IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JIMMY'S GRILLE OF DEWEY BEACH, LLC, BOTTLE TAPROOM, INC., COCONUTS-WATERFRONT, INC., DEWEY BEACH LIQUORS, INC., NOBEACH, INC., and RUSTY RUDDER, LLC, individually and on behalf of all those similarly situated,	)	
Plaintiffs,	)	
v.	)	*Civil Action No. 8363-VCG*
TOWN OF DEWEY BEACH, DIANE HANSON, as Mayor of the Town of Dewey Beach, JOY HOWELL, as Commissioner of the Town of Dewey Beach, COURTNEY RIORDAN, as Commissioner of the Town of Dewey Beach, ANNA LEGATES, as Commissioner of the Town of Dewey Beach, and GARY MAULER, as Commissioner of the Town of Dewey Beach,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: September 11, 2013
Date Decided: December 17, 2013

Stephen W. Spence, Stephen A. Spence, and Aaron C. Baker, of PHILLIPS, GOLDMAN & SPENCE, P.A., Wilmington, Delaware, Attorneys for Plaintiffs.

William E. Manning and Richard A. Forsten, of SAUL EWING LLP, Wilmington, Delaware, Attorneys for Defendants.

GLASSCOCK, Vice Chancellor

The power to tax involves, as Chief Justice Marshall famously observed, the power to destroy.[1] Relying on such concerns, the Plaintiffs here—business owners in Dewey Beach—insist that a general grant of authority to a town from the State, no matter how broad or explicit, is insufficient to convey a power to tax. However, while grants of taxing authority must be strictly construed, nothing prevents the General Assembly from delegating taxing power to inferior jurisdictions in this State, where such is its intent, as part of a general grant of authority. Having received the broadest plenary authority from the State in a town charter that does not contain language suggesting that the General Assembly otherwise meant to exclude the power to tax, the Town of Dewey Beach has the authority to levy a business license tax, and relief from exercise of that authority must come through the ballot, not this bench.

In this matter, various business establishments operating in the Town of Dewey Beach—specifically, Jimmy's Grille of Dewey Beach, LLC, Bottle Taproom, Inc., Coconuts-Waterfront, Inc., Dewey Beach Liquors, Inc., Nobeach, Inc., and Rusty Rudder, LLC (the "Plaintiffs")—contest the annual business license fee imposed by the Town of Dewey Beach (the "Town," or "Dewey Beach"). The Plaintiffs argue that this licensing fee is effectively a tax—a tax that the Town lacks the authority to impose. In addition, the Plaintiffs contend that

[1] *M'Culloch v. State of Maryland*, 17 U.S. 316, 431 (1819).

even if the Town does have the requisite taxing authority, it has breached Section 21(d) of its Charter, as no referendum was held to approve the tax at issue. Because I find that the Town has the power to impose a business license tax on the Plaintiffs, and that no referendum was required under the terms of the Charter, I grant the Defendants' Motion to Dismiss.

I. BACKGROUND

The Town's Charter grants the Town Commissioners the "authority to grant licenses and impose fees for licenses, issue permits, and regulate any activity within the corporate limits . . . ."[2] In December 1993, the Town adopted a business license fee program pursuant to Town Ordinance No. 280 and codified in Chapter 117, Article I of the Town Code.[3] The stated purpose of such a program is "to protect and preserve the safety, health, peace, cleanliness, good order and welfare of the Town of Dewey Beach and its citizens."[4] The Town Code states, in relevant part, that "[n]o person shall conduct or engage in any trade, business or occupation within the Town for which a license is required without first having obtained a license therefor and having paid the license fee prescribed."[5] The license fee

[2] Town Charter § 23(a)(15).
[3] Compl. ¶¶ 19-20.
[4] Town Code § 117-1.
[5] *Id.* § 117-13(A).

imposed is "related to the investigation, regulation and enforcement of said license activities."[6]

Between 2007 and 2013, revenues from the Town's business license fee program were approximately $1 million.[7] During this period, the Town has purportedly failed to conduct any annual inspections or investigations of the at least fifty entities that are subject to the Town's business license program.[8] The Plaintiffs sent a letter to the Town, asking for a reduction in business license fee rates "to a level reasonable in light of the actual costs of regulating those businesses."[9] However, according to the Plaintiffs, "[t]he Town has failed and refused to reduce or refund any business license fee paid by [the] Plaintiffs."[10]

