IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

RICHARD J. KORN and ANDREW DAL NOGARE, Plaintiffs, v. NEW CASTLE COUNTY, a political subdivision of the State of Delaware, CHRISTOPHER A. COONS, as County Executive and DAVID W. SINGLETON, as Chief Administrative Officer, and PAUL G. CLARK, as President of New Castle County Council, and JOSEPH REDA, ROBERT S. WEINER, WILLIAM J. TANSEY, PENROSE HOLLINS, KAREN G. VENEZKY, PATTY W. POWELL, GEORGE SMILEY, JOHN J. CARTIER, TIMOTHY P. SHELDON, JEA P. STREET, DAVID TACKETT, and JAMES W. BELL as Members of New Castle County Council, Defendants.	)	Civil Action No. 767-N

OPINION AND ORDER

Date Submitted: July 15, 2005
Date Decided: September 13, 2005
Date Revised: September 27, 2005

Gary F. Traynor and Paul A. Fioravanti, of PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware, and Ronald G. Poliquin, of YOUNG, MALMBERG AND HOWARD, P.A., Dover, Delaware, Attorneys for Plaintiffs.

Gregg E. Wilson, Carol J. Dulin, and Dennis J. Siebold, Acting County Attorney, NEW CASTLE COUNTY LAW DEPARTMENT, New Castle, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

This is the Court's decision on New Castle County's Motion for Summary Judgment on the second amended and supplemented complaint of plaintiffs Richard Korn and Andrew Dal Nogare. Plaintiffs first brought suit against the County on October 20, 2004, asserting five counts—all premised on allegations that the County had exceeded its statutory grant of authority when it had accumulated, over a period of eight years, over $200 million in surplus revenues. On February 10, 2005, this Court issued an Opinion and Order: (1) granting the relief requested in Counts I through III of the complaint, (2) dismissing Count IV of the complaint, which sought to preliminarily enjoin the County's impending $80 million bond sale, and (3) declining to grant summary judgment on Count V of the complaint, which requested a permanent injunction against the same bond sale.

The effect of the Court's February 10, 2005 Order was to permit the County to maintain cash reserves, so long as those reserves were established in accordance with the County's charter, and the procedures used to allocate monies to those reserves were transparent. After this Court's Order, the newly installed County government moved quickly to remedy the budgetary deficiencies they inherited from the previous administration and which this Court addressed.

On February 22, 2005, twelve days after the Opinion and Order was issued, plaintiffs filed their first motion to amend the complaint. That motion sought leave to add Count VI, which alleges that the actions New Castle County took pursuant to this Court's Order are unconstitutional and void to the extent those actions: (1) amend Section 14.01.013 of the New Castle County Code to permit the County to maintain reserves beyond five percent of the respective fund's revenues; and (2) create new reserve accounts to bring "on budget" the County's other surplus revenues. The Court granted plaintiffs' motion to amend.[1]

On March 24, 2005, plaintiffs again filed for leave to amend their complaint. That motion sought leave to add Counts VII through IX. Because defendants did not timely oppose plaintiffs' second motion to amend, the Court granted the motion.[2] Count VII of the amended complaint seeks a judgment declaring that "(a) the [County's] practice of commingling general tax revenues in its Sewer fund violates Chapter 22 of Title 9, 9 *Del. C.* § 8102 and Defendants' fiduciary duties, and (b) . . . [the County's] practice of charging costs unrelated to its sewer operations to the Sewer Fund violates their fiduciary duties." Count VIII of the amended complaint seeks an accounting of the County's Sewer Fund to ascertain the extent that

[1] *See Korn v. New Castle County*, C.A. No. 767-N, Let. Op. (Mar. 9, 2005), Chandler, C.
[2] *Korn v. New Castle County*, C.A. No. 767-N, Let. Op. (Apr. 21, 2005), Chandler, C.

general tax revenues have been commingled with the Sewer Fund. Plaintiffs also ask the Court to permanently enjoin future commingling of monies between the General and Sewer Funds. Count IX of the amended complaint alleges that the defendants have been unjustly enriched through the retention of revenues in excess of the limitations imposed by Delaware's constitution and NCCC § 14.01.013. To the extent the County has illegally retained surplus revenues the plaintiffs ask that the money be disgorged.

After a discovery dispute, plaintiffs' sought leave to supplement their complaint with their final claim that the County has illegally accumulated surplus revenues within the Light Tax Fund.[3] The Court granted plaintiffs' motion. Now, the plaintiffs allege that 9 *Del. C.* § 2103 requires that all surplus monies within the Light Tax Fund be applied to the succeeding fiscal year's budget to reduce the applicable tax rate. Accordingly, plaintiffs seek: (1) an accounting of the Light Tax Fund, (2) an injunction preliminarily and permanently enjoining the County from maintaining a surplus in the Light Tax Fund beyond the current fiscal year, and (3) an order directing the

[3] On May 2, 2005, plaintiffs filed a motion to compel the production of certain discoverable documents. The Court granted plaintiffs' motion; in response, defendants produced several documents indicating that the County had accumulated, over a number of years, surplus revenues within the County's Light Tax Fund: a fund used by the County to finance its obligation of providing street and highway lighting. Armed with this newly acquired information, plaintiffs sought leave to supplement their complaint to incorporate allegations concerning the County's purportedly illegal accumulation of surplus revenues within the Light Tax Fund.

County to apply all surplus funds currently held in the Light Tax Fund to the reduction of the Light Tax rates for Fiscal Year 2006. For the reasons discussed below, I enter summary judgment in favor of New Castle County, on all Counts.

I. BACKGROUND

A. Plaintiffs' Original Complaint Challenges New Castle County's Budgetary Practice of the County Executive Setting Aside Reserves in Excess of the Amounts Permitted Under New Castle County Code § 14.01.013

The facts giving rise to this suit are recounted in detail in my February 10, 2005 Opinion. Nevertheless, I will endeavor to highlight the most salient facts relevant to the present dispute. Plaintiffs' original claims stem from certain disclosures the previous County Executive made as part of his 2004 annual budget address to the New Castle County Council. In that speech, Thomas Gordon identified twelve "reserve" accounts his administration had set aside to earmark over $200 million in surplus revenues. These revenues were set aside without legislative action, and were well in excess of the twenty percent limitation the County Code placed on County reserves. Based on these disclosures, plaintiffs filed suit and charged the County Executive with usurping his authority, and they demanded that the money be returned to the taxpayers.

