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Case Number 235,2019D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PORT PENN HUNTING LODGE ASSOCIATION, a Delaware General Partnership,	:	
Appellant	:	Appeal No. 235, 2019
MATTHEW S. MEYER, Individually and in his official capacity as the County Executive for New Castle County, NEW CASTLE COUNTY a political subdivision of the State of Delaware, TRACY SURLES, individually and in her official capacity as the General Manager of Special Services for New Castle County, MARY A. JACOBSON, individually and in her official capacity as Legal Counsel to the Department of Land Use for New Castle County, RICHARD E. HALL, individually and in his official capacity as the General Manager of the Department of Land Use for New Castle County,	:	Appeal from the Chancery Court of the State of Delaware in and for New Castle County, Case No.: 2018-0328 TMR
Appellees	:	

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

This case exposes New Castle County's arbitrary, discriminatory and manipulative application of its land use powers and regulations. From the very outset, New Castle County administrations have not hesitated to play king maker with select real estate developers. Despite lip service to fairness one after another County administrations have exercised their land use powers to pick winners and losers. The winners can reap millions by rezoning and/or subdividing their land while the losers are left with a cornfield. Maybe coincidentally, but often the winners seem to be "contributors" to or friendly with elected County politicians.

In this case, while Petitioner was denied sewer service of any kind, the County colluded with adjoining favored property owners to provide sewer at public expense. The County's favoritism resulted in creating an island of 631 home sites in the middle of the adjoining cornfields. Not only did the County deny sewer that was provided at public expense to Petitioner, but the County enacted ordinances or regulations intended to preclude the utilization of adjacent sewer facilities, while agreeing to provide sewer for favored owners so their property can be developed. The County, however, is determined to preclude development by the Petitioner and neighboring properties.

The County's determination to do "everything that we can to prevent

sewering" and thereby preclude development in the Port Penn area was expressed "for the record" by a County Councilman at a public committee meeting. The County's obvious goal is to keep the Port Penn area properties as open space for free in violation of Petitioner's constitutional rights.

The dismissal of the Petitioner's Complaint precluded discovery and revelation of the County's misconduct and manipulations. The Chancery Court erred in dismissing Petitioner's complaint resulting in this appeal. This is Petitioner/Appellant's Opening Brief.

SUMMARY OF ARGUMENT

I. THE COUNTY'S DENIAL OF EQUAL ACCESS TO PUBLIC SEWER TO PETITIONER'S PROPERTY WHILE PROVIDING SEWER TO THE ADJOINING PROPERTIES IS DISCRIMINATORY AND IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION

II. THE COUNTY'S DESIGNATION OF THE PORT PENN AREA AS A SEWER DISTRICT FOR 20 YEARS WHILE REFUSING TO PROVIDE SEWER SERVICE SO AS TO OBTAIN OPEN SPACE FOR FREE CONSTITUTES A TAKING

III. THE COUNTY CANNOT BY CONTRACT CREATE A PRIVATE SEWER DISTRICT FOR FAVORED PROPERTY OWNERS WHILE EXCLUDING ADJOINING OWNERS

IV. BASED ON THE COUNTY'S INEQUITABLE CONDUCT AND REPRESENTATIONS THAT PETITIONER RELIED ON TO ITS DETRIMENT THE COUNTY IS ESTOPPED FROM PRECLUDING PETITIONER'S ACCESS TO PUBLIC SEWER

V. THE COUNTY'S ARBITRARY AND DISCRIMINATORY REFUSAL TO ALLOW PETITIONER EQUAL ACCESS TO PUBLIC SEWER VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS

STATEMENT OF FACTS

The controlling facts and the facts relied on by the Chancery Court as expressed in the Court's decision are:

> ". . . all facts from the Verified Complaint (the "Complaint"), the documents attached to it, and the documents incorporated by reference into it."

FACTUAL ALLEGATIONS CONTAINED IN THE VERIFIED COMPLAINT IN THE IDENTIFIED PARAGRAPH:

> ¶5. Some 20 years or so ago pursuant to Title 9 of the Delaware Code, the County established a sanitary sewer district for the southern portion of the County including the Port Penn area i.e., the Southern New Castle County Sanitary Sewer Service Area (the "SSSA"). (A13-14)

The Complaint also alleges that:

> ¶9. About 20 years ago, the Petitioner sought to subdivide its property for a project that was named the Preserve. The Preserve Project sought to develop and subdivide approximately 120 acres and preserve and leave 200 or so acres in its natural state. (A14)
>
> ¶10. After paying the County the required application and review fees and after spending a substantial amount of money for engineering and designing the subdivision the County Land Use Department refused to allow Petitioner to proceed to recordation because the property was in the "Southern Sewer Service Area" but sewer was not available and Petitioner had to wait until it became available. (A14-15)

The County's letter stated that Petitioner's plan could not be approved "due to absence of a public sanitary sewer system in the vicinity of the site . . ." and Petitioner

had "to wait until sewer became available . . ." (¶11) (A15)

In 2003, County Council passed a Resolution reaffirming Council's commitment to construct a sewer system in the SSSA area. The Resolution clearly stated that the County had made a commitment to provide sewer service in the Port Penn area ... which was designated as a growth area by the County and the State of Delaware. . . "[because] a sewer system in southern New Castle County is a necessary component of good land use planning."(A16)