On February 26, 2013, the Plaintiffs filed a Verified Class Action Complaint (the "Complaint"), contesting all fees imposed between 2007 and 2013.[11] The Plaintiffs argue that, since the license fee collected is unrelated to the cost of "investigation, regulation, and enforcement," this fee is in fact a business license tax, that the Town lacks the power to impose such a tax, and that even if the Town

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[6] *Id.* § 117-1.
[7] Compl. ¶ 25. Plaintiffs contend that "the Town [has] assessed business license fees as high as $10,780." *Id.* at ¶ 2.
[8] *Id.* at ¶¶ 24, 35.
[9] *Id.* at ¶ 32.
[10] *Id.*
[11] Named Plaintiffs have incurred business license fees between 2007 and 2013 as follows: Jimmy's Grille of Dewey Beach, LLC ($8,330); Bottle Taproom, Inc. ($29,261); Coconuts-Waterfront, Inc. ($13,651); Dewey Beach Liquors, Inc. ($12,562); Nobeach, Inc. ($27,542); Rusty Rudder, LLC ($41,701). *Id.* at ¶¶ 8-13.

has the authority to tax the Plaintiffs, the Town has breached its Charter by not first holding a referendum.[12] The Plaintiffs seek declaratory and injunctive relief, as well as an accounting, and an order granting them a refund of fees paid between 2007 and 2013.[13]

The Defendants—the Town, Mayor Diane Hanson, and Commissioners Joy Howell, Courtney Riordan, Anna Legates, and Gary Mauler—have moved to dismiss the Plaintiffs' Complaint. The Defendants have conceded, for purposes of their Motion only, that the business license fee imposed on the Plaintiffs should be construed as a tax.[14] Because, according to the Defendants, to impose such a tax is within the Town's authority, this matter should be dismissed. For the reasons that follow, I grant the Defendants' Motion to Dismiss.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Court of Chancery Rule 12(b)(6) "will be granted if there are no reasonably conceivable circumstances that would entitle the [plaintiff] to recover."[15] In considering the motion before me, I must "draw all reasonable inferences in favor of the [p]laintiff, and accept all well pled factual

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[12] *Id.* at ¶¶ 4-5, 26-28, 31, 58; Pls.' Answering Br. at 13-15.
[13] Compl. ¶ 6.
[14] Defs.' Op. Br. at 1.
[15] *ENI Holdings, LLC v. KBR Group Holdings, LLC*, 2013 WL 6186326, at *4 (Del. Ch. Nov. 27, 2013) (citing *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 536 (Del. 2011)).

allegations as true."[16] In addition to considering those facts alleged in the Plaintiffs' Complaint, I consider the Town Charter and Town Code, which the Plaintiffs have incorporated into their Complaint by reference.

III. ANALYSIS

This Motion to Dismiss involves a matter of statutory interpretation. It is well-settled under Delaware law that, if the statutory language at issue is "unambiguous, then there is no room for judicial interpretation and the plain meaning of the statutory language controls."[17] However, if the language at issue is ambiguous, i.e. "if it is susceptible of two reasonable interpretations or if a literal reading of its terms would lead to an unreasonable or absurd result not contemplated by the legislature,"[18] then the motion to dismiss must be denied.[19] When construing a grant of authority from the legislature to an inferior unit of government purporting to convey a power to tax, such a grant must be strictly

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[16] *Paul v. Delaware Coastal Anesthesia, LLC*, 2012 WL 1934469, at *1 (Del. Ch. May 29, 2012).

[17] *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011) (internal quotation marks omitted); *see also Borden, Inc. v. City of Lewes*, 1989 WL 147366, at *2 (Del. Super. Nov. 13, 1989) ("If the language of a statute is clear and unequivocal, there is no room for statutory construction and judicial inquiry should come to an end.").

[18] *CML V, LLC*, 28 A.3d at 1041 (footnote and internal quotation marks omitted).