Adding fuel to the fire, the County was in the process of approving a bond issuance worth $80 million. Plaintiffs contended that the County should not be permitted to issue the bonds at the same time the County was enjoying a $200 million surplus. The County, on the opinion of the County's former chief financial officer, Ronald A. Morris, continued to support its decision to issue the bonds. In a report issued to the County Council, Morris opined that beginning in fiscal year 2005, the County's 2004 General Fund revenues would be insufficient to fund current expenditures. According to Morris, this left the County with two options: tap the undesignated reserves to fund General Fund operating deficits, or issue $80 million in County debt to fund projects previously approved. Morris reported that if the bond sale was not approved, operating deficits would fully deplete the County's reserves by fiscal year 2009, and the taxpayers would face an immediate property tax increase of as much as fifteen percent, and regular annual increases of about five percent beyond that. On October 5, 2004, New Castle County Council approved the $80 million bond issuance; but before the bonds were issued, plaintiffs filed their complaint challenging the County's practice of accumulating surplus revenues and sought to both preliminarily and permanently enjoin the bond issuance.

Faced with the question whether these reserves were lawful, the Court found that the executive procedures used to establish the County's reserves were contrary to the County's charter, as well as the bicameral requirement that the legislative body, and not the executive, appropriate funds from the treasury.[4] I concluded that the Gordon administration had exceeded its authority and that a majority of the County's reserves were being held "off budget" in clear violation of law. Accordingly, my February 10 Opinion admonished the County for its past budgetary policies and encouraged the County to incorporate sound fiscal principles into their budget process.[5] I then concluded that any deviation in the amount that is appropriated to the County's reserves must be effectuated by either amending the County's Code, or by altering the permitted appropriation for that year by a supermajority, five-sevenths vote of the County Council.[6] For those reasons, I granted summary judgment in plaintiffs' favor on Counts I, II, and III of the complaint. But, because the County had voluntarily stayed its bond issuance, and the Court did not have reason to conclude that the County would proceed with the bond sale, I dismissed, as moot, plaintiffs' request for a preliminary injunction, and declined to enter summary judgment in

[4] *See Korn v. New Castle County*, C.A. No. 767-N, Mem. Op. (Feb. 10, 2005), Chandler, C. at 17-18.
[5] *See generally*, *Korn*, C.A. No. 767-N, Mem. Op. at 14.
[6] *Id*. at 24-25.

favor of either party on plaintiffs' request to permanently enjoin the bond sale.

Immediately following the February 10 Opinion, plaintiffs filed their first amended complaint to challenge whether the County was constitutionally permitted to maintain reserves in excess of five percent. Plaintiffs contended that Delaware's constitutional proscription against the State's authority to set aside a budget reserve in excess of five percent of its general fund revenues also prohibited New Castle County from doing the same.

B. New Castle County Adopts New Legislation in Response to This Court's Order and Plaintiffs file their Second Amended Complaint

Notwithstanding plaintiffs' new constitutional claim, the County moved quickly to implement the Court's decision. To that end, the County Council introduced two new ordinances (collectively the "New Ordinances"). The first ordinance created two new reserve accounts: a Tax Stabilization Reserve Account, and a Sewer Rate Stabilization Reserve Account (the "New Reserve Accounts"). Neither reserve account has a ceiling on the amount the County can set aside as reserves. The second ordinance would retroactively amend the fiscal year 2005 operating budget to appropriate all "off-budget," reserve funds, in excess of the twenty-

percent limitation imposed on the County's existing rainy day funds, to the New Reserve Accounts.

On March 22, 2005, the County Council held a public meeting to address the merits of the New Ordinances, and during that meeting the Council considered several factors including: (1) the complexity of distributing funds among various classes of taxpayers, who may or may not have lived in the County at the time the tax was collected; (2) the considerable costs a rebate would pose to the County; and (3) the reality that if the County were to rebate the accumulated funds, the County would be forced to immediately increase taxes in the forthcoming tax year.[7] One of the plaintiffs, Richard Korn, attended this meeting, and publicly voiced his objections.[8] After public comments were closed, the Council, in a unanimous vote, adopted the New Ordinances.[9]

On March 24, 2005, just two days after the Council passed the New Ordinances, plaintiffs sought leave to file a second amended complaint. The second amended complaint integrates plaintiffs' constitutional challenge with the adoption of the New Ordinances, and in addition to this constitutional claim, also challenges the New Ordinances on the grounds

[7] *See* Defs.' Answering Br. in Opp'n to Pls.' Mot. for a T.R.O. and Prelim. Inj., Ex. A ("Transcript of Mar. 22, 2005 Council Meeting") at 5-6.
[8] *See id*. at 2.
[9] On March 31, 2005, the County Executive signed the New Ordinances into law.

that: (1) they constitute impermissible retroactive legislation; (2) they do not serve a public purpose; (3) the County was unjustly enriched by the unlawful accumulation of surplus revenues; and (4) the New Ordinances authorized impermissible commingling of general tax revenues with sewer revenues in violation of 9 *Del. C.* § 8102 and 9 *Del. C.* ch. 22.

Plaintiffs formulated their commingling claim on the premise that the Sewer Fund budget has accumulated a surplus during a period when the County has operated that fund at a deficit (since fiscal year 2000) and is currently collecting only eighty five percent of the Sewer Fund's operational expenses. Plaintiffs therefore conclude that the Sewer Fund surplus must have been funded with money from non-sewer charges and that this is in violation of law.

On April 21, the Court granted plaintiffs leave to amend the complaint to incorporate these new allegations, and on April 25, plaintiffs filed a motion for a temporary restraining order and preliminary injunction enjoining the County from: (1) making any further expenditure of the accumulated surplus; (2) appropriating any funds to the New Reserve Accounts; and (3) from proceeding with the bond sale.

C. Plaintiffs Bolster and Supplement their Complaint with Newly Discovered Evidence

On April 26, 2005, the accounting firm, NachmanHaysBrownstein ("NHB"), furnished to the New Castle County Council Finance Committee an audit report which disclosed two revelations important to plaintiffs' claims. The first concerned a preliminary finding, which according to plaintiffs bolsters their commingling claim. The relevant portion of the report stated:

> Preliminary research and anecdotal evidence suggests that, as early as 1998, transactions were run through various funds to balance out what had been considered "advances" from other funds. A prime example of this is the lease of approximately 268 police cars in 1998, at a cost of $7.8 million. While this may be perfectly normal activity for the Special Services Department to undertake… the transaction would normally have come from the general fund … not the sewer fund.[10]

The second portion of the NHB report, which is of importance to the plaintiffs, concerned the discovery of an accumulated surplus of approximately $650,000 within the County's Light Tax Fund. Armed with this new knowledge, plaintiffs compared this disclosure to what was disclosed in the fiscal year 2006 budget, which Executive Coons presented on March 29, 2005. According to the 2006 budget, however, the County designated $3,352,793 in "Special Assessments" (*i.e.*, the light tax) and

[10] Ex. I to Aff. of David W. Gregory at NCC04204.

would spend that amount on administering the County's street and highway light services—no surplus was disclosed. Relying directly on the NHB report, plaintiffs sought leave to supplement their complaint to add a claim challenging the County's policy of accumulating a surplus within the Light Tax Fund. The Court granted this request.

