 from the dates on which they began operating their businesses. The County contends that not only does this Court not have jurisdiction over equitable

[22] *See Sonne v. Sacks*, 314 A.2d 194 (Del. 1973) (here, the Court found that the gravamen of the appellant's claim was action upon the checks, not the claim for wages); *Poole v. N.V. Deli Maatschappij*, 224 A.2d 260 (Del. 1966) (here, the Court looked at the gravamen of the action); *see also Liborio II, L.P. v. Artesian Water Co., Inc.*, 593 A.2d 571, 574-55 (Del. Super. Ct. 1990) (stating that "[t]he Court must look behind these contentions, examine the gravamen of plaintiffs' action").

relief, but also declaratory judgment is inappropriate because Plaintiffs are asking the Court to create a cause of action despite the fact that they have no ascertainable claims.

It is well settled law that this Court has statutory and inherent authority to grant equitable relief and decide cases based on equitable principles.[23] The Court has discretion whether to entertain an action for declaratory judgment after a practical evaluation of the circumstances present, the only limitation being that the Court cannot abuse its discretion.[24] "This discretion should be liberally exercised in order to advance [declaratory judgment's] remedial purpose,"[25] which is "to afford relief from uncertainty with respect to rights, status and other legal relations."[26]

In the present case, granting declaratory judgment will have no effect on the outcome of the matter. Even if the Court were to find that the County misclassified Plaintiffs, it would not entitle them to retroactive reimbursement because, as mentioned above, § 38.02.503 requires any rate adjustment for a reclassification be from the appeal time forward, regardless of whether the party

[23] *Odessa Nat'l Golf Course LLC v. New Castle Cnty. Office of Fin.*, 2014 WL 1101470, at *3 (Del. Super. Ct. Mar. 14, 2014).

[24] *Burris v. Cross*, 583 A.2d 1364, 1372 (Del. Super. Ct. 1990); *Schick Inc. v. ACTWU*, 533 A.2d 1235, 1238 (Del. Ch. 1987).

[25] *Burris*, 583 A.2d at 1372.

[26] *Id.* at 1371.

was classified in an incorrect subclass and, dare we repeat, Plaintiffs have already received that remedy.

Likewise, declaratory judgment would not affect Plaintiffs' equal protection claim because they would still be unable to demonstrate that the County had no rational basis for its sewer charge classification system. The Court has here ruled that the classification system satisfied the "rational basis" test of equal protection and nothing is gained by now "declaring" that it does not. Therefore, because declaratory judgment would not advance the litigation, the Court will decline to exercise its judicial discretion, and Count Three will be dismissed.

CONCLUSION

Because each count of Plaintiffs' complaint fails to state a claim upon which relief may be granted, the County's Motion to Dismiss is **GRANTED.**

IT IS SO ORDERED.

/s/ Charles E. Butler
Charles E. Butler, Judge

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