[19] *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008) ("Importantly, the Court must not choose between reasonable interpretations of ambiguous contract provisions when considering a motion to dismiss under Rule 12(b)(6). . . . Because any ambiguity must be resolved in favor of the nonmoving party, defendants are not entitled to dismissal under Rule 12(b)(6) unless the interpretation of the contract on which their theory of the case rests is the *only* reasonable construction as a matter of law.") (footnote and internal quotation marks omitted).

construed, with ambiguity resolved in favor of the taxpayer.[20] The Charter, however, must be construed to convey the authority to tax where the intention of the legislature to so grant is manifest.[21]

A. *The Town's Taxing Authority*

The General Assembly has the inherent power to levy taxes, constrained by the limits imposed by the Delaware Constitution.[22] Political subdivisions, such as The Town of Dewey Beach, enjoy exercise of police powers and other sovereign authority, including the power to tax, only to the extent authorized by the General Assembly, via the subdivision's charter or otherwise.[23] The parties here agree to

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[20] *Consol. Fisheries Co. v. Marshall*, 32 A.2d 426, 429 (Del. Super. 1943), *aff'd*, 39 A.2d 413 (1944).

[21] *Id.* ("The primary rule of construction, is to arrive at the intention of the legislature as expressed by the language used; and that intention, when clearly ascertainable, will prevail over the literal sense and precise letter of the statute.").

[22] *Harvey v. City of Newark*, 2010 WL 4240625, at *4 (Del. Ch. Oct. 20, 2010) ("The General Assembly, of course, has the 'inherent power to levy taxes, except as constrained by the [Delaware and national] Constitution[s],' and to allow municipalities to do the same.") (footnote omitted) (quoting *Town of Fenwick Island v. Sussex Sands, Inc.*, 1990 WL 161177, at *2 (Del. Super. Sept. 18, 1990)).

[23] *See, e.g.*, *Dunn v. Mayor & Council of City of Wilmington*, 219 A.2d 153, 155 (Del. 1966) ("The time-honored rule is that the legislature may validly delegate to a municipal government, Pro tempore, the exercise of police power within its boundaries . . . ."); *Simon v. Town of Seaford*, 197 A. 681, 685 (Del. 1938) ("It is well settled in this State that a municipal corporation has no power except by express legislative grant, or by fair and necessary implication because of being incident to the powers expressly granted or essential to carrying them out."); *Harvey*, 2010 WL 4240625, at *4 (noting that the General Assembly is empowered to grant municipalities the power to levy taxes); *Paul Scotton Contracting Co., Inc. v. Mayor & Council of City of Dover*, 301 A.2d 321, 326 (Del. Ch. 1972), *aff'd*, 314 A.2d 182 (Del. 1973) ("A special assessment is, I agree, an exercise of the taxing power which is vested exclusively in the legislature. However, it is a power which may be delegated by the legislature to municipal corporations which are, of course, merely instrumentalities of the state for the better administration of public affairs."); *Poynter v. Walling*, 177 A.2d 641, 646 (Del. Super. 1962) (discussing "the general principle that

that which is obvious: the Town Charter does not contain a specific grant of the power to assess a business license tax, and no other grant of such power outside the Charter exists. Instead, the Town relies on the grant of authority from the General Assembly in the "all powers" clause of the Charter to demonstrate its taxing authority. The Town's Charter, which has undergone several amendments,[24] contains the following broad "all powers" clause in Section 4(b):

> The enumeration of particular powers by this Charter shall not be held to be exclusive, or to restrict in any manner the general powers conferred herein, but in addition to the powers enumerated herein, implied hereby, or appropriate to the exercise thereof, it is intended that the Town of Dewey Beach shall have, and may exercise all powers which, under the Constitution of the State of Delaware, which [sic] would be competent for this Charter to specifically enumerate. All powers of the Town of Dewey Beach, whether expressed or implied, shall be exercised as prescribed by this Charter; or, if not prescribed herein, by ordinance or resolution of the Commissioners.[25]

The Plaintiffs argue that only a specific grant of authority may convey the power to tax, and that a general "all powers" clause is insufficient to convey *any* taxing authority. The Plaintiffs rely on the superannuated but thoughtful consideration of this issue in *Consolidated Fisheries Co. v. Marshall*:

> Where a municipality or other local authority attempts to exercise the power of taxation, it must show the legislative warrant for the exercise of the power in the words of the grant. The grant of power will be strictly construed, for the reasonable presumption is that the State has

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a municipal corporation possesses only such powers as are granted by the legislature, and possesses no inherent police power").

[24] Defs.' Op. Br. at 4.

[25] Town Charter § 4(b).