On May 31, I heard oral argument on plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. Based on the parties' presentations, I concluded that plaintiffs had not met their burden for injunctive relief. In my oral ruling, I denied plaintiffs' motion and noted that while "[t]here is no pending dispositive motion, … I think it is intuitively clear from my remarks that that would be appropriate going forward based on what I view as the … weakness of the claims that are now before the Court."[11] On June 23, 2005, the County filed its motion for summary judgment on all Counts of the second amended and supplemented complaint.

II. ANALYSIS

A. Standard of Review on a Motion for Summary Judgment

A party is entitled to summary judgment, upon motion, "if the pleadings, depositions, answers to interrogatories and admissions on file,

[11] *See* Tr. at 73.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[12] The record must be read in a light most favorable to the non-moving party.[13] When issues are decided on summary judgment, the parties must have a reasonable opportunity to present all facts pertinent to the motion.[14] Once the non-movant has been afforded the opportunity to demonstrate that genuine issues of material fact exist, the burden again shifts to the movant to demonstrate the absence of such disputes. Then, and only if the Court concludes based on the entire record that there is no genuine issue of material fact, the Court may enter judgment as a matter of law.[15]

B. Standard for Declaratory Judgment

To exercise declaratory judgment jurisdiction, four elements of an actual controversy must be established: (1) it must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and

[12] CT. CH. R. 56(c).
[13] *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1060 (Del. 1986).
[14] *Id.*
[15] *Id.*

adverse; and (4) the issue involved in the controversy must be ripe for judicial determination.[16] In my February 10 Opinion, I determined that:

> As taxpayers and residents of New Castle County, plaintiffs have a 'direct interest in the proper use and allocation of tax receipts.' Moreover, since the County's budget is being challenged and any relief granted will affect the County Executive's and Council's authority to propose and adopt their annual budgets, plaintiffs have asserted a claim against those 'who [have] an interest in contesting the claim.' Finally, because the parties' interests are real and adverse and the issues are ripe, the Court concludes that the standard set forth in Gannett is met here.[17]

To the extent plaintiffs amended and supplemented complaint seeks declaratory relief, the standard has again been met.

C. Count VI: Does Article VIII §§ 6(b)-(d) of Delaware's Constitution apply to the County's Budget Reserves?

Count VI of the second amended complaint seeks a judgment declaring that "any reserves held by New Castle County that exceed five percent of total revenues for the fiscal year violate the five percent limitation imposed by Article VIII, § 6(b)-(d) of the Delaware Constitution, and that any provision of the New Castle Code that permits the creation or maintenance of a reserve in excess of the five percent limitation, including but not limited to NCCC § 14.01.013 and the [New Ordinances], is

[16] *Gannett Co. v. Bd. of Managers of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003).
[17] *Korn*, C.A. No. 767-N, Mem. Op. at 23.

unconstitutional and void."[18] Plaintiffs contend that New Castle County, as a political subdivision of the state, necessarily derives all authority from the State. To the extent the State is constitutionally prohibited from acting, so must the County be equally prohibited. The constitutional question presented by Count VI of the complaint is one of statutory interpretation and requires a purely legal determination.[19] Therefore, summary judgment is appropriate.

When the intent of the General Assembly is logically reflected by the unambiguous language of the Delaware Constitution, the Court need not turn to rules of construction, and the language itself is controlling. In that circumstance, the role of the judiciary is limited to giving that language its literal effect.[20] Rules of constitutional construction are only applied when a constitutional provision is ambiguous or if a literal application of the text would yield an absurd or illogical result.[21]

After careful consideration of the parties' submissions, I conclude that the unambiguous language of Article VIII §§ 6(b)-(d) demonstrates that those particular sections of Delaware's Constitution do not place a five-

[18] Am. Compl. ¶ 82.
[19] *See Arnold v. Soc'y for Sav. Bancorp*, 650 A.2d 1270, 1287 n.30 (Del. 1994) (relying on *Hercules Inc. v. Leu Trust & Banking Ltd.*, 611 A.2d 476, 481 (Del. 1992), *cert. dismissed*, 113 S. Ct. 1836 (1993).
[20] *In re Opinion of the Justices*, 290 A.2d 645 (1972).
[21] *In re Opinion of Justices*, 575 A.2d 1186, 1189 (1990).

percent limitation on the budget reserves carried by New Castle County. Specifically, those sections provide that:

> (b) No appropriation, supplemental appropriation or budget act shall cause the aggregate *State General Fund* appropriations enacted for any given fiscal year to exceed 98 percent of the estimated *State General Fund* revenue for such fiscal year …
>
> … The amount of said revenue estimate and estimated unencumbered funds remaining shall be determined by the most recent joint resolution approved from time to time by a majority of the members elected to *each House of the General Assembly and signed by the Governor.*
>
> (c) Notwithstanding subsection (b) of this section, any portion of the amount between 98 and 100 percent of the estimated *State General Fund* revenue for any fiscal year as estimated in accordance with subsection (b) of this section may be appropriated in any given fiscal year in the event of emergencies involving the health, safety or welfare of the *citizens of the State*, such appropriations to be approved by three-fifths of the members elected to *each House of the General Assembly*.
>
> (d) There is hereby established a Budget Reserve Account within the General Fund. Within 45 days after the end of any fiscal year, the excess of any unencumbered funds remaining from the said fiscal year shall be paid into the Budget Reserve Account, provided, however, that no such payment will be made which would increase the total of the Budget Reserve Account to more than 5 percent of only the estimated *State General Fund revenues* as set by subsection (b) of this section. The excess of any unencumbered funds shall be determined by subtracting from the actual unencumbered funds at the end of any fiscal year an amount which together with the latest estimated revenues is necessary to fund the ensuing fiscal year's General Fund budget

> including the required estimated General Fund supplemental and automatic appropriations for said ensuing fiscal year less estimated reversions. *The General Assembly by a three-fifths vote of the members elected to each House*, may appropriate from the Budget Reserve Account such additional sums as may be necessary to fund any unanticipated deficit in any given fiscal year or to provide funds required as a result of any revenue reduction enacted by the *General Assembly*.[22]

From a plain reading, it clear that these Constitutional procedures apply exclusively to the State and not the Counties. Article VIII §§ 6(b)-(d) only make mention of the State's General Fund, require action on a State level—by specific reference to both houses of the General Assembly—to establish and appropriate the State's budget reserve, and conspicuously make no mention of New Castle County. This language, and its omissions, cannot be presumed to be incorrect. Therefore, I conclude that the language in Article VIII §§ 6(b)-(d) is unambiguous and its literal intent is to restrict the fiscal policies of the State, but not New Castle County.

