

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

RICHARD J. KORN and ANDREW)
DAL NOGARE,)
)
Plaintiffs,)
)
v.)
)
NEW CASTLE COUNTY, a political)
subdivision of the State of Delaware,)
CHRISTOPHER A. COONS, as)
County Executive and David W.)
Singleton as Chief Administrative)
Officer, and PAUL G. CLARK, as)
President of New Castle County Council,)
and JOSEPH REDA, ROBERT S.)
WEINER, WILLIAM J. TANSEY,)
PENROSE HOLLINS, KAREN G.)
VENEZKY, PATTY W. POWELL,)
GEORGE SMILEY, JOHN J.)
CARTIER, TIMOTHY P. SHELDON,)
JEA P. STREET, DAVID TACKETT, and)
JAMES W. BELL as Members of New)
Castle County Council,)
)
Defendants.)

Civil Action No. 767-N

OPINION

Submitted: January 11, 2005
Decided: February 10, 2005
Revised Cover Page: February 14, 2005

Ronald G. Poliquin, of YOUNG, MALMBERG AND HOWARD, P.A., Dover,
Delaware, Attorney for Plaintiffs

Dennis J. Siebold, Acting County Attorney, NEW CASTLE COUNTY LAW
DEPARTMENT, New Castle, Delaware, Attorney for Defendants

CHANDLER, Chancellor

This case was initiated by two taxpayers and residents of New Castle County, Delaware, who allege that New Castle County, and various members of the County government, acted illegally by accumulating “unauthorized reserves” within New Castle County’s General Fund and Sewer Fund. Resolution of this issue will necessarily touch upon broad public concerns of governmental accountability and fiscal responsibility. Consequently, this Court is cautious not to impermissibly encroach upon the independent authority of each separate branch of county government.

New Castle County, as a political subdivision of the State, should be accorded a degree of deference necessary to manage its affairs for the benefit of its citizens. Embodied in this approach is the notion that most disputes concerning the County’s policies are political in nature and must be resolved at the polls, not in the courts. This is a rare case, however, where the County, despite its broad home rule powers, exceeded its own authority established by law. It is therefore appropriate for the Court to resolve this controversy, as it is clear that once the County had determined for itself that it would retain surplus revenues (and established the procedure by which that should be accomplished) the County became obligated to follow its own ordinance. Indeed, the concept of fidelity to the law “presupposes a

commitment by the governing authority to abide by its own rules”¹ The public has a right to expect no less.

Plaintiffs’ complaint contains five counts. Count I seeks a judgment declaring that the “New Castle County Executive and County Council Members cannot make appropriations beyond the fiscal year unless encumbered.”² Count II seeks a judgment declaring that the “New Castle County Executive cannot create off-budget reserve accounts other than those within the General and Sewer Fund.”³ Count III seeks a judgment declaring that the “amount of the reserve fund cannot exceed 20 percent of the total estimated revenue of the fund for the fiscal year.”⁴ Counts IV and V requests a preliminary and permanent injunction staying an \$80 million bond sale, pending resolution of the issues raised in Counts I through III.⁵

The parties have stipulated to the material facts and have filed cross-motions for summary judgment. For the reasons set forth below, I grant the relief requested in Counts I through III of the complaint. I dismiss Count IV as moot and, in the exercise of my discretion, I deny the request in Count V for an injunction permanently enjoining the bond sale.

¹ LON L. FULLER, THE MORALITY OF LAW 234 (Yale University Press, 1964).

² Compl. at 11.

³ *Id.*

⁴ *Id.* at 12.

⁵ *Id.* at 13, 15.

I. BACKGROUND

On October 20, 2004, Richard Korn and Andrew Dal Nogare, who are both residents and taxpayers of New Castle County, brought suit against: (1) New Castle County, the nominal defendant and a political subdivision of Delaware; (2) Thomas Gordon—the County’s former Executive; (3) Sherry Freebery—the County’s former Chief Administrative Officer; and (4) the then seven Members of the New Castle County Council. Their complaint was predicated upon the County’s budgetary process and the administration’s policy of accumulating unlimited reserves within the County’s General and Sewer Fund.

Since the filing of the complaint, several months and one election have passed. This election replaced Thomas Gordon with Christopher A. Coons as the new County Executive. Coons then named David W. Singleton to replace Sherry Freebery as Chief Administrative Officer. In addition, six seats were added to the County Council to increase the seven-member Council to thirteen. Despite this election, the erroneous policies of the former administration remain in effect, thus keeping the controversy ripe for decision. As such, the Court is required by law to substitute the newly

elected officials for the defendants that they have replaced.⁶ It is left, therefore, to the new stewards of New Castle County to give effect to this decision and to put right the errors they have inherited.

