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BRETT MANDEL, et al.,	:	COURT OF COMMON PLEAS
Plaintiffs	:	PHILADELPHIA COUNTY
	:	
v.	:	
	:	January Term, 2011
CITY OF PHILADELPHIA,	:	
Defendant	:	No. 3848

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S PRELIMINARY OBJECTIONS

Plaintiffs, by their undersigned counsel, submit the within Memorandum of Law in Opposition to the Preliminary Objections to their Amended Complaint filed by Defendant the City of Philadelphia (the "City"). For the reasons set forth below, the Court should deny the City's Preliminary Objections in their entirety.

Plaintiffs Have Standing Because they Adequately Plead Equal Protection Violations

The City's failure to object to Plaintiffs' state Equal Protection count is fatal to its entire standing argument. The City fails to challenge in its Preliminary Objections Plaintiffs' state Equal Protection claim articulated in Count II of the Amended Complaint[1]. (Am. Compl. ¶¶ 84-96) The City thus concedes that Plaintiffs have stated Equal Protection claims. These claims are sufficient to confer standing for Plaintiffs'

[1] The Amended Complaint ("Am. Compl.") is attached hereto as Exhibit A.

claimed violations of the Uniformity Clause in Count III of the Amended Complaint.[2] As the Pennsylvania Supreme Court has stated, "Our analysis under the Uniformity Clause of the Pennsylvania Constitution is generally the same as the analysis under the Equal Protection Clause of the United States Constitution." Clifton v. Allegheny County, 600 Pa. 662, 969 A.2d 1197 (2009) at 1211 n. 20 (citations omitted)). See also, Downingtown Area School District v. Chester County Board of Assessment, 590 Pa. 459 (Pa. 2006) at 469, 470, 475 n. 17 ("it is well settled that the federal equal protection concept proscribing purposeful and/or systematic discrimination [sets] the floor for Pennsylvania uniformity jurisprudence" (citations omitted)).[3]

The City asserts, albeit in conclusory fashion and without any supporting argument, that its preliminary objections based on lack of standing apply to all claims in the Amended Complaint. But the City confines all of its arguments on standing to the uniformity issue, specifically to Plaintiffs' alleged failures to properly assert that they are overassessed, and makes no argument that allegations of overassessment are required to support an Equal Protection violation. Indeed, the City does not cite Plaintiffs' Equal Protection claim in any of its ten Preliminary Objections and makes no argument in its

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[2] Plaintiffs' Equal Protection violations are incorporated by reference into their count alleging a constitutional lack of uniformity. See Am. Compl. ¶¶ 97, 100, 128.

[3] See also, Millcreek Township School Dist. v. County of Erie, 714 A.2d 1095, 1101-1102 (Pa. Commw. Ct. 1998):

> the equality of taxation within the Commonwealth implicates federal constitutional principles--namely, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution…the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings. The relative undervaluation of comparable property…over time therefore denies petitioners the equal protection of the law.

(citations omitted)

60-page Memorandum of Law that Plaintiffs have failed to plead any required element of an Equal Protection claim. Accordingly, the City is now foreclosed from asserting any deficiency in Plaintiffs' Equal Protection claim.

The Equal Protection violations pleaded by Plaintiffs which, under Pennsylvania law, sustain a challenge brought under the Uniformity Clause, include the following:

> When the City values and assesses real property and collects taxes on that basis, the City is a person acting under color of state law. Acting under color of state law, including through its actions and omissions as described above, the City, via the scheme of property assessments it has created and maintained, has singled-out categories of persons, including the individual Plaintiffs, who are treated discriminatorily and who are thereby denied the equal protection of the laws. (Am. Compl. ¶ 87)
>
> Specifically, the City's Flawed Assessment Practices have resulted in the creation by the City of, at least, the following forbidden classifications of persons and subjected them to less favorable treatment than similarly situated persons (the "Discriminatory Classifications"): (a) owners of any properties that are not vacant lands; (b) owners whose properties have been "spot assessed"; (c) owners of properties that were non-uniformly assessed as of the imposition of the Moratorium; (d) owners of properties that are non-uniformly assessed as of the effective date of the 2011-2012 Tax Increase ; (e) owners of properties whose market value assigned by the City exceeds 35 percent of the property's actual market value; (f) owners whose properties the City considers to be "newer" or "newer-titled" vs. "older" or "older-titled"; (g) owners of commercial properties; (h) property owners who have applied for building permits; and (i) property owners who have applied for partial real estate tax abatements. (Am. Compl. ¶88)
>
> Each Plaintiff is a member of more than one of the above forbidden Discriminatory Classifications created by the City and therefore each Plaintiff, and all others similarly situated throughout the City, has been harmed. By way of illustration only, not by way of limitation: each Plaintiff is disparately treated as each is a member of the forbidden classifications (a) through (d) above; Plaintiffs Lisa Parsley, Sharyn Solomon, Darlene Chester, Janis Barksdale, Karen Jackson, Shaun Smith, Mr. and Mrs. Zagar and Mr. and Mrs. Snyderman are disparately treated as each is a member of the forbidden classification (e); Plaintiffs Bursich, Mr. and Mrs. Obeid, Parsley and Smith are disparately treated as each is a member of the forbidden classification (f); Plaintiffs Mr. and

