EFiled: Aug 21 2019 03:27PM EDT
Filing ID 64118768
Case Number 235,2019D

IN THE

Supreme Court of the State of Delaware

PORT PENN HUNTING LODGE ASSOCIATION,
a Delaware General Partnership,
Appellant,

v.

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,
Appellees.

NO. 235,2019

On Appeal from the Chancery Court of the State of Delaware in and for New Castle County, C.A. No. 2018-0328 TMR

APPELLEES' ANSWERING BRIEF

CONNOLLY GALLAGHER LLP
Max B. Walton (Bar No. 3876)
Kyle Evans Gay (Bar No. 5752)
267 East Main Street
Newark, DE 19711
(302) 757-7300

-and-

NEW CASTLE COUNTY OFFICE OF LAW
Brian J. Merritt (Bar No. 3982)
Assistant County Attorney
New Castle County Government Center
87 Reads Way
New Castle, DE 19720
(302) 395-5130

Attorneys for Appellees

August 21, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This case alleges constitutional violations for New Castle County's ("County") decision to not provide sewer service to an area north of Port Penn Delaware at this time. Appellant Port Penn Hunting Lodge ("Port Penn" or "Hunting Lodge") avers that the County's failure to construct sewer lines violates its constitutional rights and it seeks an order compelling the County to run sewer service to its property, at public expense, so that it can build more houses on its property than it can otherwise build if it utilizes septic systems.

The County sought dismissal of all claims and, on May 9, 2019, the Court of Chancery granted the County's motion.[1] The Court held that there is no constitutionally protected right to sewer service, rational bases support the County's sewer decisions, the takings claims are not ripe because Port Penn failed to exhaust available administrative remedies, and regarding the remaining claims, the Court held "the administrative body carried out its purpose; [and] the County followed the law . . .".[2]

Port Penn appealed the Court of Chancery's decision and filed its opening brief on July 22, 2019.[3] That brief fails to assert that Port Penn has a constitutionally protected right to sewer service – because it has no such right.

---

1 *Port Penn Hunting Lodge Ass'n v. Meyer*, 2019 WL 2077600, at *1 (Del. Ch. May 9, 2019) (hereinafter "*Hunting Lodge*, at *__").

2 *Id*. at *12.

3 Port Penn's opening brief is cited herein as OB __.

Instead, Port Penn engages in wild speculation about the potential motives of the County in settling other lawsuits almost a decade ago and in making its sewer planning decisions. Colorful adjectives aside, it remains that the County owes no duty, constitutional or otherwise, to run sewer service to Port Penn's property at public expense so that it can build more houses. The County has never made any promise of sewer service for Port Penn's property and has consistently advised Port Penn that sewer service is not available. The Court of Chancery's decision dismissing all of Port Penn's claims should be affirmed.

SUMMARY OF ARGUMENT

I. Denied. The Court of Chancery correctly dismissed Port Penn's equal protection claim because: (1) Port Penn has not identified a single property owner that is *prima facie* identical and treated differently; and (2) Port Penn has failed to negate every conceivable rational basis for the County's decisions. Moreover, Port Penn's "class of one" equal protection claim fails because a "class of one" claim cannot be asserted for a discretionary act.

II. Denied. The Court of Chancery properly held that Port Penn's takings claims are not ripe because it failed to seek an administrative beneficial use appeal. The takings claim also fails because Port Penn may develop its property by utilizing septic systems and it has not been denied all or substantially all economically viable use of its land.

III. Denied. The Court of Chancery's holding that "[t]he pleadings . . . 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" should be sustained because no rezonings occurred and no private sewer district was created.

IV. Denied. The Court of Chancery's holding that neither "Port Penn's Complaint nor its briefs provide any basis for me to find 'expensive and permanent improvements'" is entirely accurate and the elements to state a claim for estoppel have not been pled.

V. Denied. The County's decision to not provide sewer service to this area does not violate any alleged right to sewer service because no such fundamental right exists.

STATEMENT OF FACTS

A. Background

Port Penn owns land near Port Penn, Delaware. A14, ¶8. In 2001, the County first advised Port Penn that sewer service is not available for the Hunting Lodge property. A15, ¶11-12. Approximately two years later, on or about June 24, 2003, the County adopted Resolution 03–093, supporting the implementation of the Southern Sewer Service Area ("SSSA"). A15-16, ¶13.[4] That Resolution had "no fiscal impact" because "it merely support[ed] the approval of the" SSSA.[5]

B. The County's Mid-2000 Sewer Policies

In 2005, the County began to revisit Resolution 03–093. The County hired a national engineering firm to perform a review of the 2003 SSSA plan.[6] On January 2006, the consultant's report revealed that the County's existing sewage treatment and disposal plan for the SSSA was inadequate.[7] Thereafter, in March 2006, the County Council passed Resolution 06–069, which amended the County's sewer plan for the SSSA to focus on what is known as the "Central Core." Areas to the northeast, such as Port Penn's property, were located outside of the Central Core and were designated as "Capacity Not Available and No Improvements are

---

[4] Pertinent facts regarding events related to sewer service in this area are set forth in the Delaware District Court's decision in *Warren v. New Castle Cnty.*, 2008 WL 2566947, at *4 (D. Del. June 26, 2008).

[5] *Id.*

[6] *Id.* at *5.

[7] *Id.* at *6.

Funded."[8] In July 2006, the County Code was amended to implement Resolution 06-069.[9] Those amendments made clear that development outside the Central Core contemplating connection to County sewer would not be permitted to proceed through the County's review process.[10]

In 2006, Port Penn submitted a new subdivision proposal for the Hunting Lodge property that was designed for a presumed connection to public sewer. Consistent with the Code amendments, the County advised Port Penn that there is no sewer capacity available for its proposed development. A17, ¶16.

C. Litigation Relating To The Adoption And Implementation Of Resolution 06-069

The County's revised sewer policy and implementing code amendments affected several pending land use applications, including a plan for a pair of land use applications contemplating a total of 631 units by Toll Bros. Inc. ("Toll") and Gary and Gale Warren ("Warren").[11] It also impacted a 131-unit development proposal being pursued by Richland Partnership ("Richland") for land use application known as Pennfield. These developers sued the County. A17, 19, ¶¶17, 22. After initial litigation, including a dismissal of the Toll/Warren litigation by

---

8 *Id.*

9 *Id.* at *7.

10 *Id.*

11 The two projects are collectively referred to herein as "Toll's Plans."

then Magistrate Judge Stark, settlements were reached to resolve the disputes in late 2010 and early 2011. A58-73.