Having concluded that a literal reading of Article VIII §§ 6(b)-(d) applies to the State alone, I must determine whether this literal interpretation of the language produces an illogical or absurd result because "[e]very provision of the Constitution must be construed, whenever possible, to give

[22] DEL. CONST. art. VIII, §§ 6(b)-(d) (emphasis added).

effect to every other provision."[23] I conclude that a literal reading of §§ 6(b)-(d) does not render an illogical or absurd result. Article VIII embodies the State's taxing and spending authority. Our Supreme Court has already determined that Article VIII § 6 was amended to impose upon the State an annual balanced budget requirement.[24] Moreover, it has been determined that fulfillment of the mandate of Article VIII § 6 requires the State to account for all sources of State revenue and to have "complete control" over such revenue sources.[25] Finally, Article VIII, where appropriate, delineates when the Constitution's restrictions on taxing and spending affect the respective Counties—a distinction notably absent from § 6.[26] From this constitutional scheme arises a logical and consistent distinction between the taxing and spending power of the State and other political subdivisions. Nothing I have concluded here disrupts this scheme; nor would the exclusion

[23] *In re Opinion of the Justices*, 225 A.2d 481, 484 (1966).
[24] *Opinion of Justices*, 575 A.2d at 1189 ("The third part of the 1980-1981 amendments to Article VIII, set forth in Section 6, imposed upon the General Assembly, with some qualification, a requirement to balance the State budget.").
[25] *Id*. at 1189-90 ("The enactment of Section 10(a) and 11, at the time of adoption of the budget balancing requirements under the amendments to Section 6 of Article VIII, accomplished an essential element of the budget balancing process by providing the General Assembly with complete control over any tax or license fee.").
[26] *See, e.g.*, DEL. CONST. art. VIII, § 1 ("County Councils of New Castle and Sussex Counties and the Levy Court of Kent County are hereby authorized to exempt from county taxation…"); art. VIII, § 4 ("No appropriation of the public money shall be made to, nor the bonds of this State be issued or loaned to any county…"); art. VIII, § 8 ("No county, … shall lend its credit or appropriate money to, or assume the debt of, or become a shareholder or joint owner in or with any private corporation or any person or company whatever.")

of New Castle County from the prohibition of Article VIII § 6 render an absurd result. To the extent the State must balance its own budget, it is required to have plenary control over State revenues. But because each respective County takes charge of its own budget, it is clear that a literal interpretation of the scope of § 6 does not act to wrest away from the State control over any revenue which it would need to balance its budget. Therefore, because Article VIII literally evinces a demarcation between the State and the Counties, and recognizing this literal distinction does nothing to disrupt the intended result of § 6 that the State balance its own budget, I decline to look to other tools of constitutional interpretation and am satisfied that a plain reading of Article VIII § 6 makes clear that it was not the General Assembly's intent to similarly restrict the Counties. As such, as to Count VI, I enter summary judgment in favor of New Castle County and plaintiffs' request for declaratory relief is denied.

D. Plaintiffs' Retroactive Legislation and Public Purpose Arguments

Notwithstanding plaintiffs' constitutional claims, they put forth two catchall arguments as to why the County's surplus revenues should be disgorged: the New Ordinances are impermissible retroactive legislation and the carrying of unlimited surplus revenues is not a valid public purpose. I will address each in turn.

1. Retroactive Legislation

Plaintiffs argue that the County cannot cure the past practice of accumulating "off-budget" reserves by retroactively legislating two new "on-budget" reserve accounts and then appropriating the illegally accumulated surplus to those accounts. Plaintiffs contend that the ordinances themselves must be interpreted to be prospective since there is no clear legislative intent to have the ordinances act retrospectively. Next, plaintiffs contend that any law that infringes upon vested or substantive rights must act prospectively. Finally, plaintiffs argue that since the appropriation of the surplus to the newly created reserves is in effect a tax, Delaware's strong public policy against retroactive taxation would prohibit the statute from acting retroactively. For these reasons, plaintiffs assert that any surplus accumulated by the County prior to the enactment of the New Ordinances cannot be cured by appropriating the money retroactively and the surplus must be returned to the taxpayers.

I consider plaintiffs' retroactive legislation arguments unpersuasive. First, I conclude that it was the County's intent to cause the New Ordinances to act retroactively. In my February 10 Opinion, I made clear that the County had the authority to *accumulate* reserves. In fact, the Court recognized that

it was sound fiscal policy for the County to have access to easily liquidated assets to fund unanticipated budget deficits. My decision did not go to substance, but rather procedure, and I held that the power to accumulate reserves should be exercised legally and transparently. My rationale was prompted by the Court's concern with the then County Executive creating "off-budget" reserve accounts, and in effect, opaquely appropriating money in clear violation of law. The issue was resolved: if the County was to maintain reserve accounts it needed to comply with the fundamental principles of the separation of powers and its own laws. I then instructed the County how to come into compliance with the law: amend the existing code or adopt new legislation. This is what the County did. Plaintiffs cannot now challenge the ultimate authority of the County to maintain reserves. The true nature of plaintiffs' claims takes issue with the political decision of the County to maintain a specified amount of money, which plaintiffs consider to be too large. This may indeed be a legitimate contention, but it is a political contention that must be answered at the polls and not through the Courts. Thus, there can be no dispute over the County's intention to have the New Ordinances act retroactively.[27] Consequently,

[27] Plaintiffs' attempt to avoid dismissal by arguing there is a genuine issue of material fact and urge depositions of one or more of the defendants to ascertain the purposes for which the stabilization accounts are intended. This is a makeweight argument. I conclude

because the County has the inherent authority to collect and maintain reserves, it follows that the County has the power to enact corrective legislation over a subject matter it had the power to legislate originally.[28]

Plaintiffs' concern over the effect the retroactive legislation will have on vested rights and the tax rate are equally unconvincing. A vested right is a right that equates to legal or equitable title to the present or future enjoyment of property or to the present or future enforcement of a demand, or a legal exception from a demand made by another.[29] The money in question here has already been lawfully assessed and collected. Once the tax is assessed, the citizens' obligations were fixed and the right to the money vested with the County and not the taxpayers. The New Ordinances do not infringe upon any vested or substantive rights.

