IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRUCE F. HARVEY & SARAH HARVEY h/w, GLENN D. SCHMALHOFER, JOHN A. BAUSCHER, DANNY R. BEAVER, and MAIN STREET COURT LLC, individually and on behalf of all those similarly situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. 5023-VCS
CITY OF NEWARK,	)	
Defendant.	)	

OPINION

Date Submitted: July 22, 2010
Date Decided: October 20, 2010

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STRINE, Vice Chancellor.

I. Introduction

The plaintiffs are owners of rental properties in the City of Newark. They challenge the City of Newark's ordinance that requires landlords to obtain and pay for a rental permit (the "Rental Permit Fee Ordinance"). The plaintiffs challenge that ordinance on the ground that it is a tax because Newark is raising more from the rental permit fees than is required for it to recoup the costs of regulating the City's rental property businesses, and that Newark's Charter does not authorize such a tax.

Although the Rental Permit Fee Ordinance was not enacted by Newark as a tax, but rather as a permit fee, Newark has brought this motion for judgment on the pleadings arguing that: i) it has all the same taxing authority that the Delaware General Assembly could specifically give it; ii) the rental permit fee, even if considered a tax, is one the General Assembly could have specifically empowered Newark to adopt; and iii) therefore the City should be granted judgment as a matter of law. Newark bases this contention on its newly-discovered belief that the General Assembly granted the City plenary taxing authority in its 1951 Charter (the "1951 Charter").

This is a rather remarkable argument that I reject. In 1958, Newark faced a challenge to its decision to adopt an ordinance imposing a franchise fee on a utility company and defended that challenge by suggesting to Chancellor Seitz of this court that the franchise fee at issue was a proper exercise of its taxing authority.[1] Chancellor Seitz

[1] *Delaware Power & Light Co. v. Newark*, 140 A.2d 258, 260-61 (Del. Ch. 1958).

rejected that argument, finding that Newark's taxing authority was limited.[2] Then, in 1965, Newark took advantage of a state law that was available to municipalities whose charters contained a limitation on taxing authority.[3] That law gave these municipalities a chance to amend their charters without further express approval from the General Assembly to increase the amount of property taxes they levied, but only on the conditions that the municipality not use the special amendment process to increase such taxes over an amount, in addition to taxes necessary to service the municipality's bonded indebtedness, representing 2% of the "total assessed value of all the real estate subject to taxation" located within the municipality, or to "levy[] . . . any new taxes . . . ."[4]

Since 1958, Newark has accepted that it has limited taxing authority. Thus, when it adopted the Rental Permit Fee Ordinance in 1987, the City did not rely on any general power to tax, but instead on the more limited power that it had "to grant . . . and charge fees for licenses or permits for . . . businesses of any description."[5] Indeed, long after the Rental Permit Fee Ordinance was adopted, the Newark City Council unanimously adopted a resolution in 2009 lamenting the historically limited taxing authority of the City and urging the General Assembly to pass an amendment to the Charter of Newark to give the City broad taxing authority. Only when faced with this litigation did Newark's

[2] *Id.*
[3] Since its adoption of the 1965 Charter, Newark has not, outside one change later discussed in detail, materially altered the 1965 Charter. Thus, for the sake of clarity, I will refer to Newark's present day charter simply as the "Charter."
[4] 22 *Del. C.* § 830(b).
[5] City of Newark Charter § 404.

inventive new counsel "discover" that Newark had possessed plenary taxing authority for nearly sixty years without knowing it.

I refuse to indulge the hubristic notion that the City's new lawyers and I now know better than everyone who has considered this matter during the previous fifty-nine years. At a time when the 1951 Charter was much fresher, one of this court's most distinguished members held that the 1951 Charter did not grant Newark broad taxing authority, but rather gave it only limited taxing authority. Newark never appealed that ruling.

In accordance with Chancellor Seitz's interpretation, Newark, recognizing that its taxing authority was limited, took advantage of § 830(b) of Delaware's Home Rule Statute which allows a municipal corporation, the charter of which imposes a limitation on its taxing authority, to increase its property taxes in a manner prescribed in that provision, and substantially increased its taxing authority in strict conformity with the contours of that provision. As a cost of seizing that opportunity, Newark bound itself not to increase taxes further absent an express grant from the General Assembly. For nearly sixty years, Newark has honored that promise and led its citizens and the General Assembly to hold the reasonable belief that its taxing authority was limited. For various reasons I discuss, including the doctrine of *stare decisis*, Newark's attempt to escape its own history and have me conclude that Chancellor Seitz and all the members of the Newark City Council and their legal advisors until this case was filed were irrational and did not understand how plain Newark's plenary taxing authority had been all along, is rejected. In a republic, it is critical that legislators and citizens be able to order their

affairs in reliance upon the law. When the law is rationally interpreted in good faith by the judiciary, and legislative bodies such as the General Assembly and the Newark City Council take future action in reliance upon that interpretation, such as through the increases in property taxes that Newark adopted in 1965, future courts should not upset that interpretation and subject citizens to a novel state of affairs at odds with their reasonable expectations as to the law's meaning.

II. Factual Background

Newark is a university town and has a lot of rental housing. On September 14, 1987, the Newark City Council adopted § 17-4(t) of the Newark Municipal Code acting under authority of § 404 of its Charter to "grant . . . and to charge fees for licenses or permits for . . . businesses . . . within the city." Section 17-4(t) — the Rental Permit Fee Ordinance — states:

> (1) *404.8 Rental permits required*. An annual rental permit is required prior to letting, leasing, sub-leasing, renting, or otherwise allowing the occupancy of the following structures:
>
> - Every non-owner occupied single-family and/or two-family dwelling.
> - Every owner-occupied dwelling taking in more than two boarders or roomers unrelated to the owner by blood, marriage or legal adoption.
> - Every multi-family dwelling (defined as a structure containing three or more dwelling units) including condominiums.
> - Every rooming house.
> - Every boarding house.
> - Any structure housing a mixture of occupancies that includes residential. . . .[6]

Over the years, Newark incrementally increased these permit fees from 1987, when Newark charged $25 per dwelling unit in a single-family or two-family dwelling

[6] Newark Municipal Code § 17-4(t) (emphasis in original).

and $25 per dwelling unit in a multi-family dwelling, to 2004 when the permit fees were set at $300 per dwelling unit in a single family or two-family dwelling and $70 per dwelling unit in a multi-family dwelling.[7]

On October 27, 2009, the plaintiffs brought this purported class action on behalf of all other similarly situated landlords. The plaintiffs claim that Newark is using the increased rental permit fee as a revenue-raising device, rather than as a legitimate way to recover the costs the City incurred in regulating the rental property industry in the City. In support of that theory, the plaintiffs cite authority for the proposition that if a municipality raises revenue in excess of what the municipality reasonably believes it needs to "satisfy direct and indirect costs of regulation incurred by the ordinance,"[8] the permit or license fee is considered a tax and is invalid if the municipality lacks the necessary authority to enact the fee as a tax. According to the plaintiffs, Newark's Rental Permit Fee Ordinance raises far more than is necessary to fund the regulation of rental housing and they seek, on behalf of the class they seek to represent, recoupment of the amount of rental permit fees collected in excess of the amount that Newark could

[7] Compl. ¶ 26.

[8] *See* Pl. Ans. Br. at 6 (quoting *Delaware v. Harbor House Seafood,* 1997 WL 1704528, at *2 (Del. Com. Pl. Apr. 2, 1997)). *See also Harbor House Seafood*, 1997 WL 1704528, at *2 ("[A] [t]own may charge a license fee to satisfy direct and indirect costs of regulation incurred by the ordinance. The fee must be reasonable and related to the cost of such regulation. A fee which exceeds costs by a small amount will not render the ordinance invalid. However, if the fee exacted is grossly disproportionate to expenses, it becomes a tax subject to germane revenue requirements, including enabling authority to impose it."); MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 26:18 (3d ed. 2006) ("a license fee for regulation becomes a tax for revenue only when it is out of proportion to the reasonable cost of regulation.").

properly call a permit fee for the years 2005 to 2009, as well as a declaration that the rental permit fees, as currently assessed, are an unlawful and unauthorized tax.

The case is before me now because Newark injected an interesting defense. Newark contends that the court need never reach the question of whether the permit fee can be justified as a proper exercise of the City's authority to grant and collect fees for permits or licenses,[9] because even if the permit fee is considered a tax, Newark's current Charter, as well as its predecessor, the 1951 Charter, gave it taxing authority as broad as that enjoyed by the General Assembly itself.[10] Because the General Assembly could adopt a tax in the form of a rental permit fee, Newark says it could do so too. Thus, it filed a motion for judgment on the pleadings in its favor.

In doing so, Newark injected a number of documents outside the pleadings. In response, so did the plaintiffs. That, however, is of no moment. This motion involves a question of statutory interpretation and the documents that both parties have submitted are matters of public record. Neither side contends that depositions or further discovery

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[9] *See* Def. Rep. Br. at 1 ("The parties' briefs have shaped the motion before the Court into a single, concise legal issue. That issue is simply this: where a municipality's charter contains 'all powers' language, does this provide it the general power to tax?"). Outside its motion for judgment on the pleadings, however, Newark vehemently contends that the permit fee is *not* a tax. *See* Def. Op. Br. at 7 ("The City disputes that the rental permit fees are a 'tax' under *any* definition.") (emphasis in original).