A. Gordon's Speech

Plaintiffs' complaint finds its genesis in the budgetary policies of the previous administration. Those policies were brought to light during Thomas Gordon's annual budgetary address delivered in March 2004. That speech highlighted a 2005 operating budget of \$207.5 million and a capital budget of \$68.4 million.⁷ The capital budget is funded predominately through the issuance of general obligation bonds with the balance derived from various other sources. In terms of the operating budget, income is derived from numerous sources, the greatest of which is the \$98.5 million generated from real estate and real estate transfer taxes. Once collected, the

⁶ Christopher A. Coons is substituted for Thomas P. Gordon in his capacity as county executive; David W. Singleton is substituted for Sherry Freebery in her capacity as Chief Administrative Officer; Paul G. Clark is substituted for Christopher A. Coons in his capacity as County President. *See* CT. CH. R. 25(d). Since the filing of this action, J. Robert Woods has resigned from County Council and was replaced by Joseph Reda. Reda is therefore substituted for Woods in his capacity as Council Member. *See id.* On December 22, 2004, plaintiffs filed an uncontested letter indicating to the Court that six new seats were added to the County Council. The Court finds that in these parties absence, complete relief could not be accorded among those already parties. I therefore treat plaintiffs' letter as a motion filed pursuant to Chancery Rule 19(a) and join: George Smiley, John J. Cartier, Timothy P. Sheldon, Jea P. Street, David Tackett, and James W. Bell. All of the defendants have been represented in their official capacity by the Acting County Attorney, Dennis Siebold.

⁷ Parties' Limited Stipulation of Facts ("LSF") at 5 ¶ 12 & Ex. A.

money used for the County's operations is designated to three funds: the General Fund, the Sewer Fund, and the Street Light Fund. From these three funds, 71 percent (\$147,703,795) of the 2005 fiscal year budget is derived from the General Fund, the Sewer Fund represents 27 percent (\$56,534,674), and the Street Light Fund comprises the rest.

In addition to the revenues annually collected by the County, Gordon's speech went on to reveal that the County had accumulated a combined surplus of \$242 million.⁸ This amount marked a steady increase of reserves held by the County and, in fact, from fiscal year 1996 through 2003, "reserves" within the General Fund alone grew from \$30 million to \$139 million.⁹ Gordon explained that he had "created reserve accounts and stabilization accounts to earmark [the] surplus dollars to protect [the County's] future from tax increases."¹⁰ Outlining "the plan for how [the] \$242 million"¹¹ was to be used, Gordon highlighted twelve discrete reserve and stabilization accounts from which the money would be spent. Those accounts include: \$61 million for financial reserves to protect the property tax rate; \$59 million for sewer capital replacement and renovation; \$29

⁸ LSF at 5 ¶ 12.

⁹ *Id.* Ex. B ("Audited General Fund Balance").

¹⁰ Pls.' Resp. to Req. for Produc. of Docs. Ex. A ("Thomas P. Gordon, Budget Message to New Castle County Council, March 2004," ("Budget Message")) at 17. *See also* LSF at 5 ¶ 11 (stipulating to accuracy of the Budget Message).

¹¹ Budget Message at 17.

million for the sewer fund earmarked for user rate stabilization; \$26 million for “pay as you go” funding of selected capital projects; \$26 million for the general fund legislated “rainy day” fund; \$10 million for the sewer fund legislated “rainy day” fund; \$9 million for general fund undesignated balances; \$9 million in a general fund reserve for future compensated absences; \$4 million for operating costs of new and expanded facilities; \$6 million for self-insurance fund; \$2 million for fleet replacement reserve; and \$1 million for community services designated grants. Out of these twelve categories, only two represent amounts the County was authorized to hold. Those reserves include the “\$26 million for the general fund legislated ‘rainy day’ fund”¹² and the “\$10 million for the sewer fund legislated ‘rainy day’ fund.”¹³ The remaining “reserve and stabilization accounts” are not authorized by state law or the New Castle County Code. Rather, the money is held for “future applications”¹⁴ in four discrete investment accounts and, despite their executive designations, there is no limitation on how the money is spent.¹⁵

¹² Defs.’ Am. and Supplemental Resps. to Pls.’ Req. for Admis. at 10 ¶ 15 (“This account was specifically legislated by New Castle County Council pursuant to §14.01.013 of the New Castle County Code.”).

