

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

DELAWAREANS FOR )  
EDUCATIONAL OPPORTUNITY )  
and NAACP DELAWARE STATE )  
CONFERENCE OF BRANCHES, )

Plaintiffs, )

v. )

C.A. No. 2018-0029-JTL

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

Defendants. )

**DEFENDANT SUSAN DURHAM’S OPENING BRIEF  
IN SUPPORT OF HER MOTION TO DISMISS**

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## NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs filed their three-count complaint on January 16, 2018. Plaintiffs challenge the manner in which the State of Delaware funds its public schools and how it allocates the funding provided. Count I alleges that the State violates the Education Clause of the Delaware Constitution. 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. Count III alleges that by collecting school taxes for Kent County school districts based on a reassessment done in 1987, Kent County Finance Director Susan Durham violates the statutory requirement that real property be assessed at its true value in money. Complaint, ¶¶185-189.

On April 13, 2018, defendant Susan Durham filed a motion to dismiss the claims against the Kent County Director of Finance.

## STATEMENT OF FACTS

Defendant Susan Durham is the Kent County Director of Finance. Her duties are described in 9 *Del. C.* §§ 4123, 4124. Section 4123 relates to the administration of the budgeting, accounting, purchasing, treasury, and other financial affairs of Kent County and grants the Director of Finance the duties and powers formerly held by the County Comptroller. Section 4124 assigns the functions of the Receiver of Taxes and County Treasurer and the Board of Assessment to the Finance Department. Section 4124(b) requires the Department to “assess all property subject to taxation by the County and maintain appropriate records. In the performance of its functions relating to the assessment of property, the Department of Finance shall exercise the assessment functions heretofore assigned to the Board of Assessment.” *Id.* As this Court noted in *Young v. Red Clay Consolidated School District*, Del. Ch., 159 A.3d 713, 721 n.23 (2017), the annual assessment described in §4124(b) generally carries forward existing valuations as opposed to a general reassessment which involves a “systemic effort to determine current valuations for all taxable property in the county.”

Section §4124(c) makes the department “responsible for the collection of all taxes.”

## STATEMENT OF QUESTIONS INVOLVED

1. Whether plaintiffs' complaint states a claim against the Kent County Director of Finance upon which relief may be granted.
  - a. Whether Counts I and II of the Complaint implicate Susan Durham.
  - b. Whether, in light of the history of reassessment requirements, Kent County has a duty to reassess real property.
  - c. Whether Susan Durham has the authority to perform a general reassessment of real property in Kent County.
  - d. Whether the doctrine of separation of powers prevents this Court from ordering a general reassessment.
2. Whether, if a duty to reassess property in Kent County exists, this Court has subject matter jurisdiction.



## **ARGUMENT**

### **I. Plaintiffs' complaint fails to state a claim against Susan Durham upon which relief may be granted**

Plaintiff's complaint contains three counts. The counts do not clearly differentiate among the named defendants. Count I seeks to enforce the Delaware Constitution's mandate that the General Assembly "provide for the establishment and maintenance of a general and efficient system of free public schools." Del. Const. art. X §1. Count II seeks to an order requiring Delaware to alter the method by which public schools are funded and remove "the unreasonably heavy burden on taxpayers residing in school districts with low property values." Complaint, ¶183. Count III effectively seeks a Court order that requires the counties to reassess all property in the state. Complaint, ¶¶ 185-189. Plaintiffs' complaint fails to state a claim against Susan Durham upon which relief may be granted and should therefore be dismissed pursuant to Chancery Rule 12(b)(6).

#### **A. Counts I and II do not implicate Susan Durham**

Count I and II 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. Those counts should be dismissed as against Susan Durham.

#### **B. Kent County has no duty to perform a reassessment**

Among the methods used by the General Assembly to fund the public schools is by permitting school districts to "levy and collect additional taxes for school

purposes upon the assessed value of all taxable real estate in the district . . .” 14 *Del. C.* § 1902(a). School districts “shall use the assessment list of the county in which the district is located as a basis for any school district tax.” 14 *Del. C.* § 1912. Section 1916(c) of Title 14 addresses issues arising from a general reassessment of real estate in a county.

Assessment of real property in Kent County is now governed by chapters 41 and 83 of Title 9. As this Court noted in *Young v. Red Clay Consolidated School District*, Del. Ch., 159 A.3d 713, 722 n.31 (2017), there is no statute that specifies how frequently a general reassessment of real property must be done. Counties maintain the required uniformity through the use of base years, a practice approved by the Delaware Supreme Court in *Board of Assessment of New Castle County v. Stewart*, Del. Supr., 378 A.2d 113, 116 (1977). The county tax rate must be “based on the most recent assessment made by [Kent County Levy Court].” 9 *Del. C.* § 8002(a). The language of 9 *Del. C.* § 8002(a) has been unchanged since the adoption of the 1953 version of the Delaware Code. See 9 *Del. C.* 1953, § 8002(a).