The Toll/Warren and Richland settlement agreements are similar. In the Toll/Warren agreement, availability of sewer is contingent upon the Developer (defined by the settlement agreement as Toll and Warren) completing the requirements of section 3 and constructing the Developer Infrastructure Improvements. The Developer is responsible for "all costs and expenses associated with design, construction, engineering and right of way acquisition" and must obtain required approvals from "applicable governmental approval[] bodies, including, but not limited to, the County's Department of Special Services." A59, ¶3. The County is not required to build the force main to serve units until Developer completes the "Developer's Infrastructure Improvements." *Id.*[12]

Under the settlement, the County's commitment to provide sewer capacity for a fixed number of units, and the County's commitment to build the County force main, automatically expires on July 1, 2021 unless the Developer has connected two or more owner/renter occupied housing units to the County's force main by July 1, 2021. A59, ¶5. Similar provisions are contained in the Richland

[12] Port Penn's claim that "Toll Brothers/Warren, and Richland . . . were granted sewer at public expense" (OB 11) is false. The Developers are required to expend significant capital to complete the Developer Infrastructure Improvements (as defined) before they can connect to the County sewer system. A59. As yet, these improvements have not yet been constructed. A60; *see infra* note 54.

agreement. The Complaint does not allege that Port Penn contemporaneously objected to the execution of the Toll/Warren or the Richland settlement agreements.

D. The County Amends Its Comprehensive Plan

On May 7, 2012, the County adopted a new comprehensive development plan.[13] The Comprehensive Plan sets forth goals regarding where the County desires to provide sewer service. Regarding sewers in the SSSA, the Comprehensive Plan states that "[t]he provision of public sewerage serving subdivisions and land development proposals within the New Community Development Area shall be given the highest priority for authorization to connect to a public sewer system."[14] The Port Penn property is *not* in the "New Community Development Area."[15] Rather, it is designated as a Low Density

---

[13] Substitute No. 2 to Ordinance No. 11-109 to Amend *New Castle County Code* Chapter 28 ("Planning") and Chapter 40 (Unified Development Code or UDC") regarding Comprehensive Planning (Nov. 22, 2011), *available at* https://www.nccde.org/DocumentCenter/View/847/Ordinance-11-109---Adopting-the-2012-Comprehensive-Plan-Update-PDF .

[14] New Castle County Comprehensive Development Plan § 5.2.2, objective 9; *available at* https://www.nccde.org/DocumentCenter/View/854/Chapter-5-PDF; *see also* New Castle County Comprehensive Development Plan § 3.4, objective 7.

[15] *See* New Castle County Comprehensive Development Plan, Future Land Use Map (2012), *available at* https://www.nccde.org/DocumentCenter/View/4039/2012-Future-Land-Use-Map-PDF.

Residential Area. Regarding these Low Density Residential Areas, the Comprehensive Plan objective states:

> **8. Continue efforts to create zoning designations to minimize new development in the Low Density Residential Area until such time as population and employment growth justifies expansion of the public sewer system.**
>
> This area is characterized as rural with large lot development or small rural villages. Due to the significantly lower population density of these areas and location outside of the New Community Development Area, significant infrastructure investments are not planned. In order to direct development and density to the designated growth areas, while respecting the rights of landowners, these areas are designated sending areas for transfer of development rights. [16]
>
> While this area may be necessary and appropriate for growth at some time in the future, it is not financially feasible to provide public infrastructure to support development in the short term. . . .[17]

Port Penn does not allege that it objected to the Comprehensive Plan's designation of its property in the Low Density Residential Area.

E. Port Penn's Latest Sewer Request And Suit

Even though Port Penn's property is in the Low Density Residential Area, sometime in 2017, it filed a subdivision application seeking connection to County sewer. On May 16, 2017, the County, consistent with the property's Comprehensive Plan designation, again advised Port Penn that sewer is not

---

[16] Designating Low Density Residential Areas as sending areas for transfer of development rights in the Comprehensive Plan is authorized by State law. *See* 9 *Del. C.* § 2653(a)(3).

[17] *See* New Castle County Comprehensive Development Plan § 3.4, objective 8 (emphasis supplied).

available. A20, ¶26. Following this notification, Port Penn filed suit, claiming that because the County is unwilling to provide sewer service for its property at public expense, the County has violated its constitutional rights.

ARGUMENT

I. DISMISSAL OF THE EQUAL PROTECTION CLAIM SHOULD BE AFFIRMED

A. Question Presented

Should the Court of Chancery's dismissal of the equal protection claim be affirmed when: (1) an equal protection claim will not lie for discretionary acts; (2) Port Penn has failed to identify any *prima facie* identical comparators; (3) there is no fundamental right to sewer service; (4) the County has articulated numerous rational bases for its actions? Preserved Dkt. 11, pp. 17-27.

B. Scope Of Review

"This Court's standard of review of a statutory scheme challenged on due process or equal protection grounds not involving a suspect class or fundamental right is universal and well settled."[18] "In determining whether a . . . classification, not involving a suspect class or fundamental right, violates the equal protection clause, we presume that the distinctions so created are valid."[19] "A statutory discrimination or classification will not be set aside if any state of facts reasonably may be conceived to justify it."[20]

---

[18] *Marine v. State*, 607 A.2d 1205, 1207 (Del. 1992).

[19] *Id*. (quoting *Traylor v. State*, 458 A.2d 1170, 1177 (Del. 1983) (citation omitted)).

[20] *Id*.

C. Merits

1. The Rational Basis Test Does Not Apply To Discretionary Actions Of The County

Port Penn's "class of one" equal protection claim fails as a matter of law because "an individual may not pursue a class-of-one equal protection claim based on official acts that are inherently discretionary."[21] As held in *Engquist v. Or. Dep't of Agric.*,[22] if state action involves "discretionary decisionmaking," there is no equal protection violation "when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted." Although *Engquist* is a public employment case, numerous courts have held that class of one equal protection claims may not be based on inherently discretionary acts and have extended *Engquist's* holding outside the public employment context.[23] The "discretionary act" bar for class of one equal protection claims has been extended to the "enforcement of land use regulations."[24]

---

[21] *Paddock v. Otter*, 2017 WL 4077025, at *4 (D. Idaho Feb. 17, 2017).

[22] 553 U.S. 591, 601-02 (2008).

[23] *Integrity Collision Ctrs. v. City of Fulshear*, 837 F.3d 581, 588 (5th Cir. 2016) (holding that it is "impractical for the court to involve itself in reviewing these countless discretionary decisions for equal-protection violations."); *Rapp v. Dutcher*, 557 Fed. Appx. 444, 449 (6th Cir. 2014) (holding that *Engquist* "strongly suggests that a 'class of one' equal protection theory is unavailable in the discretionary decision-making context . . ."); *see also U.S. v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008).