> Mrs. Zagar and Mr. and Mrs. Snyderman are disparately treated as each is a member of the forbidden classification (g); Plaintiffs Parsley and Bradley are disparately treated as each is a member of the forbidden classification (h); and Plaintiff Parsley is disparately treated as she is a member of the forbidden classification (i). (Am. Compl. ¶89)

Clearly, Plaintiffs have properly pleaded Equal Protection violations, as seen in the excerpts[4] above, and these are unchallenged by the City. Under Pennsylvania Supreme Court precedent, discussed above, these allegations also form the basis of a Uniformity Clause challenge. Accordingly, the City's entire standing argument as well as its derivate lack of jurisdiction and lack of capacity arguments must fail.

Plaintiffs' Allegations of Lack of Uniformity are Well-Pleaded

In an abundance of caution, Plaintiffs demonstrate below that the City's remaining standing arguments are meritless.

The City claims that Plaintiffs fail to allege with sufficient specificity that they are "overassessed" and that the absence of such specificity is fatal to all Plaintiffs' claims. The City asks this Court to dismiss all three counts of the Amended Complaint (two counts of which it never addresses) because Plaintiffs have failed to allege certain facts

[4] All of the Equal Protection allegations can be found at paragraphs 84-96 of the Amended Complaint. Plaintiffs do not plead a federal equal protection violation but the state equal protection claim is substantively identical. Commonwealth v. Albert, 758 A.2d 1149, 563 Pa. 133 (Pa. 2000) ("This Court has held that 'the equal protection provisions of the Pennsylvania Constitution are analyzed…under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution." (citations omitted)).

that the City says must be included in any cause of action alleging non-uniformity (City's Brief[5] at pp. 20-24).

The City states that there is an exacting pleading requirement Plaintiffs must meet in order "[t]o establish standing" in this case. (City's Brief at p. 20). Specifically, the City asserts that "to allege injury from non-uniformity, each Plaintiff must plead the market value of his or her property, the assessed value of that property, and, at the very least, the assessment of that property that Plaintiffs allege should have been made using the current, properly calculated City-wide CLR." (Id. at p. 22, emphasis in original). The City does not argue that this *ought* to be a pleading requirement, but rather declares that this is the law.

It is not the law, and neither does the authority cited by the City support that it ought to be.[6]

The authority cited by the City is Smith v. Carbon Cnty. Bd. Of Assessment Appeals, 10 A.3d 393 (Pa. Commw. 2010). The City erroneously claims that Smith stands for a specific pleading requirement, and moreover, misstates that Smith "*held* that Plaintiffs do not have standing" and further misstates that Smith "*holds* [that] the relevant standard for measuring aggrievement [sic] for uniformity purposes is the average for the taxing district as a whole." (City's Brief at pp. 22, 27, 29 at n. 9 (emphasis added)). In fact, the Smith opinion is completely silent on any matter relating to pleadings or to the

[5] "City's Brief" refers to Defendant's Memorandum of Law in Support of its Preliminary Objections, attached hereto as Exhibit C. Defendant's Preliminary Objections are attached hereto as Exhibit B.

[6] Even if this were the law, it would only implicate Count III of the Amended Complaint, not Counts I or II, since the City does not argue that "overassessment" must be pleaded in either a claim for violation of state assessment laws (Count I, at ¶¶55-83 of Am. Compl.) or an Equal Protection claim (Count II, at ¶¶84-96 of Am. Compl).

issue of standing. This is not surprising because the decision was rendered after trial, not at the pleadings stage.

In Smith, the Commonwealth Court considered on appeal "whether Smith met his burden of demonstrating that the assessment of his condominium violated the Uniformity Clause." 10 A.3d at 396. The Court determined, after trial, only that taxpayer Smith had failed to meet his *burden of proof* when "he limited his uniformity analysis to merely a small number of units in the same [condominium] complex." Id. at 402, 406. Thus, Smith offers no guidance on what a plaintiff must *allege* in a non-uniformity action, particularly one where, as here, well-pleaded Equal Protection violations undergird the claimed uniformity violations. See argument above at pp. 1-4.

The taxpayer in Smith was complaining of the lack of uniform tax treatment accorded his condominium compared with others in his complex. The Smith court qualified its opinion because it was aware that it was adjudicating a claim of isolated lack of uniformity:

> Thus, we believe that, absent the kind of circumstances shown in *Clifton*, which mandate county-wide reassessment, or a showing of willful discrimination by taxing authorities, a taxpayer is entitled only to have his assessment conform with the common level existing in the district…"

Id. at 407. The Smith case is thus easily distinguishable from the instant litigation where Plaintiffs are alleging wholesale Equal Protection violations and decades of other illegality that permeate the entire property tax assessment system.