¹³ *Id.* at 11 ¶ 17 (“This account was specifically legislated by New Castle County Council pursuant to §14.01.013 of the New Castle County Code.”).

¹⁴ LSF at 5 ¶ 13

¹⁵ *Id.*

In short, as of June 30, 2004, New Castle County Council had accumulated a surplus of approximately \$237 million.¹⁶ Even more confounding is that approximately \$200 million of that surplus clearly exceeds the amount of reserves the County is authorized by law to hold. These numbers overshadow, and in fact exceed, 100 percent of the estimated revenues the County expects to take in through various taxes, fees, and state reimbursements in fiscal 2005.

B. The \$80 million Bond Sale

In March 2004, Ronald A. Morris, the County's former Chief Financial Officer, presented to the Council his long-term financial projections that included the gradual drawdown, through fiscal year 2009, of the executively designated reserves.¹⁷ That presentation indicated that the current revenues within the General Fund would be insufficient to fund current expenditures beginning in fiscal year 2005.¹⁸ Morris indicated further that at the County's current rate of spending, some of the

¹⁶ As of June 30, 2004, \$145,302,914 of this surplus is held in the County's General Fund. Of that amount only \$27,005,000 is allocated to the legislatively created General Fund's "rainy day" reserve account. Similarly, \$91,177,761 of surplus monies is held in the Sewer Fund, with \$9,754,679 allocated to the legislatively created "rainy day" reserve account. *See* LSF Exs. A-C.

¹⁷ LSF at 5-6 ¶ 16.

¹⁸ *Id.*

accumulated surplus would need to be tapped or an increase in property tax rates would be inevitable.¹⁹ Morris concluded his presentation by indicating that the County's growing deficits would deplete the entire surplus by fiscal year 2009.²⁰

In September 2004, the Council met to discuss methods of funding various capital projects previously approved. To that end, the Council considered approving the issuance of \$80 million in County bonds. During the meeting, Morris submitted a report suggesting that if the bonds were not issued and the Council in fact drew on the surplus to fund these capital projects, the surplus would not gradually deplete over the next four fiscal years, but instead, would dry up much sooner.²¹ That report estimated that without issuing the bonds, a property-tax increase, as much as 15 percent the first year, with a regular annual increase of five percent thereafter, would be necessary.²² On October 5, 2004, the Council approved the bond issue.²³ Fifteen days later, plaintiffs filed this action.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 6 ¶ 17.

²² *Id.*

²³ *Id.*

II. ANALYSIS

A. Applicable Legal Standards

On October 20, 2004, plaintiffs filed their five-count complaint. Three of those counts sought a declaratory judgment. The last two counts sought a preliminary and permanent injunction. On October 25, 2004, defendants filed a motion for judgment on the pleadings and their brief in opposition to the injunctions. Before a hearing on the injunctions, defendants voluntarily stayed the bond issuance pending resolution of Count I through Count III of the complaint. Both parties have conducted discovery, have filed the Limited Stipulation of Facts, and now present their cross-motions for summary judgment.

In light of this procedural history, the Court now finds the following issue before it. First, because defendants have submitted matters outside the pleadings, I will treat their Rule 12(c) motion as a motion for summary judgment pursuant to Rule 56. I will, therefore, consider the arguments defendants presented in their Rule 12(c) motion concurrently with their present cross-motion for summary judgment and will apply the same standard to the issues raised in both motions. Second, because defendants have voluntarily stayed the bond issue until a decision is reached, I consider

the relief sought in Count IV of the complaint moot and dismiss it as such.²⁴

That leaves the Court to consider whether summary judgment is appropriate to resolve the issues implicated in Counts I through III and Count V of the complaint.

A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”²⁵

When the Court is faced with cross-motions for summary judgment the same standard must be applied to each of the parties' motions and the mere existence of cross-motions does not necessarily indicate that summary judgment is appropriate for one of the parties.²⁶ Thus, when presented with cross-motions for summary judgment a movant will be granted relief only if the Court determines that the record does not require a more thorough development to clarify the law or its application to the case.²⁷ As applied to Counts I through III, this standard is met and will therefore be decided

²⁴ See *City of Wilmington v. Wilmington FOP Lodge # 1*, 2004 Del. Ch. LEXIS 86, at *7 (June 22, 2004) (dismissing as moot a motion for preliminary injunction to enjoin arbitration proceedings when parties voluntarily rescheduled).

²⁵ CT. CH. R. 56.

²⁶ *Kronenberg v. Katz*, 2004 Del. Ch. LEXIS 77, at *38 (May 19, 2004).