> granted in clear and unmistakable terms all that it intended to grant. The general principle is well settled that revenue laws are not to be so construed as to extend their provisions 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 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.[26]

According to the Plaintiffs, this passage demonstrates that the Town needs a specific grant of power or legislative warrant to exercise taxing authority.[27] In fact, Plaintiffs contend that, in accordance with the common law, taxing power must be granted expressly, such that the word "tax," or some variation of that word, is used.[28] Accordingly, Plaintiffs assert that Section 4(b) is insufficient to provide the Town with taxing authority.[29] However, the rationale of *Consolidated Fisheries* is explicitly cabined by the caveat that the strict construction called for is not such as to defeat legislative intent; indeed, vindication of such intent is the point of the exercise of statutory construction. *Consolidated Fisheries* directs that ambiguity be construed against a grant of the authority to tax, but otherwise "the rules governing the construction of tax statutes are the same which govern any other

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[26] *Consol. Fisheries Co. v. Marshall*, 32 A.2d 426, 429 (Super. Ct. 1943), *aff'd*, 39 A.2d 413 (1944).
[27] Pls.' Answering Br. at 6-8; Oral Arg. Tr. 18:21-19:4 ("[I]f you are going to find the power to tax, you have to find it in the express[] words of a grant somewhere . . . not just in an all powers clause. . . .").
[28] Oral Arg. Tr. 18:17-19:8.
[29] Pls.' Answering Br. at 7-8.

statute . . . ."[30] Nothing in our case law supports the rule proposed by the Plaintiffs, which is that a power to tax cannot be conveyed in a general "all powers" grant, provided that such a grant, read in the context of the charter as a whole, makes such an intent on the part of the legislature clear.

In fact, courts addressing this issue have found to the contrary. A charter provision similar to Section 4(b) has been found by this Court to *explicitly* grant the City of Dover the authority to levy special assessments—"an exercise of the taxing power"—even when strictly construed.[31] In *Paul Scotton Contracting Co. v. Mayor and Council of the City of Dover*, the Court noted that "[e]ven under a rule of strict construction it is clear . . . that [this section] was intended to grant the City of Dover broad powers to act in the absence of express provisions in the charter," including the power to levy a special tax assessment.[32] Similarly, in *Korn v. New Castle County*, this Court noted that the County's charter, "vest[ing] the

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[30] *Consol. Fisheries*, 32 A.2d at 429.

[31] *Paul Scotton Contracting Co., Inc. v. Mayor & Council of City of Dover*, 301 A.2d 321, 326 (Del. Ch. 1972), *aff'd*, 314 A.2d 182 (Del. 1973).

[32] *Id.* at 325. Then-Vice Chancellor Marvel reasoned that, pursuant to Section 3 of the Dover charter:

> The City of Dover is granted not only enumerated powers but those "* * * implied thereby * * *" or "* * * appropriate to the exercise thereof * * *". In addition, Section 3 grants "* * * all powers which * * * it would be competent for this charter specifically to enumerate." And although nowhere in the Charter is the term "home rule" used, I note a similarity in language between the above quoted provisions of the charter of the City of Dover and the recently enacted home rule provisions found in 22 *Del. C.* § 801 et seq., which allow municipalities to amend their own charters to confer "* * * all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration."

Id.

County with wide authority to 'assume and have all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute,'" included "the power to tax and spend for the general welfare of the County's residents."[33] Consistent with the rationale of *Paul Scotton* and *Korn*, the Delaware Supreme Court has acknowledged that "where a charter . . . 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.'"[34] I must turn, then, to the language of the Charter itself to see whether its language, read in its entirety and strictly construed in favor of the Plaintiffs, conveys the power to levy the tax in question.

Dewey Beach was not incorporated until 1981,[35] previously existing as a free-wheeling, unincorporated beach area south of Rehoboth. The Charter grants the Town "all powers which, under the Constitution of the State of Delaware, [it] would be competent for this Charter to specifically enumerate," except those limited by the Charter.[36] Specifically, the "all powers" clause in Section 4(b) provides:

> The enumeration of particular powers by this Charter shall not be held to be exclusive, or to restrict in any manner the general powers

[33] *Korn v. New Castle Cnty.*, 2005 WL 2266590, at *9 (Del. Ch. Sept. 13, 2005) (quoting 9 *Del. C.* § 1101(a)).
[34] *Harvey v. City of Newark*, 2010 WL 4240625, at *9 (Del. Ch. Oct. 20, 2010) (quoting *Schadt v. Latchford*, 843 A.2d 689, 693-94 (Del. 2004).
[35] Defs.' Op. Br. at 4.
[36] Town Charter § 4(b).