Prior law did mandate periodic general reassessments of real property in Kent County. Prior to 1869, general reassessments were required every eight years. In 1869, the General Assembly changed the requirement and mandated general reassessment every four years. 13 Del. Laws ch. 394 (1869). In 1898, the General Assembly passed legislation that stated “a general assessment of real property shall

stand and be acted upon for four years and shall be made so as to be returned on the said first Tuesday in February, A. D. 1899 and every fourth year thereafter.” 21 Del. Laws ch. 29 § 1 (1898). In 1920, the General Assembly required Kent County to perform a general reassessment “so as to be acted upon for the year 1921.” 31 Del. Laws ch. 14, § 18 (1920). In 1933, the General Assembly amended the 1920 legislation to provide in pertinent part: “[a] general assessment of persons, personal property and real estate in Kent County shall be made by the Board of Assessment for the year 1934, and shall stand and be acted on for four years and a like general assessment shall be made every four years thereafter.” 38 Del. Laws ch. 74 (1933). That provision become part of the 1935 version of the Delaware Code. *Del. C. 1935*, §1302. In 1943, the General Assembly tinkered again with the idea of periodic general assessments and adopted a provision stating in pertinent part:

A general assessment of persons and real estate and houses and other buildings owned by tenants or occupiers on lands owned by others in Kent County shall be made by the Board of Assessment for the year 1934 and a like general assessment shall be made every four years thereafter. This General Assessment, when so made, shall stand and be acted on for four years, unless one of the annual assessments herein provided for shall add to said assessment or change or alter certain items of same, in which case the revision or alteration shall stand and be acted on in place of the item appearing on said General Assessment.

44 Del. Laws ch. 91, § 1 (1943). That provision survived, essentially intact, and became part of the 1953 Delaware Code:

A general assessment of persons and real estate and houses and other buildings owned by tenants or occupiers on lands owned by others in

Kent County shall be made by the Board of Assessment shall be made every four years. The general assessment, when so made, shall stand and be acted on for four years, unless one of the annual assessments herein provided for in this chapter shall add to the assessment or change or alter certain items of same, in which case the revision or alteration shall stand and be acted on in place of the item appearing on said general assessment.

9 *Del. C.* 1953, § 8303. In 1959, the General Assembly repealed § 8303 and thus removed the requirement that Kent County periodically reassess real estate. *See* 52 *Del. Laws* ch. 157 (1959).

The General Assembly has periodically attempted to provide incentives to Kent County to conduct another general assessment. *See* 55 *Del. Laws* ch. 124 (1965) (permitting Kent County's tax rate to exceed the 50¢/\$100 of assessed valuation for one year in order to recoup the costs of the reassessment) and 58 *Del. Laws* ch. 427 (1972) (permitting all counties to reap a 15% increase in revenue for the year following a reassessment). The latter legislation is codified at 9 *Del. C.* § 8002(c). However, in 1984, the General Assembly effectively created a permanent disincentive to any new general assessments when it adopted amendments of 9 *Del. C.* § 8002(d) and (e). *See* 64 *Del. Laws* ch. 363, § 2 (1984). Those sections provide

(d) When any total reassessment of taxable properties within a county of this State shall have become effective, a tax rate shall be computed so as to provide the same tax revenue as was levied during the prior fiscal year. That rate shall be known as the "rolled-back rate."

(e) The ordinance establishing a property tax rate upon total reassessment shall state the percent, if any, by which the tax rate to be levied exceeds the rolled-back rate computed pursuant to subsection (d) of this section, which shall be characterized as the percentage increase

in property taxes adopted by the governing body. Within 15 days of the meeting at which the ordinance shall be considered by the governing body, the county shall advertise, in a newspaper of general circulation in the county, said percentage increase in the tax rate.

9 *Del. C.* § 8002(d) and (e).

The General Assembly proposed several legislative efforts in the 1990s to address the issue of reassessment. *See* Del. S.B. 217, 138th General Assembly § 15 (1995) (reassessment on a five-year cycle), Del. S.B. 118, 139th General Assembly § 16 (1997) (same), Del. H.B. 345, 139th General Assembly § 1 (1997) (state takeover of reassessment; five-year cycle), Del. S.B. 188, 139th General Assembly § 16 (1997) (five-year cycle), Del. S.B. 109, 140th General Assembly § 12 (1999) (same), and Del. H.B. 380, 140th General Assembly § 12 (1999) (same). None of the bills ever reached a floor vote.

**C. Susan Durham has no authority to perform a reassessment**

Defendant Susan Durham is the Kent County Director of Finance. Title 9, section 4124 of the Delaware Code assigned the functions of the Board of Assessment to the Finance Department. Section 4124(b) requires the Department to “assess all property subject to taxation by the County and maintain appropriate records. In the performance of its functions relating to the assessment of property, the Department of Finance shall exercise the assessment functions heretofore assigned to the Board of Assessment.” *Id.* As this Court noted in *Young v. Red Clay Consolidated School District*, Del. Ch., 159 A.3d 713, 721 n.23 (2017), the annual

assessment described in §4124(b) generally carries forward existing valuations as opposed to a general reassessment which involves a “systemic effort to determine current valuations for all taxable property in the county.” A general reassessment of all properties in Kent County will be an expensive proposition. Estimates place the cost at around five million dollars (\$5,000,000). In Kent County, the decision of whether to conduct a general reassessment and how to pay for it must be made by the Kent County Levy Court, the governing body of Kent County. 9 *Del. C.* §§ 301(c) (Levy Court as governing body of Kent County), 330(a)(1) (county government has direction, management and control of business and finances of county), 4110(a) (general grant of power to Kent County Levy Court), and 8001(a) (Levy Court adopts budget). Susan Durham is only authorized to collect those taxes for which the taxing authority has issued its warrant. 9 *Del. C.* § 8005; 14 *Del. C.* § 1916(d).