[24] *Jones v. Town of Quartzsite*, 2015 WL 12551172, at *11 (D. Ariz. Mar. 30, 2015); *Novotny v. Tripp Cnty., S.D.*, 664 F.3d 1173, 1179 (8th Cir. 2011); *Long v. Cnty. of Fresco*, 2014 WL 3689694, at *4 (E.D. Cal. July 24, 2014); *Papas v.*

The decision whether, where, and when to provide sewer service is inherently a discretionary decision.[25] Because a class of one equal protection claim cannot be based on official acts that are discretionary, the dismissal of the equal protection claim should be affirmed.

2. Class Of One Equal Protection Standards

The Court of Chancery evaluated the equal protection claim under a "class of one" rubric.[26] The seminal "class of one" equal protection case in Delaware is *New Castle Cnty. v. Wilmington Hospitality, LLC*.[27] *Wilmington Hospitality* holds that, to state a "class of one" equal protection claim, Port Penn must demonstrate:

Leonard, 2012 WL 1445853, at *17 (D. Or. Apr. 25, 2012); *Tarantino v. City of Hornell*, 2009 WL 1384983, at *11 & n.11, (W.D.N.Y. May 18, 2009).

[25] *AvalonBay Cmties, Inc. v. Sewer Comm'n of the City of Medford*, 853 A.2d 497, 505 (Conn. 2004) ("[t]he date of construction, the nature, capacity, location, number and cost of sewers and drains *are matters within the municipal discretion* with which the courts will not interfere . . .") (emphasis supplied); *see also Hawkins v. City of Greenville*, 594 S.E.2d 557, 564 (S.C. App. 2004) (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 501 (Tex. 1997)) (emphasis supplied) ("The duties of the municipal authorities in . . . determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, *involving the exercise of deliberate judgment and large discretion*, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of a general plan or system . . . is not subject to revision by a court or jury in a private action . . .").

[26] *Hunting Lodge*, at *6.

[27] 963 A.2d 738 (Del. 2008).

(1) intentionally different treatment from others similarly situated; and (2) that the County had no rational basis for its actions.[28]

Regarding the first prong, similarity requires Port Penn to "establish 'an extremely high degree of similarity' between its circumstances and those of others who were treated differently."[29] The comparators must be "*prima facie* identical in all relevant respects."[30]

The second prong requires application of the rational basis test. Rational basis review is not a license for Courts to judge the wisdom, fairness, or logic of governmental choices,[31] but rather is a "highly deferential" standard that requires that the challenged classification be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[32] The Court may even "hypothesize the motivations [of the County] . . . to find a legitimate

---

[28] *Id.* at 743; *Hunting Lodge*, at *5; *see also Phillips v. Cnty. of Alleghany*, 2006 WL 1330206, at *4 (W.D. Pa. May 15, 2006) (quoting *Keenan v. City of Philadelphia*, 983 F.2d 459, 465 (3d Cir. 1992)).

[29] *Wilmington Hospitality, LLC*, 963 A.2d at 743.

[30] *Id.*; *Hunting Lodge*, at *5; *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002).

[31] *Acierno v. New Castle Cnty.*, 2000 WL 718346, at *7 (D. Del. May 23, 2000); *Hunting Lodge*, at *6; *see also Cash Inn of Dade, Inc. v. Metro. Dade Cnty.*, 938 F.2d 1239, 1241 (11th Cir. 1991) ("Even if the court is convinced that the political branch has made an improvident, ill-advised, or unnecessary decision, it must uphold the act if it bears a rational relation to a legitimate governmental purpose.").

[32] *Angstadt v. Midd-West School Dist.*, 377 F.3d 338, 345 (3d Cir. 2004); *Hunting Lodge*, at *6.

objective promoted by the provision under attack."[33] Any rational basis, even a rational basis "conjured up by the court itself" defeats an equal protection challenge.[34] Additionally, the District Court of Delaware has held that, to satisfy the rational basis prong, Port Penn "must also identify a fundamental right which has been violated."[35]

3. Lack Of A Fundamental Right Precludes Any Alleged Equal Protection Claim

The Court of Chancery's dismissal of the equal protection claim should be affirmed because there is no fundamental constitutional right to sewer service. Citing the Third Circuit decision in *Ransom v. Marrazzo*,[36] and the District of Delaware decision in *Warren v. New Castle Cnty.*,[37] the Court of Chancery held that Port Penn had not established that any fundamental rights regarding the

---

33 *U.S. v. Pollard*, 326 F.3d 397, 408 (3d Cir. 2003); *Hunting Lodge*, at *6; *see also Parrish v. Consol. City of Jacksonville*, 2005 WL 1500894, at *3 (M.D. Fla. June 22, 2005) ("When confronted with 12(b)(6) motions to dismiss equal protection claims subject to the rational basis standard, courts have . . . interpret[ed] basic facts about the possible classes of individuals in a manner most favorable to the plaintiff, but hypothesize about any justifications that would support distinctions between the classes.").

34 *Freedman v. Longo*, 1994 WL 469159, at *5 (Del. Ch. Aug. 10, 1994); *see also Salem Church (Del.) Assocs. v. New Castle Cnty.*, 2006 WL 2873745 at *13 ("there is a 'strong presumption of validity and those attacking the rationality of the . . . classification have the burden to negate *every* conceivable basis which might support it.'"); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (same).

35 *Fruchtman v. Town of Dewey Beach*, 60 F.Supp.3d 556, 564 (D. Del. 2014).

36 848 F.2d 398, 411-12 (3d Cir. 1988).

37 2008 WL 2566947, at *18.

provision of sewer service exist.[38] Legions of cases hold that there is no fundamental right to sewer service,[39] and Port Penn does not even attempt to appeal the Court of Chancery's ruling that sewer service is not a fundamental right.[40] It has now waived any right to challenge the Court of Chancery's holding.[41]

Port Penn's failure to appeal the Court's fundamental right ruling dooms its equal protection challenge. Infringement of a fundamental right is a prerequisite

---

[38] *Hunting Lodge*, at *4. An equal protection claim is not "a device to dilute the stringent requirements needed to show a substantive due process violation." *South Alleghany Pittsburgh Restaurant Enters. LLC v. City of Pittsburgh*, 2019 WL 251506, at *9 (W.D. Pa. Jan. 17, 2019); *Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 287 (3d Cir. 2004); *see also Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 831 (Del. Ch. 2015) (citation and quotation omitted) ("the distinction between a due process claim and an equal protection claim does not matter much, because '[r]egardless of whether a court is employing substantive due process or equal protection analysis, it should use the same standards of review.'").

