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49 MAP 2016

IN THE SUPREME COURT OF PENNSYLVANIA

No. 49 MAP 2016

VALLEY FORGE TOWERS APARTMENTS N, LP, et al., Plaintiffs, MORGAN PROPERTIES ABRAMS RUN OWNER LP and KBF ASSOCIATES LP,

v.

UPPER MERION AREA SCHOOL DISTRICT and KEYSTONE REALTY ADVISORS, LLC,
Appeal of: Morgan Properties Abrams Run Owner LP; KBF Associates, LP

REPLY BRIEF OF APPELLANTS MORGAN PROPERTIES ABRAMS RUN OWNER LP and KBF ASSOCIATES LP

On Appeal from the September 10, 2015 Opinion and Order of the Commonwealth Court of Pennsylvania in Appeal No. 1960 CD 2014
Affirming the Judgment of the Court of Common Pleas of Montgomery County at No. 2014-09870

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs' Uniformity Clause challenge rests on two unassailable principles: (1) A taxing authority may not establish different tax rates for different types of real property (*i.e.,* commercial versus residential properties); and (2) a taxing authority violates this prohibition by engaging in a pattern of appealing the assessments of commercial properties while not appealing any residential properties.

The first principle is indisputably correct; not even the School District argues that a taxing authority may establish different millage rates for commercial properties than single-family homes.

As for the second principle, the School District has not disputed that its deliberate pattern of appealing the assessments of commercial properties (and not residential properties) will lead to a higher effective tax rate – the ratio of taxes actually paid to market value – on commercial properties as a whole. The School District's Brief argues, instead, that its conduct is permissible because the Court's Uniformity Clause jurisprudence provides only nominal, rational-basis scrutiny of a taxing authority's discrimination between different sub-classifications of property.

This Reply will first show that the School District's Brief hatches its rational-basis scrutiny theory not from a fair reading of this Court's precedent.

Rather, it leans heavily upon a flawed interpretation of this Court's decisions in *Downingtown* and *Clifton*, as well as a series of Commonwealth Court decisions inconsistent with those decisions and this Court's century-old Uniformity Clause jurisprudence.[1]

The second part shows that the School District's arguments about pleading standards and the impact of the CLR on uniformity challenges fail because they are contrary to this Court's precedent, while the third section rebuts the School District's misplaced objection about the practical effects of imposing limits on its reverse appeal rights. Finally, the fourth section demonstrates that the trial court had equity jurisdiction to consider Plaintiffs' Uniformity Clause challenge.

I. *DOWNINGTOWN* AND *CLIFTON* PROHIBIT A TAXING AUTHORITY FROM DISCRIMINATING BETWEEN CLASSES OF REAL PROPERTY

Over one hundred years ago, this Court recognized that a taxing authority cannot apply different effective tax rates to different types of property: "It will not do to assess farm lands at one-fifth their actual value, dwelling houses at one-third, manufacturing establishments at one-half, and coal lands at full value"; instead, "the rule of uniformity must be applied to all

[1] The School District offers no response to Plaintiffs' arguments about the text of the Uniformity Clause or its history. (*See* Appellants' Br. 17-21.)

kinds of real estate as a class." *Delaware, L. & W. R. Co.'s Tax Assessment*, 224 Pa. 240, 248, 73 A. 429, 432 (1909). Since then, this Court has repeatedly reaffirmed this unambiguous prohibition against discriminating between different types of real property.[2]

In response, the School District's Brief argues that *Downingtown* and *Clifton* created a cavernous exception to this settled prohibition by: (1) authorizing school district "consideration" of different subclassifications of real property in deciding which properties' assessments to appeal (UMASD Br. 20-23), and (2) endorsing a deferential rational-basis review of a taxing authorities' differential treatment of different types of real property (*Id.* at Br. 22, 39-42). The School District's argument has no basis.

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[2] *See, e.g., Buhl Found. v. Board of Prop. Assessment Appeals and Review of Allegheny Cty.*, 407 Pa. 567, 571, 180 A.2d 900, 903 (1962) ("[W]hat the law requires is uniformity in the taxation of real estate as a class."); *Deitch Co. v. Board of Prop. Assessment Appeals and Review of Allegheny Cty.*, 417 Pa. 213, 223, 209 A.2d 397, 402 (1965) ("The uniformity requirement of the Constitution of Pennsylvania has been construed to require that all real estate is a class which is entitled to uniform treatment."); *Westinghouse Elec. Corp. v. Board of Prop. Assessment, Appeals & Review of Allegheny Cty.,* 539 Pa. 453, 467, 652 A.2d 1306, 1314 (1995); *Clifton v. Allegheny Cty.*, 600 Pa. 662, 686, 969 A.2d 1197, 1212 (2009) (courts have "consistently" held all real estate to be "a single class entitled to uniform treatment").

This court has also recognized a general constitutional principle prohibiting the government from accomplishing indirectly a result that would be unconstitutional if imposed directly. *See, e.g.*, *Robinson Twp., Washington Cty. v. Commonwealth*, 623 Pa. 564, 705, 83 A.3d 901, 987 (2013); *Fell v. Gilligan*, 195 Pa. 504, 513, 46 A. 124, 126 (1900). (*See also* Appellants' Br. 12-15, 34-36 (explaining how the District's appeals seek to evade the constitutional prohibition on differential millage rates and spot assessments).)