²⁷ *Id.*

pursuant to Rule 56(c).²⁸ The facts concerning Count V, however, are not sufficiently developed and therefore summary judgment is not appropriate.

B. New Castle County's Authority to Carry Reserves

The Court first turns to the organic authority of the Council to carry surplus funds, and begins that analysis by looking to the County's charter.²⁹ There we find that the State has delegated to the County "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."³⁰ Clearly within that delegation are the enumerated powers to adopt annual operating and capital budgets.

These budgets are adopted as one would expect—through the combined efforts of *both* the County's Executive and the Council. The process begins with the County Executive who identifies and estimates the County's expenditures. If the revenues for the year are insufficient to meet that demand, the County Executive must recommend "revenues sufficient to

²⁸ The Court is positioned to grant summary judgment as to Counts I through III, because the Limited Stipulation of Facts creates a record sufficient to determine that no genuine issue exists as to any material fact and, to a large extent, the relevant questions presented by those Counts concern statutory interpretation.

²⁹ It remains unclear whether plaintiffs still take issue with the authority to carry a reserve but because defendants have briefed the issue it is herein addressed. *See, e.g.*, Defs.' Br. in Supp. of Mot. for Summ. J. ("Defs.' Open. Br. ") at 7.

³⁰ 9 *Del. C.* § 1101.

achieve a balanced budget.”³¹ These projections are then submitted to the County Council for their consideration.³² If accepted, the Council “ordain[s] such taxes and other revenue measures as will yield sufficient revenue, which, together with any available surplus, will balance the budget. Thus, both the Council and Executive are vested with wide discretion³³ when adopting and administering the County’s two budgets.³⁴ This discretion remains, however, subordinate to the State’s proscription on spending more than the County takes in.³⁵ The public policy incorporated into an annual balanced budget requirement is strong and the effect twofold. A balanced budget first, “inculcate[s] sound business principles and practices into the [county economy,] with particular reference to avoidance of waste,

³¹ 9 *Del. C.* § 1132(d).

³² Once the proposed operating budget is completed, and no later than April 1, the County Executive presents to the County Council the annual budgets in a form of ordinance ready to be enacted. *Id.* §§ 1132(f), 1134(c).

³³ Eight specific categories must be included in the operating budget. *See, e.g., id.* § 1132(e)(1)-(9). Although no specific line items are mentioned, there are several limitations on the preparation of the capital budget (limitations not relevant to the decision today). *See id.* §§ 1134(a)-(e).

³⁴ The County is authorized by law to administer two budgets—the annual operating budget and the annual capital budget. The operating budget allocates the County’s operating funds for the fiscal year beginning July 1 and ending June 30. The capital budget allocates funds to the County’s capital program. By law, the capital budget must be adopted before the operating budget, thus affecting the revenues available for the operating budget. *See id.* § 1159(a).

³⁵ “The annual operating budget ordinance shall not become effective until the County Council shall have adopted revenue measures which, together with the available surplus, shall in the opinion of the County Executive be estimated to yield sums at least sufficient to balance the proposed expenditures. The Office of Finance shall not approve any expenditure under any portion of an annual operating budget ordinance until such balancing shall have been provided.” *Id.* § 1158(d).

extravagance, and ill-considered expenditures.”³⁶ Second, by dispelling opaqueness with transparency, interested taxpayers are provided a window into the “anticipated disposition of public moneys.”³⁷

Nowhere in this statutory design is the power to set aside surplus money expressly denied. In fact, the only reference to surplus money is the affirmative obligation to use any available surplus to balance each year’s operating budget. Thus, each year, the County’s charter envisions that the money not expended or encumbered will lapse and become available to appropriate to another item that year—through a supplemental budget ordinance—or will become available for the proceeding year to balance the budget.³⁸ If, however, unencumbered cash were appropriated to a duly created reserve account, it would, of course, become unavailable to balance the budget. This process of taking unencumbered cash and appropriating it to a reserve allows the County to carry a surplus for that fiscal year instead of expending it to balance the budget. Indeed, it makes sense to keep a certain amount of easily liquidated assets on hand to fund “any unanticipated

³⁶ 56 AM. JUR. 2D Municipal Corporations § 535 (2000).