Neither is the City's three-prong test[7] for pleading supported by the case law. In fact, Smith expressly *rejected* the City's first prong (namely that a Plaintiff must *plead* the market value of his or her property): "We also reject the School District's suggestion

[7] City's Brief at p. 22.

that Smith failed to meet his burden of proof because he did not offer any evidence regarding the fair market value of his own condominium." 10 A.3d at 402. Clearly, if *failing to prove* market value is not fatal to a claim for injury due to non-uniformity, then failing to plead market value cannot be either.

In sum, despite the City's representations to this Court, the Smith decision does not establish a particular pleading requirement. Moreover, the facts of Smith render it inapposite. There is no legal precedent for what the City asks the Court to do—establish a heightened pleading requirement. Therefore the Court should reject the City's argument.

The City argues, in the alternative, that eight Plaintiffs must be dismissed because they purportedly failed to allege that they were overassessed relative to the district.[8] This argument is also meritless.

First, it is clear that the City's foundational argument that only overassessed plaintiffs can bring a uniformity claim fails. The City does not cite any law that supports this contention. The dearth of authority is not surprising since the City's position is at odds with a continuing line of Pennsylvania Supreme Court jurisprudence going back more than fifty years, and it conflicts with long-standing constitutional precedent of the United States Supreme Court.

The arguments advanced by the City here have been considered and expressly rejected by the Pennsylvania Supreme Court. For example, in the Brooks Building case, the Court found a viable constitutional uniformity violation, *even though the taxpayer's*

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[8] In support of this argument the City claims first that only "overassessed" plaintiffs have standing to sue under the Uniformity Clause and, second, that a plaintiff can only have standing if s/he is "overassessed relative to the taxing district as a whole" versus relative to comparable sub-groups of property. City's Brief at pp. 24-29.

property was assessed at below market value, because the property was less under-assessed than three similar properties. In re Brooks Building, 391 Pa. 94, 137 A.2d. 273 (1958). There, the taxpayer had demonstrated that its building was assessed at approximately 92% of its market value while the three comparators were assessed at lower ratios to their actual value (ranging from 40% to 57%). The Court, in reversing the denial of relief to the taxpayer, lambasted the lower court's reasoning as follows:

> In other words, if an assessor, without actual fraud, negligently, foolishly or capriciously assessed some properties at 10% of actual value, other similar properties at 20%, other similar properties at 50%, others at 75%, and plaintiff's at 90%, it would be unjust and ridiculous to hold that since there was no fixed ratio of assessed value to actual value generally throughout the district, plaintiff failed to prove a lack or violation of uniformity which the Constitution requires.

137 A.2d. at 275 (emphasis added). In so doing, the Pennsylvania Supreme Court, citing U.S. Supreme Court authority, expressly rejected the same argument advanced by the City here, that is, that only "overassessed" plaintiffs have standing to assert a uniformity violation. Specifically, the state Supreme Court stated:

> The city contends that since the assessment of appellee's property is admittedly less than the market value thereof, there cannot be a lack or violation of uniformity, and the taxpayer…has no standing to complain since he has not been injured. *This contention is without merit.* Exactly the same contention was made and rejected in Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, 284 U.S. 23, 52 S.Ct. 48, 50, 76 L.Ed. 146.

Brooks Building, 137 A.2d. at 276 (emphasis added). The Court went on to reiterate that the "first contention that appellant's assessment cannot be changed unless it exceeds the market value is utterly devoid of merit." Id.

This same reasoning was expressly reaffirmed by the Pennsylvania Supreme Court in 2009, as follows:

> [E]ach property should be assessed at its fair market value; it cannot be assessed at more than its fair market value or higher than the percentage of value uniformly fixed throughout the taxing district, *nor can there be an intentional or systematic under-valuation of like or similar properties*. In re Brooks Bldg., 391 Pa. 94, 137 A.2d 273, 275 (1958) (emphasis added); *see also* Narehood v. Pearson, 374 Pa.299, 96 A.2d 895, 899 (1953) ("The intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property.") quoting Cumberland Coal Co. v. Bd. Of Revision of Tax Assessments in Greene County, Pa., 284 U.S. 23, 28, 52 S.Ct. 48, 76 L.Ed.146 (1931)

Clifton, 969 A.2d at 1214[9].

Thus it is clear that the City's argument that only overassessed plaintiffs can bring a uniformity claim has no basis in law.

It necessarily follows that since a plaintiff need not be "overassessed" to bring a uniformity claim that the City's second argument – that only evidence of "overassessment" relative to the entire City is relevant – also fails. One need not rely on logic alone, however, because this second argument of the City also has been expressly rejected by the Pennsylvania Supreme Court. Specifically, in Downingtown Area School District v. Chester County Board of Assessment, 590 Pa. 459, 913 A.2d 194 (2006) the Supreme Court ruled that the trial court erred in failing to consider the taxpayer's evidence of seven comparable properties, thus rejecting the same argument advanced by the City here -- that "the pertinent class of properties consisted of all real estate in the taxing district" (Downingtown, 590 Pa. at 463). The Court held that, despite a 1982 assessment statute that appeared to limit the court's review to the entire taxing district, the trial court erroneously failed to consider the "common law procedure for asserting a

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[9] Earlier in its opinion, the Clifton court also cites Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W. Va., 488 U.S. 336, 345, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989) for the same proposition. 969 A.2d at 1211.

uniformity challenge", which, it confirmed, requires a court to credit taxpayer's evidence of non-uniformity relative to comparable properties. Downingtown, 590 Pa. at 477.