[10] Def. Op. Br. at 9 ("Because the power to tax — both generally and specifically with regard to rental permits — is a power that *could* be conferred upon Newark by the General Assembly (because such conferral is not precluded by State law), then such power *was* conferred upon the City as of June 2, 1951.") (emphasis in original). *Id.* at 7 ("The City has the general power to tax.") (emphasis in original); *Id.* at 8 ("The City indeed has the general power to levy taxes."); *Id.* at 10 ("Thus Newark has had the power to tax, without interruption, since June 2, 1951."); *Id.* at 15 ("Their [the words in § 7 of the 1951 Charter and in § 201 of the current Charter] literal meaning is that Newark has all powers that the legislature could competently delegate to it. That includes the general power to tax.").

are necessary to address the legal question, and therefore I apply the familiar Rule 56 summary judgment standard.[11]

III. The Parties' Arguments

The clearest and most direct way to address this motion is to briefly frame the parties' contending positions. The facts relevant to resolving who is correct can then be considered in context with my resolution of the interpretative question presented.

For its part, Newark's position is a simple one. Newark says that I should blind myself to a broad view of fifty-nine years of history and the traditions of Delaware jurisprudence regarding the interpretation of the taxing authority of local municipalities. The City would thus have me focus exclusively on the text of its current charter, but through the monocular lens of its current lawyers' historical perspective. Based on a law review article written in 2003,[12] Newark advances the proposition that the charter adopted for Newark in 1951 was part of a historically significant movement designed to

[11] Ct. Ch. R. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.").

[12] David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003). Professor Barron's interesting and comprehensive article is cited by Newark to buttress the view that Delaware's Home Rule Statute granted localities the "self-executing power to adopt any measure (with certain exceptions) that the state legislature could constitutionally delegate to them . . . [while still reserving for states the] powers of preemption." *Id.* at 2327. Absent, however, from Newark's discussion of the article is Professor Barron's acknowledgement that especially in the area of taxing authority, courts were reluctant to read so-called home rule charters as providing municipalities with taxing authority as broad as the state legislature's absent a specific expression of intent to that effect. *Id.* at 2348, 2365. Although Barron does praise those courts that read general empowerment provisions as extending to the area of taxation, he is careful to note the judicial authority to the contrary. *See, e.g., id.* at 2348 (citing *Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384, 395-96 (Ill. 1995)); *see also* OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 335-37 (2d ed. 2001) (concluding that in most states the power to tax is conferred by separate state legislative enactments rather than by a grant of home rule).

broadly empower municipalities. In its 1951 Charter, Newark was granted "all the powers granted to municipal corporations and to cities by the Constitution and general laws of the State of Delaware, together with all the implied powers necessary to carry into execution all the powers granted."[13] Although another provision of the 1951 Charter that dealt specifically with the City's power to raise revenue contained only specific and limited ways to raise revenue,[14] and does not grant the City specific authority to raise revenue by imposing a fee on landlords, the City says that is of no moment. Because the 1951 Charter was a "limitations of powers charter,"[15] Newark says that the fact that the

[13] 1951 Charter § 7.

[14] 1951 Charter § 34.

[15] "Limitations of powers charters," as they are known, differ from the traditional "grants of powers charters" of a prior era, and were proposed to address the inhibitory effect on the exercise of municipal power of the so-called "Dillon's Rule." That rule was named for John Dillon, a preeminent local government scholar and state court judge. Barron, 116 HARV. L. REV. at 2285. Dillon "acknowledged that the state's incorporation of a municipality implicitly delegated some power" to the municipality. *Id.* But, to make sure that newly empowered local governments did not "make the 'local' a site for ambitious, redistributive governmental intervention into the private market," Dillon called for the strict construction of a grant of what he called "inherent local powers:"

> The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter of incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal and public bodies which are out of the usual range, or which grant franchises, or rights of that nature, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property, or, as it may be compendiously expressed, any common law right of the citizen or inhabitant.

1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 15, at 34 (4th ed. 1890). Thus, "Dillon's Rule," the name by which it continues to be known today, acknowledged that the state's enactment of a municipality's charter constituted a grant of certain powers, but that this grant carried with it a "correlative legal judgment that, beyond their quasi-private corporate powers, local governments possessed *only those powers that could be traced to specific and express delegations from the state*." *Id.* (emphasis added).

So-called limitations of power charters arose to temper the effect of Dillon's Rule and to give municipalities more flexibility to address the increasingly complex and diverse problems they faced. Thus, in contrast to the grants of power charters, limitations of powers charters, occasionally referred to as home rule charters, instead of being enacted by the state legislature,

1951 Charter's revenue provisions do not place any limitation on the City's ability to impose a rental permit fee is irrelevant. Further, even if the permit fee is a tax, a point Newark has conceded for purposes of its motion, a limitation on Newark's authority to act (with the full powers of the General Assembly) will not be implied but must be express. Newark supports that argument by pointing to language in the 1951 and current Charters that specifically states: "The enumeration of particular powers by this Charter shall not be held or deemed to be exclusive, but, in addition to the powers enumerated herein, implied thereby, or appropriate to the exercise thereof, it is intended that the City of Newark shall have and may exercise all powers which, under the Constitution of the State of Delaware, it would be competent for this Charter specifically to enumerate."[16] According to the City, its revenue-raising power was only limited as to the express powers to tax mentioned in the 1951 Charter — the power to tax real property and certain

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are typically adopted by the municipality itself under authority of either the state constitution or state enabling legislation. Under this view, "apart from express provisions of the charter, municipal powers respecting local affairs are unlimited" so long as those powers are exercised in accordance with the state constitution and applicable state laws. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 9:8 (3d ed. 2006). As one might expect, there is a great deal of variance in the practices of various states, even those who have gone toward the "limitations of powers" approach. *See, e.g., id.* § 10:18 (noting that "[c]onstitutional provisions authorizing home rule charters in the various states differ in content and phraseology, and judicial decisions interpreting and defining the meaning of the constitutional provisions are not uniform," and that "the subjects which that lawfully and with propriety be treated in home rule charters are diverse and in number infinite") (internal citations omitted). In Delaware, for example, the Home Rule Statute embraces a limitations of powers charter approach but limits municipal authority in specific areas, including taxation, and requires that charters be initially adopted by the General Assembly and that most amendments to the charter still be specifically approved by a two thirds vote of both houses of the General Assembly. *See* DEL. CONST. art. IX, § 1 (requiring a two-thirds vote of both houses of the General Assembly to charter a new municipal corporation or to amend an existing municipal corporation's charter); 22 *Del. C.* § 835 (prohibiting, in addition to the prohibition against most charter amendments relating to taxing authority set forth in 22 *Del. C.* § 830(b), a municipal corporation from unilaterally adopting certain charter amendments under authority of the Home Rule Statute).

[16] 1951 Charter § 7; Charter § 201.

utility infrastructure — leaving Newark free to exercise whatever other power the General Assembly could grant it as to tax. The General Assembly, of course, has the "inherent power to levy taxes, except as constrained by the [Delaware and national] Constitution[s],"[17] and to allow municipalities to do the same.[18] Thus, under Newark's view, it, like the General Assembly, could impose an income or sales tax, as well as the rental permit fees it adopted here.[19] In further support of this position, Newark notes that its charter was amended in 1965 to add a provision requiring that the "charter shall be construed liberally in favor of the city . . . ."[20] As a result, Newark says that doubt must be resolved in favor of its authority to tax.[21]

Consistent with its very selective view of what is relevant history, Newark points me to decisions regarding other Delaware cities that it contends supports its position,[22] but even more urgently to decisions of courts in other states that it believes illustrate the

[17] *Town of Fenwick Island v. Sussex Sands, Inc.*, 1990 WL 161177, at *2 (Del. Super. Sept. 18, 1990) (citing *Consol. Fisheries v. Marshall*, 32 A.2d 426, 429 (Del. Super. 1943)).
[18] *Betts v. Zeller*, 263 A.2d 290, 296 (Del. 1970) (approving an act of the General Assembly delegating the "unrestricted power to tax" to the City of Wilmington); *see also Opinion of the Justices*, 233 A.2d 59, 62 (Del. 1967) (holding that the General Assembly's delegation to a municipal corporation of its authority to levy and collect taxes for local purposes falls outside the Delaware constitutional requirement that all bills for raising revenue originate in the General Assembly); MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 44:07 (3d ed. 2006) ("It is firmly established that the power to tax may be delegated to municipalities.").
[19] Def. Op. Br. at 1, 7.
[20] Charter § 201.
[21] Def. Op. Br. at 17.
[22] *See, e.g., Schadt v. Latchford*, 843 A.2d 689 (Del. 2004) (interpreting Wilmington's charter); *Paul Scotton Contracting Co. v. Dover*, 301 A.2d 321 (Del. Ch. 1972), *aff'd*, 314 A.2d 182 (Del. 1973) (interpreting Dover's charter); *Wilmington v. Lord*, 340 A.2d 182 (Del. Super. 1975) (interpreting Wilmington's charter).

proper way to read charters such as Newark's, which is by construing them as allowing the city to exercise plenary taxing authority.[23]

The plaintiffs have a very different take on the case. The plaintiffs' answering brief prominently cites a case that Newark's opening brief fails to mention or cite. This omission by Newark is notable because the case is called *Delaware Power & Light Co. v. City of Newark* and it dealt with a challenge to Newark's imposition of a franchise fee on an electrical utility company. In that case, as the plaintiffs note and as will be discussed further, Chancellor Seitz rejected Newark's suggestion that the franchise fee could be justified as a tax, finding that "the limited taxing power delegated to the City clearly does not authorize the imposition of a gross sales tax."[24]

The plaintiffs further note that Newark took advantage of a provision of a state statute — the Home Rule Statute —[25] that was available to municipalities with limited taxing authority and that gave such municipalities the right to increase their property taxes substantially, up to "2% of the total assessed value of all the real estate subject to taxation located within the municipal corporation," in addition to an amount "necessary

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[23] *Home Builders Ass'n of Lincoln v. City of Lincoln*, 711 N.W.2d 871, 876 (Neb. 2006) (noting the distinction between a traditional "legislative charter" and a home rule charter and upholding a municipal ordinance imposing development impact fees on the basis that in the absence of an express limitation, a home rule municipality may enact ordinances imposing various taxes); *Multnomah Kennel Club v. Dep't of Revenue*, 666 P.2d 1327, 1330 (Or. 1983) (upholding a county's business income tax enacted under the provision of a home rule charter allowing the county to exercise power "over matters of county concern to the fullest extent granted or allowed."); *West Coast Advertising Co. v. San Francisco*, 95 P.2d 138 (Cal. 1939) (quoting CAL. CONST. art. XI, § 6) (upholding San Francisco's license tax under its home rule charter adopted under the California constitution that allowed municipal corporations to "make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters").