³⁷ *Id.*

³⁸ 9 *Del. C.* § 1133(a); *see also* 63C AM. JUR. 2D. Public Funds § 46 (defining the term “lapse”).

deficit in any given fiscal year or to provide funds required as a result of any revenue reduction enacted by the General Assembly or County Council.”³⁹

A similar method of maintaining surplus funds through a reserve system is also employed by the State.⁴⁰ The existence of this power on the State level suggests, “it would be competent for the General Assembly to grant [to the County the power to create and fund reserve accounts] by specific enumeration.”⁴¹ A noteworthy question, not raised by the parties and therefore not before the Court, is this: how large a reserve is the County authorized to carry? By Constitutional design, the State is limited to a five percent reserve account. Would it be competent for the State to delegate a budgetary power beyond its own? Notwithstanding these interesting questions, the Court concludes that the County is authorized to carry surplus funds through the use of its reserve accounts.⁴²

C. The Legality of Carrying Reserves in Excess of 20 Percent

With the budgetary process (and the policy that process implicates) in mind, the Court turns to the \$230 million in reserves now held in the

³⁹ County Code § 14.01.013(C).

⁴⁰ See DEL. CONST. art. VIII, § 6(b)-6(d).

⁴¹ 9 *Del. C.* § 1101(a).

⁴² Plaintiffs direct the Court’s attention to *Korn v. Gulotta*, 72 N.Y.2d 363 (N.Y. 1988). In *Korn*, New York’s highest court ordered the Nassau County Council to adopt a new budget because the budget at issue failed to set forth the year-end estimated cash balance and all estimated revenues as required by Nassau County Charter § 302 (5). No similar requirement is found in New Castle County’s charter. Thus, while the opinion in *Korn* is informative, its rationale is not applicable here.

County's coffers. Plaintiffs contend that the language governing the amounts held in the reserve accounts is unequivocal and that New Castle County's Code ("County Code") § 14.01.013, which was adopted in April 2001, clearly provides that "[t]he amount of these reserves in each fund [*i.e.*, the General and Sewer funds] at the beginning of each fiscal year *shall be equal* to twenty (20) percent of the total estimated revenues of that fund for that fiscal year."⁴³ Defendants respond by arguing that the ordinance establishing the reserve accounts was intended to serve as a floor and not a maximum.⁴⁴ Defendants also contend that the comments embodied in Gordon's budget address were simply remarks and "did not create true

⁴³ County Code at § 14.01.013(B) (emphasis added). Section 14.01.013 provides, in its entirety, as follows:

Sec. 14.01.013. Budget Reserve Account.

- A. There is hereby established a Budget Reserve Account within the General Fund and the Sewer Fund.
- B. The amount of the reserve in each fund at the beginning of each fiscal year shall be equal to twenty (20) percent of the total estimated revenues of that fund for that fiscal year.
- C. County Council may, by a five-sevenths (5/7) vote, appropriate from the Budget Reserve Account such sums as may be necessary to fund any unanticipated deficit in any given fiscal year or to provide funds required as a result of any revenue reduction enacted by the General Assembly or County Council.
- D. Any change to the percentage allocation to the Budget Reserve Account of either the General Fund or the Sewer Fund shall require a five-sevenths (5/7) vote of County Council.

⁴⁴ See Defs.' Answering Br. in Supp. of Mot. for Summ. J. ("Defs.' AB") at 11; *see also* Affidavit of Ronald A. Morris, former Chief Financial Officer, New Castle County ("Morris Affidavit") ¶¶ 8-9; Affidavit of Christopher A Coons, former President, New Castle County Council ("Coons First Affidavit") ¶ 2; Affidavit of Karen G. Venezky, Member, New Castle County Council ("Venezky Affidavit") ¶ 3; Affidavit of Robert S. Weiner, Member, New Castle County Council ("Weiner Affidavit") ¶ 2.

‘accounts’ or binding financial appropriations or obligations on the part of the County” and that this contention “was understood by County Council, which actually voted on the budget and, later, voted to approve the bond issue that is central to this controversy.”⁴⁵ I address these contentions in turn.

First, defendants’ reliance on the legislative intent at the time the ordinance was adopted is unavailing. In the face of unambiguous statutory language, the Court’s sole method for determining legislative intent is by looking to the plain meaning of the statutory language employed.⁴⁶ Only if the language appears ambiguous will the Court employ its various methods of statutory interpretation.⁴⁷ One would be hard pressed to find statutory language plainer than “shall be equal.” The phrase means no more and no less than 20 percent of the respective fund as determined at the beginning of the fiscal year. Thus, despite the County being legally permitted to retain revenues in excess of their current expenses, the County has established for itself that those reserves “shall be equal” to 20 percent of the respective funds in which the reserves are held. Moreover, since Section 14.01.013

⁴⁵ Defs.’ AB at 4.