[39] *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 141 (3d Cir. 2000) (quoting *Ransom*, 848 F.2d at 411-12); *Gagliardi v. Clark*, 2006 WL 2847409, at *10 (W.D. Pa. Sept. 28, 2006); *Quinn v. Bd. of Cnty. Comm'rs for Queen Anne's Cnty., Md.*, 862 F.3d 433, 439 (4th Cir. 2017); *Mihaly v. Town of Trumbull Water Pollution Control Auth.*, 2013 WL 2948329, at *5 (D. Conn. June 14, 2013); *R.J. Invs. v. Bd. of Cnty. Comm'rs for Queen Anne's Cnty., Md.*, 2009 WL 5216056, at *8 (D. Md. Dec. 29, 2009); *State ex rel. Gilbert v. City of Cincinnati*, 928 N.E.2d 706, 712 (Ohio 2010).

[40] "Port Penn does not tackle the exceedingly difficult task of establishing a new fundamental constitutional right." *Hunting Lodge*, at *4.

[41] *Harris v. State*, 99 A.3d 227 (Table), 2014 WL 3883433, at *1 (Del. July 29, 2014) ("An appellant must state the merits of an argument in his opening brief or that argument will be waived."); Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

for an equal protection claim.[42] The Court of Chancery's dismissal of the equal protection claim can be affirmed on this basis alone.

4. The Court Of Chancery's Holding That Rational Bases Exist For The County's Sewer Service Area Determinations Should Be Affirmed.

The Court of Chancery's holding that Port Penn did not state a claim under the rational basis test should be affirmed because, as the Court held, there are numerous articulated rational bases for the County's actions.[43]

a. The County Has Rationally Based Land Use Objectives

Reliance on the plain language of the County's Comprehensive Plan provides a rational basis for the County's refusal to provide sewer service to the Property at this time. The Comprehensive Plan designates the Port Penn's property a Low Density Residential Area – an area where the County Council has determined that it is not financially feasible to provide public infrastructure to support development in the short term.[44] Other properties to the south do not have the same designation and different sewer service objectives apply to those properties. Those properties are in the New Community Development Area – which are given a higher priority for authorization to connect to a public sewer

42 *Fruchtman*, 60 F.Supp.3d at 564.
43 *Hunting Lodge*, at *6.
44 *See supra* n. 17.

system.[45] The County Council has drawn a line where it will provide sewer service at this time. The County's exercise of discretionary line drawing is not subject to judicial review.[46]

Moreover, the County is permitted to decide, in its discretion, the demarcation line of where sewer service starts and stops because there is "no duty to provide sewer service."[47] As a bevy of courts have held, municipal decisions regarding the location or timing of sewer service do not rise to an equal protection

---

[45] *Id.* The Court of Chancery did not address whether Port Penn had identified *prima facia* identical comparators. Because Toll/Warren and Richland had pending land development applications at the time of their lawsuits in 2007 (and Port Penn did not), and because Toll/Warren and Richland have settlement agreements with the County regarding their lawsuits (and Port Penn does not), and because Toll/Warren and Richland's properties are in the New Community Development area of the Comprehensive Plan (and Port Penn's property is not), the purported comparators to Port Penn are not *prima facie* identical in all relevant respects.

[46] *Prices Corner Liquors, Inc. v. Del. Alcoholic Beverage Comm'n*, 1995 WL 716802, at *3 (Del. Super. Ct. Nov. 13, 1995) ("the Court has almost no authority to second-guess legislative decisions, even ones involving line-drawing."). "[That] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Ga. Cemetery Assoc., Inc. v. Cox*, 403 F.Supp.2d 1206, 1212 (N.D. Ga. 2003) (citing *Fed. Commc'ns. Comm'n v. Beach Commc'ns., Inc.*, 508 U.S. 307, 316 (1993)); *Brian B. ex rel. Lois B. v. Pa. Dep't of Educ*., 230 F.3d 582, 587 (3d Cir. 2000) ("the necessity of [governmental] line-drawing 'renders the precise coordinates of the resulting [governmental] judgment virtually unreviewable, since the [government] must be allowed leeway to approach a perceived problem incrementally.'").

[47] *Snyder v. State Dept. of Health & Mental Hygiene*, 391 A.2d 863, 866 (Md. App. 1978); *State ex rel. Gilbert v. City of Cincinnati*, 928 N.E.2d 706, 712 (Ohio 2010) (citing *Doud v. Cincinnati*, 87 N.E.2d 243 (Ohio 1949)); *Richards v. City of Tustin*, 225 Cal. App.2d 97, 99 (Cal. App. 1964); *Martinez v. Cook*, 244 P.2d 134, 140 (N.M. 1952); *Mayor & Alderman of the City of Vicksburg v. Vicksburg Water Works Co.*, 202 U.S. 453, 472 (1906).

clause violation.[48] Plausible land use planning objectives, as the County has articulated in its Comprehensive Plan, also provides a rational basis.[49] There is no viable equal protection claim as a matter of law.[50]

Against this settled authority, Port Penn primary relies on *Delmarva Enters., Inc. v. Mayor & Council of City of Dover*,[51] in support of its equal protection claim. In that case, the City of Dover was acting as a public utility (instead of its

---

[48] *Haik v. Town of Alta*, 176 F.3d 488, 1999 WL 190717, at *5 (10th Cir. Apr. 5, 1999) (holding that refusal to send water lines is not an equal protection violation); *Unity Ventures v. Cnty. of Lake*, 631 F.Supp. 181, 199 (ND. Ill. 1986) ("innocent delay in provision of or a mere denial of sewer services does not, without more, constitute a violation of due process or equal protection."); *Sunset Cay LLC v. City of Folly Beach*, 593 S.E.2d 462, 469 (S.C. 2004) (holding that when "the classifications [providing sewer differently to various districts] rest on rational bases—providing sewer service to a limited area due to the financial burden of additional operating and maintenance costs for all users, aesthetic and environmental concerns, and the effect on City's long-range zoning, planning, or organization . . . [t]he challenged ordinance does not violate Developer's right to equal protection under the law.").