[24] *Delaware Power & Light*, 140 A.2d at 261.

[25] 22 *Del. C.* §§ 801-42.

to service the bonded indebtedness of the municipal corporation," without further General Assembly approval.[26]

As the plaintiffs show, since Chancellor Seitz's 1958 decision and the adoption of Newark's Charter, Newark's own City Council has consistently interpreted the Charter as only giving it the specific powers to raise revenue that are spelled out in the Charter. Thus, when the City adopted the Rental Permit Fee Ordinance, it relied not on any general authority to impose taxes, but on a provision of the Charter dealing specifically with permit and license fees.[27] Indeed, in June 2009, the plaintiffs note that the City Council lamented its lack of taxing authority in a resolution adopted specifically to authorize the City to seek the General Assembly's passage of a bill amending the Charter to remedy this deficiency and to give the City plenary taxing authority.[28]

Based on this history, the plaintiffs argue that it is far too late for Newark's current lawyers to pretend that this is the very early days of rock and roll, to ignore fifty-nine years of history, and to urge me to discover that Newark's City Council has had all of the taxing authority of the General Assembly since before Chuck Berry and Buddy Holly made the music scene, but just did not realize that was the case.[29]

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[26] 22 *Del. C.* § 830(b).
[27] *See* Charter § 404 ("The Council shall have the right to grant or refuse, and to charge fees for licenses or permits for traveling shows and other businesses of any description within the city and to control their use of any property within the city.").
[28] Pl. Ans. Br. Ex. 4 (Newark City Council Resolution No. 09-L (June 8, 2009)).
[29] Chuck Berry recorded his first album, *Rock Rock Rock*, in 1957. The Official Site of Chuck Berry Discography, *available at* http://www.chuckberry.com/music/discography.htm. Buddy Holly recorded his first album, *The "Chirping" Crickets*, also in 1957. "Buddy Holly's Albums," *available at* http://www.billboard.com/charts/hot-100#/artist/buddy-holly/discography/albums/4834.

In the pages that follow, I explain why I reject Newark's position and embrace the contrary argument of the plaintiffs. I begin by spelling out the basic rules of statutory interpretation that guide my analysis.

IV. Legal Analysis

A. Relevant Principles Of Interpretation

The starting point for the interpretation of a statute, such as Newark's Charter, begins of course with the statute's language.[30] Where that language is susceptible to only one reasonable interpretation,[31] the duty of the court is to give effect to the statute's plain meaning.[32]

Given the complexity of human affairs and the imperfection of human drafters, the reality is that complex documents like statutes and contracts are often susceptible to more than one meaning.[33] Another related reality is that complex documents must be read

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[30] *Freeman v. X-Ray Assocs., P.A.*, 2010 WL 2685732, at *4 (Del. May 12, 2010) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)) ("We must give effect to the legislature's intent by ascertaining the plain meaning of the language used.").

[31] *Ross v. State*, 990 A.2d 424, 428 (Del. 2010) (quoting *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007) (citing *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 68 (Del. 1993))) ("Under Delaware law, a statute is ambiguous if: first, it is reasonably susceptible to different conclusions or interpretations; or second, a literal interpretation of the words of the statute would lead to an absurd or unreasonable result that could not have been intended by the legislature.").

[32] *Ross v. State*, 990 A.2d at 428 ("A court is allowed to look behind the statutory language itself only if the statute is ambiguous."); *Freeman*, 2010 WL 2685732, at *4; *Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000) ("If the statute is unambiguous, there is no room for interpretation.") (internal citations omitted).

[33] *See, e.g.*, Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) ("Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, *especially a complicated enactment*, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness.") (emphasis added).

contextually,[34] both in the sense that specific provisions must be read in context with the entire document,[35] and in the sense that complex documents typically cannot be rationally understood without an appreciation for the particular political or business context in which they were adopted.[36] Although those realities are not a broad license for judges to

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[34] *Cf.* Melvin A. Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 37 (1995) ("A reasonable interpretation of a text always depends on all the contextual circumstances . . . . Like a translator who renders a literal translation of a text, a strict-textualist judge fails to be faithful to the text. Like a union that works to rule, a judge who uses the methodology of strict textualism steps out of the proper subordinate status to unfaithfully frustrate the legislation that the judge is institutionally bound to further. Strict textualism reflects not the obedience that the court owes to the legislature, but an improper and indeed arrogant move by a subordinate to assume a role that is equal or even dominant to that of his master.").

[35] *Rubick*, 766 A.2d at 18; *see also Green v. Sussex County*, 668 A.2d 770, 775 (Del. Super. 1995) (quoting *E.I. DuPont de Nemours & Co. v. Clark*, 542 A.2d 760 (Del. Super. 1988)) (Courts must interpret a statute "so as to give a 'sensible and practical meaning to a statute as a whole' and to give effect to the object sought to be attained and to the general intent of the General Assembly.").

[36] In an influential debate between Lon Fuller and H.L.A. Hart in the Harvard Law Review — published the same year that *Delaware Power & Light* was decided — Professor Fuller illustrated this point well. In his article, Hart used a hypothetical statute — one that most first-year law students would recognize — to illustrate his point that the words used in statutes must have standard meanings if the statutes are to be effective. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). Hart posited the existence of a statute that makes it illegal to "take a vehicle into the public park." *Id.* He then argued that if the statute is going to have any meaning at all, the word "vehicle" must have some "standard instance" in which no doubts are felt about its application. *Id.* It is this principle, Hart argued, that allows someone to see that an automobile would clearly fall within his statute's scope. *Id.*

Fuller responded to this argument in two ways. First, he correctly pointed out that "we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of text." Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958). Surely, Fuller argued, paragraphs cannot have a "standard instance," but must instead be given meaning based on the context in which they appear. *Id.* Second, Fuller argued that even if the interpretative problem comes down to discerning the meaning of a single word, context plays an important role that Hart had glossed over. Fuller agreed with Hart that in his "no vehicles in the park" statute an automobile would clearly be prohibited. But, Fuller suggested, the reason for this is not because "automobile" is a "standard instance" of "vehicle," but because "we can see clearly enough what the rule 'is aiming at in general' . . . there is no need to worry about the difference between Fords and Cadillacs." *Id.* In other words, when it appears obvious how to apply a statute's command without asking what the purpose is, that is not because the purpose and context are not important,

invariably consider legislative history or parol evidence, they cannot be forgotten if the judge is to interpret the text sensibly.[37]

Likewise, precisely because our political tradition encourages citizens to resolve their affairs peaceably in accordance with the law and the bargains they strike with their fellows in reliance upon it, great weight is given to the practical interpretation that is given to complex documents after their adoption. When the parties under a contract give it an interpretation through a course of performance, that is given great weight in any interpretative dispute.[38] Similarly, when a statute has been applied by the relevant government organ in a consistent way for a period of years, that is strong evidence in favor of interpreting the statute in accordance with that practical application.[39]

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but because the purpose and context are so elementary that we synthesize them into our textual analysis without ever focusing specifically and separately on them. *Id.*

[37] *See F.C.C. v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 311 (2003) (Breyer, J., dissenting) ("It is dangerous, however, in any actual case of interpretive difficulty to rely exclusively upon the literal meaning of a statute's words divorced from consideration of the statute's purpose. That is so for a linguistic reason. General terms as used on particular occasions often carry with them implied restrictions as to scope. 'Tell all customers that . . .' does not refer to every customer of every business in the world. That is also so for a legal reason. Law as expressed in statutes seeks to regulate human activities in particular ways. Law is tied to life. And a failure to understand how a statutory rule is so tied can undermine the very human activity that the law seeks to benefit.").

[38] RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981) (ranking course of performance as persuasive evidence of the intent of the parties second only to the text of the contract itself).

[39] *Vegso v. Bd. of Trustees of the Employees Ret. Sys. of New Castle County*, 1986 WL 9019, at *4 (Del. Super. Aug. 20, 1986) (citing *Delaware v. Mayor of Wilmington*, 163 A.2d 258, 264 (Del. 1960)); *Council 81, American Fed'n of State, County and Municipal Employees v. Delaware*, 293 A.2d 567, 571 (Del. 1972) ("In seeking legislative intent, we give due weight to the practices and policies existing at the time [the statute] was enacted . . . . A long-standing, practical, and plausible administrative interpretation of a statute of doubtful meaning will be accepted by this Court as indicative of legislative intent."); *J.N.K., LLC v. Kent County Levy Court*, 974 A.2d 197, 209 (Del. Ch. 2009) (citing *Delaware v. Mayor of Wilmington* and holding that deferring to a county's interpretation of its own code is proper when the interpretation is "long-standing"); *Green v. Sussex Count*y, 668 A.2d 770, 775 (Del. Super. 1995) (citing *Delaware v. Mayor of Wilmington* for the same proposition); *McCusker v. Ret. Comm. of the*

Of course, the easy retort is that these doctrines of interpretation do not come into play if the document in question is unambiguous, in the sense of being subject to only one reasonable interpretation. Thus, say some, the fact that for a generation or more, a statute or contract has been interpreted as meaning X in its real world application does not constrain a judge from finding that contrary meaning Y is in fact the only reasonable way to read the instrument in question.[40]

But assuming good faith, and that all those affected have had a fair say in the matter,[41] it would seem rare indeed to discover that a practical construction that had been relied upon for many years was based on an entirely implausible reading of the text at issue. Although there are many wicked smart people, it takes immense intellectual bravado to decide that a large number of other people directly affected by the interpretation of a document just flat out blew it and have been reading the document in a clearly untenable way for a lengthy period of time. To do so requires the judge to have the confidence to know that his own ability to interpret written text in sensible context is

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City of Dover, 1986 WL 13993, at *3 (Del. Super. Nov. 21, 1986) (same); SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 49:3 (7th ed. 2010) (same). *Cf. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984) (holding that, as a general matter, reasonable agency interpretations of a statute should be given deference); *Skidmore v. Swift & Co.*, 323 U.S. 134, 137-40 (1944) (holding that agency interpretations of ambiguous statutes are entitled to respect by courts to the extent that they have persuasive power based on consistency, factual basis, and expertise).