In light of Council's reaffirmed commitment to provide sewer and relying on same. Petitioner sought to subdivide approximately 120 acres. (¶14) (A16)

> ¶15. However, after again spending thousands of dollars with a new engineer in reliance on the County's commitment to provide sewer and after spending a substantial amount of time and money the County once again refused to allow the plan to proceed to recordation because sewer was not available. (A16-17)

Toll Brothers, a national builder accumulated several properties referred to as the "Port Penn Assemblage", that are "adjacent to the Preserve, the Petitioner's project" and with the Warren Farms also applied for subdivision and in November of 2007 sued the County to compel sewer service in the Port Penn SSSA area. (¶18) (A17-18)

> ¶19. At the same time Petitioner was also considering filing suit, however, Charles Baker, the General Manager at that time, informed Petitioner's representative that if sewer was provided

> for anyone in that area the County would certainly not play favorites and in fairness would provide sewer to other property owners in the area. Relying on that representation and commitment, Petitioner did not file suit . . ." (A18)

Three years later, the County on November 29, 2010 "agreed to provide sanitary sewer service at public expense" to Toll Brothers/Warren Farms for 631 housing units. (¶20 and ¶21) (A18)

Another Port Penn owner, Richland Partnership also filed suit to obtain sewer service in Chancery Court and entered into a settlement for sewer the same as or similar to Toll Brothers (with 137 units). (¶22) (A19)

In 2017, there was a change in the County Administration and the new County Executive Meyer expressed his intent to make public sewer available for the area and to treat all property owners in the Port Penn area fairly and equally. (¶24) (A19).

> ¶25.Since it appeared that the County was now willing to finally honor its longstanding commitment to provide sewer for the Port Penn SSSA area, fairly and equally to all property owners, Petitioner filed a new subdivision application for the Preserve. (A20)

On May 16, 2017 the application for the Preserve was rejected since sewer was "currently not available." (¶26) (A20)

In response to Petitioner's protest that the County was engaging in "favoritism" the County reaffirmed its decision that only "Richland Partnership farm and the

Warren Farm" would be provided sewer pursuant to their settlement agreement. (¶27) (A20)

Subsequently, Petitioner filed a fourth application which was rejected because of the County's refusal to provide sewer. (¶28 and ¶29) (A20-21)

The Complaint also alleges:

> ¶36. By designating the area as a sewer district, but intentionally refusing to provide sewer service the County precluded a private sewer system or septic system and thereby intentionally and unlawfully precluded any type of development. (A28)
>
> ¶37. The County's actions are intended to improperly and illegally force the Port Penn properties, including Petitioner's property, to remain undeveloped . . . The County's goal is to obtain open space for free. . . . (A22-23)

DOCUMENTS OR FACTS INCORPORATED BY REFERENCE BY THE PARTIES.

The County's November 29, 2010 "settlement agreement" with Toll Brothers/Warren retroactively revived their plans which otherwise would have expired years ago and granted an additional 18 months for the approval of their plans. The agreement further provided that:

> ". . . if a complete record plan application for the Plans is not received within the time set forth above, or if the Plans are not recorded within two (2) years of the submission of the record plan application, the Plans shall be considered expired. (Emphasis Added)" (A58-63)

That was also the plan approval deadline contained in the Consent Court Order:

> "If a complete record plam application is filed within eighteen (18) months, the plan recordation process must be completed within two (2) years of the date of record plan application or the Plains will be considered expired. If for any reason the Plans are not recorded within forty-two (42) months, the Plans shall expire." (A64)

Richland entered into a similar agreement on January 24, 2011 with a 24 month deadline for plan approval. (A66-72) The Court Consent Order dismissed the case with prejudice and also provided that the plan:

> "Shall not be subject to expiration by New Castle County for a period of twenty four (24) months from the date of the Order." (A73)

As indicated in the County's 2012 Future Land Use Map, the Toll Brothers/Warren properties and the Richland property and the Petitioner's property are all zoned exactly the same - Suburban: - "low density" "1-3 units per acre." (A74) In the 2007 Legend map the County acknowledged that these same projects all had "Pending Plans." (A75)

The proposed 2012 Future Land Use Map noted that only "Sites which have been awarded sewer rights have been added to the New Community Development Area." (A76) (Petitioner was not included because it was not awarded sewer rights.)

At a Public Work Committee meeting on October 2, 2018 County Councilman

at that time, Robert Weiner made the following statement:

> "Just for the record, there are many of us not only in County government but outside that feel that Port Penn Assemblage is an environmentally sensitive area. With oceans rising and environmental sensitivity from a public policy perspective, we should do everything that we can to prevent sewering for Port Penn Assemblage." (Emphasis Added) (A77-78)

ARGUMENT

I. THE COUNTY'S DENIAL OF EQUAL ACCESS TO PUBLIC SEWER TO PETITIONER'S PROPERTY WHILE PROVIDING SEWER TO THE ADJOINING PROPERTIES IS DISCRIMINATORY AND IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION

QUESTION PRESENTED

Was the County's denial of equal access to public sewer to Petitioner's property while providing sewer to the adjoining properties discriminatory and in violation of Petitioner's Constitutional Rights to Equal Protection? Preserved in the Notice of Appeal from the Chancery Court.