Finally, the single case relied upon by the City for this argument (Smith v. Carbon Cnty. Bd. Of Assessment Appeals, 10 A.3d 393 (Pa. Commw. 2010)) does not support its position. As discussed above (at p. 6), Smith is easily distinguishable. Moreover, the Smith court determined that the small subset of properties selected for analysis by the taxpayer in its uniformity challenge (certain units within his 88-unit condominium complex) did in fact constitute relevant and admissible evidence. Smith, 10 A.3d at 405. Indeed, in reviewing jurisprudential history, the Court noted that "the Supreme Court has reiterated that consideration of meaningful sub-classifications as a component of the overall evaluation of uniform treatment is proper" (Smith, 10 A.3d at 404) citing Clifton, 600 Pa. at 688, 969 A.2d at 1212-1213.

Whether it is three properties (Brooks Building), seven properties (Downingtown) or a handful of properties within one condominium complex (Smith), the applicable jurisprudence affirms that in a uniformity challenge evidence concerning properties that are subsets of the entire taxing district is relevant.

All Plaintiffs Plead "Overassessment"

Notwithstanding the City's misreading of the Amended Complaint, it is clear that *all Plaintiffs*, including the eight the City claims fail to allege "overassessment" relative to the taxing district, do in fact sufficiently allege that they are overassessed. They do so expressly in at least six different paragraphs. See, e.g., Am. Compl. ¶¶20, 21, 44, 53, 80, 82. The Plaintiffs also have asserted, inter alia, that their properties are assessed at higher

ratios than vacant properties (Am. Compl. ¶88; see also Am. Compl. ¶¶71, 77, 126) -- of which even the City admits there are tens of thousands (City's Brief at p. 2), and that overall each Plaintiff is overassessed as compared to "at least hundreds" of other properties in the City. (Am. Compl. ¶¶20, 21, 44, 80). In addition, Plaintiffs have alleged that certain citywide measurements of uniformity (statistical standards known as the COD and PRD) also show that there is an illegal lack of uniformity throughout the entire real estate tax system. Am. Compl. ¶¶118, 120. As demonstrated above, there is no legal precedent for requiring that Plaintiffs allege more. For these reasons alone, the Court should dismiss the City's Preliminary Objections. For the same reasons, the City's argument that the sole taxpayer who has a tax lien, Mr. Rudi, lacks standing because he does not claim to be "overassessed"[10] is frivolous. That argument fails since, as discussed above, all Plaintiffs, including Mr. Rudi, sufficiently allege harm, including overassessment.[11]

Plaintiffs Clearly Allege Current Deficiencies in the Property Assessment Scheme

The City's contention that Plaintiffs fail to allege deficiencies within the current assessment system is a mischaracterization of the Amended Complaint. (City's Brief at pp. 29-31)

In more than 35 instances over 29 distinct paragraphs, the Amended Complaint includes the following terms, among others, to convey the present state of the City's assessment system: "continue(s)", "current(ly)", "continuing", "ongoing," "present(ly)",

[10] See City's Brief at pp.55-59

[11] Accordingly, Mr. Rudi has a proper basis on which to request equitable relief relating to tax liens (subsections (i) and (j) of the Prayer for Relief).

"exist" and "currently in effect." A few examples of the context in which these kinds of terms appear are as follows (with relevant terms bolded):

- Despite the endemic flaws, the City **continues** to collect taxes under a system that **remains**, in the words of its current Mayor, "broken." The publicly-announced steps taken by the City are insufficient to correct the serious and **continuing** constitutional or statutory deficiencies. Moreover, in utter disregard of the foreseeable disproportionate effect of its actions, the City recently has deliberately *increased* the **existing** inequities by freezing them in place with a "moratorium," and increasing property taxes by 9.9 percent. The City also announced a tripling of the number of tax delinquent properties the City sends to sheriff sale, but it has failed to take any steps to determine the portion of the underlying tax bills that are the result of historical and **ongoing** overassessment. Whatever hopes the public pinned on the recent reorganization of the assessment bureaucracy, the City's new Office of Assessment's accomplishments in fixing the system, if any, are entirely hidden. The Court's intervention is therefore necessary and appropriate to remedy the **continuing** illegal assessment policies and practices that show no sign of remediation or abatement. (Am. Compl. ¶3)

- The Uniformity Clause prohibits the imposition of varying rates of effective taxation on different properties. Yet, the City's **current** assessment scheme **causes** and **ensures** wild variations in the effective tax rates imposed on properties throughout the City. Indeed, the combination of the Moratorium and the 2011-2012 Tax Increase **harms** owners of over-assessed properties, including Plantiffs, twice. First, their illegally disproportionate assessments are frozen in place by the Moratorium and then those assessments are used to calculate the higher taxes mandated by the 2011-2012 Tax Increase. The result of this combination of the City's **recent actions** is that the effective rates of taxation on Plaintiffs' properties **exceed** the taxation rates of, at least, hundreds of other properties throughout the City. The tax disparities imposed upon the Plaintiffs, and upon thousands of other property owners, by the City's **continuing** acts and omissions are illegal under the Uniformity Clause. (Am. Compl. ¶44)