Additionally, the transfer of the surplus money to the new reserve accounts does not function as a new tax levy, nor does it have the effect of increasing the applicable tax rate for the relevant fiscal year. Again, the

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that there is no genuine issue of fact in this regard. It is clear what the County was doing, and as a matter of law, I conclude that the effect of the New Ordinances is retroactive. *See Price v. All Am. Eng'g Co.*, 320 A.2d 336, 341 (Del. 1974). ("[R]etroactive legislation, effect is impelled if … the retrospective legislative intent is unmistakable.").

[28] *Mayor and Council of Wilmington v. Wolcott*, 112 A. 703, 707 (Del. 1921), ("It is not questioned that the Legislature could make [any] act retroactive … [a]nd it is well settled that the Legislature may [retroactively] validate an act which it could originally have validated.").

[29] 16B AM. JUR. 2d CONST. LAW § 690; *see also Hazzard v. Alexander*, 173 A. 517, 519 (Del 1934) ("A vested right was defined … as one which is absolute, complete, and unconditional to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency.").

money in question has already been lawfully assessed and collected, and its transfer does not create a new liability, or impose any other obligation on the County's residents that did not exist before the New Ordinances were enacted.

In sum, the Court concludes that: (1) it was the County's clear intent to have the New Ordinances act retroactively in an obvious attempt to comply with this Court's February Order; (2) the County has enacted a curative measure over a subject matter it could have legitimately legislated in the first instance; (3) the New Ordinances do act to abridge any vested rights; (4) and the New Ordinances do not impose a retroactive tax. To the extent the complaint relies on these arguments, summary judgment is entered in favor of the County and the complaint is dismissed.

2. Public Purpose

With respect to the surplus funds held in the various reserve accounts, plaintiffs contend that the money is not being used for a public purpose because the money is "not being 'used' for anything, let alone a public purpose."[30] Plaintiffs cite to a 1933 Illinois court decision for the proposition that an unnecessary accumulation of money in the public

[30] Pls.' Answering Br. in Opp'n to Defs.' Mot. for Summ. J. at 27.

treasury is unjust.[31] I find this precedent to be of dubious value at best. There is no exact definition or strict formula for determining what is a public purpose, since the concept expands with population, scientific knowledge, and changing social and economic conditions.[32] A more fluid test is appropriate, and the question has been phrased by some courts in terms of whether a particular appropriation is for the support of government, or for any of the recognized objects of government.[33]

New Castle County's charter vests the County with wide authority to "assume and have all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute."[34] This includes the power to tax and spend for the general welfare of the County's residents.[35] If the County, in its wisdom, has decided that maintaining tax and sewer rate stabilization reserves best serves its citizens, then that decision is entitled to

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[31] *See People ex. rel. Schaefer v. New York, C. & St. L. R. Co.*, 187 N.E. 443 (Ill. 1933).
[32] *See Wilmington Parking Auth. v. Ranken*, 105 A. 2d 614 (Del. 1954); *see also* 63C AM. JUR. 2D PUBLIC FUNDS § 58.
[33] 63C AM. JUR. 2D PUBLIC FUNDS § 58.
[34] 9 *Del. C.* § 1101(a).
[35] *See generally Wolcott ex rel. Taxpayers' League, Inc. v. Wilmington*, 95 A. 303, 305 (Del. 1915) ("The power to determine the fitness of measures to promote the interests or discharge the duties of the public, and of each political division thereof, is inherent in the sovereignty of every state having an organized government. Necessarily coincident with this power is the power to raise money by taxation levied upon the whole body politic, or some subordinate organization thereof, as may be deemed just and proper, for the purpose of accomplishing the intended object.").

judicial deference, unless it is irrational or arbitrary and capricious.[36] Plaintiffs offer no reason why the accumulation of surplus revenues does not serve a public purpose, except to say that the amount held by the County is too much. Generally, courts have found a public purpose so long as the ends of the expenditure promote the public health, safety, morals, security, *prosperity*, contentment, and the general welfare of all the inhabitants.[37] In the circumstances of this case, I conclude, as a matter of law, that the accumulation of surplus revenues by the County, and the appropriation of money to that end, serve a public purpose. To the extent plaintiffs seek to have the surplus revenues disgorged on the ground of a lack of public purpose, the complaint is dismissed and summary judgment is entered in favor of the County.

[36] *See Wolcott*, 95 A. at 305 ("The legislative power over municipal corporations is large and ordinarily its determination of what is a public purpose for taxation, or the appropriation of money, is uncontrollable by the courts. But where the Legislature clearly devotes public funds to an object in no sense public, the judiciary may, and should, declare its action invalid."). It is generally recognized that the phrase "public purpose" has a broad, expansive definition, and that the term should not be construed in a narrow or restrictive sense. *See* 63C AM. JUR. 2D PUBLIC FUNDS § 58. Since the State has the power to appropriate money for any purpose for which taxes may be levied and collected, it follows that New Castle County's charter vests the same power in the County. This is not a situation where the County is raising and hoarding money for that sake alone—rather the County is using the reserves to systematically defray increasing costs to their citizens—clearly a public purpose. *Cf. In re Opinion of Justices*, 177 A.2d 205, 213-214 (Del. 1962).

[37] 63C AM. JUR. 2D PUBLIC FUNDS § 58.

D. Count VII: Plaintiffs' Allegations Concerning the Improper Commingling of Revenues Between the General and Sewer Funds and the Unlawful Expenditure of Sewer Funds on Unrelated Operations

Count VII of the amended complaint seeks a judgment declaring that "(a) the [County's] practice of commingling general tax revenues in its Sewer fund violates Chapter 22 of Title 9, 9 *Del. C.* § 8102 and Defendants' fiduciary duties, and (b) . . . [the County's] practice of charging costs unrelated to its sewer operations to the Sewer Fund violates their fiduciary duties."[38]

Plaintiffs resist the County's motion for summary judgment on this Count by arguing (1) that the County cannot show there are no genuine issues of material fact, and (2) that plaintiffs first must have access to information exclusively within the County's control before summary judgment can be granted. Specifically, plaintiffs argue that they are entitled to additional discovery relating to the conclusions reached in the NHB report before summary judgment would be appropriate. The County contends that the plaintiffs have had ample opportunity to present their positions, and the record is sufficiently developed to show that there are no genuine issues of material fact. The Court agrees with the County.