[40] *See, e.g., Holder v. Hall*, 512 U.S. 874, 892, 944-45 (1994) (Thomas, J., concurring) (advocating for a complete reinterpretation of § 2(a) of the Voting Rights Act "explicitly anchor[ed] in the statutory text," and rejecting as an affront to the course of the nation "set by the people through their representatives in Congress," despite the "powerful concern" of *stare decisis*, "a disastrous [30-year] misadventure in judicial policymaking" in which "federal courts . . . engaged in methodically carving the country into racially designated electoral districts . . . .").

[41] *Plessy v. Ferguson*, 163 U.S. 137 (1896) would seem a good example of a situation when a prior judicial interpretation and ensuing societal implementation is owed little deference as legitimate.

so excellent and comprehensive that he can confidently conclude that he is not missing any other rational reading and that all the many others who have long harbored a contrary view are, sadly, just plain wrong.

The need for such confidence is palpable because, by taking such action, the judge will upset the expectations of those who made decisions in reliance upon the long-standing practical construction. That is, those who ordered their affairs believing that the statute or contract meant X, as it had been practically interpreted for many years, would now find that it meant Y, and suffer the costs that come with having relied on the prior construction. Those costs notably include potentially missing the chance to make patently clear that the document meant X, or to avoid being subject to the document at all, such as in a case like this when one might decide not to buy property in a community whose town council possessed plenary taxing authority.

Precisely because our republic is built on the notion that citizens should be able to depend on the law,[42] it is not surprising that there are additional legal doctrines that serve

[42] *See United States v. Title Ins. Co.*, 265 U.S. 472, 485 (1924) (noting the importance of citizens' ability to rely on settled law, and the court's inclination to avoid causing "injurious results" to those who have relied on that law in the event that the court alters it); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992) (noting the importance, in reevaluating the rule set forth in *Roe v. Wade*, of "whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it"); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) ("[O]ur reexamination of well-settled precedent could nevertheless prove harmful. . . . To overturn a decision settling one . . . matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability."); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289-90 (1990) ("[I]nevitability of change touches law as it does every aspect of life. But stability and moderation are uniquely important to the law. . . . [R]estraint in decisionmaking and respect for decisions once made are the keys to

to promote the ability of citizens to confidently rely upon the law. One of those doctrines is *stare decisis*.[43] When the interpretation of a statute has been the subject of litigation and the court has read the statute in a certain way, that interpretation should not be lightly set aside by future courts.[44] The reason is obvious: it disrupts the reasonable expectations of citizens ordering their affairs in accordance with the law for a judge to decide that a statute now means something different than was determined in a prior case.[45] When a judge does so on the basis that the previous jurist's reading was not even a plausible reading of the text, that can only have the effect of undermining confidence in our system of justice. Furthermore, when the prior judicial interpretation was subject to being overturned by the operation of the legislative process and was not overturned, the justification for departing from *stare decisis* is even more tenuous.[46]

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preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights.").

[43] "The rule of stare decisis means that when a point has been once settled by decision it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside even though it may seem in later years archaic." *Oscar George, Inc. v. Potts*, 115 A.2d 479, 481 (Del. 1955). Although *stare decisis* is not an "inexorable command," *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), nor a "mechanical formula of adherence to the latest decision," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833, 864 (1992).

[44] *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 124 (Del. 2006) (quoting *Oscar George, Inc. v. Potts*, 115 A.2d 479, 481 (Del. 1955)) ("Under the doctrine of *stare decisis*, settled law is overruled only 'for urgent reasons and upon clear manifestation of error.'").

[45] *See Oscar George, Inc.*, 115 A.2d at 481 (*Stare decisis's* "support rests upon the vital necessity that there be stability in our courts in adhering to decisions deliberately made after careful consideration."); *Casey*, 505 U.S. at 854; *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (*Stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); *United States v. Title Ins. Co.*, 265 U.S. at 485.

[46] *See Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (quoting *Patterson v. McClean Credit Union*, 491 U.S. 164, 172-73 (1989)) ("Considerations of *stare decisis* have

With these principles in mind, I turn to my resolution of the parties' arguments.

B. The Taxing Authority Of Newark Was Determined To Be Limited By This Court In 1958

The structure of my analysis begins where Newark says it should, with a focus on the key provisions of the 1951 Charter itself. But unlike Newark, I do not blind myself to the fact that the 1951 Charter was the subject of prior judicial interpretation by this court in 1958, a time much closer to the adoption in 1951 of the key language that Newark now relies upon.

According to Newark, the 1951 Charter responded to growth in the greater Newark area, due its status as the home of the University of Delaware and, more importantly, several new industrial facilities, such as Chrysler Corporation's Newark Assembly Plant.[47] The 1951 Charter thus nearly doubled the City in size and replaced its outdated late-nineteenth century charter with a more complex one that gave the City

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special force in the area of statutory interpretation, because unlike in the context of constitutional interpretation, the legislative power is implicated, and [the legislature] remains free to alter what we have done."); *IBP, Inc. v. Alverez*, 546 U.S. 21, 32 (2005) ("Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("we must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 260 (2008) (Roberts, C.J., concurring) ("In matters of statutory interpretation, where principles of *stare decisis* have their greatest effect, it is important that we not seem to decide more than we do."); *see also Hilton*, 502 U.S. at 202 (1991) ("Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision . . . ."); *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 146 (2008) (Ginsburg, J., dissenting) (same).

[47] Def. Op. Br. Ex. 1 ("A Brief History of Newark," from the Official Website of the City of Newark, *available at* http://www.cityofnewarkde.us/index/aspx?nid=56).

broad powers.[48] Newark now situates its 1951 Charter in the context of a "second wave of home rule reform" that was designed to give burgeoning suburban municipalities more authority to address the complex problems presented by their growth.[49] Newark says that the basic premise of this wave involved the following bargain: state legislatures would give municipalities the authority to adopt any measure the legislatures could themselves adopt, but reserve the right to preempt any exercise of authority that the legislatures found offensive.[50]

Newark relates this argument to § 7 of its 1951 Charter, which provided:

> Section 7. POWERS OF THE CITY:—The City of Newark shall have all the powers granted to municipal corporations and to cities by the Constitution and general laws of the State of Delaware, together with all the implied powers necessary to carry into execution all the powers granted. The City of Newark shall continue to enjoy all powers which have been granted to it by special acts of the General Assembly of the State of Delaware, except insofar as they may be repealed by the enactment of this Charter. The City of Newark, as body politic and corporate, shall succeed to, own or possess all property whether real, personal, or mixed, and all the rights, privileges, franchises, powers and immunities now belonging to, possessed by, or enjoyed by the former corporation known as "The Council of Newark."
>
> The City of Newark may have and use a corporate seal, may sue and be sued, may acquire property within or without its corporate limits by purchase, gift, devise, lease or condemnation, for the purpose of providing sites for public buildings, parks, sewer system, sewage treatment plant, water system, water plant, gas or electric system, or other municipal purposes, but not for a gas or electric manufacturing or generating plant, and may sell, lease, mortgage, hold, manage and control such property or utility as its interest may require; and except as prohibited by the Constitution of the State of Delaware or restricted by this Charter, the City of Newark shall and may exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever.

[48] *Id.* The 1951 Charter's predecessor was dated 1887. *Id.*
[49] Def. Op. Br. at 5 (quoting Barron, 116 HARV. L. REV. at 2325).
[50] *Id.* (quoting Barron, 116 HARV. L. REV. at 2326-27).

> *The enumeration of particular powers by this Charter shall not be held or deemed to be exclusive, but, in addition to the powers enumerated herein, implied thereby, or appropriate to the exercise thereof, it is intended that the City of Newark shall have and may exercise all powers which, under the Constitution of the State of Delaware, it would be competent for this Charter specifically to enumerate. All powers of the City, whether expressed or implied, shall be exercised in the manner prescribed by this Charter, or, if not prescribed herein, then in a manner provided by ordinance or resolution of the Council.*[51]

Under Newark's reading, the 1951 Charter would have been complete had it simply contained the italicized language. As Newark reads it, that language says that the City of Newark may exercise any power that the General Assembly could have specifically given it. Because this is a limitations of powers charter, Newark says that the rest of the Charter must be read as limitations on its powers, not as specific grants of power.

It is through this prism that Newark says another key provision of the 1951 Charter must be read. That provision is § 34, which stated:

> Section 34. POWER TO RAISE REVENUE:—The Council shall have the power to levy and collect taxes on real property within the limits of the City, except that which is not assessable and taxable by virtue of any law of the State of Delaware, *which shall not be more than $100,000 in any one year clear of all delinquencies and expenses of collection.* The Council shall have the right to grant or refuse, and to charge fees for licenses, or permits for traveling shows, and other businesses of any description within the limits of the City, to control their use of any property within the City. The Council shall also have the power to levy and collect franchise fees and to impose sewer rentals on sanitary sewers.
>
> All manufacturing plants *employing ten or more employees* hereafter established within the City of Newark or brought within the boundaries of the City of Newark by virtue of the adoption of this Charter, or by virtue of any future extensions of said boundaries *shall be exempt from City taxation*

[51] 1951 Charter § 7 (emphasis added).