- The City has been on notice that the historic and pervasive inequities in the assessment system **persist**. The City's **current** Mayor repeatedly made public statements, before and since imposing the Moratorium, demonstrating the City's awareness of the serious ongoing assessment problems. For example, in 2009, when Mayor Nutter proposed a real estate tax increase, he acknowledged that "some people are paying more than they should while others are not paying enough.…" Mayor Nutter's Budget Address to City Council, March 19, 2009 Since this announcement over two years ago, the City has not disclosed any plan or intention to compensate citizens who have been "paying more than they should." (Am. Compl. ¶49)

- The City, in violation of applicable law, **does not value** all properties at their actual value. Indeed, for many years, the City has intentionally undervalued properties, though not all of them consistently, and it **continues** to do so today. (Am. Compl. ¶61)

- Further evidence of the City's **current** policy and practice of setting recent values of real property at 35 percent of their actual value (the "35 Percent Rule") is to be found in the 2010 "Moratorium Guidelines." Those guidelines (attached hereto as Exhibit D) provide, in relevant part, as follows: "2. New construction and any value added for permits, etc. *will be put on at 35%* of sale price or actual value….4. Subdivisions and consolidations should be processed as usual; value *put on at 35%* of sale price or actual value." (Am. Compl. ¶64)

- The City, in violation of applicable law, does not **currently** assess each property every year. Indeed, the Moratorium expressly prohibits the City from following this clear requirement of Pennsylvania law. (Am. Compl. ¶65)

- As a result of the City's deliberate and **ongoing** failure and refusal to follow the law with respect to property assessments, the market values assigned by the City, for almost all properties, are far lower than their actual fair market values. The degree of under-valuation among properties, however, varies wildly throughout the City, all in violation of the law. By way of example only, vacant lands, of which there are more than 44,000 in the City, are far more underassessed by the City than other categories of real property. By way of further example only, commercial properties, of which there are more than 13,000 in the City, are less underassessed by the City than other categories of real property. (Am. Compl. ¶71)

- The City, in violation of applicable law, **does not** equalize real property market values within the City. In fact, the 2010 Moratorium Guidelines **currently in effect** expressly prohibit such equalization, providing, in relevant part: "No individual revaluation projects *of any kind* will be undertaken during the term of the moratorium. *This includes revaluations for purposes of uniformity*." (emphasis added). Consistent with these guidelines, at a November 23, 2010 market value appeal hearing before the BRT, an assessor for the City testified that she was prohibited by the Moratorium from making adjustments to properties in order to equalize them with similar properties in the neighborhood. (Am. Compl. ¶76)

- In sum, the following policies, practices and customs of the City, (the "Flawed Assessment Practices") individually and collectively, **violate** applicable Pennsylvania statutory assessment laws: (a) the failure to assess all properties annually; (b) the failure to assess all properties at their actual values; (c) the failure to equalize properties; (d) the imposition and continuance of the Moratorium; (e) the implementation and maintenance of the 35 Percent Rule; (f) spot assessment; (g) selective assessment of "newer" or "newer titled" properties; (h) the failure to "rectify all errors" in assessments; and (i) the implementation

and maintenance of different effective tax rates on different classifications of properties, including without limitation, higher effective tax rates on commercial property compared to residential property and lower effective tax rates on vacant lands compared to other properties. (Am. Compl. ¶77)

- The City has knowingly and deliberately adopted and applied the Flawed Assessment Practices and **continues to do so**. (Am. Compl. ¶78)

- As detailed throughout this Amended Complaint, the City's actions and omissions, including, without limitation, its Flawed Assessment Practices as well as its Discriminatory Classifications, have directly contributed, and **continue to contribute**, to the non-uniform and inequitable assessment and taxation of real property within the City, in violation of all applicable constitutional and statutory requirements and to the great detriment of Plaintiffs and all others similarly situated. (Am. Compl. ¶92)

- The Uniformity Clause requires that taxes be applied uniformly upon similar properties within the City, with owners of comparable properties shouldering relatively equal property tax burdens. **Currently**, in violation of the Uniformity Clause, taxes are not applied uniformly upon similar properties within the City and owners of comparable properties do not shoulder relatively equal property tax burdens. (Am. Compl. ¶99)

- The charts attached hereto as Exhibit B provide additional **current** examples of such irrational and illegal tax assessments. The Moratorium, the other Flawed Assessment Practices and the Discriminatory Classifications **currently enforced** by the City **ensure** that these illegal inequities, and those suffered by the Plaintiffs, will continue. (Am. Compl. ¶130)

- As all of the above demonstrates, in Philadelphia the real estate taxing scheme **as presently operated** by the City is not applied with uniformity on all properties or even on properties that are similar to each other. As a result, large and illegal disparities in property tax liability **exist** throughout the City. Plaintiffs are subjected to numerous of these illegal disparities as detailed above. The City therefore has failed to perform its constitutional duty of providing for the uniform and equalized valuation of all real properties located in the City, in violation of the Uniformity Clause. (Am. Compl. ¶131)

There can be no good faith argument that Plaintiffs fail to allege deficiencies in the current real estate tax assessment scheme.