A. *Downingtown* and *Clifton* Did Not Authorize a Taxing Authority to Discriminate in Favor of Some and Against Other Subclassifications of Property

Downingtown concerned whether a taxpayer was permitted to prove its property is overassessed by reference to "'similar properties of the same nature in the neighborhood,'" rather than exclusively by reference to all properties in the county. *Downingtown v. Chester Cty. Board of Assessment Appeals*, 590 Pa. 459, 467, 913 A.2d 194, 199 (2006) (quoting *In re Brooks Bldg.*, 391 Pa. 94, 101, 137 A.2d 273, 276 (1958)). This Court held that the Uniformity Clause requires that the taxpayer be permitted to make such a proof. *Id.*[3]

With pretzel-like logic, the School District's Brief twists now-Chief Justice Saylor's Opinion to argue that *Downingtown* authorizes *taxing authorities* to treat different subclassifications of real property differently, including through selective appeals. (*See* UMASD Br. 20-21, 40.) In supposed support, the Brief quotes:

> While we agree with the trial court that this Court has interpreted the Uniformity Clause as precluding real property from being divided into different classes for purposes of systemic property tax assessment, *we do not find that this general uniformity precept eliminates any opportunity or need to consider meaningful sub-*

[3] *Downingtown* also held unconstitutional a provision of the Assessments Law that barred a uniformity challenge based on variance from the CLR if the CLR was within 15 percent of the established predetermined ratio violated the Uniformity Clause. (*See* Appellants' Br. 22-23.)

> *classifications as a component of the overall evaluation of uniform treatment*.

Downingtown, 590 Pa. at 468, 913 A.2d at 200 (emphasis supplied); *see also* UMASD Br. 40. The Brief reads this statement to mean that, in deciding what properties to appeal, a taxing authority may "consider meaningful sub-classifications of property." (*See* UMASD Br. 40.)

The School District's interpretation is plainly wrong. First, *Downingtown* concerned what evidence a *court* may consider in a *taxpayer's* effort to establish the non-uniformity of its assessment. Thus a commercial-property owner may show that its property was overassessed by having a court consider evidence concerning other commercial properties' assessments.[4] *See Downingtown*, 590 Pa. at 467-69, 913 A.2d at 201-02. The quoted language thus does not refer to what **a taxing authority** may consider in deciding which properties to appeal and which not to appeal.

Second, the Court's language makes clear that any permissible "consideration" of subclassifications of real property must further "uniform treatment." This flows from the quoted language itself and was emphasized in

[4] While the School District's Brief does not mention it, the very next sentence after the one quoted confirms that this holding of *Downingtown* grew out of the minimum requirements of the federal Equal Protection Clause, which sets the floor for the interpretation of Pennsylvania's Uniformity Clause. *See Downingtown*, 590 Pa. at 469, 913 A.2d at 200; *see also* Appellants' Br. 29-30.

Clifton, 600 Pa. at 680, 969 A.2d at 1213. Here, in contrast, the School District's "consideration" of commercial versus residential properties furthers disuniformity because the District's selective appeals create different effective tax rates for commercial and residential properties, something this Court long ago prohibited.[5]

Accordingly, the language upon which the School District bases its argument fails to support its theory that *Downingtown* and *Clifton* somehow rewrote the Court's Uniformity Clause jurisprudence to permit taxing authorities to discriminate between subclassifications of real property.

B. *Downingtown* and *Clifton* Do Not Permit Discrimination upon a Showing of Rational Basis

The School District's Brief also advances the notion – again, contrary to this Court's century-old prohibition on governmental discrimination between types of real property – "that *rational* subclassifications may pass Constitutional muster." (UMASD Br. 22.) This, too, rests on flawed readings of *Downingtown* and *Clifton*.

[5] *Clifton* confirms that a taxing authority may not impose different effective tax rates, even unintentionally. *See* 600 Pa. at 711, 969 A.2d at 1227 (rejecting county's argument regarding uniformity because county's conduct "creates the same disparity *in effect* as applying a different ratio to current actual values" (emphasis added)).

1. *Downingtown* Did Not Authorize "Rational" Discrimination Between Subclasses of Real Property

Much of the School District's argument for a rational-basis test rests on the statement in *Downingtown* that, because the classification there was "not based on any legitimate distinction between the targeted and non-targeted properties, it is arbitrary, and thus, unconstitutional" (UMASD Br. 22 (quoting *Downingtown*, 590 Pa. at 205, 913 A.2d at 475); *id.* at 40 (same)). From that, it concludes that, contrary to *Delaware, L. & W. R. Co.'s Tax Assessment* and its many progeny, a taxing authority's "rational subclassifications may pass Constitutional muster." (UMASD Br. 22 (emphasis removed).)

But *Downingtown* did no such thing. The opinion nowhere states that a rational-basis test should govern or announces any intention to move away from this Court's long-settled prohibition on disparate treatment of real property. That's because the *Downingtown* Court was not establishing a new standard but merely noting that, even under the most permissive Uniformity Clause standard – *i.e.* the one applicable outside the real-property context – the school district's argument failed.[6]

[6] Thus, none of the cases the *Downingtown* court cited as support for the quoted sentence are involve ad valorem taxes on real estate. *See Leonard v. Thornburgh*, 507 Pa. 317, 321, 489 A.2d 1349, 1352 (1985); *City of Harrisburg v. Harrisburg Sch. Dist.,* 551 Pa. 295, 304, 710 A.2d 49, 53 (1998); *Columbia Gas Transmission Corp. v. Commonwealth,* 468 Pa. 145, 151, 360 A.2d 592, 595 (1976).