> conferred herein, but in addition to the powers enumerated herein, implied hereby, or appropriate to the exercise thereof, it is intended that the Town of Dewey Beach shall have, and may exercise all powers which, under the Constitution of the State of Delaware, which [sic] would be competent for this Charter to specifically enumerate. All powers of the Town of Dewey Beach, whether expressed or implied, shall be exercised as prescribed by this Charter; or, if not prescribed herein, by ordinance or resolution of the Commissioners.[37]

Such powers include the power to tax.[38] The Delaware Legislature's power to delegate taxing authority to its municipalities is well-settled and not at issue here.[39] Further, no Charter—or Constitutional[40]—provision limits the Town's authority to impose the business license tax at issue. In other words, the General Assembly has explicitly granted to Dewey Beach all powers which it could, consistent with our Constitution, grant. This includes, necessarily, the power to levy a business license tax, unless some other section of the Charter can plausibly be read to limit the Town's authority in this regard.

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[37] *Id.*

[38] *See generally Korn v. New Castle Cnty.*, 2005 WL 2266590 (Del. Ch. Sept. 13, 2005); *Paul Scotton Contracting Co., Inc. v. Mayor & Council of City of Dover*, 301 A.2d 321 (Del. Ch. 1972), *aff'd*, 314 A.2d 182 (Del. 1973).

[39] *See, e.g*, *Harvey*, 2010 WL 4240625, at *4 ("The General Assembly, of course, has the 'inherent power to levy taxes, except as constrained by the [Delaware and U.S.] Constitution[s],' and to allow municipalities to do the same.") (footnote omitted) (quoting *Town of Fenwick Island v. Sussex Sands, Inc.*, 1990 WL 161177, at *2 (Del. Super. Sept. 18, 1990)); *Paul Scotton Contracting Co., Inc.*, 301 A.2d at 326 ("A special assessment is, I agree, an exercise of the taxing power which is vested exclusively in the legislature. However, it is a power which may be delegated by the legislature to municipal corporations which are, of course, merely instrumentalities of the state for the better administration of public affairs.").

[40] *See, e.g.*, *Town of Fenwick Island*, 1990 WL 161177, at *3 ("The municipality may exercise that grant of power [to tax] as it sees fit, so long as it does not violate the Constitution.").

The Charter contains three express provisions relating to the Town's taxing authority. It is important to my analysis that these sections, explicitly, are not *grants* of taxing authority; instead, they are limitations on, or clarifications of, the Town's authority to tax. First, Section 21(d) provides that "[n]o taxes or assessments may be imposed on real or personal property or tax or assessment rates changed unless approved by referendum."[41] Second, Section 23(b) provides:

> Notwithstanding any provision in this Section or in this Act to the contrary, the Town Commissioners shall have no power or authority to impose or require any fee, tax, license or permit regarding use of the beaches by persons for individual recreational purposes.[42]

Lastly, following a Town referendum, the General Assembly amended Section 23(a) of the Charter in 2009 to include Section 23(a)(16),[43] which provides:

> (a) Not by way of limitation upon the power vested in the Town Commissioners to exercise all powers delegated by this Charter to the municipal corporation of the Town Commissioners of Dewey Beach except as may expressly appear herein to the contrary, but, rather *by way of enumeration and for purposes of clarity*, the Town Commissioners are vested by this Charter with the following powers, which may be exercised by said Commissioners in the interest of good government and the safety, health, and welfare of the Town, its inhabitants and affairs, that is to say:
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> * * *
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> (16) To levy and collect tax upon the renting or leasing of residential property located within the municipal boundaries of Dewey Beach, except that no accommodations tax for a residential rental shall be collected upon a valid rental agreement or valid lease agreement with an initial term of at

[41] Town Charter § 21(d).
[42] *Id.* § 23(b).
[43] Pls.' Answering Br. at 8-9; Defs.' Reply Br. at 8.