Furthermore, the City misunderstands the posture of the litigation by asserting that "the use of pre-recession, pre-OPA, data simply cannot *prove* Plaintiffs' case" and

that "without more updated allegations, Plaintiffs' Amended Complaint cannot stand." (City's Brief at p. 30) (emphasis added).[12] Plaintiffs are not required to *prove* anything at this point.[13] The weight and extent of Plaintiffs' future proof cannot be foretold and is not determinative on a ruling on preliminary objections. And, as demonstrated above at pp.1-4, contrary to the City's assertions (City's Brief at p. 31) once Plaintiffs prove Equal Protection violations, they will have succeeded as well in proving that the current system lacks the uniformity required by the Uniformity Clause.

Finally, the two cases cited by the City, Smith v. Carbon County, discussed *supra*, and Beattie v. Allegheny County, do not support the City's argument. Both are distinguishable because the plaintiffs did not allege therein the kinds of widespread constitutional violations that are at the heart of this case. See, e.g., Beattie, 589 Pa. at 130 and the discussion of Smith above at pp. 5-6. Moreover, to the extent that the City contends that Beattie or any other decision stands for the requirement that in every lawsuit alleging non-uniformity a plaintiff must prove its case exclusively through use of the COD or PRD statistical measures, it is mistaken. The Supreme Court in Clifton, decided three years after Beattie, discussed several non-exclusive ways in which a lack of uniformity could be proved and it declined to set a bright-line test for proving constitutional non-uniformity. Clifton, 969 A.2d 1203-1205, 1226-1227 ("There is no

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[12] Incidentally, the City's admission in the very next paragraph of its Brief that Plaintiffs do in fact allege that current data support a finding of the illegality in the system dooms its own argument. City's Brief at p. 30.

[13] In any event, Plaintiffs *have* cited the most recent available public data and have alleged that the City has a longstanding and continuing practice of failing to disclose data that would further show that the current system is illegally operated. (Am. Compl. ¶¶40, 121, 122).

suggestion by Judge Wettick or this Court that deviation from one or more of these standards proves a lack of uniformity.")

As demonstrated above, the City is wrong on the facts as well as the law. For the foregoing reasons, the City's claim that the Amended Complaint should be dismissed because Plaintiffs have failed to allege deficiencies in the current system should be rejected.

Plaintiffs are Entitled to Have All Claims for Relief Considered by the Court

The City argues that Plaintiffs claims for "economic relief" must be heard by the BRT and that Plaintiffs cannot seek any "economic relief" that might benefit other taxpayers. Their arguments are unavailing for the reasons set forth below.

Plaintiffs Do Not Need to Go Before the BRT First

Plaintiffs do not need to go before the BRT because this case is about long-standing, unconstitutional policies and practices that have contributed to, and that keep in place, an assessment system that it is rotten to its core. It thus presents precisely the kind of circumstances under which numerous courts throughout the Commonwealth have found equity jurisdiction to be appropriate. The City asserts, without any legal authority, that the Plaintiffs' purported pursuit of "economic relief," a term it invents, puts this case into a special category of one that deprives Plaintiffs of full and complete equitable relief and renders this Court powerless to act with respect to certain claims for relief[14].

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[14] The City does not challenge the appropriateness of the relief requested in subsections (a) through (e) of the Prayer for Relief.

What the City fails to acknowledge is that the allegedly discriminatory effects of The Tax Rate Increase (as to which the City cleaves its "economic relief" argument) are inextricably part and parcel of the ongoing scheme that disparately impacts already-overassessed taxpayers, including Plaintiffs. (Am. Compl. ¶¶44-45, 81)[15]. This case is not, as the City asserts, merely about assessments as determined by the BRT and the simple multiplication thereof by a tax rate set by the City.[16]

Accordingly, even if the BRT could figure out how to adjust Plaintiffs' individual assessments, which it cannot, Plaintiffs will not be afforded the "full, perfect and complete relief" that they are entitled to in equity, because the City's Flawed Assessment Practices and the Discriminatory Classifications will continue unabated. (See Am. Compl. ¶¶ 77, 78, 88, 92, 130). Plaintiffs clearly allege that:

> The BRT does not have the authority: (a) to make initial valuations or assessments of taxable properties; (b) to modify or direct in any way the assessment practices, timing, policies or methodologies of the City; (c) to implement a City-wide reassessment of properties; or (d) to declare any assessment practices of the City unconstitutional or otherwise illegal. *The BRT does not have the authority to award Plaintiffs, or any other taxpayer, any of the relief requested in this litigation*.