[38] Am. Compl. ¶ 82.

Since November 8, 2004, the plaintiffs have been conducting discovery. Key officers of New Castle County, including County Executive Coons (who was the Council President during the previous administration), the County's Accounting and Fiscal Manager, Michael D. Finnigan, and the County's former Chief Administrative Officer, David W. Singleton have been deposed. Plaintiffs have had access to voluminous internal documents of the County, and have had access to all past County budgets within the relevant time periods, as that information has been made publicly available and have also been produced during discovery. Additionally, this Court has been called to intervene on behalf of the plaintiffs, on several occasions, and has ordered the production of the documents plaintiffs sought. In short, plaintiffs have had a reasonable opportunity to develop the record and put forth all pertinent material. It is not appropriate to use the summary judgment standard for dilatory tactics or to avoid the inevitable. Additional discovery is not appropriate in this case when its only purpose would be "to assist [the plaintiffs] in a mere roving speculation … to see whether [they] can fish out a case from the [County]."[39]

[39] *Colvocoresses v. W. S. Wasserman Co.*, 13 A.2d 439, 442 (Del. 1940).

1. Plaintiffs' Claim that the County Unlawfully Leased Police Cars with the Use of Funds Generated by Sewer Service Charges is barred by laches

For all of plaintiffs' efforts, they have been able to point only one instance where the County may have potentially used sewer funds for non-sewer uses: the lease of approximately 268 police cars in 1998, at a cost of $7.8 million. I say, "may have" because the NHB report itself is not evidence of wrongdoing, and in fact notes that this expenditure may have been normal. Nevertheless, the ultimate question whether this expenditure violated 9 *Del. C.* § 8102 and 9 *Del. C.* ch. 22 is no longer justiciable because laches bars recovery. To prove laches, it is a defendant's burden to establish that: (1) the plaintiffs have knowledge of the claim; and (2) prejudice to the defendant arising from an unreasonable delay by plaintiff in bringing the claim.[40] Plaintiffs argue that laches is a fact sensitive question and, in this instance, it is inappropriate to grant summary judgment. The Court disagrees and concludes that it is not necessary to engage in a traditional laches analysis because an analogous statute of limitations has run its three-year course.[41] Courts of equity do not normally apply statutes

[40] *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000).
[41] *See* 10 *Del. C.* § 8104 ("No action shall be brought upon the official obligation of any … county treasurer … against either the principal or sureties, after the expiration of 3 years from the accruing of the cause of such action."); *see also* 10 *Del. C.* § 8106 ("… no action based on a statute … shall be brought after the expiration of 3 years from the accruing of the cause of such action ….").

of limitations directly; but because equity follows the law, the Court of Chancery will, in appropriate circumstances, apply the statute of limitations by analogy.[42] Plaintiffs' seven-year-old claim is barred.

Even if the Court did not apply the relevant statute of limitations by analogy, it would still be appropriate to bar Count VII to the extent the complaint relied on the 1998 lease of the police cars. The ordinance approving that expenditure was publicly budgeted and approved by the County Council.[43] The plaintiffs do not contest this point. It is appropriate to charge taxpayers with notice of this budget expenditure because the public, by law, was provided notice of its adoption, and had the right and opportunity to participate in a public hearing.[44] Finally, it cannot be disputed that after seven years the County has changed its financial position dramatically and has expended significant funds from both the General and Sewer Funds. If the Court were to order an accounting that would date back to 1998 it would certainly be prejudicial to the County in light of eight years

[42] *See NL Indus., Inc. v. MAXXAM, Inc*., 659 A.2d 760 (Del. Ch. 1995).
[43] *See* Finnigan Aff. ¶ 11.
[44] *See* 9 *Del. C.* § 1152(b) (requiring public notice and public hearing on all ordinances); *see generally, Grand Lodge of Del. v. Odd Fellows Cemetery of Milford*, 2002 Del. Ch. LEXIS 136, at *26-27 (Nov. 18, 2002) (holding that a plaintiff is chargeable with knowledge of a claim obtained upon inquiry, provided the facts already known to that plaintiff were such as to put the duty of inquiry upon a person of ordinary intelligence).

without a word from the taxpayers.[45] Laches is, therefore, appropriate in this instance. Accordingly, to the extent Count VII relies on the 1998 lease of police cars, plaintiffs' claims are barred and summary judgment is entered in favor of the defendants.

2. Plaintiffs cannot State a Claim that Defendants' violated Chapter 22 of Title 9

Plaintiffs' claims as they relate to Chapter 22 of Title 9 rely exclusively on the interpretation of New Castle County's charter and therefore present questions of statutory interpretation and require a purely legal determination. The complaint specifically alleges that the County has violated Chapter 22 Title 9, but to get to this point, plaintiffs rely exclusively on 9 *Del. C.* § 2208(b)(2) which states that: "[t]he service charges prescribed shall be such as will procure revenue at least sufficient: To provide for all expenses of operation and maintenance of such sewerage systems, including reserves therefore." Plaintiffs then contend "the source of the funds for 'all expenses of operations [of the County sewage systems], including reserves therefore' must be sewer services charges, not other revenues."[46] By juxtaposition, plaintiffs contend that it is "impossible for [a]

[45] *See Kerns v. Dukes,* 2004 Del. Ch. LEXIS 36, at *30 (Apr. 2, 2004) (adopting the principle that a court of equity's hostility toward one who unjustifiably delays filing suit carries even greater force when the suit attacks the legality of the collection and spending of public monies).
[46] Pls.' Opening Br. in Supp. of Mot. for a T.R.O. and Prelim. Inj. at 14.

surplus to have been created from excess sewer service charges which, according to Coons, presently cover only 85% of the sewage system's operating expenses"[47] and it must be the case that the County is commingling non-Sewer Fund revenues with the Sewer Fund in violation of § 2208.

Defendants do not dispute that at the time the complaint was filed the Sewer Fund held a $97 million surplus[48] and that Coons had indeed made an admission that "since fiscal 2000 . . . our customer charges cover only 85% of our operating expenses."[49] What defendants argue is that § 2208 is inapplicable and plaintiffs have not pointed to any source of law to support their claim. The Court agrees with defendants.