**D. Separation of powers prevents this Court from ordering a general reassessment.**

Because the Delaware Constitution imposes the duty to “provide for the establishment and maintenance of a general and efficient system of free public schools,” Del. Const. art. X §1, and the General Assembly has developed funding mechanisms, the judiciary should not wade into the quagmire of reassessment on the basis of the doctrine of separation of powers. As the Supreme Court stated in *State ex rel. Oberly v. Troise*, Del. Supr., 526 A.2d 898 (1986),

the doctrine of the separation of powers, which is deeply ingrained in the jurisprudence of the State and of the nation. Broadly stated, the doctrine stands for the proposition that the coordinate branches of government perform different functions and that one branch is not to encroach on the function of the others. Separation of powers is intended to make the three separate departments of government independent within the scope of their constitutionally conferred fields of activity subject to any constitutional restrictions, whether express or necessarily implied. Each of the three branches has been assigned certain powers and must respect the power given to the other two branches.

*Id.* at 904 (citations omitted). Relying on *Baker v. Carr*, 369 U.S. 186 (1962), the Delaware Supreme Court noted that “in order to avoid judicial encroachment on the prerogatives of the other branches of government, courts have ruled that cases involving ‘political questions’ are for that reason non-justifiable” and that such cases will clearly present at least one of the following formulations:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

526 A.2d at 904 (quoting *Baker*, 369 U.S. at 217). In *Sexton v. State Farm Fire & Cas. Co.*, Del. Super., 2003 Del. Super. LEXIS 430 (December 30, 2003), the Superior Court stated

Typically, Delaware's General Assembly will declare the public policy of this state with its statutes and resolutions. The legislature not only has the power to make laws, but also the discretion to determine what is in the public's interest. It is the preferred venue to effectuate social change because it offers a forum where elected representatives can voice the concerns of their constituents and openly debate the issues of the day after careful study and consideration of all competing interests and concerns. Generally, the separation of powers doctrine forbids one branch of government from encroaching upon the functions of another.

*Id.* at \*12-13. In this case, Article X, § 1 clearly assigns the establishment and maintenance of the public schools to the General Assembly. In addition, there are no judicially discoverable or manageable standards which would define the conditions under which reassessment should be performed. Delaware courts would be forced to determine at what point a general reassessment would be necessary. Is reassessment required every four years, every ten years, or every twenty years? Should a reassessment be delayed because of a collapse in the real estate market? The General Assembly is better equipped to use its discretion to determine when reassessment is in the public interest.

## **II. If a duty to reassess exists, this Court lacks subject matter jurisdiction.**

The Court of Chancery is a court of limited jurisdiction. As the Court in *Walker v. City of Wilmington* noted, this Court

can acquire subject matter jurisdiction over a case in three ways: (1) the invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction. This Court will not exercise subject matter jurisdiction where a complete remedy otherwise exists but where



plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic “open sesame” to the Court of Chancery.

*Walker v. City of Wilmington*, Del. Ch., 2014 Del. Ch. LEXIS 165, \*22 (Sept. 5, 2014) (citations omitted). In Count III of this action, plaintiffs seek “an order that will require compliance with 9 Del. C. §8306(a).” Complaint, ¶189. In *Capital Educators Association v. Camper*, 320 A.2d 782 (Del. Ch. 1974), this Court held

Where the object of a suit is to compel the performance of an obligation arising out of official station or imposed by law upon the respondent, the remedy lies in the common law action for mandamus. While mandamus may not be sought to create a duty, it is historically the proper remedy to coerce performance of a pre-existing duty. A writ of mandamus is a command which can be issued by a court of law having competent jurisdiction, to an inferior tribunal or board, among others, to require the performance of some duty attached to the official position of the party to whom the writ is directed.

Where the duty sought to be enforced does not involve the exercise of discretion, but is ministerial only, mandamus has traditionally been deemed an adequate legal remedy.

*Id.* at 786 (citations omitted). All proceedings in mandamus shall be commenced in the Superior Court. 10 *Del. C.* § 564. Another statute, 10 *Del. C.* § 342, provides that the “Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law . . . before any other court or jurisdiction of this State.” Therefore, if a duty exists to reassess real property in Kent County, only the Superior Court jurisdiction to issue the required writ of mandamus.

## CONCLUSION

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

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirement of Ct. Ch. R. 171(d)(4) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Ct. Ch. R. 171(d)(4) because it contains 3,031 words, which were counted by Microsoft Word 2016.

April 13, 2018

/s/ William W. Pepper Sr., Esquire