> least one (1) year. The accommodations tax on a residential rental shall be as set from time to time by the Commissioners of Dewey Beach, but not to exceed three percent (3%) of the rent or lease amount unless approved by referendum. . . .[44]

These are the only provisions of the Charter pertaining to taxation that relate to the matter before me. Section 4(b), in concert with the additional Charter provisions that address the Town's taxing authority, specifically Sections 21(d), 23(b), and 23(a)(16), demonstrate that the Charter read as a whole does not limit the broad taxing authority granted under the "all powers" clause so as to preclude the levy of a business license tax. The first of these provisions, Section 21(d), requires that any tax or assessment, or changes thereof, on real or personal property be approved by referendum.[45] The second provision, Section 23(b), limits the Town's ability to tax the use of beaches.[46] These two provisions clearly impose limitations on the Town's broad taxing authority, granted in Section 4(b).

The third of these provisions, Section 23(a)(16), addresses the Town's ability to "levy and collect tax upon the renting or leasing of residential property."[47] At first blush, this provision seems not to limit the Town's broad taxing authority, but instead, to explicitly grant the Town specific taxing authority

[44] Town Charter § 23(a)(16) (emphasis added).
[45] *Id.* § 21(d).
[46] *Id.* § 23(b).
[47] *Id.* § 23(a)(16).

to collect an accommodation tax.[48] If Section 4(b) grants general taxing authority to the Town, as I have found, Section 23(a)(16) would, under this reading, be surplusage. However, the prefatory language to Section 23 reads: "[n]ot by way of limitation upon the power vested in the Town Commissioners to exercise all powers delegated by this Charter to the municipal corporation of the Town Commissioners of Dewey Beach except as may expressly appear herein to the contrary, but, rather *by way of enumeration and for purposes of clarity*, the Town Commissioners are vested by this Charter with the following powers . . . ."[49] This language provides explicitly that Section 23(a)(16) is not to be read as a grant of taxing power, but rather as an enumeration of one source of the Town's power to raise revenue. The section then goes on to *limit* the Town's authority to collect an accommodation tax, restricting its application to short-term leases only and subjecting taxes greater than 3% of the rental amount to the referendum process. Thus, reading Section 4(b) in conjunction with these three sections demonstrates that the Charter operates by granting the Town broad authority to tax, and then limiting and clarifying that authority where the General Assembly has deemed appropriate. In fact, it is these limitations on tax authority that would be

[48] In fact, the synopsis to House Bill 51, the act adopting the Town Charter to add Section 23(a)(16), states that the purpose of the act is "to authorize" the Town to levy an accommodations tax. Pls.' Answering Br. Ex. C.
[49] Town Charter § 23(a) (emphasis added).

surplusage, if Section 4(b) did not grant broad taxing authority, as I have found.[50] Further, the limitations imposed do not apply to a business license tax.

The Plaintiffs argue that this Court's holding in *Harvey v. City of Newark* is controlling here, and indicates that an "all powers" clause is insufficient to convey plenary tax authority, given the further treatment of the taxing authority in that charter. I find *Harvey* distinguishable, however. In *Harvey*, the Court addressed Sections 7 and 34 of the 1951 Newark Charter. Section 7, entitled "Powers of the City," provided that:

> 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 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. . . .[51]

Section 34 of the 1951 Charter, entitled "Power to Raise Revenue," provided that

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[50] *See, e.g.*, *Chase Alexa, LLC v. Kent Cnty. Levy Court*, 991 A.2d 1148, 1152 (Del. 2010) ("[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible.") (quoting *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994)). The Plaintiffs attempt to show that other sources of taxing authority exist—pointing to statutory grants of the power to assess a realty transfer tax and home rule tax authority (the latter of which will remain unavailable to Dewey Beach unless its population should grow to 1,000)—and thus that the tax-power limitations in the Charter do not amount to surplusage under Plaintiffs' reading of Section 4(b). I find this argument unpersuasive; in fact, a non-sequitur.

[51] *Harvey*, 2010 WL 4240625, at *8 (quoting 1951 Charter § 7) (emphasis omitted).

> The Council shall have the power to levy and collect taxes on real property with the limits of the City, except that which is not assessable and taxable by virtue of any law of the State of Delaware . . . . 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.
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> 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 extension of said boundaries *shall be exempt from City taxation for a term of ten years from the time said plants are established or brought within the boundaries of the City of Newark.*
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> 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.
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> 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]

The *Harvey* Court held that Section 34 acted as an exclusion of taxing authority from Newark's broad "all powers" clause contained in Section 7, reasoning that "[b]y 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

[52] *Id.* at *8-9 (quoting 1951 Charter § 34 (emphasis added)).

operation in Newark."[53] Thus, the Charter in *Harvey* was interpreted to exempt taxation from the conveyance of authority under the "all powers" clause, because tax authority was explicitly provided for—and authorized within—a discrete section of the Charter.