[49] *See Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 1001 (7th Cir. 2006) (holding a zoning ordinance that required a church to obtain a special use permit valid under rational basis review because the requirement could be "traced to legitimate municipal land planning goals."); *Sameric Corp. of Del., Inc. v. City of Philadelphia*, 142 F.3d 582, 595 (3d Cir. 1998) (where there is no claim presented demonstrating that the government "acted for reasons 'unrelated to land use planning,'" there is no viable claim for arbitrary or unreasonable government conduct).

[50] Port Penn contends that the Comprehensive Plan designation of its property in a Low Density Residential area "is the result of the County's manipulation." OB 15. But this contention fails to recognize that: (1) the County is not required to provide sewer services to every property at the same time; and (2) the County, for budgetary and land use related reasons, is allowed to draw the line where it will be providing sewer services at this time. That line has not changed since the County adopted the Comprehensive Plan Update in 2012.

[51] 282 A.2d 601 (Del. 1971).

governmental capacity) because it provided sewer service to customers outside of its municipal boundaries. The Court held:

> [T]he water and sewer lines are in existence and taps have been permitted in the past. To refuse this request, therefore, is discriminatory against this appellant. The authorities relied on by the City are not on point . . . they are cases seeking to compel the extension of a utility line, and not the prevention of a discriminatory refusal to permit tapping.[52]

The case at bar is materially distinct from *Delmarva Enterprises*. First, the County is not treating anyone in a discriminatory manner. The County is treating all properties in the Low Density Residential Area the same. Second, the County is not acting in a public utility capacity outside its own territory; rather, it is exercising governmental and police power authority within its own boundaries.[53] Third, Port Penn seeks to compel the extension of a utility line at County expense to its own property – and does not seek to simply tap into any existing utility line.[54] For these reasons, the *Delmarva Enterprises* decision is inapplicable and the Court

---

[52] Id. at *603.

[53] The General Assembly has provided the County "general jurisdiction over all matters pertaining to the County . . . including the power to act upon all matters pertaining to sewers, sewerage disposal plants, trunk line sewers and sewerage systems generally. . ." 9 *Del. C.* § 1521.

[54] The Court may take judicial notice of a pair of cases pending before the Court of Chancery which seek to compel the County to build the sewer connection upon which Port Penn seeks to connect. These cases are founded on commitments in the Toll/Warren settlement agreement. *Glen Allen Farm LLC v. New Castle Cnty.*, C.A. No. 2019-0425-TMR (Del. Ch. filed June 6, 2019) and *Good v. Meyer*, C.A. No. 2018-0152-TMR (Del. Ch. filed March 7, 2018). In both cases, the County has asserted that there is no obligation to build the sewer line because the contingencies in the Toll/Warren settlement agreement have not been satisfied.

of Chancery's holding that Port Penn has failed to state an equal protection violation as a matter of law should be sustained.

b. The Settlement Of The 2007 Lawsuits Provide A Rational Basis For The County's Actions

The County's actions in settling the lawsuits in 2010-11 also provide a rational basis. The Toll/Warren lawsuit was filed on November 2007 (A17, ¶17) and the County vigorously defended that suit. In late 2010, the County faced the prospect of further defenses of the Toll/Warren lawsuit and the Richland lawsuit – and decided to settle those cases contingent on County Council approval. In so doing, the County acted rationally in allowing a very limited (and contingent) extension of its sewer system when settling the lawsuits, especially when many of the required sewer infrastructure improvements would be paid for by the Developer(s).

Port Penn speculates that the County should not have settled the Toll/Warren litigation because the Magistrate Judge had recommended granting of the County's Motion to Dismiss, and avers that "the *Richland* suit . . . was prearranged" but "never litigated." OB 16-17. But these averments do not negate every conceivable rational basis for the County's actions. Indeed, the County could have stayed the Richland litigation to first obtain the result of the Toll/Warren litigation. The County may have believed that there were potential pitfalls in their legal positions in the cases. The County may have outspent its budget for the Toll/Warren

litigation. The County could have been in a budget crunch and decided that it was financially more prudent to allow the Developers to pay for the required developer infrastructure improvements rather than spending money on the litigations. Port Penn's speculation about why the lawsuits were settled does not satisfy its heavy burden of negating every *conceivable* rational basis for the County's settlement of the lawsuits.[55] The dismissal of the equal protection claim should be affirmed.

c. The County Is Not Required To Build Sewer For All Properties At The Same Time.

The County submits that it cannot be an equal protection violation if the County does not provide sewer service to all properties at once.[56] The County is entitled to engage in a step-by-step process and it is not required to build its system to serve all properties in the County at the same time.[57] Sewer infrastructure

---

[55] Port Penn claims that the County should have expired the plans submitted for Toll's Plans and Pennfield, and claims that expiration of the plans would have placed them on the same footing as Port Penn's plans. OB 16-17. This is simply wrong. Even assuming *arguendo* that the County was required to expire Toll's Plans or Pennfield's plan application (as Port Penn contends), upon expiration, the contingent sewer commitment for Toll's Plans would remain in place until July 1, 2021 because the settlement agreements expressly provide that, until that date, "nothing . . . shall prevent the Developer . . . from pursuing other development options and/or different development plans. . . " A60, ¶6.

[56] *Novak v. City of Pittsburgh*, 2006 WL 3420959, at *2 (W.D. Pa. Nov. 27, 2006) ("The Constitution does not require the City to address all . . . functions at the same time.").

[57] *See* Eugene McQuillin, 18A *McQuillin Mun. Corp.* § 53:147 (3d ed. 2018 Supp.) ("the fact that a municipality has adopted a plan of sewerage does not make it liable in damages arising from its failure to execute part of the plan because the municipality is at liberty to carry out the plan in whole or in part at such times as it

planning and construction takes time. There are numerous factors at play in sewer planning – costs, budgets, environmental factors, land use planning goals, right of way issues, and system capacity issues to name a few. The County is not required to, and cannot be forced to spend public dollars, so Port Penn can build a larger housing development connected to sewer service – no matter the taxpayer costs, system limitations, environmental constraints, and connection constraints.[58] Thus, it cannot be an equal protection violation when the County does not provide sewer service to Port Penn's property at this time.

5. Rational Basis Review Is A Question of Law

The Court of Chancery properly dismissed the equal protection claim without allowing any discovery. Port Penn's claims do not state a claim as a matter of law, and therefore, no discovery is permitted. Beyond this, it is well established that a rational basis determination is a question of law for the Court not a factual issue to be resolved by a jury.[59] This is so because the County is not

---

sees fit."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("Legislatures may implement their program step by step . . .").

[58] *See supra* n. 47-48 (citing cases).