Moreover, *Clifton* rejected any suggestion that *Downingtown* made the rational-basis standard applicable to Uniformity Clause cases involving real-property taxation, emphasizing that "this Court has consistently interpreted the uniformity requirement of the Pennsylvania Constitution as requiring all real estate to be treated as a single class entitled to uniform treatment." 600 Pa. at 686-87, 969 A.2d at 1211-12 (distinguishing standard applicable to property taxation from rational-basis test applicable in other contexts). Thus, per *Clifton*, even after *Downingtown*, the Uniformity Clause bars discrimination between subclasses of real property, regardless of the stated justification. *See also id.* at 687, 969 A.2d at 1212 (Taxing principles "*must be applied equally and uniformly to all real estate within the taxing authority's jurisdiction*." (quoting *Westinghouse*, 539 Pa. at 469, 652 A.2d at 1314 (emphasis in original)).

2. *Clifton* Did Not Abrogate the Strict Prohibition on Discrimination Between Classes of Real Property

Nor does *Clifton* support the School District's arguments for a rational-basis test. The District's Brief focuses on various fragments from *Clifton*, ignoring critical language that reaffirms the longstanding prohibition on discrimination between subclasses of real property.

The School District's Brief also neglects to mention that the quoted statement comes from *Downingtown*'s second holding about the application of the EPR rather than the CLR, not the holding about what evidence a court can consider in a uniformity challenge. *See Downingtown*, 590 Pa. at 495, 913 A.2d at 202.

Here's what the District's Brief argues. It starts by asserting, "Pertinent to this appeal…this Court specifically provided that a rational basis test is applied in the Uniformity context." (UMASD Br. 22.) In supposed support, the Brief then quotes *Clifton*'s description of the rational-basis standard applicable to *non-real-property* tax classifications.[7] But, as the School District admits, the Court crucially emphasized, "Property taxation, however, is different." *Clifton*, 600 Pa. at 686, 969 A.2d at 1212; UMASD Br. 23. That should end the discussion and close the door on the District's theory.

Inexplicably, the School District's Brief then zooms forward through the *Clifton* opinion, skipping over paragraphs that (a) are directly contrary to the District's rational-basis theory, and (b) squarely require that real property be treated as a single class. For example, the District ignores language that absolutely prohibits nonuniform treatment of different kinds of real property. *Clifton,* 600 Pa. at 687, 969 A.2d at 1212 ("[A]ll real estate [must] be treated as a single class entitled to uniform treatment.").[8] That discussion locks the closed door on the District's theory.

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[7] The Brief does accurately quote: "When a taxpayer believes that he has been subjected to unequal taxation . . . he generally must demonstrate that: (1) the enactment results in some form of classification; and (2) such classification is unreasonable and not rationally related to any legitimate state purpose." *Id.* at 685, 969 A.2d at 1211; UMASD Br. 22-23.

[8] The Brief also elides the Court's explanation, "[T]he Uniformity Clause requires that all taxes shall be uniform, upon the same class of subjects. . . . This means that all real

Ignoring that reality, the District's Brief leads the Court to a sentence fragment more than 500 words after the previous language it quoted stating that, in *Downingtown*, "we have [ ] retreated from such an absolutist approach" *Clifton*, 600 Pa. at 688, 969 A.2d 1212-13. The Brief apparently takes this to mean that, according to *Clifton*, *Downingtown* abolished the prohibition on discrimination in the real-property context and replaced it with the rational-basis test that the Court has applied in non-real-property contexts. But *Clifton* never says that. Rather, as shown above, *Downingtown* did not embrace a rational-basis test; instead, *Downingtown* recognized only that a court may consider meaningful sub-classifications in evaluating a taxpayer's evidence of non-uniformity. *See Clifton*, 600 Pa. at 688, 969 A.2d at 1213 (quoting *Downingtown*, 590 Pa. at 468, 913 A.2d at 200).

Moreover, completely walling off the School District's argument, the *Clifton* Court roundly rejected Allegheny County's argument for the application

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estate is a constitutionally designated class entitled to uniform treatment and the ratio of assessed value to market values adopted by the taxing authority must be applied equally and uniformly to all real estate within the taxing authority's jurisdiction." *Clifton*, 600 Pa. at 1212, 969 A.2d at 1212. The Court emphasize the long history of this rule, citing several cases in support, *id.* at 686-87, 969 A.2d at 1212, emphasized that this longstanding prohibition is consistent with *Downingtown*, *id.* at 687, 969 A.2d at 1212, and noted the continuing distinction from the federal Equal Protection Clause, which, unlike the Uniformity Clause, "does not require equalization across all potential sub-classifications of real property (for example, residential versus commercial)," *id.* at 687 n.21, 969 A.2d at 1212 n.21 (quoting *Downingtown* 590 Pa. at 470 n.9, 913 A.2d at 201 n.9).

of a rational-basis test. The Court held that it "fails for a number of reasons," including at the threshold because, "the Uniformity Clause commands that similarly situated taxpayers should be taxed similarly." *Id.* at 713, 969 A.2d at 1228. That threshold determination does not involve a review of any purported taxing authority interest or motivation. *See id.* The following paragraph of the opinion confirms this as it emphasizes that "even if disparate treatment (*i.e.*, a classification) were permissible under these circumstances," which the Court had held it was not, Allegheny County's claimed interests[9] "cannot justify a taxing scheme that routinely taxes" one class of property owners at a higher effective rate than another. *Id.* at 714, 969 A.2d at 1228-29. *Clifton* thus squarely rejects any argument for rational-basis review of differential taxation of real property.