Plaintiffs mischaracterize 9 *Del. C.* § 2208 by selectively drawing the Court's attention to § 2208(b)(2).[50] The unambiguous language of the *entire*

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[47] *Id*. at 11.
[48] *See* Compl. Ex. A ("2003 Ernst & Young Audit") at 2.
[49] *See* Athey Aff. Ex. F ("Coon's March 16, 2005 Address to County Employees") at 4.
[50] 9 *Del. C.* § 2208 reads in its entirety:

> (a) If the County issues revenue bonds under this chapter, the County Council shall prescribe and collect reasonable service charges for the services and facilities rendered or afforded by the sewerage systems, the revenues of which are pledged to the payment of such bonds, and shall revise such service charges from time to time whenever necessary.
> (b) The service charges prescribed shall be such as will procure revenue at least sufficient:
> (1) To pay when due all revenue bonds and interest thereon, for the payment of which such revenue is or shall have been

statute, however, makes clear that its application is dependent upon the issuance of revenue bonds under Chapter 22. Only in that circumstance is the County obliged to set sewer service charges at least sufficient to provide for all expenses. Plaintiffs cannot selectively parse out statutory language to distort the purpose of the section. Consequently, § 2208 must be read in its entirety and it is clear that the statute has no bearing on the merits of this case because plaintiffs have not pointed to any evidence that the County has invoked the provisions of § 2208 by issuing revenue bonds to fund sewer projects. The reason for that omission is simple: the County has not done so.[51] Accordingly, to the extent the plaintiffs charge the County with violating Chapter 22 of Title 9, the complaint fails to state a claim upon which relief can be granted and summary judgment is entered on Count VII in favor of the County.

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pledged, charged or otherwise encumbered, including reserves therefor; and

(2) To provide for all expenses of operation and maintenance of such sewerage systems, including reserves therefor.

(c) The service charges when collected shall be applied to the payment of the revenue bonds and interest and to the expenses of such operation and maintenance in accordance with the resolutions authorizing the revenue bonds.

[51] *See* Finnigan Aff. ¶ 13.

3. Defendants have Established that There is an Absence of Evidence to Support the Plaintiffs' Claim that the County has Violated 9 *Del. C.* § 8102

Without resort to § 2208 the complaint falls back on 9 *Del. C.* § 8102. Section 8102 provides in relevant part:

> (a) Notwithstanding any statute to the contrary, the county government of each county shall have the power by ordinance to impose and collect a tax, to be paid … upon the transfer of real property….
>
> ….
>
> (c) Any funds realized by a county pursuant to this section shall be segregated from the county's general fund and the funds, and all interest thereon, shall be expended solely for the capital and operating costs of public safety services, economic development programs, public works services, capital projects and improvements, infrastructure projects and improvements, and debt reduction.[52]

Nowhere in the complaint is it alleged that the County has failed to properly segregate revenues derived from the real estate transfer tax. Rather, the complaint states a broad supposition that the County must have violated § 8102 because the sewer service charge does not meet the County's sewage operating expenses, and yet there is a surplus within the fund. In light of the broad authority the County is given in designating sewer service charges, it is unremarkable that the fund has a surplus. Indeed, Coons admitted that

[52] 9 *Del. C.* § 8102(a) & (c).

the County's sewer customer charges were eighty-five percent of sewer operation expenses. But these are not the only sewer revenues assessed by the County. Section 2209 of Title 9 specifically authorizes the County to charge for both the direct *and indirect* use of the sewerage system. This practice would clearly encompass more than direct fees for domestic and commercial uses. Fees for septic waste haulers, who for example discharge waste from septic systems into the County's sewerage system for treatment, are chargeable. Indirect uses would also encompass groundwater and wastewater discharge fees and may encompass survey and inspection fees, lateral connection fees, wastewater discharge fees, and numerous other fees listed by the County as sewer-related revenues.[53] The record clearly shows that New Castle County earns other money that goes into the Sewer Fund in addition to the actual user fees.[54] A concrete example of this is the interest income the Sewer Fund earns, which in some years, the record demonstrates, had amounted to more than $8 or $9 million.[55] These revenues could, over a period of years, generate a surplus within the Sewer Fund notwithstanding the fact that the user fees themselves may be insufficient to meet operating expenses. Plaintiffs do not contest these facts.

[53] *See* Finnigan Dep. at 111-113.
[54] *See* Athey Aff. Ex. H ("Ex. A to Defs.' Resp. to Pls.' Second Set of Interrogs.").
[55] *Id.*

Despite eight months to formulate a single concrete example supporting their all but conclusory claim, plaintiffs have failed to set forth one instance of the County failing to segregate real estate transfer taxes as required by § 8102. Moreover, the County has offered an uncontested and perfectly logical and lawful explanation for the discrepancy between Coons' statement and the Sewer Fund surplus—customer sewer charges are not the only revenues flowing into the Sewer Fund. For these reasons, I am satisfied that the County has established that "that there is an absence of evidence to support the nonmoving party's case"[56] and the County is entitled to summary judgment. To the extent Count VII relies on 9 *Del. C.* § 8102, it is dismissed.[57]

[56] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[57] *See Giordano v. Marta*, 1998 Del. Ch. LEXIS 63, at *13 (Apr. 27, 1998) ("While the moving party bears the initial burden in support of its motion [for summary judgment], the burden may be discharged if the moving party demonstrates the absence of evidence supporting the nonmoving party's case."). The conclusions reached in the above two subsections are sufficient justification to grant summary judgment in favor of the County on plaintiffs' fiduciary duty claims because defendants have discharged their burden by demonstrating an utter lack of evidence to support a claim for breach of fiduciary duty. *See id*. Additionally, to the extent plaintiffs ask this Court to make distinctions between related and unrelated sewer costs, the issue is non-justiciable because 9 *Del. C.* § 2209 gives the County that authority, and it is exclusively a legislative function to make that determination. Challenges to that determination may be brought only to the extent plaintiffs can allege that the County failed to follow the general principle that the charges must be reasonable, fair, and equitable, not arbitrary, and must be uniform and without undue discrimination against particular property owners. No such claim is in the complaint. *See generally*, 56 AM JUR 2D MUNICIPAL CORPORATIONS § 526.

F. Counts VIII and IX: Plaintiffs' Request for an Accounting and the Unjust Enrichment Claim

Count VIII of the complaint demands an accounting of the Sewer Fund. A plaintiff must establish a right to an accounting.[58] For the reasons discussed above, plaintiffs' claims, as they relate to the County's Sewer Fund, fail. Accordingly, plaintiffs' request for an accounting of the Sewer Fund is denied and summary judgment is entered in favor of the County.