[59] *See Myers v. Cnty. of Orange*, 157 F.3d 66, 74 n.3 (2d Cir.1998) ("The issue of whether the [municipal] policy has a rational basis and therefore does not violate the Equal Protection Clause . . . is a legal issue for the court and not a factual issue for jury determination."); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 471 (1st Cir.1990) (stating that, under rational basis review, rationality is "a question of law for the judge—not the jury—to determine."); *see also Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991) (the "'rational relationship' test is a legal standard applied by the court, not a factual

required to prove it has a rational basis for its actions; rather, it is Port Penn's burden to negate every *conceivable* rational basis for its actions – even justifications that can be hypothesized.[60] Port Penn, therefore, is not entitled to any discovery whatsoever on the equal protection claim because it does not (and cannot) negate every conceivable rational basis for the County's actions.[61]

---

determination rendered by a jury."), *overruled on other grounds, United Artist Theatre Co. v. Twp. of Warrington*, 316 F.3d 392 (3d Cir. 2003); *Gaalla v. Citizens Med. Ctr.*, 407 Fed. Appx. 810, 814 (5th Cir. 2011) (same); *Associated Builders & Contractors, Eastern Pa. Chapter v. Cnty. of Northampton*, 376 F.Supp.3d 476, 502 (E.D. Pa. 2019) (same).

[60] *Weber v. State*, 197 A.3d 492 (Table), 2018 WL 5993473, at *1 n.3 (Del. Nov. 13, 2018) (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)) ("When rational basis review applies, the burden of proof 'is on the one attacking the . . . arrangement to negative every conceivable basis which might support it.'").

[61] Port Penn engages in unsupported speculation, without pleading any supporting facts, regarding the motivations of the County in settling the Toll/Warren and Pennfield lawsuits nearly a decade ago. *Hunting Lodge,* at *8. It has long been settled that this type of unfounded speculation does not create a right to obtain discovery. *Colvocoresses v. W.S. Wasserman Co.*, 13 A.2d 439, 442 (Del. Ch. 1940) ("Courts of Equity will order discovery to assist a plaintiff in proving a known case, but not to assist him in a mere roving speculation, the object of which is to see whether he can fish out a case from the defendant."); *Crescent/Mach Partners I v. Turner*, 846 A.2d 963, 981 (Del. 2000) (citation and quotation omitted) ("Conclusory allegations that are pleaded without supporting facts 'cannot be the platform for launching an extensive litigious fishing expedition for facts through discovery in the hopes of finding something to support them.'").

II. THE COURT OF CHANCERY'S DISMISSAL OF THE TAKINGS CLAIM SHOULD BE AFFIRMED

A. Question Presented

Did the Court of Chancery properly dismiss Port Penn's takings claim when it failed to (a) take a beneficial use appeal as required by the County Code; and (b) when there is no claim that Port Penn has been denied all or substantially all economically viable use of the land? Preserved Dkt. 11, pp. 37-42.

B. Scope Of Review

This Court reviews questions of justiciability and ripeness *de novo*.[62]

C. Merits

The Court of Chancery appropriately held that any takings claim is not ripe because Port Penn failed to seek a beneficial use appeal[63] before the New Castle County Board of Adjustment.[64] Constitutional claims, such as Port Penn's takings claims here, are not ripe until all available administrative remedies are exhausted.[65] Under Delaware law:

---

62 *XI Specialty Ins. Co. v. WMI Liquidating Trust Co*., 93 A.3d 1208, 1217 n.35 (Del. 2014).

63 "A beneficial use appeal is a process by which the County evaluates an allegation that no beneficial use remains in a property and determines that some level of relief from this Chapter is warranted. A landowner who has been denied all or substantially all economically viable use of property through the application of this Chapter may apply for relief after exhausting all other available avenues of appeal to a County body." NCC Code § 40.31.600.

64 *Hunting Lodge*, at 6-7.

65 *Eastern Shore Envtl. v. Kent Cnty. Dept. of Planning*, 2002 WL 244690, at *7 (Del. Ch. Feb. 1, 2002).

> a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. . . [This] allow[s] regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.[66]

In *Salem Church*, the Court of Chancery held that "[t]he County, . . . could and did require a landowner, . . . to seek a beneficial use review before asserting a takings claim."[67] The Vice Chancellor further opined that "exhaustion of the remedy afforded by § 40.31.600 of the Unified Development Code [a beneficial use appeal] . . . [is a] necessary precursor to the filing of a takings claim. . . "[68] Because there is no allegation whatsoever that Port Penn has ever sought, let alone been denied a beneficial use appeal, the Court of Chancery properly dismissed Port Penn's takings claim as not ripe.

Port Penn has no defenses other than to assert that "[t]he Board of Adjustment could not provide sewer . . ." OB 22. This argument, however, misses the mark. The question is not whether the Board of Adjustment could provide sewer service; rather, the question is whether the County's actions have caused a Fifth Amendment taking. "In order for a regulation to rise to the level of a compensable taking, it must deny all economically beneficial or productive use of

---

66 *Salem Church*, 2006 WL 2873745, at *8 (quoting *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. at 339-40 and *Palazzolo v. R.I.*, 533 U.S. 606, 620-21 (2001)).

67 *Salem Church*, 2006 WL 2006 WL 2873745, at *8.

68 *Id.*

the land."[69] Port Penn, however, does not allege that it has been denied all economically viable use of the land[70] because it cannot – it may unquestionably develop its property using septic systems.[71] If and only if the County's regulations deny Port Penn substantially all economically viable use of the land can a takings claim be asserted. In such event, Port Penn must seek a beneficial use appeal first. Because Port Penn failed to take a beneficial use appeal, its takings claim is not

---

[69] *State v. Booker*, 1992 WL 245576, at *3 (Del. Super. Ct. Sept. 2, 1992), *aff'd*, 642 A.2d 836 (Del. 1994); *Salem Church*, 2006 WL 2873745 at *15 (holding that for a regulatory takings claim, the challenged regulation must deny "all economically beneficial or productive use of the land"); *Wilmington Hospitality, LLC v. New Castle Cnty.*, 2004 WL 2419157, at *2 (Del. Super. Ct. Oct. 8, 2004) (holding that there must be "a complete elimination of value or a total loss").

[70] Port Penn makes unfounded statements, not attributed to any County personnel, stating that the collective County "wants the entire property to remain open space. . . .". OB 21. In support of this claim, Port Penn cites to a statement of a former member of New Castle County Council who stated that Toll's Plans are in an environmentally sensitive area and "we should do everything that we can to prevent sewering for Port Penn Assemblage." OB 9. Nothing in this statement of the former councilperson in any way indicates that Port Penn cannot develop with septic systems or indicates that the County seeks to acquire the property for open space for free. The former councilperson (who does not speak for the entirety of County Council or the County as a whole) simply states his desire to not provide sewer service for areas encompassing Toll's Plans.