SCOPE OF REVIEW

In this appeal the decision of the Chancery Court is subject to a *de novo* review by this Court on both the law and the facts. *DuPont v. DuPont*, 216 A.2d 674 (Del. 1966)

MERITS OF ARGUMENT

The Chancery Court erred in dismissing Petitioner's discriminatory and Equal Protection Claim.

For 20 years Petitioner has been trying to subdivide approximately 120 acres of its 320 acre property in Port Penn and leave 200 acres as open space. For 20 years

or so the County has designated that area as a Sewer District but has not provided sewer. As alleged in the verified complaint, Petitioner filed for subdivision in reliance on the County's commitment to provide sewer in 2000. After paying the County the required application and review fees and after spending a substantial amount of money for engineering and designing the subdivision the County Land Use Department refused to allow Petitioner to proceed to recordation because the property was in the "Southern Sewer Service Area" but sewer was not available and Petitioner had to wait until it became available. (Exhibit B of Petitioner's Complaint, A38)

Petitioner was informed by the County on June 7, 2001 that its plan would expire, if not completed, in 12 months. The plan was rejected:

> "Due to the absence of a public sanitary sewer system in the vicinity of the site, it is not possible for the plan to achieve approval. Accordingly, you are advised to wait until sewer becomes available before submitting a new plan." (A38)

Since the adjoining properties Toll Brothers/Warren, and Richland another property in the area, were granted sewer at public expense, sewer is now or shortly will be available in the vicinity of Petitioner's property, but the County is not allowing Petitioner access to the sewer that essentially is next door.

Public sewer is a public utility and a municipal service that is required to be provided to all residents equally and not to only a select few. Once public sewer is

installed at public expense and is located feet or inches away from Petitioner's property, the County cannot discriminate and Petitioner cannot be arbitrarily and capriciously denied equal access to the public sewer. That was the holding by this Court in *Delmarva Enterprises, Inc. v. The Mayor and Council of the City of Dover,* 282 A.2d 601 (Del. 1971).

In that case, the City of Dover provided water services to certain developers but refused to do so for Delmarva. Per an agreement with the County, Dover had the exclusive and discretionary right to provide water and sewer services to a "buffer zone" outside of the City limits which this Court stated:

> . . . as to all intents and purposes has created a service zone when water and sewer lines are in existence.

The Court's decision by Chief Justice Wolcott ruled that:

> . . . the City, in supplying water and sewer services, is acting in its proprietary capacity and in so doing, is operating a public utility and is therefore subject to regulation as such. (Citations omitted)
>
> As a pubic utility, the City is subject to she same requirements of the law as a private utility. One of the prime requirements laid on a public utility is that in the operation of its existing facilities it shall not discriminate among customers, but shall make its facilities available to all alike. (Citations omitted)
>
> Under the facts of this case, the water and sewer lines are in existence and taps have been permitted in the past. To refuse this request, therefore, is discriminatory against this Petitioner. The decision below must therefore be reversed. (Citations omitted)

In a subsequent *per curiam* decision, this Court reaffirmed its holding that:

> The City, acting as a public utility is providing similar services to other non-city residents within the service zone it created and its refusal to provide the same services to Delmarva is discriminatory as a matter of law. *The Mayor and Council of the City of Dover v. Delmarva Enterprises, Inc.,* 301 A.2d 276 (Del. 1973).

The County's refusal to allow Petitioner to connect to the public sewer in the sewer service zone it created is not only discriminatory but also violates Petitioner's equal protection rights.

> The Equal Protection Clause of the Fourteenth Amendment requires the government to treat all similarly situated individuals alike. *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985). If two individuals are treated differently, despite some facial similarly in their situations, the Constitution requires that there be some rational, legitimate basis for the difference in treatment. *Tarantino v. City of Hornell*, 615 F.Supp.2d 102 (2009)

The law is clear that:

> The Equal Protection Clause requires that "all persons similarly situated should be treated alike.
>
> The purpose of the Equal Protection Clause is to secure all citizens "against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly considered agents. *Long v. Cty. of Fresno*, 2014 WL 3689694 (C.D. Cal. July 24, 2014)

In *Mihaly v. Town of Trumball Water Pollution Control Authority*, 2013 WL

2948329 (D. Conn. June 14, 2013), the Court held that a "class of one" violation of equal protection is:

> . . . viable where a plaintiff alleges that she has been treated differently from other similarly situated people and that there was no rational basis for this differential treatment.

The decision also makes it clear that a property right cannot be eliminated without due process.

In its decision, the lower Court considered Equal Protection and ruled that to avoid dismissal, Petitioner must establish that it:

> . . . was 'intentionally treated differently from others similarly situated' who were '*prima facie* identical in all relevant respects' and 'that there is no rational basis for the difference in treatment'.

The Chancery Court decided that Port Penn failed to overcome the rational basis test. That decision is counter to this Court's holding in *Delmarva* which should be controlling. However, if rational basis is a required element the facts and inferences of this case viewed favorable to Petitioner preclude dismissal.

The County contended that Petitioner's property is dissimilar for the following reasons:

1. Petitioner's property is zoned "Low Density Residential" but the three favored properties are not.
2. The Petitioner is not included in the new Community Development Area but the three favored properties are.
3. The Petitioner did not file suit but the three favored owners did.