I find Harvey inapplicable here, for two reasons. First, Harvey was decided under *stare decisis*.[54] In *Delaware Power & Light Co. v. City of Newark*—decided in 1958 soon after the charter language at issue was enacted—then-Chancellor Seitz, interpreting *the same town charter*, held that Newark had only limited taxing authority.[55] In rejecting Newark's position that it held plenary authority to tax, the *Harvey* Court noted that "[f]or 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."[56] The Court's rationale for invoking *stare decisis* is explicit and compelling:

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[53] *Id.* at *9.
[54] *Id.* at *12.
[55] *See generally Delaware Power & Light Co. v. City of Newark*, 140 A.2d 258 (Del. Ch. 1958).
[56] *Harvey*, 2010 WL 4240625, at *2. The Plaintiffs note that the *Harvey* Court bolstered its holding by reference to numerous actions taken over 50 years following the Court's 1958 ruling in *Delaware Power and Light*, indicating that the City of Newark did not believe it had general tax authority. Although the Plaintiffs refer to certain legislative history from the 2009 amendment of Dewey Beach's Charter, which added Section 23(a)(16), to demonstrate that the Town "believed [it] could not impose a tax without a specific legislative warrant," this pales in comparison with the record in *Harvey*. Pls.' Answering Br. at 8-11. Moreover, the record

> When the law is rationally interpreted in good faith by the judiciary, and legislative bodies . . . take further action in reliance upon that interpretation . . . 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.[57]

Such considerations are absent here.

More fundamentally, the Dewey Beach Charter is structured differently, and operates differently, from the city charter at issue in *Harvey* and *Delaware Power and Light.* That charter contained an "all powers" clause, but also a specific grant of taxing authority, with accompanying limitations, in a provision entitled "Power to Raise Revenue." Construing that grant of taxing authority strictly, it was reasonable to conclude that the General Assembly had meant to convey taxing authority within the discrete section addressing taxation, and not the "all powers" clause. By contrast, Dewey Beach's Charter, in addition to the "all powers" clause, does not contain a specific grant of taxing authority, but only provisions that limit or clarify the Town's taxing power.[58] Unlike Newark's charter, the

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suggests that Dewey Beach has been imposing other taxes not specifically mentioned in the Charter—for instance, realty transfer taxes (including before such taxes were otherwise provided for by statute)—for many years. Defs.' Reply Br. at 5.

[57] *Harvey*, 2010 WL 4240625, at *2.

[58] After noting that the "all powers" clause could be understood as a "catch-all," the *Harvey* Court acknowledged that, "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." *Id.* at *11 n.69. By contrast, in the Town's Charter, there is no specific grant of taxing authority outside of the broad "all powers" clause, only limitations and clarifications on the Town's taxing authority. Consequently, as explained above, the "all powers" clause in the Town's Charter is not properly

Dewey Beach Charter contains no discrete, limited, and apparently self-contained separate section conveying taxing authority, which section would be surplusage if the General Assembly had meant to convey tax authority under the "all powers" clause. On those bases, I find that *Harvey* is inapplicable here.

Reading the Town Charter as a whole, strictly construing it in favor of the taxpayer, and in light of the applicable case law, I find that the Charter delegates to the Town the power to impose a business license tax.

B. *The Referendum Requirement*

Having found that its Charter grants the Town authority to tax the Plaintiffs, I turn to the issue of whether the Town was required to hold a referendum before imposing this business license tax, because that tax is, in reality, a property tax. Pursuant to Section 21(d) of the Town Charter, "[n]o taxes or assessments may be imposed on real or personal property or tax or assessment rates changed unless approved by referendum."[59] The issue before me is whether the business license assessment at issue is a tax on property upon which the General Assembly has imposed a referendum requirement in the Charter.

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interpreted as acting as a "gap filler" or "catch-all," but as a specific grant of the Town's authority to tax except as otherwise limited by the provisions of the Charter and applicable law.

[59] Town Charter § 21(d).