⁴⁶ See *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1994) (citations omitted).

⁴⁷ *Id.*

dictates how the amount of reserves are to be changed,⁴⁸ until those strictures are followed, any reserves in excess of 20 percent are illegally held.

Secondly, if the Court finds that the \$230 million of public funds is being held pursuant to executive action, such a finding would be fatal to defendants' contention that the County has the authority to retain surplus money in excess of the 20 percent reserves.⁴⁹ Embodied in our representative form of government is the concept of the separation of powers. This hallmark of democracy is found in our Federal Constitution, our State's Constitution and even New Castle County's charter. While the exact scope of each branch's powers can sometimes become blurred, we do not face such conceptual problems here. It is and always has been within the exclusive province of the legislative branch to appropriate funds from the

⁴⁸ Any change in the 20 percent allocation to the Budget Reserve Account of either the General Fund or the Sewer Fund shall require a 5/7 vote of County Council. *See* Section 14.01.013(D) of the New Castle County Code.

⁴⁹ Anticipating this consequence, defendants now contend that newly elected County Executive Coons believes that "the ultimate authority over the expenditure of County revenues lies in the power of the County Council . . ." Affidavit of Christopher A Coons, County Executive, New Castle County ("Coons Second Affidavit"). It is not clear what defendants hoped to achieve by the submission of Coons' second affidavit, but it has no evident bearing on the conclusions reached here.

treasury.⁵⁰ This fundamental legislative responsibility is non-delegable and can never be left to the unilateral discretion of the Executive branch.

Emblematic of the consequences of eight years of unilateral management of the County's fiscal affairs is the effect the former County Executive had on the financial audit relied upon in creating the 2004 fiscal year budget. In that audit, Ernst & Young, an independent accounting firm, certified that the County held \$9,420,513 of "available surplus" within the General Fund and an "available surplus" of \$20,816,229 within the Sewer Fund.⁵¹ These amounts were then certified to the Council when it adopted the operating budget. Strikingly, the computation begins with approximately \$142 million of available surplus within the General Fund and \$97 million within the Sewer Fund. It is only after money is set aside for the budget reserve accounts and other "designated" purposes that the "available" surplus is reduced to the amounts outlined above.

These executive designations, although not amounts *appropriated* by the Council, had real consequences on the County's budgetary process. As

⁵⁰ See U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); DEL. CONST. art VIII, § 6(a) ("No money shall be drawn from the treasury but pursuant to an appropriation made by Act of the General Assembly"); 9 Del. C. § 1155(b) ("The County Council, upon conclusion of its public hearings but not later than the 1st day of June, shall enact the operating budget ordinance."). See also 63C AM. JUR. 2D Public Funds § 34 (2004) ("The appropriation of money for various state purposes rests in the sole discretion of the legislature.").

⁵¹ See Compl. Ex. A ("Report of Independent Accountants on Applying Agreed-Upon Procedures," June 30, 2003) at 2.

discussed above, the County's charter requires that each year the amount of available surplus be certified to the Council⁵² and that the Council is to use these funds in conjunction with other revenue measures to balance the budget.⁵³ "Available" in its plainest sense means "capable of use for the accomplishment of a purpose."⁵⁴ If the County Executive, absent legislative authority, can designate particular funds and then use those designations as a means of reducing the available surplus, he has in reality *appropriated* those funds in violation of the County charter and usurped an exclusively legislative function.⁵⁵

In light of these consequences, defendants cannot succeed by arguing that the executive commitments did not create actual accounts.⁵⁶ The fact is that the County Executive, through unilateral action, diverted surplus money into executive designations, avoiding the strictures of 9 *Del. C.* § 1158(a) that requires the use of available surpluses to balance the budget. Those acts had real and legal consequences and would only be valid if they were the

⁵² 9 *Del. C.* § 1158(c).

⁵³ *Id.* at § 1158(a).

⁵⁴ WEBSTER'S THIRD NEW INT'L DICTIONARY 150 (1976).

⁵⁵ Defendants contend that the meaning of appropriation refers specifically to "an authorized expenditure." *See* Defs.' Opening Br. at 9-10 (citing Bailey, Governmental GAAP Guide for State and Local Governments (2003), § 7.05). The Court does not accept such a restrictive definition. An appropriation can mean "the designation or authorization of the expenditure of public moneys." But it may also encompass the "setting apart from the public revenue of a definite sum of money for a specified object." 63C AM. JUR. 2D. Public Funds § 33 (2004).