Contrary to the County's contention all properties are zoned exactly the same - "Suburban." The County's 2007 Land Use Maps clearly establish that Toll Brothers/Warren, Richland and Petitioner's projects are all zoned the same "low [density] (1-3 dwelling units per acre)." (A74) Moreover, the County's Legend Map clearly confirms that all four projects have "pending plans" pending sewer availability. (A75) The properties are not only similar but exactly the same.

In a circular type argument, the County also argues that the properties are dissimilar because the three favored properties are included in the 2012 Comprehensive Plan, New Community Development Area and Petitioner's property is not. The proposed 2012 Future Land Use Map noted that "Sites which have been awarded sewer rights have been added to the New Community Development Area." (A76) However, that designation is the result of the County's manipulation.

The County improperly provided sewer for the three favored properties and used the grant of sewer to place only those three in their New Community Development Area. That designation did not increase or change the density or does anything else, but is only the result of the County's improper decision to provide only Toll Brothers/Warren and Richland with sewer.

However, the Toll Brothers/Warren plans and the County's commitment to provide sewer expired on May 29, 2014 and Richland plans expired on January 24,

2013, but they were not removed from the New Community Development Area. On the contrary, the County allowed the Richland plans to be recorded on January 23, 2018, five (5) years after the agreement and the Court Order provided that they expired. The expiration of the plans placed them on the same footing as Petitioner's plans. Nevertheless, Toll Brothers/Warren and Richland will be provided sewer at public expense but Petitioner will not.

The County also contended that the Petitioner's property is not similar to the three select owners' property because they filed suit and Petitioner did not. Initially, it must be noted that the Complaint clearly alleges that suit was not filed by Petitioner because it relied on the assurances or representations of the County's Land Use Manager that there was no need to file suit since if anybody obtained sewer it would also be made available to all owners in Port Penn.

Moreover, the circumstances surrounding the agreements to provide sewer are at best questionable. According to the County they were forced to provide sewer to avoid costly litigation. However, the District Court had granted their Motion to Dismiss, but even though the County had won, the County agreed to provide them with sewer. The County also retroactively extended their plans expiration deadlines and gave them more time to obtain plan approval in violation of the applicable regulations.

The County complied with the terms of the settlement agreements and Court Orders, but the owners allowed their plans to expire and that was the end of the County's obligation and the termination of the settlement agreements. As stated, with their plans having expired that placed them on equal footing with Petitioner's plan. Therefore, it is perplexing why the County takes the position that they need to provide public sewer at public expense to these three owners and no one else, including Petitioner.

Petitioner contends that the agreement to provide sewer services to the three favored owners was not because they filed suit and in order to avoid litigation expenses, but rather than who the property owners were. If avoiding expenses was the reason the same could apply to Petitioner's present claim and litigation. Moreover, as stated, the County's motion to dismiss the Toll Brothers/Warren suit was granted and the *Richland* suit which was prearranged was never litigated. The Chancery Court stated:

> Port Penn also speculates that the settlement agreements were "sham" agreements that the County prearranged with the other developers. Port Penn asserts that "[o]ne can envision a County official telling Lester [Richland's owner] to just file suit and we won't really litigate, but this will give us a reason to agree to give you sewer." This speculation is unsupported.

What the Chancery Court stated was "speculation" was certainly "conceivable"

and justified discovery. The Richland suit was filed on March 6, 2007 and a stipulated stay was entered on March 7, 2007, one day later. The stipulation "stays the litigation and prevents the plan from expiring," which was its express purpose. (A66-73) Obviously, this was a "friendly" pre-arranged suit and there never was any intent to litigate, or that can certainly be inferred and is clearly conceivable.

It is well established that this Court's policy favors allowing cases to be decided on their merits. Dismissing a claim pursuant to Rule 12(b)(6) defeats that policy. Consequently, in deciding such motions, the Court must:

> . . . accept as true all of the well-pleaded allegations of fact and draw reasonable inferences in the [petitioner's] favor . . . Dismissal is inappropriate unless the '[petitioner] would not be entitled to recover under any reasonable conceivable set of circumstances susceptible of proof.' *In re Gen. Motors (Hughes) S'holder Litig.,* 897 A.2d 162, 168 (Del. 2006)

See also *Ramunno v. Cawley*, 705 A.2d 1029, 1034-36 (Del. 1998).

Based on the *Delmarva* decision alone, the Chancery Court erred in dismissing Petitioner's discriminatory claim. Also the Chancery Court erred in its decision that Petitioner failed to overcome the "rational basis test" and thereby dismissed Petitioner's equal protection claim. The alleged and established similarity between the favored properties and Petitioner's property were factual issues that required discovery or at the very least were sufficient to assert a conceivable claim that needs

to proceed to discovery and to be decided on the merits. There was no "rational basis" for Petitioner to be treated differently and denied acess to public sewer.

II. THE COUNTY'S DESIGNATION OF THE PORT PENN AREA AS A SEWER DISTRICT FOR 20 YEARS WHILE REFUSING TO PROVIDE SEWER SERVICE SO AS TO OBTAIN OPEN SPACE FOR FREE CONSTITUTES A TAKING

QUESTION PRESENTED

Does the County's designation of the Port Penn Area as a sewer district for 20 years while refusing to provide sewer service so as to obtain open space for free constitute a taking? Preserved in the Notice of Appeal from the Chancery Court.