[71] *See* NCC Code §40.22.330; *see also Warren*, 2008 WL 2566947, at *18 ("[I]t is undisputed that Toll could have developed—and still could develop—its properties using individual septic systems."). Port Penn does not have "a constitutionally-protected property interest in building more units than can be serviced by individual septic systems." *Id.* Its claim that the County wants the entire property to remain open space for free (OB 21) is objectively incorrect when Port Penn can develop with septic systems. The Court is it is not "required to accept as true conclusory allegations 'without specific supporting factual allegations.'" *In re Gen. Motors (Hughes) S'holder Litig.,* 897 A.2d 162, 168 (Del. 2006).

ripe and the Court of Chancery's dismissal of the takings claim should be affirmed.

III. THE COURT OF CHANCERY PROPERLY DISMISSED PORT PENN'S CONTRACT ZONING CLAIM

A. Question Presented

Did the Court of Chancery properly dismiss Port Penn's contract zoning/special sewer district claim when there is no contention "that the County rezoned any land as part of the settlement agreements, which is a necessary element of *per se* illegal contract zoning."[72] Preserved Dkt. 11, pp. 41-42.

B. Standard Of Review

This Court reviews dismissal of the contract zoning claim *de novo*.[73]

C. Merits

Port Penn's "contract zoning" contention is misplaced. Contract zoning is a bilateral agreement between a government and a private party to zone a property in a particular way.[74] It is illegal because "the legislative function may not be surrendered or curtailed by bargain . . ."[75] Here, the zoning of the Port Penn's property and surrounding properties never changed. All properties are zoned (S) "Suburban." Because there is no allegation that the zoning classification of any

---

72 *Hunting Lodge*, at *8.

73 *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

74 *New Castle Cnty. v. Pike Creek Recreational Servs. LLC*, 82 A.3d 731, 736 n.17 (Del. Super. Ct. 2013), *aff'd*, 105 A.3d 990 (Table), 2014 WL 7010183, at *1 (Del. Nov. 13, 2013).

75 *Hartman v. Buckson*, 467 A.2d 694, 699 (Del. 1983) (quoting *V.F. Zahodiakin Eng. Corp. v. Zoning Bd. of Adjustment*, 86 A.2d 127, 131 (N.J. 1952)).

property changed, let alone any contention that zoning changed due to a bilateral contractual agreement, the Court of Chancery's conclusion that "[t]he pleadings . . . 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" should be affirmed.[76]

The claim that the County created a private sewer district (OB 24) when it executed the Toll/Warren and Richland settlement agreements is without merit. It is hornbook law that "municipalities have power to enter into contracts with respect to their sewer systems."[77] As such, there is nothing illegal or improper about executing a settlement agreement to contingently provide sewer service and settle litigation.[78] There is simply no "private" sewer district and the County never bargained away any legislative authority – which is a prerequisite to a contract zoning claim. Thus, the Court of Chancery's dismissal of this claim should be affirmed.

---

[76] *Hunting Lodge*, at *8. The contract zoning claim further fails because there can be no credible contention that the County ever curtailed or surrendered its legislative function by contract.

[77] Eugene McQuillin, 11 *McQuillin Mun. Corp*. § 31:14 (3d ed. 2018 Supp.).

[78] The County is expressly required by code to enter into sewer agreements with private parties for every single land development plan that will be connected to County sewer. *See* NCC Code § 38.02.002.

IV. DISMISSAL OF THE EQUITABLE ESTOPPEL CLAIM SHOULD BE AFFIRMED

A. Question Presented

Should the Court of Chancery's dismissal of the equitable estoppel claims be affirmed when: (1) Port Penn indisputably did not plead any dollar amount of expenditures made in reliance on the County's purported representations; (2) it never pleads the elements necessary to establish an equitable estoppel claim; and (3) when Port Penn did not amend its complaint pursuant to Court of Chancery Rule 15(aaa) to correct these pleading defects? Preserved Dk. 11, pp. 28-34.

B. Standard Of Review

Dismissal of the equitable estoppel claims are reviewed *de novo*.[79]

C. Merits

"Application of the doctrine of equitable estoppel to governmental actions is rare."[80] The doctrine "arises 'when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.'"[81] "Parties may use equitable estoppel 'as a defense against the enforcement of a zoning regulation where: (1) a party, acting in good faith, (2) on

---

79 *Siga Techs. Inc. v. PharmAthene Inc.*, 67 A.3d 330 (Del. 2013).

80 *Salem Church*, 2006 WL 2873745, at *12; *Kejand, Inc. v. Bd. of Adjustment of the Town of Dewey Beach*, 1993 WL 189536, at *3 (Del. Super. Ct. Mar. 19, 1993), *aff'd*, 634 A.2d 938 (Del.1993) (TABLE) (noting that equitable estoppel will not be invoked "where to do so would render ineffective the operation of a policy adopted to protect the public")).

81 *Salem Church*, 2006 WL 2873745, at *12 (quoting *Walton v. Beale*, 2006 WL 265489, at *4 (Del. Ch. Jan. 30, 2006)).

affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine.'"[82] Port Penn is required to prove all elements of the test by clear and convincing evidence, and courts have cautioned that they "will not depart from their traditional cautiousness in applying the doctrine 'unless there are *exceptional* circumstances which make it *highly* inequitable or oppressive to enforce the regulations.'"[83]

1. The Court Of Chancery's Dismissal Of The Equitable Estoppel Claim Should Be Affirmed.

Noting that "[t]he doctrine of equitable estoppel is an awkward fit for Port Penn's attempt to compel the County to" compel sewer service, the Court of Chancery held that "[n]either Port Penn's time, nor its unspecified thousands of dollars in costs and engineering, nor its lost profits from not being able to develop

---

[82] *Hunting Lodge*, at 10; *Acierno*, 2000 WL 718346, at *9 (quoting *Miller v. Bd. of Adjustment of Town of Dewey Beach*, 521 A.2d 642, 645-56 (Del. Super. Ct. 1986)).