Accordingly, *Downingtown* and *Clifton* do not depart from this Court's longstanding prohibition on differential treatment of different subclasses of real property.[10] Just as a school district's application of different millage rates to

[9] These claimed interests, which included an interest in economic efficiency like that asserted by the School District here, were afforded no weight by the Court. *See Clifton*, 600 Pa. at 695-96, 713-16, 969 A.2d at 1217, 1228-29.

[10] *Amicus* West Chester Area School District's argument based on the New Jersey and Maryland constitutions likewise fails. First, unlike Pennsylvania's Uniformity Clause, which applies to all governmental conduct, the New Jersey and Maryland uniformity clauses specifically address "assessments." *See* NJ Const., Art. VIII, 1, par. 1(a); Md. Const. Decl. of Rights Art. 15. As a result, those states recognize a constitutional basis for distinguishing between assessments and reverse appeals. Second, Maryland uniformity clause – contrary to

different subclassifications of real property is prohibited and not subject to any rational-basis test, so too the School District's targeting of certain subclassifications for discriminatory appeals is prohibited regardless of claimed motive. No Pennsylvania Supreme Court decision holds that conduct such as the School District's discrimination against commercial property and in favor of residential property is subject to a deferential rational-basis test. The Commonwealth Court therefor erred and should be reversed.

II. THE SCHOOL DISTRICT MISCONSTRUES THE LAW GOVERNING UNIFORMITY CLAUSE CHALLENGES AND THE PROCEDURAL POSTURE

The School District also contends that Plaintiffs' Complaint was correctly dismissed because: (1) it does not meet certain statistical pleading requirements (*see* UMASD Br. 24-26), and (2) Plaintiffs cannot state a claim because the application of the CLR cures any alleged Uniformity Clause defect (*see id.* at 17-18, 58-60). The School District's arguments are contrary to logic and settled law.

A. Without Basis, the School District Argues that Plaintiffs Must Plead Irrelevant Statistics

The School District contends Plaintiffs have not stated a cognizable Uniformity Clause challenge because their Complaint does not include

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this Court's longstanding interpretation of Pennsylvania's – explicitly authorizes different "classification and subclassification" of real property. Md. Const. Decl. of Rights Art. 15.

sufficient statistical allegations of non-uniformity such as measures of the variation of assessments or percentages of commercial properties under-assessed. (*See* UMASD Br. 24-26.) The School District is wrong for three reasons.

First, the School District's assertion misses the key allegation of Plaintiffs' Complaint, namely that the District's pattern of deliberate appeals creates different effective tax rates for commercial versus residential properties. Plaintiffs have alleged sufficient facts regarding those different effective rates. (*See, e.g.*, R.14-15a, 17-21a, 23-25a, 31a.) The School District's statistics are irrelevant to that challenge.

Second, the District's argument that disuniformity must be shown in a particular way rests entirely upon inapposite Commonwealth Court decisions that are contrary to this Court's guidance in *Downingtown* and *Clifton*. (*See* Appellants' Br. 53-59 (discussing, *inter alia*, *Springfield I*, *Weissenberger*, *Springfield II*, and *Smith*).)[11] These decisions thus do not establish pleading requirements applicable to Plaintiffs' uniformity challenge.

[11] The Commonwealth Court's holdings in *In re Penn-Delco Sch. Dist.*, 903 A.2d 600, 605 (Pa. Commw. 2006), and *In re Sullivan*, 37 A.3d 1250, 1256 (Pa. Commw. 2012), rely on that court's erroneous prior decisions and are erroneous for the same reasons. *Fosko v. Board of Assessment Appeals* also does not support the School District's argument, because it concerned a challenge to an assessment, not a challenge to a discriminatory policy of appeals. 646 A.2d 1275, 1279 (Pa. Commw. 1994).

Finally, ignoring that this case was decided on preliminary objections, the School District faults Plaintiffs for failing to "present[] credible, relevant and competent evidence" (UMASD Br. 25 (quoting *Fosko*, 646 A.2d at 1279)) or "make [the] required proof" (*id.* at 24),[12] but relies exclusively on cases decided on summary judgment or after trial.[13] However, a complaint need only "plead ultimate facts; evidentiary facts need not be set forth in the complaint." *Wicks v. Milzoco Builders*, 503 Pa. 614, 623, 470 A.2d 86, 90 (1983) (citation omitted). The question on a demurrer is whether, on the facts averred, the law

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[12] The School District's Brief's repeatedly misstates the governing standards applicable on a demurrer, contending that Plaintiffs failed to "demonstrate" this or "prove" that. (*See, e.g.*, UMASD Br. 54 ("These allegations are insufficient to 'prove a lack of uniformity.'" (quoting *Clifton*, 600 Pa. at 709-10, 969 A.2d at 1226-27)); *id.* at 31 ("Appellants' burden is to demonstrate that the School District's appeals resulted in 'deliberate, purposeful discrimination…."); *id.* at 7 (question addressed by Commonwealth Court was "whether Appellants demonstrated" the facts sufficient to survive rational-basis review); *id.* at 12 (objecting that Plaintiffs "fail to demonstrate that they are paying a disproportionate amount of taxes"); *id.* at 49 ("[T]o overcome the presumption that a litigant must exhaust all statutory remedies in an assessment case, a plaintiff must prove ….").)