SCOPE OF REVIEW

In this appeal the decision of the Chancery Court is subject to a *de novo* review by this Court on both the law and the facts. *DuPont v. DuPont*, 216 A.2d 674 (Del. 1966)

MERITS OF ARGUMENT

The Chancery Court erred in dismissing Petitioner's Taking Claim.

Petitioner alleges that by designating Port Penn as a sewer district for 20 years without providing sewer services and refusing to allow on site septic system the County has effectively precluded any development. That alone would constitute a taking under both the United States and State Constitution.

The Fifth Amendment to the U.S. Constitution states that, "nor shall private property be taken for public use, without just compensation." The Constitution of the

State of Delaware states, "nor shall any person's property be taken or applied to public use … without compensation being made." DEL. CONST., Art. 1 §8.

In ¶ 36 of the Complaint, the Petitioner alleges that the County was intentionally precluding any type of development for twenty years or so. In ¶ 37, the Complaint alleges that the County's "goal is to obtain open space for free" by precluding development. The County's manipulations in order to obtain open space in the Petitioner's property by arbitrarily precluding any development constitutes a taking. Petitioner's plan would develop only 120 acres and provide for 200 acres of open space for free. The County, however, wants the entire property to remain open space for free.

The County's scheme to obtain open space for free is reinforced by Councilman Weiner's statement "for the record" that he and other members of Council would do "everything they can" to avoid sewering and thereby development. It is clear that the County wants the land to remain in its natural state, but does not want to pay for same. That can certainly be inferred and is conceivable so as to preclude dismissal.

The Chancery Court, however, held that the taking claim was not ripe because Port Penn did not bring an administrative beneficial use appeal before asserting a taking claim.

In *Eastern Shore Environmental, Inc. v. Kent County Department of Planning*, 2002 WL 244690 (Del. Ch. Feb. 1, 2002), the Chancery Court discussed the exhaustion of administrative remedies requirement. The Court ruled that:

> That doctrine applies, however, "only where a claim must be initiated before an administrative agency which has exclusive jurisdiction over the matter and is able to provide an adequate remedy. Thus the exhaustion of administrative remedies doctrine will not be applied "where the issues do not involve administrative expertise or discretion or where irreparable harm would result from denial of immediate judicial relief. Nor will the doctrine be applied if the administrative remedy available is not "substantially equivalent" to the remedy being sought in Court.

Futility will also preclude the application of the exhaustion rule. In *Warren v. New Castle County*, 2008 WL 2566947, (D. Del. June 26, 2008), the Court stated:

> The final exception to the finality rule is where exhaustion of administrative remedies would plainly have been futile, generally because the administrative body the plaintiff avoided had no power to provide the relief sought.

The Board of Adjustment could not provide sewer and could not change the County's determination and manipulations to obtain open space for free. Councilman Weiner made it clear that the County would do "everything" to prevent sewering and there are certainly conceivable circumstances that would justify discovery. Consequently, the Chancery Court erred in disregarding the futility of seeking

administrative relief and dismissing the taking claim for that reason.

III. THE COUNTY CANNOT BY CONTRACT CREATE A PRIVATE SEWER DISTRICT FOR FAVORED PROPERTY OWNERS WHILE EXCLUDING ADJOINING OWNERS

QUESTION PRESENTED

Can the County by contract create a private sewer district for favored property owners while excluding adjoining owners? Preserved in the Notice of Appeal from the Chancery Court.

SCOPE OF REVIEW

In this appeal the decision of the Chancery Court is subject to a *de novo* review by this Court on both the law and the facts. *DuPont v. DuPont*, 216 A.2d 674 (Del. 1966)

MERITS OF ARGUMENT

The Chancery Court erred in dismissing Petitioner's Claim.

Petitioner contends that the agreement to provide sewer at public expense for only three property owners, Toll Brothers/Warren and Richland created a "private" or "contract" sewer system, while excluding others and even adjoining owners.

In addition to creating a "private" or "contract" sewer district for the three property owners in 2011 or 2012, the County also changed their Comprehensive Development Plan for the Port Penn area to include only the three select properties

and exclude Petitioner's property. Manipulating the one year plan expiration date and thereafter ignoring the extended expiration date and improperly keeping three select properties in the development area as an island being surrounded by properties that cannot be developed is essentially contract zoning, which is in violation of the holding in *Hartman v. Buckson and The Town of Camden*, 467 A.2d 694 (Del. Ch. 1983).

There is no logical or rational reason for the County to engage in contract zoning by administratively changing their Comprehensive Plan and create a New Community Development Area with only there three property owners being included. That obviously is disturbing and suspicious or at least an inference can be drawn that it is an improper manipulation.

In *Hartman,* Buckson sought to subdivide his property to 88 townhouses but Camden rejected his plan as being in violation of their zoning regulations. However, Buckson threatened to sue and the Camden Council apparently alarmed at the prospects of litigation and the incidental expenses associated with it, entered into a "compromise" agreement with Buckson allowing Buckson to have the 88 townhouses even though it violated the zoning regulations. The Vice-Chancellor noted that:

Article II, Section 25 of the Constitution of the State of Delaware

> is designed for the protection of the general welfare and benefit of the entire public.