> *for a term of ten years from the time said plants are established or brought within the boundaries of the City of Newark.*
>
> The Council shall have the power by ordinance to allow discounts for early payments of taxes, to impose reasonable penalties and forfeitures for tax delinquencies, and to review and determine proper and appropriate properties to be exempt from taxation.
>
> The Council shall have the power to fix the rates for general utility services operated by the City and to collect and utilize revenues from such utility services for the benefit of the City.[52]

By its plain terms, § 34 spells out certain powers that the City has to levy taxes. Likewise, it also plainly limits those powers, most notably by limiting Newark's ability to collect "more than $100,000" in property taxes annually and by exempting certain manufacturing plants from taxation during their first ten years of operation in Newark.

Regardless of the fact that § 34 does not have a provision stating that the City had broad authority to impose other kinds of taxes in addition to those specifically mentioned, Newark says that the 1951 Charter — and all of its successors which carried forward the language on which Newark now relies — gave the City such authority. The reason is simple. Because § 7 said that the City had all the authority that the General Assembly could have specifically given it and because § 34 does not specifically say that the City could not levy different kinds of taxes than were mentioned, it has all the authority that the General Assembly could give it to adopt a tax on landlords, or a general income or sales tax. All that § 34 limits is the Council's authority to impose a property tax of more than $100,000 annually or to tax manufacturing plants in their first ten years. Section 34 is thus simply an illustration of certain specific taxing powers Newark had and limitations

[52] 1951 Charter § 34 (emphasis added).

applicable only to those specific powers, and not a complete recitation of the City's taxing authority.

In order to decide this case, I need not and therefore do not conclude that Newark's argument about the meaning of the 1951 Charter is an implausible and irrational one. The language in § 7 of that Charter stating that Newark "may exercise all powers which, under the Constitution of the State of Delaware, it would be competent for this charter specifically to enumerate" is obviously broad. Section 7 also says that the fact that the rest of the Charter grants specific powers does not operate to suggest that other powers were denied to the City by the General Assembly.[53] Indeed, as Newark points out, our Supreme Court has held that where a charter, like Newark's, has an "all powers" provision, the specific provisions of the charter must be "read . . . as a limitation on governmental power, and not as a grant of specific powers."[54]

That Newark has advanced a plausible interpretation of the 1951 Charter does not mean that it has advanced the only plausible interpretation of that Charter. According to Newark, its reading is plainly mandated and obvious, especially when considered as part of the then-au courant "new wave" of municipal home rule. Anyone reading Newark's 1951 Charter should have realized that it was a vanguard charter, freeing Newark's City Council from the shackles of a past era in which municipalities only exercised the specific powers they were given and empowering the Council to freely pass legislation of

[53] The part of § 7 immediately preceding the "all powers" text states that the "enumeration of particular powers by this charter shall not be held or deemed to be exclusive, but [is] in addition to the powers" otherwise enumerated in the 1951 Charter.
[54] Def. Op. Br. at 10 (quoting *Schadt v. Latchford*, 843 A.2d 689, 693-94 (Del. 2004)).

virtually any kind that would be operative within the City's borders, absent a Delaware constitutional prohibition.

The problem for Newark is that its interpretation was not so obvious to one of the most distinguished jurists in this state's history, Chancellor Collins J. Seitz, when he was asked to consider the meaning of the 1951 Charter. In 1958 — a year rather closer in time to the adoption of the operative language upon which Newark relies than 2010 — Newark was sued by an electrical utility company, Delaware Power & Light. Delaware Power & Light complained that the City had imposed on it an unlawful, unconstitutional and void franchise fee.[55] The fee required the payment of $0.0005 for each kilowatt of power Delaware Power & Light sold within Newark to any customer other than the City itself.[56] As part of its response, the City suggested that even if the franchise fee could not be justified on its own terms, it could be justified as an exercise of the City's taxing authority.[57] Chancellor Seitz rejected this argument, holding that:

> *Although defendants apparently argue to the contrary, the ordinance under attack cannot be justified as an exercise of the City's taxing power because the limited taxing power delegated to the City clearly does not authorize the imposition of a gross sales tax.* In case of doubt, such a matter is resolved against the finding of such power. Compare *Consolidated Fisheries Co. v. Marshall*, 3 Terry 283, 32 A.2d 426.[58]

Chancellor Seitz then went on to conclude that the City lacked the authority under its 1951 Charter to impose the franchise fee on Delaware Power & Light and issued

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[55] *Delaware Power & Light*, 140 A.2d at 259. Although the ordinance specifically and exclusively named Delaware Power & Light, Delaware Power & Light made "no point about the fact that [it] [wa]s by name the only entity made subject to the franchise fee." *Id.* at 260.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 260-61 (emphasis added).

summary judgment declaring the franchise fee unenforceable.[59] The City of Newark took no appeal and Chancellor Seitz's judgment thus became final.

Newark slights the importance of Chancellor Seitz's ruling. Actually to say slight is to underestimate Newark's belittling of the decision. Newark fails to even cite it in its opening brief.

Unlike Newark, I do not find the ruling one to be belittled. *Delaware Power & Light* was a high-stakes matter in which the City had every incentive to, and in fact did, argue to this court that its imposition of a franchise fee that would raise revenue was justified by the 1951 Charter, including by its "taxing power."[60] The City's current lawyers fault the lawyers who represented Newark in that case, noting that in their briefs the lawyers never claimed that the so-called "all powers" language of § 7 that Newark's current counsel finds so patently supportive,[61] granted plenary taxing authority to the City. Thus, says Newark, no court has ever considered whether the "all powers" language authorizes the City to impose taxes beyond those listed in the specific section of

[59] *Id.* at 261, 263.
[60] *Id.* at 260-61; *see also* Def. Rep. Br. Ex. 2 (Newark's brief in *Delaware Power & Light* (1958)) at 10 ("The Defendant's contention is that the ordinance of October 16, 1956, imposing a franchise fee upon the operations of the Plaintiff within the City limits is based upon the power granted by Section 34 of the City charter to levy and impose franchise fees, which are a kind of tax.").
[61] *See* Def. Rep. Br. at 4 ("But neither case [including *Delaware Power & Light*] reaches its conclusion in light of 'all powers' language in the town's charter. Indeed, in both cases, this point simply is not considered. Neither opinion makes any mention of 'all powers' language, nor anything similar. Nor was the argument raised in the parties' briefs.").

the Charter addressing the City's power to raise revenue, which was at the time § 34 of the 1951 Charter. [62]

[62] But, Newark does contend that Vice Chancellor Marvel, in adjudicating a challenge to the City of Dover's imposition of special sewer assessments in the case of *Paul Scotton Contracting Co. v. Dover*, 301 A.2d 321 (Del. Ch. 1972), *aff'd*, 314 A.2d 182 (Del. 1973), reached a conclusion as to the meaning of the "all powers" language in the Dover charter that is consistent with Newark's argument. Dover's charter included a provision with nearly identical language to that of § 7 of Newark's 1951 Charter. In that case, Dover residents living along a newly constructed sewer line were, under a city ordinance, assessed fees on a frontage-foot basis to pay for the construction of the new sewers serving the community and argued that such assessments were "ultra vires" under Dover's charter. *Id.* at 322-24. Vice Chancellor Marvel admitted, perhaps too easily so, that "the power to levy special assessments cannot be fairly implied" from the City's power to operate a water plant and install additional sewer lines, "and do all things necessary for [their] maintenance and operation." *Id.* at 324 (quoting Dover City Charter § 25). But, he nonetheless concluded that the broadly empowering "all powers" language in Dover's charter allowed Dover to make the special assessments. *Id.* at 324-25.

Vice Chancellor Marvel, however, did not go so far as to say, as Newark does in support of its motion, that by virtue of the "all powers" language in Dover's charter, the City of Dover enjoyed complete and unfettered plenary taxing authority. Rather, Vice Chancellor Marvel read Dover's charter as giving it solely the right to construct a sewer and levy a special assessment to raise the revenue necessary to construct it. *Id.* His ruling does not state that Dover could have used its general "all powers" charter provision to levy taxes to pay for general government functions. Indeed, Vice Chancellor Marvel's conclusion that the similarly worded "all powers" section of the Dover city charter granted Dover "the authority to make special assessments" was explicitly tempered by his conditioning that finding on there being no "*express charter provision or applicable general law to the contrary*." *Id.* at 325 (emphasis added). Furthermore, Vice Chancellor Marvel, despite his previously noted conclusion that the power to levy special assessments to pay for construction of a sewer line could not be implied from its express power to install and maintain sewer lines, did give credence to the fact that Dover was granted "not only enumerated powers but those '* * * implied thereby * * *' or '* * * appropriate to the exercise thereof * * *'." *Id.* (quoting Dover City Charter). Thus, the argument made by Newark in its opening brief that the "Court of Chancery was convinced that [the "all powers" language] plainly and unambiguously conferred the power to tax" is not that plain or unambiguous at all. Indeed, one could rationally read Vice Chancellor Marvel's decision as using the "all powers" language to fill logical gaps between giving Dover the express power to establish and maintain a sewer line, and the lack of an express power in the charter to levy assessments to pay for that sewer line's construction. And, his reliance on an Oregon Supreme Court case for the "view that such a broad ["all powers"] provision in a city charter . . . would in and of itself be sufficient to empower a city to make special assessments for the construction of water lines" plausibly promotes a narrower reading of the *Paul Scotton* holding (one specifically limited to levying assessments for the construction of public utilities the city was specifically empowered to build) than Newark presses today. Finally, the fact that in *Scotton*, a different judge interpreted a different charter and may have reached a different conclusion does little to undermine the

The problem with that argument is, to use a word that Newark's current lawyers like, plain. If it was so plain, clear, unambiguous and obvious that the 1951 Charter was intended as a "new wave," "all powers" charter giving Newark's City Council authority in all areas as extensive as the General Assembly could specifically grant, it is jarring that qualified counsel and the City Council failed to recognize that. Were they all caught up in a vanguard they did not understand?[63]

Or does another, more mundane possibility exist? The 1951 Charter was itself adopted in a particular legal context in a particular polity, that of Delaware. As Chancellor Seitz's ruling reflects, Delaware law before his decision reflected the view that when in doubt, a municipal charter should be read not to grant taxing authority to a municipality.[64] That is, in the special area of taxation, our law was more skeptical of

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precedential force of *Delaware Power & Light.* What is important for purposes of *stare decisis* when interpreting a statute is that the precedential decision interpreted the *same* statute, not a different one adopted at a different time, by different people, etc. In this respect, what matters for purposes of interpreting Newark's Charter is the interpretation Chancellor Seitz gave it in 1958 in *Delaware Power & Light*, not what interpretation Vice Chancellor Marvel gave to Dover's charter — a different document outside the linguistic similarity previously discussed — in a 1972 decision.