Multiple supporting *amicus* briefs are similarly confused. For example, the brief submitted by Crestwood and other school districts invites the Court to consider expert testimony from a different case. (Crestwood *Amicus* Br. 8-10.) In addition to being procedurally improper, Crestwood's suggestion also represents an exercise in cherry picking. (*See* Ex. A to Crestwood *Amicus* Br., Transcript of Record at 101-02 (opining that Downingtown Area School District's policy of selective appeals will, in fact, increase disuniformity).)

[13] *See, e.g., Fosko*, 646 A.2d at 1277 (on appeal from *de novo* trial in court of common pleas); *Smith v. Carbon Cty. Bd. of Assessment Appeals*, 10 A.3d 393 (Pa. Commw. 2010) (same); *Weissenberger v. Chester Cty. Bd. of Assessment Appeals*, 62 A.3d 501, 504 (Pa. Commw. 2013) (on appeal after grant of summary judgment).

indicates with certainty that no recovery is possible. *See Poulson v. Pennsylvania Bd. of Prob. and Parole*, 610 Pa. 394, 20 A.3d 1178 (2011). The School District cannot re-write that settled law to maintain that Plaintiffs' Complaint is insufficient. Plaintiffs' Complaint pleads sufficient facts to survive a demurrer.[14]

B. The CLR Is Not a Cure All for Uniformity Clause Violations

The School District's Brief is similarly myopic in contending that Plaintiffs' Complaint fails to state a claim because the only remedy for a Uniformity Clause violation is to adjust a property's assessment-to-value ratio to the CLR. (UMASD Br. 17-18, 60.) As an initial matter, that is not so because, as the School District concedes, where there is "systemic unfairness or 'willful discrimination by the taxing authorities,'" a Plaintiff is entitled to

[14] The School District also mistakenly dismisses as a speculative "unwarranted inference" (UMASD Br. 8 n.5), Plaintiffs' allegation that "the School District has failed to appeal the assessments of single family homes because many if not all are owned by residents who vote in local elections and it would be politically unpopular to appeal such voters' property assessments." (R.24a.) Far from speculative, Plaintiffs' allegation of political favoritism accurately describes the School District's political incentives and actions, and is corroborated by the statements of its supporting *amici*. Of the 17 districts represented in the *amicus* briefs, only one even claims to apply a nondiscriminatory methodology in selecting properties to appeal, and even that district's methodology violates uniformity, *inter alia*, by discriminating based on relative wealth. (*See* West Chester Area School Dist. *Amicus* Br. 2; Appellants' Br. 45-46.)

Moreover, to the extent that any of Plaintiffs' allegations of fact were insufficient, Plaintiffs were entitled to an opportunity to amend the Complaint, which the trial court did not provide. *See, e.g.*, *Framlau Corp. v. Delaware Cty.*, 299 A.2d 335, 337 (Pa. Super. 1972) (*citing Stevens v. Doylestown Bldg. and Loan Assoc.*, 321 Pa. 173, 183 A. 922 (1936)).

other remedies. (UMASD Br. 17-18 (quoting *In re Sullivan* at 37 A.3d at 1256, 400-01).)[15] Plaintiffs have alleged *both* systemic unfairness and willful discrimination by the School District. (*See* R.14a, 20-24a.)

In addition, the School District's suggestion that the CLR is a Uniformity-Clause cure-all misses the mark entirely. The CLR cannot resolve the disuniformity alleged here because, notwithstanding the application of the CLR, the School District's pattern of selective appeals creates a higher effective tax rate on commercial properties. A simple example shows this: Consider two groups of underassessed properties – A and B. If the valuations of some underassessed Class A properties, but no Class B properties, are subject to reverse appeals and have their derived assessed values moved to the CLR, the overall Class A effective tax rate will increase relative to the effective rate for Class B properties. Thus, despite applying the correct CLR, Class A properties overall will face a higher effective tax rate than the preferred Class B properties.[16]

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[15] *See also Clifton*, 600 Pa. at 712, 969 A.2d at 1227 (application of the CLR "is not adequate when the inequity is pervasive").

[16] The primary classifications alleged in the complaint are commercial properties versus single family homes. In addition, a taxing authority may not selectively appeal assessments in a way that discriminates against high-value properties relative to low-value properties because this would be akin to discrimination based on relative wealth or income, which is prohibited under the Uniformity Clause. (*See* Appellants' Br. at 45-46.)

Finally, this Court has never held that the CLR is a panacea for all Uniformity Clause violations. To the contrary, the *Clifton* Court recognized that taxpayers were entitled to relief because, even though their assessment-to-value ratios could be adjusted to the CLR, they had no way to ensure that any other class of underassessed properties was also normed to the CLR. *See Clifton*, 600 Pa. at 712-13, 969 A.2d at 1228. Likewise here, adjusting the assessment-to-value ratio of **only** Plaintiffs' properties and other commercial properties to the CLR, while leaving more than 80 percent of single-family homes assessed at a lower rate, creates different effective tax rates that Plaintiffs cannot challenge through the assessment-appeal process.[17]

[17] The School District's position that the CLR is a uniformity cure-all also obscures the fact that the CLR is calculated on a county-wide basis, *see* 72 P.S. §§ 4656.16a, 5020–102, 5342.1, and thus does not reflect the average assessment-to-value ratio in a particular district. (*See* UMASD Br. 16.) Because the CLR is calculated on a county-wide basis, moving the assessment-to-value ratios of select properties in a broadly underassessed district to the CLR will increase disuniformity within that district. Plaintiffs' Complaint sufficiently alleges that properties in the School District are, on average, underassessed. (R.14a, 19a, 21a.)