The Vice-Chancellor stated that Buckson and Camden argued:

> . . . that the Town of Camden was acting properly in entering into a contract with Buckson. The "compromise", they contend, was an appropriate exercise of Camden's inherent authority to compromise claims against it.

The Vice Chancellor, however, ruled otherwise:

> The Court cannot agree, however, that the contract between these parties is anything but a private agreement to create a particular zoning district for the benefit of Buckson.

The Vice-Chancellor ruled that although the Town can compromise:

> It may not, under the guise of compromise, impair a public duty owed by it. By entering the contract in question, Camden bargained away part of its zoning power to a private citizen. It simply does not possess the authority to normally contract such authority and the fact that this agreement was in furtherance of a compromise, an attempt to avoid Buckson;'s threats to sue, does not make it any more valid.

Vice Chancellor Longobardi cited authority that clearly held that the Town's:

> . . . power may not be exerted to serve private interests merely, nor may the principle be subverted to that end.

However, in this case, the Chancery Court held that:

> The pleadings before me do not indicate that the County rezoned

> any land as part of the settlement agreements, which is a necessary element of *per se* illegal contract zoning.

Creating a private sewer district has the same effect as "contract zoning." As stated, the favored properties, as well as Petitioner's property are all zoned exactly the same. However, without sewer services zoning is of no value and essentially irrelevant. Providing sewer services allows the property to be developed as zoned. Without sewer, despite zoning, the cornfields will forever remain cornfields. If "contract zoning" is invalid, creating a private sewer district" which is essentially "contract sewering" must also be invalid.

Moreover, in this case, the County manipulated the Comprehensive Plan by creating a New Community Development Area as an island in the middle of cornfields for these three properties solely because they had been awarded sewer. Creating a New County Development Area to accommodate the three properties–and only those three properties–is the same as rezoning them. In essence, by providing sewer, the County rezoned an island in the middle of cornfields to allow for 631 homes, and the Chancery Court erred in ruling otherwise.

IV. BASED ON THE COUNTY'S INEQUITABLE CONDUCT AND REPRESENTATIONS THAT PETITIONER RELIED ON TO ITS DETRIMENT THE COUNTY IS ESTOPPED FROM PRECLUDING PETITIONER'S ACCESS TO PUBLIC SEWER.

QUESTION PRESENTED

Is the County estopped from precluding Petitioner's access to public sewer based on the County's inequitable conduct and representations that Petitioner relied on to its detriment? Preserved in the Notice of Appeal from the Chancery Court.

SCOPE OF REVIEW

In this appeal the decision of the Chancery Court is subject to a *de novo* review by this Court on both the law and the facts. *DuPont v. DuPont*, 216 A.2d 674 (Del. 1966)

MERITS OF ARGUMENT

The Chancery Court erred in dismissing Petitioner's Estoppel Claim.

The County's inequitable conduct misled Petitioner to its detriment and justice requires the enforcement of the County's promises and commitments.

As alleged in the Complaint, Petitioner's estoppel claim is based on the County designation of the Port Penn area as a sewer district for 20 years without providing sewer. It is also based on the County's 2003 commitment to provide sewer for the

Port Penn Area.

The 2003 Resolution clearly stated that "a sewer system in Southern New Castle County is a necessary component of good land use planning . . ." It went on to state:

> . . . the installation of sewers in southern New Castle County will provide better protection for the environment by substantially reducing the pollution of groundwater resulting from leaking septic systems. (A40)

Petitioner's estoppel claim is also based on the express assurances of the County Land Use Manager as stated in Paragraph 19 of the Complaint:

> 19. At the same time Petitioner was also considering filing suit, however, Charles Baker, the General Manager at that time, informed Petitioner's representative that if sewer was provided for anyone in that area the County would certainly not play favorites and in fairness would provide sewer to other property owners in the area. Relying on that representation and commitment, Petitioner did not file suit on the belief that sewer would be provided fairly to all the property owners in the area if it was provided to anyone.

According to the County's position, Petitioner's failure to file suit was the reason why Petitioner was not provided access to the sewer service that the County provided for Petitioner's next door neighbor. If Petitioner had filed suit it would also have sewer. Apparently, sewer is awarded based on filing suit and not on sound planning in accordance with County Council's 2003 commitment.

As stated in the Complaint, Petitioner's estoppel claim is also based on the County Executive Meyer's assurances that:

> his intent [was] to make public sewer available for the area and to treat all property owners in the Port Penn area fairly and equally.

Relying on Meyer's statement, Petitioner filed a new application only to be told that only Warren and Richland would be provided sewer.

As to the representation of the Land Use Manager, the Chancery Court ruled that pursuant to *Harmon v. State*, 62 A.3d 1198, 1201 (Del. 2013) in considering a promissory estoppel claim against a Delaware state agency '[a]s a general rule, however, the 'state is not estopped in the exercise of its governmental functions by the acts of its officers.'"

Discriminatory conduct by the County is not a valid "governmental function." The representation of the Land Use Manager was nothing more than a recitation of the County's obligation of fairness to allow equal access to County services provided with public funds.