⁵⁶ Defs.' Open. Br. at 9.

objects of legislative action.⁵⁷ Similarly, defendants cannot cure this defect by asserting that the Council had knowledge of the surplus funds and the practice of executive designations.⁵⁸ The County Council does not exist to be a rubber stamp of the Executive. The Council has an independent, co-equal and indispensable role as designed by New Castle County's charter. As stewards of the public trust, this role cannot be abdicated.⁵⁹ Acquiescence in the face of executive abuses cannot elevate those abuses to the dignity of law. In short, any money dedicated to any purpose, reserves or otherwise, must be appropriated from the County's treasury through a duly adopted ordinance as prescribed in Section 1152 of New Castle County's charter. This procedure captures the Constitutional functions conferred upon the Legislature and has the additional benefit of informing the public openly and transparently of the County's fiscal policies.⁶⁰

⁵⁷ See *supra* n.49 (describing the appropriation of money from the treasury as exclusively a legislative function); see also 9 Del. C. § 1103 (“All powers of the government of New Castle County shall be carried into execution as provided by this title or by other law of this State or if this title or other law of this State makes no such provision, as provided by ordinance or resolution of the County Council of New Castle County.”). Executive designations of non-appropriated funds are neither a law of the State, an ordinance nor a resolution.

⁵⁸ Defs.’ AB at 18.

⁵⁹ “Government is a trust, and the officers of the Government are trustees; and both the trust and the trustees are created for the benefit of the people.” Letter by Henry Clay (December 4, 1801) reprinted in JOHN BARTLETT, BARTLETT’S FAMILIAR QUOTATIONS (Justin Kaplan 16th ed., Little Brown & Company 1992).

⁶⁰ See 9 Del. C. § 1152 (requiring a public hearing on the adoption of any ordinance.)

County Code Section 14.01.013 states that the reserve accounts shall be equal to 20 percent of the respective fund in which the reserve is held. Finding no denial of the power to carry a reserve, and that the County has established the means by which that is accomplished, the County must abide by its own rules.

D. The Validity of the Bond Sale

Turning next to the question of the bond sale, the nexus between the bond sale and the 2005 fiscal year budget is clear. The rationale offered for the bond sale was the desire to avoid drying up surplus funds sooner than expected.⁶¹ Because (1) the County has not used its available surplus to balance the budget; and (2) the amount of the “rainy day” reserves exceeds the legislative limit (as currently adopted), the Council has adopted an invalid budget. To the extent the decisions of the Council were made in reliance upon that budget—*i.e.*, the bond sale—the process is sufficiently tainted for the Court to conclude that the bond issuance would harm the taxpayer plaintiffs. Despite this connection, the Court is unable to ascertain (on the present record) the degree of harm that the proposed bond sale currently poses (irreparable or otherwise). Contributing to this uncertainty is the fact that the defendants have voluntarily stayed the bond issuance, and

⁶¹ LSF 6 at ¶ 17.

one would seriously doubt the County's ability to proceed with the sale in light of the Court's findings today.⁶²

E. Counts I through III

Plaintiffs style the first three Counts for relief as requests for declaratory judgment. To exercise declaratory judgment jurisdiction there must be an actual controversy: (1) involving the rights or other legal relations of the party seeking declaratory relief; (2) in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) between parties whose interests are real and adverse; and (4) the issue involved in the controversy must be ripe for judicial determination.⁶³

⁶² One could also question the ability to issue the bonds in light of the holding here, as the bond prospectus must have relied on the financial status of the County and detailed that analysis to potential investors. Once the FY 2005 budget is invalidated the prospectus would necessarily be omitting material information. Defendants also contend that their authority to issue the bonds is independent of the question concerning the reserves. The Court cannot draw such a neat distinction between the two issues, however. The County has frequently touted its AAA credit rating, which in no small part is linked to the huge sums of cash the County has on hand. Furthermore, the County's ability to borrow at low interest rates will also depend on its ability to service the debt—again tying the bond sale to the amount of cash on hand. Finally, it is clear that the proceeds from the bond sale will be used to fund projects made part of this year's budget. Accordingly, as a practical matter, the bond sale and the surplus reserves are inextricably intertwined.

⁶³ *Gannett Co. v. Bd. of Managers of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003).