[63] This is an epistemological problem that some philosophers have pondered. *E.g.*, MAURICE HALBWACHS, THE COLLECTIVE MEMORY 80-87 (Francis J. Ditter, Jr. & Vida Yazdi Ditter, trans., Harper & Row, Publishers, Inc. 1980) (1950) (opining that abrupt changes in societies are not experienced individually as such, nor are the implications of such abrupt changes fully understood until they are reconstructed at a later point in time by historians who "select[], combine[], and evaluate[] in accord with necessities and rules not imposed on the groups that had through time guarded [notable facts] as a living trust").

[64] *See Consol. Fisheries Co. v. Marshall*, 32 A.2d 426,429 (Del. Super. 1943), *aff'd*, 39 A.2d 413 (Del. 1944) (citing *United States v. Wigglesworth*, 28 F.Cas. 595 (Cir. Ct., D. Mass. 1842) ("In every case of doubt, therefore, such statutes are construed most strongly against the taxing power, and in favor of the citizen, because burdens are not to be imposed, or presumed to be imposed, beyond what the statutes expressly and clearly import."); *see also* 82 C.J.S. *Statutes* § 543 (2010) (citing precedent dating back to 1936) ("As a general rule, revenue or taxing law are to be strictly construed . . . against the imposition of tax."); SUTHERLAND STATUTES AND

municipal authority and required a clear showing that the General Assembly had given the municipality the taxing authority it claimed. The case that Chancellor Seitz cited — *Consolidated Fisheries Co. v. Marshall* — reflects that view, as did even earlier authority.[65] In this sense, Delaware shared a tradition with many of its sister states, who were chary about reading municipal charters as granting municipalities wide-ranging authority to impose taxes.[66]

Of course, Newark now says that the 1951 Charter was part of a movement to do away with precisely this kind of begrudging attitude toward municipal authority and that Chancellor Seitz failed to embrace the zeitgeist of his own era. But it also seems plausible that he instead simply took a more measured view of what the 1951 Charter was intended to do than does the City now.

STATUTORY CONSTRUCTION § 66:2 (7th ed. 2010) (same and citing precedent dating back to 1932); 38 AM. JUR. § 385 (1941) (same and citing precedent dating back to 1891).

[65] *See United States v. Wigglesworth*, 28 F.Cas. 595, 596-97 (Cir. Ct., D. Mass. 1842) ("In the first place, it is, as I conceive, a general rule in the interpretation of all statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import.").

[66] *See, e.g., Hukle v. City of Huntington*, 58 S.E.2d 780, 783 (W. Va. 1950) ("[I]t is a principle of general application that if doubtful language is employed in the taxing statute or ordinance that doubt will be resolved against the taxing authority and in favor of the taxpayer. Such principle is well stated in the following language: A municipality has no inherent power to levy taxes; it can do so only by virtue of authority delegated to it by the legislature. Its powers are limited, and the statute vesting it with power to tax must be strictly construed and strictly followed; in construing the statute all doubts should be resolved against the city and in favor of the taxpayer . . . .") (internal citations omitted) (citing precedent dating back to 1947); *Chism v. Jefferson County*, 954 So. 2d 1058, 1067 n.12 (Ala. 2006) (same and citing precedent dating back to 1954); *Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello*, 31 So. 2d 905, 910 (Fl. 1947) (same and citing precedent dating back to 1852); *Fischer v. Pittsburgh*, 112 A.2d 814, 817 (Pa. Super. 1955) (same and citing precedent dating back to 1868).

One can leave room for the "all powers" language to have real bite and still embrace, as Chancellor Seitz did, the notion that Newark was limited to the revenue-raising authority set forth in § 34 of the 1951 Charter. By its own terms, § 34 can be read as carefully cabining the City's authority to raise revenue. By specifically detailing only certain ways the City could raise revenue and by confining the amounts that the City could raise by those means and from whom it could raise those amounts, the text of § 34 could be read as carving out the entire subject of taxation from the all powers language of § 7. In other words, consistent with the proposition that the specific provisions of a so-called limitations of powers charter should be read as limitations, not as grants of authority,[67] § 34 could be read as a "limitation" restricting the City to the revenue-raising powers granted it in that section. To read it otherwise and as leaving the City free to impose an income or sales tax raising unlimited sums invites the question of why the General Assembly was so careful to limit the City's ability to raise more than $100,000 by means of a property tax. Did the General Assembly have some particular concern about raising more than that sum by a property tax while being entirely unconcerned if Newark raised more than that by other means, including by means such as an income or sales tax that might be exported to people who did not even live in Newark?[68] Put

[67] *See Schadt v. Latchford*, 843 A.2d 689, 693-94, n.22 (Del. 2004) (quoting *West Coast Advertising Co. v. San Francisco*, 95 P.2d 138 (Cal. 1939)) (home rule charters give the city "full control over its municipal affairs . . . *so long as the power is exercised within the limitations or restrictions placed in the charter*.") (emphasis added).

[68] Given the events of the years that followed *Delaware Power & Light*, one can rationally infer that the General Assembly's intention with respect to the "all powers" language was narrower than Newark contends. As shall be discussed, the Home Rule Statute suggests that the General Assembly believed that "all powers" provisions did not give municipalities carte-blanche taxing authority when in charters also containing a section specifically addressing taxing authority and

simply, it seems to me that irrespective of the fact that the articulation of a specific power in the 1951 Charter does not, without more, imply a limitation on other powers, the manner in which § 34 is written does plausibly suggest an intent to constrain the City's taxing authority to the means tolerated by § 34's begrudging terms. Section 34 is no mere section of empowerment. Rather, it is a carefully written section redolent with limitation. For Chancellor Seitz to reject the insinuation that the City retained broad taxing authority in the face of § 34, does not strike me as the impulsive action of a closed mind bent on ignoring a plain meaning he wished to avoid. Instead, his ruling is not hard to rationalize as one sensible reading of the 1951 Charter, a reading under which the City

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spelling out very limited authority. In this regard, it is also notable that Wilmington — Delaware's largest city — adopted its own home rule charter in 1965 that contained similar "all powers" language to that employed in Newark's Charter. In 1969, the city council of Wilmington adopted an ordinance assessing an income tax on every person, resident or non-resident, working in Wilmington. Wilmington City Code § 30-30. It did so not under any claimed plenary power to tax as a result of its charter's "all powers" provision, but instead under the authority of 22 *Del. C.* § 901, a statute specifically adopted by the General Assembly in 1969 by which the General Assembly expressly authorizes "[a]ny municipality of this State with a population in excess of 50,000 persons . . . to levy, assess and collect a tax for general revenue purposes on earned income of its residents and on any income earned within the city by persons not residing within such city but engaged or employed in any business, profession or occupation within such city." *Betts v. Zeller*, 263 A.2d 290, 291 (Del. 1970). Wilmington was, at the time *Betts* was decided, and still is, the only city in Delaware with a population over 50,000 inhabitants. *Wilmington, Delaware Quick Facts*, U.S. Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/10/1077580.html. This income tax was challenged, and upheld, in *Betts v. Zeller*, in which the Delaware Supreme Court held that the income tax, and city-ordained exemptions to it, constituted a proper exercise of a legislative grant of taxing authority. *Betts*, 263 A.2d at 296 ("[B]y the Enabling Act [in 22 *Del. C.* § 901], . . . the General Assembly delegated to the legislative body of Wilmington a general and unrestricted power to tax" income up to 1% of such income per annum.). Importantly, as Newark concedes here, *Betts* makes no reference to Wilmington's charter's "all powers" language and instead rests its decision to uphold the tax exclusively on the express enabling legislation. Indeed, the word "charter" is not mentioned anywhere in the *Betts* opinion.

was left with potent and flexible authority in many areas but constrained by § 34 in the traditionally sensitive area of taxation.[69]

Because Chancellor Seitz's ruling was never disturbed, the doctrine of *stare decisis* counsels strongly against embracing Newark's argument. That argument depends on an interpretation of Newark's taxing authority that is contradictory to that reached by Chancellor Seitz in *Delaware Power & Light*. And, as noted, in the area of statutory interpretation, *stare decisis* plays a critical role in ensuring that citizens can rely upon the law in ordering their affairs, and that the legislature can legislate based on the assumption that the statutory law means what it has been determined to mean in binding adjudications.