Relatedly, the suggestion that Plaintiffs should have sought a county-wide reassessment (UMASD Br. 60) is misguided for two reasons. First, even if a county-wide reassessment were ordered for some future date, Plaintiffs' properties would remain subject to the pending discriminatory appeals initiated by the School District that would govern their assessments before any county-wide reassessment took effect. Second, a reassessment is only a temporary solution because, as the assessment inevitably becomes outdated, the School District will simply resume its policy of discriminatory appeals.

III. PRACTICAL AND POLICY CONSIDERATIONS WEIGH AGAINST THE SCHOOL DISTRICT

Bereft of support in *Downingtown*, *Clifton,* or this Court's other precedent, the School District's Brief hyperbolically objects that ruling in favor of Plaintiffs would require the School District to "(1) analyze every property within its jurisdiction and (2) appeal every under-assessed property revealed by such analyses," which is equivalent to requiring a "de facto school district-wide assessment when it exercises its statutory right to appeal." (UMASD Br. 45-46.)[18] That sky-is-falling objection has no merit; it is the School District's discriminatory appeals that have serious negative economic impacts.[19]

First, the School District need do neither (1) nor (2) because Plaintiffs argue only that the School District cannot deliberately appeal properties in a way that creates a greater effective tax rate on commercial properties than

[18] The School District frames this argument in terms of the integrity of the Assessment Law, contending overdramatically that "granting Appellants' requested relief would wholly undermine the Assessment Law." (UMASD Br. 45.) The School District never explains how recognizing a uniformity limitation on a taxing authority's appeal rights will "wholly undermine" a lengthy statute of which those appeal rights are a very small part. Moreover, all acts of the legislature are subordinate to constitutional requirements. *See, e.g.*, *Amidon v. Kane*, 444 Pa. 38, 41, 279 A.2d 53, 55 (1971).

[19] Notably, many *amicus* school districts supporting the District acknowledge that they are engaging in reverse appeals against commercial properties in order to gain additional revenue. Perhaps part of the motivation is that any revenue gained through reverse appeals is not subject to the statutory millage cap. In any event, the fact that discriminatory appeals have become a means of obtaining revenue is no excuse for unconstitutional conduct.

residential ones. Period. Our courts could work out several standards that permit appeals and comply with the Uniformity Clause. In their opening brief, Plaintiffs offered, for example, that the School District could avoid discrimination and further uniformity by appealing a representative set of properties from each category recognized by the STEB (*e.g.*, residential, industrial, commercial, agricultural), in proportion to the dollar value of properties.[20] Alternatively, the School District could appeal the properties whose market-to-assessed-value ratios are furthest from the CLR. (*See* Appellants' Br. 52-53.) Neither proposed solution requires the School District to value every property in the District or appeal a particular number of properties, as the School District suggests. To do either, the School District could use the current valuations of properties as an approximation. And, just as the School District hired a consultant to help it identify commercial property assessments for appeal, so too the consultant could identify the most underassessed properties.

[20] The School District misconstrues Plaintiffs as contending that any consideration of different types of real property is prohibited. (*See, e.g.*, UMASD Br. 6, 60.) Of course, Plaintiffs do not contend that the government can never acknowledge the existence or relative proportions of different types of real property. It just cannot do so in ways that create disuniformity between different subclasses.

Finally, the *amici curiae* supporting Plaintiffs make clear that the School District's discriminatory scheme has serious negative economic impacts,[21] including:

- Increasing rent prices because at least some portion of the higher effective tax rate on commercial properties will be passed on to tenants (*see* Economists *Amicus* Br. 23-24; Apartment Owner Assn. *Amicus* Br. 2-5);
- Promoting inefficient low-density development through favoritism towards single-family homes (Economists *Amicus* Br. 25);
- Causing the misallocation of capital within the School District (*id.* at 18-21);
- Detrimentally impacting labor and wages in the District (*id.* at 25);
- Discouraging investment in the District as capital moves to jurisdictions with lower effective rates on commercial properties (*id.* at 21-22; Penn. Chamber of Business and Industry *Amicus* Br. 20-21).[22]

Thus any inconvenience the School District might suffer in the process of making its assessment-appeals policy consistent with the Uniformity Clause

[21] Plaintiffs' position was supported by *amici curiae* representing a wide range of academic and business interests.