Similarly, plaintiffs' claims fail to establish that the County has retained any ill-gotten profits from retaining the surplus revenues. The Delaware Supreme Court has defined unjust enrichment as:

> [T]he unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. To obtain restitution … plaintiffs [are] required to show that the defendants were unjustly enriched, that the defendants secured a benefit, and that it would be unconscionable to allow them to retain that benefit.[59]

This Court has already determined that the underlying revenue measures by which the County generated its surplus were valid. The illegality of the County's budgetary practice arose not by the collection of the revenue, but in how the surplus was appropriated to executively designated reserves. Because those deficiencies have been remedied there is no unjust enrichment

[58] *See Terry v. Stull*, 169 A. 739, 741 (Del. Ch. 1933).
[59] *Schock v. Nash*, 732 A.2d 217, 232-233 (Del. 1999).

in the retention of money by the County. For the reasons discussed herein, plaintiffs' claims of unjust enrichment are dismissed and summary judgment is entered in favor of the County.

G. Plaintiffs' Supplemental Claim: The Illegal Accumulation of Surplus Within the Light Tax Fund

Plaintiffs' final allegation concerns the accumulation of approximately $675,000 of surplus revenue within the Light Tax Fund. Plaintiffs point to 9 *Del. C.* § 2102(a), which provides in relevant part:

> The County Council, for the purpose of providing street and highway lighting pursuant to § 2101 of this title, shall levy for the installation and maintenance of such lights an annual tax based on the full annual cost of such lighting, plus up to but not exceeding 10% thereof to cover the actual direct and indirect costs of administration and billing.[60]

Additionally, plaintiffs cite 9 *Del. C.* § 2103, which reads in relevant part:

> If, after payment of all contracts entered into pursuant to this chapter, there remains a surplus in the light account, the surplus shall be applied to reduce the light tax rate for the succeeding taxable year.[61]

Plaintiffs conclude from these two provisions that the County is prohibited from accumulating any surplus revenue beyond the current fiscal year and that any surplus currently held needs to be applied to this fiscal year's budget to reduce the Light Tax. The plain meaning of this statutory

[60] 9 *Del. C.* § 2102(a).
[61] 9 *Del. C.* § 2103.

language clearly withholds the authority to accumulate a Light Tax Fund surplus from year to year, and obliges the County to operate the Fund on an annual cash basis.

At the May 31 oral argument, plaintiffs acknowledged that "[i]t would appear that a good deal of the surplus that we claimed as being unlawfully maintained and not applied to reduce the tax rate was applied."[62] Counsel for the County expressed his opinion, at the oral argument, that the issue was moot. Additionally, the Court noted: "both parties conceded that the issue had been mooted by the action of County Council."[63]

Now faced with this dispositive motion, plaintiffs want yet another opportunity to conduct even more discovery, to ascertain how the Light Tax Fund surplus has been utilized. In an attempt to stir up a genuine issue of fact, plaintiffs cite figures from the NHB Report to the Court and rely upon them as if they were audited budget amounts. It is undisputed, however, that County council has directly and transparently addressed the Light Tax Fund in the fiscal year 2006 budget—a publicly available document. Additionally, plaintiffs had the opportunity to examine Mr. Finnigan about the Light Tax Fund issue at his deposition, but—apart from a brief reference to the manner in which the light tax formula was calculated—they chose not

[62] Tr. at 32.
[63] Tr. at 49-50, 72.

to pursue that line of questioning.[64] Defendants have entered into the record the Annual Revenue Ordinance.[65] That Ordinance showed that the amount of the Light Tax Fund surplus was applied to reduce light tax rates for fiscal year 2006.[66] Plaintiffs had every opportunity to participate in the budget hearing and the record is clear that the County has now complied with § 2103. It is equally clear that plaintiffs' arguments are simply dilatory, and do not present genuine issues of material fact. Therefore, I conclude that there are no genuine issues of material fact, and summary judgment is entered in favor of the County on plaintiffs Light Tax claims.

H. Count V: Enjoining the $80 million Bond Sale

I finally turn to the question whether to issue an injunction on the $80 million bond sale. The standard for granting a permanent injunction requires a plaintiff to demonstrate that: (1) it has proven actual success on the merits of the claims; (2) irreparable harm will be suffered if injunctive relief is not granted; and (3) the harm that will result if an injunction is not entered

[64] *See* Tr. at 73-74.
[65] *See* Answer to the Supp. to Pls.' Am. Compl. Ex. A.
[66] Any discrepancy between the amount of the surplus held within the Light Tax Fund and the Revenue Ordinance appropriating that money is explained by the fact that the difference between the total available cash surplus and the amount certified for reduction of light tax rates (*i.e.*, $55,345) is being applied to projected electric rate increases by Conectiv Power, and that any available surplus that may be determined to be available once New Castle County's annual audit is completed for Fiscal Year 2005 will be applied to reduce light tax rates in Fiscal Year 2007. *See* Defs.' Reply Br. in Supp. of Defs.' Mot. for Summ. J. Ex. A ("Finnigan Aff.").

outweighs the harm that would befall the defendant if an injunction is granted.[67] For the reasons stated herein, plaintiffs have not met the first prong of this standard. Accordingly, their request for a permanent injunction is denied.

III. CONCLUSION

For the reasons discussed herein, I conclude that there are no genuine issues of material facts and the County is entitled to judgment as a matter of law. Therefore, I enter summary judgment in favor of the County on all Counts of plaintiffs' second amended and supplemental complaint and plaintiffs' claims are dismissed with prejudice in their entirety. An Order consistent with this Opinion has been entered.

[67] *Examen, Inc. v. Vantagepoint Venture Partners 1996*, 2005 Del. Ch. LEXIS 103, at *4-5 (July 7, 2005).

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

RICHARD J. KORN and ANDREW DAL NOGARE, Plaintiffs, v. NEW CASTLE COUNTY, a political subdivision of the State of Delaware, CHRISTOPHER A. COONS, as County Executive and DAVID W. SINGLETON, as Chief Administrative Officer, and PAUL G. CLARK, as President of New Castle County Council, and JOSEPH REDA, ROBERT S. WEINER, WILLIAM J. TANSEY, PENROSE HOLLINS, KAREN G. VENEZKY, PATTY W. POWELL, GEORGE SMILEY, JOHN J. CARTIER, TIMOTHY P. SHELDON, JEA P. STREET, DAVID TACKETT, and JAMES W. BELL as Members of New Castle County Council, Defendants.	)	Civil Action No. 767-N

O R D E R

For the reasons set forth in this Court's Opinion entered in this case on this date, it is

ORDERED that summary judgment of dismissal is entered in favor of defendants and against plaintiffs and the amended and supplemental complaint is dismissed. Each party shall bear its own costs and attorneys' fees.

William B. Chandler III

Chancellor

Dated: September 13, 2005