For these reasons, unless there was a material change to the 1951 Charter after the decision in *Delaware Power & Light* that broadened Newark's taxing authority,

[69] Section 7 of the 1951 Charter is perhaps best read as a sort of "catch-all," designed to afford Newark the flexibility it would need to address evolving circumstances through new government functions. For instance, if Newark wished to create a parks department to oversee the City's public parks or an arts department to encourage artistic performances and education, the "all powers" language in § 7 could be seen as the necessary umbrella grant of power that would dissuade any challenges to it doing so. But, as opposed to areas that the General Assembly left unaddressed by the 1951 Charter and susceptible to gap filling by the "all powers" language in § 7, it seems that the General Assembly was focused on the City's taxing authority, as is evidenced by the inclusion of the limitation-redolent § 34 in the 1951 Charter. That the General assembly would focus specifically on the area of taxation is, of course, unsurprising. Taxation is historically, and currently, a politically sensitive subject. Our state constitution reflects that sensitivity. It places special limits on the ability of the General Assembly to raise taxes. *See* DEL. CONST. art. VIII, § 10(a) ("The effective rate of any tax levied or license fee imposed by the State may not be increased except pursuant to an act of the General Assembly adopted with the concurrence of three-fifths of all members of each House."). By stark contrast, under Newark's argument, the General Assembly gave the City the broad ability to enact taxes by the simple majority vote required to pass ordinances. That is not only a bold move politically, it is also one with important economic ramifications for the state. If municipalities could levy a range of new taxes on economic activity, it could threaten the state's ability to compete as a home for economic activity, because the patchwork of various taxes could deter business formation and entry into Delaware.

adherence to *stare decisis* counsels denying Newark's motion for summary judgment, which attempts to have me embrace a different view than that taken by Chancellor Seitz.

As I now explain, the events after the decision in *Delaware Power & Light* only serve to demonstrate that Chancellor Seitz's reading was embraced by Newark itself as good law, and that the City took actions in reliance on that decision.

C. Newark's Own Conduct Confirms That Its Taxing Power Under The 1951 Charter Was Limited And Remains So Today

1. Newark Amends Its 1951 Charter Under The Authority Of § 830(b) Of The Home Rule Statute

In 1961, the Delaware General Assembly passed the so-called Home Rule Statute. Materially, § 802 of that statute provides in relevant part that:

> Every municipal corporation in this State containing a population of at least 1,000 persons . . . may, subject to the conditions and limitations imposed by this chapter, amend its charter so as to have and assume 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.[70]

The Home Rule Statute gave municipalities a special chance to amend their charters without having to gain the affirmative vote of the General Assembly. Under the Home Rule Statute, these special amendments are to be proposed by the governing body of the municipal corporation (i.e., the city council) and submitted to the municipal electorate to approve by way of a referendum.[71] Upon approval by a majority of the votes cast and

[70] 22 *Del. C.* § 802.
[71] 22 *Del. C.* § 811. In addition to the municipality adopting an amendment by referendum, "a charter may be amended by act of the General Assembly, passed with the concurrence of two thirds of all the members elected to each House thereof." *Id.* *Accord* DEL. CONST. ART. IX, § 1.

after the requisite filings,[72] the General Assembly has thirty days to negate the amendment by statute. "[F]ailure of the General Assembly to negate such charter amendment . . . shall be deemed to be an assent . . . and the charter amendment shall be as effective as if enacted into law by a [Delaware] statute."[73]

But, the Home Rule Statute had an important limitation on such special amendments. To wit, § 830(b) of the Home Rule Statute prohibits certain amendments that would expand a municipal corporation's taxing power:

> (b) No municipal corporation, *the charter of which imposes a limitation on the taxing power of the municipal corporation, shall amend its charter, pursuant to this chapter, so as to permit the municipal corporation to increase the amount of money that may be raised by taxes or to permit the levying of any new taxes, except* that any such municipal corporation which may amend its charter pursuant to this chapter may adopt a charter amendment pursuant to this chapter which provides that the municipal corporation may raise, in addition to the taxes necessary to service the bonded indebtedness of the municipal corporation, by taxes upon real estate, a sum of money not in excess of 2% of the total assessed value of all the real estate subject to taxation located within the municipal corporation.[74]

That is, § 830(b) makes sure that municipalities with limited taxing authority could only use the special chance to amend their charters to increase their property taxes to the 2% threshold spelled out in § 830(b), and not to permit the "levying of any new taxes."

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[72] "[N]o charter amendment so adopted [by referendum] will be effective until the chief executive officer files copies thereof with the Governor, President Pro Tem of the Senate, Speaker of the House, Secretary of State and the Director of the Legislative Reference Bureau, and until the General Assembly shall have been in session 30 calendar days after such filing." 22 *Del. C.* § 813.
[73] *Id.*
[74] 22 *Del. C.* § 830(b) (emphasis added).

On April 26, 1965, Newark, by way of a referendum pursuant to §§ 802 and 811 of the Home Rule Statute amended the 1951 Charter, "in order to secure for [itself] the benefits of municipal home rule and to exercise all the powers of local self-government under the Constitution and laws of the State of Delaware, pursuant to [the Home Rule Statute]."[75] It left the broad "all powers" language, previously in § 7 of the 1951 Charter, intact, simply moving it to § 201 and adding a sentence, italicized below, calling for a liberal construction benefitting the City:

> **201- POWERS OF THE CITY.**
>
> The City of Newark shall have all the powers granted to municipal corporations and to cities by the Constitution and general laws of the State of Delaware, together with all the implied powers necessary to carry into execution all the powers granted. The City of Newark shall continue to enjoy all powers which have been granted to it by special acts of the General Assembly of the State of Delaware, except insofar as they may be repealed by the enactment of this charter. The City of Newark, as a body politic and corporate, shall succeed to, own or possess all property whether real, personal, or mixed, and all the rights, privileges, franchises, powers and immunities now or heretofore belonging to, possessed by, or enjoyed by the City of Newark.
>
> The City of Newark may have and use a corporate seal, may sue and be sued, may acquire property within or without its corporate limits by purchase, gift, devise, lease or condemnation, for the purpose of providing sites for public buildings, parks, sewer system, sewage treatment plant, water system, water plant, gas or electric system, or other municipal purposes, and may sell, lease, mortgage, hold, manage and control such property or utility as its interest may require; and except as prohibited by the Constitution of the State of Delaware, or restricted by this charter, the City of Newark shall and may exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever.
>
> The enumeration of particular powers of this charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated herein, implied thereby, or appropriate to the exercise thereof, it is intended that the City of Newark shall have, and may exercise all powers which, under the Constitution of the State of Delaware, it would be competent for

[75] Charter Preamble.

> this charter specifically to enumerate. All powers of the city, whether expressed or implied, shall be exercised in the same manner prescribed by this charter, or, if not prescribed herein, then in a manner provided by ordinance or resolution of the council.
>
> *This charter shall be construed liberally in favor of the city, and nothing in this charter shall be construed as exempting any individual or agency from the operation of this section.*[76]

More important for purposes of this motion, the City of Newark, exercising precisely the leeway afforded to it under § 830(b), amended its charter in 1965 to expand its power to tax real property — previously limited to $100,000 annually in § 34 of the 1951 Charter. Specifically, Newark adopted a new section on its power to raise revenue — § 404 — which was materially identical to § 34 of the 1951 Charter, but added the italicized text below:

> **404 – POWER TO RAISE REVENUE.**
>
> *The council shall have the power to levy and collect taxes on real property within the city, except that which is not assessable and taxable by virtue of any law of the State of Delaware, which shall not be more than two (2) per cent of the assessed valuation of the assessable and taxable real estate within the city in any year clear of all delinquencies and expenses of collection; provided, however, in addition thereto, the council shall have the power to levy the taxes necessary to service the bonded indebtedness of the city.*
>
> The council shall have the right to grant or refuse, and to charge fees for licenses or permits for traveling shows and other businesses of any description within the city and to control their uses of any property within the city.
>
> The council shall have the power to levy and collect franchise fees and to impose sewer rentals on sanitary sewers.
>
> The council shall have the power by ordinance to allow discounts for early payment of taxes, to impose reasonable penalties and forfeitures for tax delinquencies, and to review and determine proper and appropriate properties to be exempt from taxation.

[76] Charter § 201 (emphasis added).

> The council shall have the power to fix the rates for utilities operated by the city and to collect and utilize revenues from such utilities for the benefit of the city.[77]

The amended provision in § 404 that allows Newark to levy taxes on real estate "which shall not be more than two (2) per cent of the assessed valuation of the assessable and taxable real estate," and the proviso that that two percent limitation will not be applicable insofar as such taxes are "necessary to service the bonded indebtedness of the city" tracks the tailored exception in Home Rule Statute § 830(b) that allows municipal corporations that have a preexisting limitation on their taxing power to expand their taxing power over real estate, but only to "raise, in addition to the taxes necessary to service the bonded indebtedness of the municipal corporation . . . a sum of money not in excess of 2% of the total assessed value of all the real estate subject to taxation located within the municipal corporation."

As the plaintiffs argue, Newark's adoption of an amendment tracking § 830(b) is strong evidence that Newark conceded that the 1951 Charter limited the City's taxing authority. Taking advantage of § 830, the City increased its property taxes from the 1951 Charter's limit of only $100,000 annually to the new statutory cap of 2% of the assessed value of all real estate within the City. The apparent speculation of Newark's new lawyers that the raise to 2% was somehow coincidental is unconvincing. The far more rational inference is that Newark accepted the *Delaware Power & Light* ruling, recognized it had only limited taxing authority, and seized the General Assembly-granted chance to substantially increase its property tax collections. By doing so, Newark also

[77] Charter § 404 (unamended) (italicized emphasis added).

accepted that it could not use the Home Rule Statute — in particular § 830 — to amend its Charter further to levy any other taxes outside the "2% of the total assessed value" property tax increase.