[22] *See also* Kenney *et al.*, *Cherry Picking: Actions by Taxing Authorities to Increase Assessments on Unsuspecting Tax Payers* at 10 (2016), https://www.ipt.org/iptdocs/Files/Papers/2016CON/23KenneyManzioneStavitsky.pdf (acknowledging that reverse appeals "balance short term financial benefits to School District vs. long term negative consequences putting business in non-competitive position.").

would be limited and outweighed by the economic benefits of prohibiting the District's current discriminatory policy.[23]

IV. PLAINTIFFS PROPERLY INVOKED THE EQUITY JURISDICTION OF THE TRIAL COURT

After Plaintiffs filed their opening brief, the School District applied to quash it, asserting that Plaintiffs had waived any response to the Commonwealth Court's supposed holdings about administrative exhaustion. Plaintiffs responded that the School District's arguments were premised on a stark misreading of the Commonwealth Court's opinion and applicable law.[24] Plaintiffs also identified the applicable two-part test for equity jurisdiction set forth in *Beattie v. Allegheny Cty.,* 589 Pa. 113, 122, 907 A.2d 519, 524-25 (2006). That test requires that a plaintiff raise a substantial constitutional question and lack an adequate remedy in the applicable administrative proceeding. Should

[23] The Pennsylvania Economy League suggests that Plaintiffs' position is analogous to arguing that "a police officer cannot write a traffic citation because the police force has not pulled over every potential speeder on the road at any given time." (Economy League *Amicus* Br. 10.) This analogy is misleading and unhelpful. The School District's conduct is more akin to a scheme to enforce the law only as to one type of luxury automobile owned largely by non-voters so as to subsidize roads for all other drivers. Such a policy would be contrary to the Uniformity Clause if the Uniformity Clause applied to traffic enforcement.

Additionally, the Pennsylvania Economy League's unsigned *amicus* brief should be stricken for failure to comply with this Court's rules and this Court's written request for a corrected filing with a signature block.

[24] *See* Answer and Brief of Appellants in Opposition to Appellees' Application to Quash Appeal (filed August 26, 2016). As of the date of this Reply, the School District has not sought leave to file a reply in further support of its Application.

this Court elect to reach this issue, it is readily apparent that Plaintiffs satisfy both prongs. (*See* Answer to Appl. to Quash at 2, 20-26.)

In its Brief, the School District acknowledges that the *Beattie* test is a means to "overcome the presumption that a litigant must exhaust all statutory remedies in an assessment case." (UMASD Br. 49 (citing Commw. Op. at 13 (quoting *Beattie*, 589 Pa. at 113, 907 A.2d at 519)).) But, the School District argues, Plaintiffs have not met the requirements for equity jurisdiction because they have not raised a substantial constitutional question and have an adequate remedy in the statutory appeals process.[25] The School District is wrong on both points.

A. Plaintiffs Have Raised a Substantial Constitutional Question

The School District's contention that Plaintiffs have not raised a substantial constitutional question suffers from three flaws. First, while the School District's argument relies heavily on the Commonwealth Court's conclusion that Plaintiffs' Uniformity Clause argument was without merit (*see*

[25] The School District (UMASD Br. 50-53) also relies on *Fox v. County of Clearfield*, No. 1328 C.D 2010, 2011 WL 10845573 (Commw. July 15, 2011), an unreported decision of the Commonwealth Court where, among other things, the court found Plaintiff had an adequate administrative remedy when he sought a reduction in the assessed value of his property. *Fox*, 2011 WL 10845573, at *7. Contrary to the District's suggestion, *Fox* is not "nearly identical" to this case, because Plaintiffs are not challenging their assessments or contending their properties are overassessed.

UMASD Br. 53-55), that conclusion was erroneous for the reasons stated above and in Plaintiffs' opening brief.

Second, the School District's argument that Plaintiffs' "allegations are insufficient *to 'prove* a lack of uniformity'" (UMASD Br. 54 (emphasis added) (quoting *Clifton*, 600 Pa. at 710-11, 969 A.2d at 1226-27)), is another example of the School District's confusion about the procedural posture.[26]

Third, the School District's argument relies on outdated law. Specifically, it quotes a dated Commonwealth Court decision for the proposition that equity jurisdiction is only appropriate where a plaintiff raises a "frontal attack on the constitutionality of a statute." (UMASD Br. 55 (quoting *Jordan v. Fayette Cty. Bd. of Assessment Appeals*, 782 A.2d 642, 646 (Pa. Commw. 2001)).) This Court likely never enforced such a blanket rule; if it did, the Court abandoned it in *Beattie. See Beattie,* 589 Pa. at 128, 907 A.2d at 529 (A substantial constitutional issue *can* be raised "based solely upon the manner in which the governing taxing statute is applied.").[27]

[26] *See* pages 14-15, *supra*.

[27] *See also Beattie,* 589 Pa. at 128-29, 907 A.2d at 529 (citing earlier precedent for the proposition that there was never a "*per se* rule precluding equity jurisdiction absent a facial challenge"); *Clifton*, 600 Pa. at 683 n.17, 969 A.2d at 1209 n.17.

Plaintiffs have unquestionably raised a substantial constitutional question because, for all for the reasons set forth above and in their opening brief, their Uniformity Clause challenge has merit.