The Plaintiffs contend that the method of calculating the tax at issue qualifies it as a property tax.[60] In particular, Plaintiffs emphasize the method of calculating the business license fee for food and beverage service establishments, which is derived from a "$273 base fee, plus $6 per person, based on Fire Marshal occupancy."[61] Similarly, residential property rentals, as well as motels and hotels, are charged a base fee, plus an additional fee per room.[62] Because the tax is indirectly related to the size of the improvements upon a property devoted to the business, argue the Plaintiffs, the business license assessment is in reality a "property" tax, in the broad view of that term.[63]

This calculation, tied as it is to the manner and scope of the trade in which the owner is engaged, does not transform the business license tax into a real or personal property tax: the tax is not rendered on personal or real property, or the value thereof, but on the grant of a right to conduct business or pursue an occupation. In fact, most business organizations are charged a flat rate, depending

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[60] Oral Arg. Tr. at 21:3-15 ("[I]n the context of this particular lawsuit and the particular license fee, the fee is calculated based upon the size of your facility, the fire marshal occupancy of your business, or the type of business you conduct. And those are all, in my view, personal property rights that you possess as an owner of a business. The size of your facility, how you operate it, are your bundle of rights, your personal property rights, and the Town is now taxing those personal property rights . . . . [I]t may not be real property, but if it's not personal property, then what is it?").

[61] Town Code § 117-13(B)(5).

[62] *Id.* §§ 117-13(B)(1), (2).

[63] Plaintiffs argue that "Delaware courts have interpreted the concept of property broadly for the purposes of taxation," citing *State v. Pinder*, 108 A. 43, 45 (Del. Ct. Gen. Sess. 1919), a decision addressing whether individual income constitutes property under Delaware's income tax law. Pls.' Answering Br. at 15.

on their specific trade, business, or occupation.[64] For instance, package stores are charged $2,180, real estate brokers are charged $382, and "large" in-town retail businesses, defined as five or more employees, are also charged $382.[65] This payment scheme, as well as the Town Code provisions from which the program derives, demonstrate that the business license program is designed to extract payment from those "conduct[ing] or engag[ing] in any trade, business or occupation" requiring a license.[66] The tax is not levied on personal property such as goods held for sale, nor upon the value of the realty, improvements, and fixtures of the location at which the trade is engaged. In fact, an individual could buy the largest hotel or most happening nightspot in Dewey Beach and pay no tax upon the realty, improvements, and fixtures of those premises, under this business license tax provision, simply by choosing not to operate those businesses. As such, the tax at issue is not a property tax—"one clearly and directly on property"—but instead an occupation or license tax "imposed on the voluntary action of the person taxed in performing the act or occupation in question."[67] Therefore, no referendum was necessary, and the Town is not in breach of its Charter.

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[64] Town Code § 117-13(B).
[65] *Id.* §§ 117-13(B)(3), (6), (9).
[66] *Id.* § 117-13(A).
[67] *Am. Tel. & Tel. Co. v. Everett*, 152 A.2d 295, 299 (1959) ("[T]he name given to a tax is not the controlling factor in determining its nature, a property tax being one clearly and directly on property while an occupation tax is imposed on the voluntary action of the person taxed in performing the act or occupation in question."); *see id.* (holding that a tax constituted an occupation tax, and not a property tax, where "the tax clearly does not fall directly upon

IV. CONCLUSION

Although "it is clearly settled in Delaware that a municipal corporation has no authority beyond that which is expressly granted, fairly implied or indispensible to its declared objects and purposes,"[68] and that grants of taxing authority are strictly construed in favor of the taxpayer, it is clear in this instance from looking at the unambiguous language of the Charter as a whole that the Town has been granted broad taxing authority, constrained only by those limitations inherent within the Charter, as well as those necessitated by the Delaware and United States Constitutions. None of those limitations are applicable here. Accordingly, assuming that the business license fees imposed by the Town constitute, in fact, taxes, I find that the Town has the authority to levy business license taxes upon the Plaintiffs. Furthermore, the Town Charter did not require that the Town hold a referendum before adopting this business license tax. Therefore, the Defendants' Motion to Dismiss is granted. An appropriate Order accompanies this Memorandum Opinion.

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plaintiff's lines of wires or transmitters as such but is rather imposed on the occupation of being engaged in the telephone business, whether as owner, lessee or otherwise . . .").

[68] *Paul Scotton Contracting Co., Inc. v. Mayor & Council of City of Dover*, 301 A.2d 321, 324 (Del. Ch. 1972), *aff'd*, 314 A.2d 182 (Del. 1973).