As taxpayers and residents of New Castle County, plaintiffs have a “direct interest in the proper use and allocation of tax receipts.”⁶⁴ Moreover, since the County’s budget is being challenged and any relief granted will affect the County Executive’s and Council’s authority to propose and adopt their annual budgets, plaintiffs have asserted a claim against those “who [have] an interest in contesting the claim.”⁶⁵ Finally, because the parties’ interests are real and adverse and the issues are ripe, the Court concludes that the standard set forth in *Gannett* is met here.⁶⁶

1. Count I

Count I seeks a judgment declaring that the “New Castle County Executive and County Council Members cannot make appropriations beyond the fiscal year unless encumbered.” For the reasons set forth above, the Court finds that any money appropriated to the General and Sewer Fund reserve accounts must be done so annually. To the extent those funds remain unexpended and unencumbered by the fiscal year’s end, such money

⁶⁴ *Wilmington v. Lord*, 378 A.2d 635 (Del. 1977); accord *Koffler v. McBride*, 283 A.2d 855 (Del. Ch. 1971); *Richardson v. Blackburn*, 187 A.2d 823 (Del. Ch. 1963); *Anderson v. Mayor and Council of Wilmington*, 137 A.2d 521 (Del. Ch. 1958); *Haddock v. Board of Education in Wilmington*, 84 A.2d 157 (Del. Ch. 1951); *Fetters v. Mayor and Council of Wilmington*, 73 A.2d 644 (Del. Ch. 1950).

⁶⁵ *Gannett*, 840 A.2d at 1237.

⁶⁶ The issue is ripe for determination because the County’s 2005 fiscal year budget has been recommended and approved and the bond issuance waits in the balance.

shall lapse and become available for the following year to be used as the County shall see fit.

2. Count II

Count II seeks a judgment declaring that the “New Castle County Executive cannot create off-budget reserve accounts other than those within the General and Sewer Fund.” For the reasons set forth above, the Court concludes that the County Executive shall not create any such reserve account.

3. Count III

Count III seeks a judgment declaring that the “amount of the reserve fund cannot exceed 20 percent of the total estimated revenue of the fund for the fiscal year.” For the reasons set forth above, the Court concludes that to the extent the reserve accounts are authorized by County Code § 14.01.013, as currently adopted, the amount of those accounts shall be equal to (no more and no less than) 20 percent of their respective funds.⁶⁷ Any deviation in this amount may be appropriated to the reserves by either amending the

⁶⁷ As earlier noted, the State is itself constitutionally limited to five percent reserve account. This case does not present the question whether the State may delegate a budgetary power greater than its own, and I offer no opinion on that question.

County's Code, or by altering the permitted appropriation for that year by a supermajority, 5/7 vote of the County Council.⁶⁸

F. Count V

Plaintiffs' final Count seeks to permanently enjoin the County's \$80 million bond sale. In order to obtain a permanent injunction, a party must demonstrate: (1) that the movant has succeeded on the merits after a full hearing, (2) that imminent and irreparable injury will result if the relief is not granted, and (3) that considering the potential harm to the parties, the balance of equities favors the issuance of the relief.⁶⁹

Plaintiffs have succeeded on the merits of their claim, but have failed to demonstrate whether the harm they face is irreparable.⁷⁰ Currently, the bond sale is voluntarily stayed. Moreover, serious doubts exist whether the County would pursue a bond sale in light of the fact it was predicted on an illegal budget. Equally important, a new County government has recently assumed office. While it is true they have inherited some significant policy issues, they could fairly and openly remedy the deficiencies identified here.

⁶⁸ The Council could, by a 5/7 vote of its thirteen members, change the percentage allocation amount. It would also appear possible for the Council by a simple majority vote to alter the requirements of Section 14.01.013, including the percentage allocation requirement and the supermajority vote requirement.

⁶⁹ *Grand Metropolitan PLC v. Pillsbury Co.*, 558 A.2d 1049, 1052 (Del. Ch. 1988); *Draper Communications, Inc. v. Delaware Valley Broadcasters*, 505 A.2d 1283, 1288 (Del. Ch. 1985).

⁷⁰ Based on this conclusion, it is not necessary for the Court to consider the third part of the permanent injunction test.

Thus, at this point, the record is not sufficiently developed to permit summary judgment on the question of a permanent injunction. As to Count V, the parties' cross-motions for summary judgment are denied.⁷¹

III. CONCLUSION

For the reasons set forth above, the relief requested in Counts I through III is granted. Count IV is dismissed as moot. The parties' cross-motions for summary judgment on Count V are denied.

IT IS SO ORDERED.

⁷¹ If plaintiffs were able to provide information to the Court at trial that the County intended to proceed with the bond sale despite the budget deficiencies the record likely would be sufficient to conclude that plaintiffs would suffer irreparable harm.