B. Plaintiffs Lack an Adequate Administrative Remedy

The statutory appeal process is not an adequate administrative remedy for three reasons. First, Plaintiffs' claims fall outside the scope of an assessment appeal because Plaintiffs do not seek review of an individual tax assessment. The Assessment Law, 53 Pa. C.S. §§ 8801, *et seq*., permits and governs only challenges by "[a]ny person aggrieved by any assessment." 53 Pa. C.S. § 8844(c). Plaintiffs are not aggrieved by their assessments, but rather by the School District's discriminatory method of selecting assessments to appeal. Nothing in the text of Assessment Law permits, much less requires, that kind of systemic challenge to be litigated in an individual assessment appeal.[28]

Second, nothing in the Assessment Law authorizes, in the context of an assessment appeal, the equitable relief Plaintiffs seek, namely an injunction barring the School District from pursuing discriminatory and selective appeals

[28] While Plaintiffs have each asserted the Uniformity Clause argument as an affirmative defense in the individual appeals, they have done so to preserve their rights pending the outcome of this litigation. Nothing in the Assessment Law ensures that their argument about the Uniformity Clause will be heard. Indeed, in those pending appeals the School District has taken the position that discovery in support of that argument is not relevant. *See* Aff. of Paul Morcom ¶¶ 6-7 (Exhibit 1 to Answer to Application to Quash).

and a declaration that its selective appeals violate the Uniformity Clause. (R.32a, 37a.) That relief is simply not available in an individual Assessment Law appeal, which is limited to the determination of the assessed value of the property. *See* 53 Pa. C.S. § 8854(a)(2), (3).

Under similar circumstances, in *Beattie*, the Supreme Court recognized that "systematic under-assessment of higher-value properties can[not] be cured through a series of administrative appeals taken by members of the asserted class of lower-value property owners," and that, as a result, an equity action – not individual assessment appeals – is the appropriate vehicle for challenging systematic discrimination. 589 Pa. at 126, 907 A.2d at 527. Just as in *Beattie*, the limited relief available in an individual assessment appeal cannot cure the harm Plaintiffs allege.

Finally, Plaintiffs' constitutional challenge raises issues and requires the introduction of evidence that the Commonwealth Court has held **cannot** be litigated in an individual assessment appeal. *See* Appellants' Br. 53-60. The Commonwealth Court has held (erroneously) that (1) comprehensive evidence regarding the overall scheme of a school district to selectively appeal properties does not establish a Uniformity Clause defense in an individual assessment appeal, *In re Springfield Sch. Dist.*, 879 A.2d 335, 341 (Pa. Commw. 2005), and (2) evidence of the market and assessed value of particular other properties is

inadmissible to prove a uniformity violation in an assessment appeal.[29] Under this precedent, the very evidence Plaintiffs submit demonstrates the School District is violating the Uniformity Clause has been held irrelevant and inadmissible in individual assessment appeals.[30]

In short, the statutory assessment appeal process is a grossly inadequate remedy for the wrong Plaintiffs seek to correct,[31] and this Court should find the requirements of equity jurisdiction satisfied.[32]

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiffs' opening brief, Plaintiffs respectfully request that this Court reverse the judgment of the

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[29] *See Smith*, 10 A.3d at 407; *In re Springfield Sch. Dist.*, 101 A.3d 835, 850 (Pa. Commw. 2014).

[30] The School District has taken this position in discovery in the individual assessment appeals. *See* n.28 *supra.*

[31] In contrast to the clearly unworkable prospect of litigating Plaintiffs' challenge through assessment appeals, this case seeks the sort of "tidy global resolution" that this Court has recognized is more appropriately sought through an equity action. *See Kowenhoven Kowenhoven v. County of Allegheny*, 587 Pa. 545, 558, 901 A.2d 1003, 1011; *see also Borough of Green Tree v. Board of Prop. Assessment Appeals of Allegheny Cty.*, 459 Pa. 268, 279, 328 A.2d 819, 824 (1974) ("Where the administrative process has nothing to contribute to the decision of the issue…exhaustion should not be required." (citation omitted)).

[32] The School District's final argument, that Plaintiffs have not requested the proper relief, also fails. Consistent with Pa. R.C.P. 1021(a), Plaintiffs' Complaint requests several different types of relief in the alternative, including injunctive and declaratory relief and and "[a]ny other relief the Court deems just and proper." (R.32-33a.) The School District cites no authority barring Pennsylvania courts from granting equitable relief to redress unconstitutional conduct. To the contrary, Pennsylvania courts clearly possess such authority. *See, e.g.*, *Clifton*, 600 Pa. at 717, 969 A.2d at 1231 (directing trial court to set time frame for completing reassessment).

Commonwealth Court and the Court of Common Pleas and remand to the Court of Common Pleas with instructions to hold a hearing to determine whether the School District's scheme for selecting appeals violates the Uniformity Clause because, among other things, it results in a classification of real property and deliberately discriminates against commercial properties, without regard to any economic justification the School District offers.

Respectfully submitted,

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Dated: September 26, 2016

CERTIFICATION

This 26th day of September, 2016, I certify that:

Electronic version. The electronic version of this brief that has been provided to the Court in .pdf format in an electronic medium today is an accurate and complete representation of the paper original of the document that is being filed by Plaintiffs-Appellants.

Word count. This brief contains 6,657 words, as counted by the undersigned's Microsoft Word word processing software, and it therefore complies with the 7,000 word limit set by Pa. R.A.P. 2135(a)(1).

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IN THE SUPREME COURT OF PENNSYLVANIA

Valley Forge Towers Apartments N, LP; Morgan Properties Abrams Run Owner LP; KBF Associates, LP; Gulph Mills Village Apartments LP; and The Lafayette at Valley Forge LP	:	49 MAP 2016
v.	:	
Upper Merion Area School District and Keystone Realty Advisors, LLC	:	
Appeal of: Morgan Properties Abrams Run Owner LP; KBF Associates, LP		

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