Am. Compl. ¶ 29 (emphasis added). Yet, the City asks this Court to ignore the implications of these facts. Since the BRT is powerless to decide anything other than individual property assessment appeals, it cannot put a halt to the illegal, ongoing practices that sustain the constitutionally defective system, including the Flawed Assessment Practices and other illegal policies, such as the Moratorium. Therefore, even

[15] It is not proper for the City to attempt to dispute the facts alleged in the Amended Complaint, which it does in several places, such as at pp.36-37 of its Brief. The Amended Complaint clearly articulates, with examples, how the Tax Rate Increase disproportionately impacts already overassessed Plaintiffs. Am. Compl. ¶¶44-45.
[16] City's Brief at pp. 37, 43, 53-54.

if the BRT were an adequate forum in which to perform the calculations requested by Plaintiffs (which it is not), any adjustment to underlying assessments would do nothing to correct the pervasive system wide discrimination and lack of uniformity because the ancillary policies and practices (all of which Plaintiffs allege are also illegal under state law[17]) would be unaffected.

Plaintiffs are not required to return year after year to seek incomplete from the BRT, especially since, as clearly alleged in the Amended Complaint, it has co-created, with the City, a system of property tax assessments and taxation that has been legally deficient for decades. It is precisely under circumstances such as those alleged here that courts throughout the Commonwealth have repeatedly upheld the right of taxpayers to litigate their claims for unconstitutional property assessment practices in court without having to first exhaust statutory remedies. See, e.g., Millcreek Township School Dist. v. County of Erie, 714 A.2d 1095 (Pa. Commw. Ct. 1998); Ackerman v. Carbon County, 703 A. 2d 82 (Pa. Commw. Ct. 1997); City of Harrisburg v. Dauphin County Board of Assessment Appeals, 677 A.2d 350 (Pa. Commw. Ct. 1996); City of Lancaster v. County of Lancaster, 599 A.2d 289 (Pa. Commw. Ct. 1991), petition for allowance of appeal denied, 530 Pa. 634, 606 A.2d 903 (1992).

The BRT in fact is *not* a body capable or empowered to "determine the amounts by which all overassessed properties are disproportionately penalized by the Tax Increase," as Plaintiffs request in subsection (h) of the Prayer for Relief. The City admits, the BRT is not even responsible for citywide equalization or for dealing with alleged non-uniformities. According to the City:

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[17] See Count I of the Amended Complaint (State Assessment Law Violations), Am. Compl. ¶ ¶ 55-83

> the "Office of Property Assessment (OPA)…is the office now charged with making assessments in Philadelphia, *including resolving any non-uniformities,* and which, after only eight months in existence *has already taken several significant steps toward equalizing assessments* in Philadelphia and is taking more."…"

City's Brief at p. 13, emphasis added. As part of its responsibility for "making assessments", "resolving any non-uniformities" and "equalizing assessments" the City's OPA must perforce figure out which, and to what extent, properties have been overassessed. There is no other way to equalize assessments. Thus, according to the City, it already is engaged in the process of making these important calculations. All Plaintiffs request is that this Court, following a finding of liability against the City, ensure that the City continues to do so.

Finally, none of the case law cited by the City about exhaustion of administrative remedies, or about exclusive remedies, is controlling. This is not a simple "refund" case; yet, the bulk of the City's cited authority consists of refund cases. Moreover, all of the cases cited by the City presume the existence of an *adequate* administrative method for the disposition of the taxpayer's claim. Here, Plaintiffs have alleged that the entire system has been broken for decades and that almost all properties in the City are illegally underassessed as a result of the current assessment methodologies. The allegations include:

- 2011 admissions by the City's current Director of Finance that the BRT has not conducted a city-wide assessment "for almost a decade" and that the current assessment methodology is so inaccurate that it currently deprives the City and School District of hundreds of millions of dollars in tax revenue. (Am. Compl. ¶¶69, 71, 82)

- 2010 admissions by the former BRT Chair that the current problem of overassessment and underassessment "dates back several decades" (Am. Compl. ¶50)

- 2010 admissions by the current Mayor that he felt compelled to issue a property tax Moratorium because of the BRT's "bad or inaccurate data" (Am. Compl. ¶38)

- 2010 description of the BRT's assessment data by the City's current Managing Director as "a classic garbage in, garbage out scenario" (Am. Compl. ¶39)

- The most recently available State-calculated data shows that the City's assessments are far outside industry norms for accuracy and equity. (Am. Compl. ¶118)

Moreover, as this Court undoubtedly is aware from the extensive press coverage and public hearings, the City takeover of the BRT arose out of its and the public's vociferous and prolonged complaints that the BRT was not competent to properly assess properties. It is thus disingenuous, at best, of the City to now claim that the same BRT from which the City wrested control of the assessment function and implored the City's voters to abolish has miraculously transformed itself into an adequate forum before which the Plaintiffs would receive appropriate redress.

The Court Can Award the Relief That Plaintiffs Request

The relief requested by Plaintiffs is proper because Courts in equity regularly fashion relief that benefits non-parties, whether the underlying litigation is brought on behalf of a class or not. The City's unsupported assertion that this Court cannot even "require the City to develop procedures to ensure that the tax increase does not worsen non-uniformity for all overassessed taxpayers" (City's Brief at p. 35), is particularly troubling since the Court clearly "may fashion relief as justice and good conscience dictate." Tredyffrin-Easttown Schol Dist. V. Valley Forge Music Fair, Inc. 156 Pa. Cmwlth. 178, 627 A.2d 814, appeal denied, 538 Pa. 638, 647 A.2d 513 (1993).