The County cannot be allowed to argue that it is not allowing Petitioner access to the adjoining sewer services because Petitioner did not sue the County when the failure to sue was in reliance on the commitment of its Land Use Manager. The County can only operate through its officials and if the actions of its officials cannot

be relied on the County cannot function. The *Harmon* decision was not intended and cannot be used as a shield for the County's discriminatory conduct which is certainly not a valid "governmental function."

It also cannot apply to the assurances of the County Executive that sewer would be provided fairly to all property owners in the area. It would certainly be unreasonable if in dealing with the County, one could not rely on the assurances of the County Executive.

The Chancery Court did recognize that:

> . . . equitable estoppel may be invoked "when a party by his conduct intentionally or unintentionally leads another in reliance upon that conduct to change position to his detriment.
> *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990) (quoting *Wilson v. Am. Ins. Co.,* 209 A.2d 902, 903-04 (Del. 1965)

The Chancery Court recognized that the claim of equitable estoppel was to preclude inequity. *Timmons v. Campbell*, 111 A.2d 220, 224 (Del. 1955)

The Complaint alleges that as a result of the County's 20 year commitment to provide sewer, the 2003 County Resolution and the assurances and representations of the County Executive, Petitioner relied on same and expended "thousands and thousands" of dollars in engineering costs, etc.

The Chancery Court noted that:

> The Complaint asserts, in total, that Port Penn "incurred substantial investment of time and substantial expenses in fees and engineering, etc. on at least two occasions to its detriment." In its answering brief Port Penn refers to "paying the County the required application and review fees and . . . spending a substantial amount of money for engineering and designing the subdivision," "spending thousands of dollars in engineering," and "thousands and thousands of dollars in engineering, traffic studies, permit fees, etc."

The Chancery Court noted that in *Wilmington Materials, Inc. v. Town of Middletown*, 1988 WL 135507 (Del. Ch. Dec. 16, 1988), the Court held that $88,000 (in 1988) was sufficient to show "substantial reliance" given the small size of the developer.

The Chancery Court also noted that in *DMDY, L.P. v. Board of Adjustment of Sussex County*, 1994 WL 150082 (Del. Super. Mar. 16, 1994), the court applied equitable estoppel "[a]lthough Petitioner never established what amount was expended "before and after a violation notice out of a total of $40,000 (in 1992) "the Court recognize[d] these improvements were expensive."

The Chancery Court however, stated that Petitioner "has not 'pled any dollar amounts at all" nor has it "pled that it made permanent improvements" and ruled that Petitioner's "equitable estoppel claim fails to assert a conceivable claim." The Chancery Court erred in dismissing Petitioner's equitable estoppel claim since there is no requirement that the amount of expenditure be expressly alleged. Notice

pleading is sufficient since discovery would provide the supporting or controlling facts. Petitioner's allegations should preclude dismissal of the Complaint since it is certainly conceivable that, after discovery, Petitioner's claim would prevail.

Moreover, there are additional circumstances which should preclude dismissal. Relying on the County's commitment to provide sewer, Petitioner spent thousands of dollars in engineering, etc. both in 2001 and 2007 only to be rejected because sewer was not "in the vicinity of the site" and Petitioner had to wait until sewer was available.

Petitioner was expressly told by the County that:

> . . . Due to the absence of a public sanitary sewer system in the vicinity of the site, it is not possible for the plan to achieve approval. Accordingly, you are advised to wait until sewer becomes available before submitting a new plan. (A38)

Petitioner waited patiently and sewer is now available in the vicinity and will be available literally next door. Now that sewer is available "in the vicinity" the County cannot be allowed to deny Petitioner access to sewer. That would be inequitable and should preclude dismissal of Petitioner's complaint by a Court of equity.

V. THE COUNTY'S ARBITRARY AND DISCRIMINATORY REFUSAL TO ALLOW PETITIONER EQUAL ACCESS TO PUBLIC SEWER VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS.

QUESTION PRESENTED

Did the County's arbitrary and discriminatory refusal to allow Petitioner equal access to public sewer violate Petitioner's constitutional rights? Preserved in the Notice of Appeal from the Chancery Court.

SCOPE OF REVIEW

In this appeal the decision of the Chancery Court is subject to a *de novo* review by this Court on both the law and the facts. *DuPont v. DuPont*, 216 A.2d 674 (Del. 1966)

MERITS OF ARGUMENT

The Chancery Court erred in dismissing Petitioner's Claim.

It is elementary that property rights are constitutionally protected and may not be eliminated or infringed upon without due process. In *Mihaly*, the Court held that:

> "A state-created entitlement that cannot properly be eliminated except for cause is a property right of which the holder may not be deprived without procedural due process."

At this point, we are not dealing with whether the County is required to provide

sewer service. The issue is whether the County can deny equal access to one property owner while providing sewer service at public expense to the next door neighbor. Such arbitrary and discriminatory abuse of power by the County cannot be allowed or upheld by a Court of Equity.

In *Sisk v. Sussex County*, 2012 WL 1970879 (Del. June 1, 2012), this Court has held that to defeat a motion to dismiss a substantive due process violation the complaint must state:

> . . . sufficient facts that, taken as true, would allow a court to conclude that the government engaged in conduct that is arbitrary in nature, because the "core of the concept of due process is protection against arbitrary action."