Of course, it is an established principle of statutory construction in this state, that where a piece of legislation is "doubtful or ambiguous in its terms, a practical administrative interpretation over a period of time, if founded upon plausibility, will be accepted by the courts as indicative of the legislative intent."[78] For instance, in this state's leading case articulating that principle, *Delaware v. Mayor of Wilmington*, our Supreme Court rejected the City of Wilmington's interpretation of an ambiguous statute when Wilmington's conduct over a course of the thirteen years preceding the suit against it was in direct conflict with the interpretation it urged at trial.[79] At issue there was Wilmington's unwillingness to continue to contribute payments to a firemen's pension fund unless and until the total amount in the fund dropped to a statutorily prescribed minimum.[80] The fund's trustees, on the other hand, urged a construction that imposed upon Wilmington the obligation to maintain the fund at its 1945 levels, the year in which an amendment was made to the Firemen's Pension Fund Law that required Wilmington to make appropriations to the fund in an amount "as may be required to meet all charges on [the Fund] not covered by the annual income on said Fund and the other revenues

[78] *Vegso v. Bd. of Trustees of the Employees Ret. Sys. of New Castle County*, 1986 WL 9019, at *4 (Del. Super. Aug. 20, 1986) (citing *Delaware v. Mayor of Wilmington*, 163 A.2d 258, 264 (Del. 1960)).
[79] *Delaware v. Mayor of Wilmington*, 163 A.2d 258, 264 (Del. 1960).
[80] *Id.* at 263.

coming into said Fund."[81] Our Supreme Court, "in view of the two divergent possible and logical constructions of the statute in question," concluded that the appropriate interpretation — and the one indicative of the General Assembly's intent — was that given the statute by the City of Wilmington itself as evidenced by its conduct after the conflicting 1945 amendment to the Firemen's Pension Fund Law was adopted:

> [a]s we have pointed out, for the period 1945 to 1958 the City of Wilmington *acquiesced* in the maintenance of the Fund at its 1945 level and appropriated *without question* such moneys as were required in addition to revenue received by the Trustees to defray the firemen's pension obligations.[82]

By adopting the Charter, Newark conceded that its taxing power was limited under the 1951 Charter, and took advantage of § 830(b) of the Home Rule Statute, a section that by its terms is applicable to those municipal corporations, "the charter of which imposes a limitation on the taxing power of the municipal corporation."[83] In other words, Newark, by its conduct in drafting, proposing, and submitting to the voting public an amendment to its 1951 Charter that manifested an understanding that its taxing power was limited, acquiesced to the interpretation urged here by the plaintiffs — namely, that § 34 of the 1951 Charter limited the City's power to tax and therefore any claim of general taxing authority thereafter is obviated by § 830(b) of the Home Rule Statute which bars a unilateral expansion of Newark's taxing authority outside the narrow confines in § 830.

In so finding, I note an obvious point. Had Newark believed its taxing power was general and limited only by the Constitution as it argues today, any amendment to its

[81] *Id.* at 262 (quoting 45 *Del. Laws* Ch. 168).
[82] *Id.* at 264 (emphasis added).
[83] 22 *Del. C.* § 830(b) (emphasis added).

1951 Charter, taxing provisions or otherwise, would have been entirely unnecessary. Indeed, by Newark's reasoning in this suit, it could have adopted a wage tax, sales tax, and income tax at any time after 1951 in an ordinance to that effect, but not only has it declined to do so, it also continues to promulgate ordinances, such as the Rental Permit Fee Ordinance, in conformity with its specifically enumerated powers in § 404, not under its general power to tax it now claims for itself under the "all powers" language of § 201. Furthermore, to the extent that Newark's current lawyers argue that the City was subject only to the limitations on its ability to raise property taxes and just used § 830(b) of the Home Rule Statute to get around the $100,000 limit, they run into the language of § 830(b) that specifically conditioned the right to increase property taxes to "2% of the total assessed value of all the real estate" located in the municipality by prohibiting any such municipality from otherwise "increas[ing] the amount of money that may be raised by taxes or . . . levying . . . any new taxes" by a charter amendment under the Home Rule Statute.[84] Given that § 830(b) specifically barred charter amendments to levy new taxes using the special amendment provisions of the Home Rule Statute, it is difficult to conceive that § 830 allowed towns availing themselves of it to enact new taxes by simple ordinances. In other words, even when considered from this perspective, history supports the inference that Newark's own City Council itself viewed the City as having limited, not plenary, taxing authority.

[84] 22 *Del. C.* § 830(b).

2. The General Assembly Affirmatively Expands Newark's Taxing Power By Adopting A New Amendment To Newark's Charter In December, 1965

After Newark enacted its amended Charter in the spring of 1965 using the special amendment procedure of the Home Rule Statute, Newark continued to conduct itself under a belief that its taxing power was limited to those enumerated instances now codified in § 404, and had to seek any additional revenue-raising power from the General Assembly by way of a specific charter amendment requiring an affirmative vote of two thirds of the members in each house.[85] Thus, later in 1965 itself, Newark sought and obtained the General Assembly's affirmative approval of an amendment to its Charter that gave Newark the specific power to levy a *new* tax on certain infrastructure. That charter amendment added the following paragraph to § 404:

> The council shall have the right to levy and collect taxes upon all gas mains, water lines and telephone, telegraph power poles or other erections of like character erected within the limits of the City of Newark, together with the wires, cables and appliances thereto or thereon attached, as well as such wires, cables and appliances which may be installed underground and to this end may, at any time, direct the same to be included in or added to the city assessment. In case the owner or lessee of such poles or erections and such wires, cables and appliances shall refuse or neglect to pay the taxes that may be levied thereon, the said taxes may be collected as in the case of other taxes.[86]

After 1965, the City's actions are entirely consistent with its acceptance that it could only raise revenue using the authority spelled out in § 404 and could not impose new kinds of taxes. Although not a feature of the record, the absence of any citation by Newark to exercises of taxing authority by using the "all powers" language found in both

[85] DEL. CONST. art IX, § 1.
[86] 55 *Del. Laws* Ch. 289 (approved December 27, 1965).

Charters, either before or after 1965, is strong evidence that it was not a source of such authority, and that the City did not view it as such. For all the reasons the City's lawyers cite, Newark could have used additional revenue to address its needs. But it never looked to either § 7 of the 1951 Charter or § 201 of the Charter for authority to levy taxes. Most relevant to this discussion is what the City did do when it adopted the Rental Permit Fee Ordinance, and what it did shortly before this case in June 2009.

3. Newark Adopts The Rental Permit Fee Ordinance As A Permit Fee Under § 404 And Not As A Tax Using Any "All Powers" Authority In § 201

In 1987, Newark enacted the Rental Permit Fee Ordinance that the plaintiffs now attack, but not as a tax. Rather, that Ordinance was adopted as a permit fee pursuant to § 404 of the Charter, which expressly allows the Council to "grant or refuse, and to charge fees for licenses or permits for traveling shows and other businesses of any description . . . ."[87] Only when sued did Newark do an about face and claim the general power to tax that would save the alleged permit fee if found to be excessive, and therefore a tax. Newark's failure to rely upon § 201 as a source of authority again suggests acceptance by the City of the fact that its ability to raise revenue was limited to that set forth in § 404.

4. Shortly Before This Litigation Arose, Newark Passed An Ordinance Admitting Its Limited Taxing Authority And Asking The General Assembly To Pass A Charter Amendment Giving It The Plenary Taxing Authority It Now Claims

The most obvious admission by the City of its limited taxing authority is very recent and very plain. Long after the Rental Permit Fee Ordinance was adopted, but just

[87] Charter § 404.

over four months before the plaintiffs filed this suit, Newark's City Council unanimously resolved,[88] in June 2009, that its "taxing authority . . . has historically been limited by its municipal Charter" and requested that the General Assembly grant it what it now claims to have had ever since the 1951 Charter:

> the power and authority to license, tax, and collect fees annually or more frequently for any and all city purposes of such various amount or amounts as the council shall, from time to time, fix from any individual, firm, association or corporation carrying on or practicing any activity, business, profession or occupation within the limits of the city.[89]

To date, the General Assembly has not seen it fit to grant Newark this authority. But Newark now asks me, as a judge, to recognize that it was wrong in finding that it did not already have this plenary authority. Being rather traditional, I instead find Newark's own affirmance of the long-standing interpretation of its Charter in 2009 to be another strong reason to adhere to the interpretation persisting since *Delaware Power & Light* was decided in 1958.

V. Conclusion

In conclusion, Newark's Charter has been interpreted consistently for over a half-century as one that although broadly empowering, places limitations on the City's ability to act in the historically sensitive area of taxation. Indeed, the City's ability to impose property taxes at the current rates depends on its prior recognition of its otherwise limited taxing authority. Although from a certain perspective, the certainty of the City's current lawyers in discovering a meaning of Newark's powers all their predecessors as City

[88] Pl. Ans. Br. Ex. 5 (Newark City Council Meeting Minutes (June 8, 2009)).
[89] Pl. Ans. Br. Ex. 4 (Newark City Council Resolution No. 09-L (June 8, 2009)).

counsel missed might be considered creative and laudable, their argument requires for its acceptance a willingness to assume that all the well-equipped and well-motivated minds who have interpreted the Charter since 1951 have missed a reality of the supposedly most obvious and plain kind. I do not so assume. Rather, I adhere to *stare decisis*, and to an interpretation of Newark's Charter consistent with that upon which citizens and our General Assembly have reasonably relied for generations.

For the foregoing reasons, the City of Newark's motion for summary judgment is DENIED.[90]

[90] An order granting the plaintiffs' motion to certify a class is also granted. Newark conceded that class certification was in order if its motion was denied. Stipulation and Order on Plaintiffs' Motion for Class Certification (May 12, 2010).