In addition, to the extent that the City suggests that a court in equity cannot fashion a remedy that has any component of "economic relief," it is clearly incorrect. The City cites no case for the general proposition that a Court of equity cannot award "economic relief." Indeed, one of the cases cited by the City specifically *allowed* the court to exercise equity jurisdiction over the taxpayers' claim for an injunction against the municipality's collection of the tax at issue. Israelit v. Montgomery Cnty., 703 A.2d 722 (Pa. Commw. 1997) (City's Brief at pp. 35, 47).

Because Plaintiffs clearly have asserted substantial constitutional issues and the absence of an adequate statutory remedy, this Court should exercise jurisdiction over *all* of Plaintiffs' claims. Clifton, 969 A.2d at 1209, n. 17; Borough of Green Tree v. Bd. Of Proprty Assessments, Appeals & Review of Allegheny County, 459 Pa. 268, 328 A.2d 819, 825 (1974). This will promote both justice and efficiency.

The Court Should Not be Deterred by Hyperbole

Dispersed throughout the City's arguments regarding the Prayer for Relief is the specter of devastation raised in an apparent attempt to deter the Court from acting. A few examples of the City's exaggerated statements are as follows (with responses in italics):

- "The clear implication of Plaintiffs' Amended Complaint is that…the government…should be prohibited from ever raising taxes" (City's Brief at p. 37). *Nowhere do the Plaintiffs question the authority of the City to raise taxes.*

- "Given the massive consequences to both the city and the school district of a rollback of a tax increase, the court should reject Plaintiffs' claims for economic relief" (City's Brief at 48) and, "The granting of Plaintiffs' request to stay enforcement of liens would wreak havoc with the City's budget and could ravage the School District's education efforts" (City's Brief at p. 58) *Plaintiffs request neither a general rollback of a tax increase nor an injunction against all lien enforcement. Moreover, as the City's current Finance Director admits, fixing the system will deliver millions of dollars to the coffers of the City and School District.*[18]
- Plaintiffs are "asking this Court to hold that the BRT's entire appeal procedure violates due process, and that the BRT has violated, and continues to violate, due process in every individual assessment appeal since the BRT's inception" (City's Brief at p. 50) *Plaintiffs have asked for no relief relating to the BRT and the BRT is not a party to this case.*

The City seeks merely to distract from the serious constitutional issues that merit the Court's attention.

The City's Taxpayers Are Entitled to Notice

The City's final argument is that no matter what the outcome of this litigation, taxpayers have no right to know the effects or extent of the City's illegal tax collection practices. This also should be rejected. The City cites no law that divests this Court of the power in equity to require the City, after a finding of liability, to provide information

[18] Am. Compl. ¶72.

to property owners concerning the scope of overassessment and non-uniformity. This is a particularly troubling assertion where, as here, there are allegations that the City has refused to make critical assessment analysis information available and that much of the public remains unaware of the pervasive illegality of the system. (Am Compl. ¶¶32, 40, 82, 121, 122).

Moreover, the City's "futility" argument is itself futile since the property assessment statute it cites (City's Brief at p. 60) would not bar taxpayers from seeking appropriate relief upon news that this Court had declared the City's entire property tax assessment system illegal. Pennsylvania law specifically provides (in 72 P.S. § 5566b) that taxpayers may seek return of taxes *paid for the last three years* from a city that was not entitled to collect the tax at issue.

Finally, the City presents no compelling reason why the Court should prematurely rule on the appropriateness of the requested relief now, before a ruling on the merits. The City is in essence asking this Court to "put the cart before the horse" in violation of the principles enunciated by the Pennsylvania Supreme Court in Automobile Trade Association of Greater Philadelphia v. City of Philadelphia, 528 Pa. 233, 596 A.2d 794 (1991) (reversing Commonwealth Court decision denying relief on a constitutional challenge to Mercantile License Tax and directing the lower court to resolve the uniformity challenge first before addressing the issue of relief). The Court should wait until it rules on the merits of Plaintiffs' claims, and then consider what relief is appropriate rather than summarily determining at the inception of the case that Plaintiffs have no right in equity to certain remedies.

CONCLUSION

As demonstrated above, Plaintiffs have adequately pleaded all elements of their claims and they are not obligated to pursue or exhaust any administrative remedies. When the Court, as it must, accepts as true all material facts as set forth in the Amended Complaint, as well as all inferences reasonably deducible therefrom, Bilt-Rite Contractors, Inc. v. Architectural Studio, 581 Pa. 454, 866 A.2d 270 (Pa. 2005), it becomes clear that the City has fallen far short of a showing that "it is certain that no recovery is possible under the law." O'Brien v. Township of Ralpho, 166 Pa. Cmwlth. 337, 646 A.2d 663, appeal denied, 544 Pa. 639, 675 A.2d 1254 (1996).

WHEREFORE, for all of the foregoing reasons, Plaintiffs request that the Court deny the City's Preliminary Objections in their entirety.

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Respectfully submitted by,

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