Petitioner contends that the County's decision to deny sewer service to Petitioner's property while providing it for the next door neighboring property is arbitrary and capricious. The Chancery Court noted that:

> An arbitrary decision is one "which is unreasonable or irrational, or . . . which is unconsidered or which is willful and not the result of a winnowing or sifting process. *Coker v. Kent Cty. Levy Court*, 2008 WL5451337 (Del.Ch. Dec. 23, 2008)

The Court, however, went on to state that:

> "[t]he courts of this State have long held that when a municipality exercises a governmental function 'no court will, in the absence of a showing of bad faith or fraud, assume to invade the municipality's field of discretion." *Ash/Ramunno Assocs., Inc. v.*

> *Branner,* 1993 WL 11701, at *3 (Del. Ch. Jan. 19, 1993) quoting *Lynch v. Town Council of Georgetown,* 180 A.594, 596 (Del. Ch. 1935)"

The Chancery Court held that Port Penn has not pled facts sufficient to the task and dismissed Petitioner's claim. The Court erred since it is alleged and it is clear that the County is engaged in bad faith if not fraud by intentionally precluding development so as to obtain free open space.

The Petitioner did allege that:

> 37.The County's actions are intended to improperly and illegally force the Port Penn properties, including Petitioner's property, to remain undeveloped and thereby rendering the properties in the area unmarketable to anyone other than the County. The County's goal is to obtain open space for free without having to pay for preservation rights or at the very least reducing the value of the property and thereby the price for same.

That certainly conceivably constitutes "bad faith or fraud" or an inference of same which should preclude dismissal and allow discovery.

In *Acierno v. New Castle County*, 2000 WL 71836 (D. Del. May 23, 2000), the Court stated that:

> In *DiBlasio*, the Third Circuit concluded that mere "ownership is a property interest worthy of substantive due process protection."

The Court also held that:

> Moreover, the down-zoning of plaintiff's property "impinged upon" plaintiff's use and enjoyment of the property by limiting his intended use for it - namely by precluding him from building a multi-unit apartment complex on the land.

The Court distinguished between an administrative action and legislative action and the Court can inquire if the administrative action was taken for reasons unrelated to the merits of Petitioner's record plan. In that case, the Court denied the County's Motion to Dismiss because "when taken in the light most favorable to plaintiff the record reveals facts indicating that certain Council members did harbor ill-will toward development."

There is certainly sufficient facts in this case to infer the County's ill will toward development by Petitioner. That is alleged in the Complaint and clearly supported by Councilman Weiner's "on the record" statement that some members of the Council would do whatever they had to to avoid sewering of the Port Penn properties. ("Everything" but pay the property owners for the resulting open space.)

Moreover, the assertion here is that the County official's administratively allowed only the three select properties to have sewer in violation of the County Code thereby giving them an illegal monopoly in Port Penn. Such unorthodox conduct can only be justified by a personal desire to favor them for some improper reason and the Court can certainly draw such a reasonable inference requiring discovery. Discovery

is essential to determine the rationality of their unorthodox decisions, or if there were personal reasons by the officials for their irrational, arbitrary and capricious decisions. There is enough of an inference of impropriety to require discovery.

In dealing with property rights, which are constitutionally protected there must be a "… finding that non-legislative government conduct must 'shock the conscience' before rising to the level of a substantive due process violation finding." *Shamrock Creek, LLC v. Borough of Paramus,* 2014 WL 4824353 (D.N.J. Sept. 25, 2014).

Petitioner contends that the County's conduct regarding the denial of sewer to Petitioner while providing public sewer at public expense to adjacent owners was arbitrary, capricious and irrational to the point that the Court can find that it shocks the Court's conscience or at least there is sufficient allegations that require discovery.

In order to provide sewer to only the favored owners, the County violated their own ordinances and regulations. As previously noted, plans are only valid for one year. The County, however, not only retroactively extended their expired plans but also agreed to allow many more years. Initially 42 months more for Toll Brothers/Warren and 24 months more for Richland. When that period expired, pursuant to their agreements and the Court Orders, the County allowed the plans to nevertheless proceed for many more years. Five (5) years more for Richland until its plans were recorded.

The County not only violated the regulations limiting plans approval deadlines to one year, they also violated the County ordinance that provides that sewer is provided on a first come first serve basis when the plans are approved and sewer is available.

Moreover, not only did the County violate their own agreements, the County also violated two Court Orders. The District Court and Chancery Court Orders, which expressly stated that the plans would be void if not approved by a certain date. That alone should shock the conscience, but the fact that the County is engaged in bad faith if not fraud by intentionally precluding development so as to obtain free open space certainly does.

As stated in a letter to the County's officials:

> There are many ways for a government to be corrupt and what this government is doing with sewer that has been promised for over 20 years to all the property owners can also be another form of corruption. (A57)

The Court cannot allow the County to bury such serious allegations of impropriety, if not corruption, by dismissal of the Complaint. There are sufficient facts and allegations which require discovery and a decision on the merits.

CONCLUSION

For the reasons stated herein, the Chancery Court's dismissal of the Complaint should be reversed so Petitioner can proceed with discovery and a decision on the merits.

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