[83] *Salem Church*, 2006 WL 2873745, at *12 (emphasis in original) (citing *Miller*, 521 A.2d at 646 (emphasis supplied)); *see Two South Corp. v. City of Wilmington*, 1989 WL 76291, at *7 (Del. Ch. July 11, 1989) ("However, because of the public interest involved-particularly where the governmental body acts in furtherance of its police power-the estoppel doctrine is applied cautiously, and generally only where the circumstances require its application to prevent manifest injustice.") (citations omitted); *see also Motiva Enters. LLC v. Sec'y of the Dept. of Natural Res. & Envtl. Control*, 745 A.2d 234, 250 (Del. Super. Ct. 1999) (recognizing that "courts have applied the reasoning and rationale of traditional equitable estoppel against the government very narrowly" and that some courts in the context of estoppel against the government have required a showing of "affirmative misconduct")).

over 200 lots, is sufficient to plead expensive and permanent improvements in reliance" on any actions of the County.[84]

This holding should be affirmed because, as the Court of Chancery properly notes, Port Penn makes no allegation that it has spent legally significant sums of money or made expensive and permanent improvements sufficient to make out an equitable estoppel claim. Equitable estoppel only is established when and if Port Penn "makes expensive and permanent improvements"[85] or, stated differently, incurs "a substantial change of position or incurs extensive obligations and expenses" in reliance on the government's promise.[86] Alleging the expenditure of money is not enough. As discussed in *Acierno*[87] (the case relied upon by Petitioner (OB 36)), land acquisition costs and mortgage interest may not be included in the equitable estoppel calculus. Significant expenditures for "engineering and architectural fees" in the amount of $38,500 do "not rise to the level of substantial reliance."[88] An unsupported claim that Port Penn expended "thousands of dollars in engineering, etc." (OB 33) is insufficient to state an equitable estoppel claim as a matter of law. When Port Penn makes no effort to plead the alleged costs it expended, and when Port Penn did not amend its Complaint pursuant to Court of

---

84 *Hunting Lodge*, at *9-10.
85 *Miller*, 521 A.2d at 645-46.
86 *Salem Church*, 2006 WL 2873745, at *12.
87 2000 WL 718346, at *10.
88 *Id.*

Chancery Rule 15(aaa) to correct this pleading defect, the Court of Chancery's holding should be sustained.[89]

Even more significantly, there is no promise by the County upon which Port Penn could have reasonably relied. Since 2000, the County has consistently advised Port Penn that no sewer service is available.[90] The primary alleged "promise" upon which Port Penn relied was purported statement by the former General Manager of the Department of Land Use that if sewer were provided to certain owners "the County . . . in fairness would provide sewer to other property owners . . ." OB 29.[91] Port Penn alleges that it did not file suit on the basis of this one statement. *Id.* But this alleged statement cannot form the basis for an equitable estoppel claim for at least three reasons.

First, any detrimental reliance on a statement of the Land Use General Manager is not reasonable reliance. The Department of Land Use does not control sewer service – that is handled by the Department of Special Services (now known

---

89 *Hunting Lodge*, at *10.

90 Port Penn's appendix provides numerous examples of the County consistently refusing to process proposed land use applications for the lack of sewer availability. A38, A41-48, A52; *see also* A15-20 ¶¶11-12, 16, 26.

91 Port Penn alleges that the County Executive expressed his intent to make public sewer available. A19, ¶24. Port Penn, however, only alleges that it submitted an application in reliance on this statement. OB 30. Any reliance on this purported statement is not reasonable reliance because the County Executive alone cannot change the Comprehensive Plan without the approval of County Council.

as the Department of Public Works).[92] Port Penn may not assert detrimental reliance on an alleged promise made by a County official that had no authority to make the promise of sewer.

Second, Port Penn did not incur substantial obligations in reliance on this alleged promise because no extensive financial obligations were incurred from *not* filing suit.[93] Because Port Penn did not spend money in reliance on an alleged statement of a former County official, there is no viable equitable estoppel claim.

Third, Port Penn claims that "[i]f Petitioner had filed suit [in 2007] it would also have sewer." OB 29. This is nothing but unfounded speculation. Indeed, it is wholly speculative that: (1) Port Penn could have won a suit if it filed a Complaint in 2007; and (2) that the County would have been willing to settle with Port Penn and provide sewer service because of the suit. Mere speculation cannot form the basis for a prejudicial change in position.[94]

---

[92] 9 *Del. C.* § 1341.

[93] Equitable estoppel requires "a substantial change of position or [the] incur[ance of] extensive obligations and expenses" in reliance on the government's promise. *Salem Church*, 2006 WL 2873745, at *12.

[94] *Smith v. Univ. of Md. Univ. Coll.*, 2011 WL 5833665, at *3 (D. Md. Nov. 18, 2011) ("factual allegations that fail to raise the right to relief above a speculative level are insufficient to state a facially plausible claim for relief."); *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998) ("Conclusory allegations, conjecture, and speculation, however, are insufficient to create a genuine issue of fact."); *Hodge Drive-It-Yourself Co. v. City of Cincinnati*, 284 U.S. 335, 338 (1932) ("The claim of repugnancy to the equality clause cannot be supported by mere speculation or conjecture.").

The dismissal of the equitable estoppel claim should therefore be affirmed.[95]

[95] Equitable estoppel in the land use context will only be found when "it would be highly inequitable or unjust to impair or destroy rights that the landowner has acquired." *Salem Church*, 2006 WL 2873745, at *12. At no time did Port Penn have any right to sewer service; at most it had a unilateral expectation which is insufficient to state an equitable estoppel claim as a matter of law. *See A.A.A. Always Open Bail Bonds, Inc. v. Dekalb Cnty., Ga..*, 129 Fed. Appx. 522, 525-26 (11th Cir. 2005) (holding that a mere unilateral expectation that an application might be accepted does not qualify as a protected property interest); *see also Kaminski v. Twp. of Toms River*, 595 Fed. Appx. 122, 125 (3d Cir. 2014) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)) ("to have a property interest . . . a person must have 'more than an abstract desire or need' for a benefit and 'more than a unilateral expectation of it'; he or she must have 'a legitimate claim of entitlement to it.'"). Thus, there is no state created entitlement as Port Penn alleges. OB 34.

V. DISMISSAL OF THE SUBSTANTIVE DUE PROCESS CLAIM SHOULD BE SUSTAINED

A. Question Presented

Should the dismissal of Port Penn's substantive due process claim (Count I of the Complaint) be affirmed when: (1) sewer service is not a fundamental right subject to substantive due process protection; and (2) no actions of the County shock the conscience of the Court? Preserved Dkt. 11, pp. 11-16.

B. Scope Of Review

Dismissal of Port Penn's substantive due process claim is reviewed *de novo*.[96]

C. Merits

Port Penn contends that the County's actions are purportedly "arbitrary and discriminatory" because the County is not providing sewer service to its property. OB 34. These allegations are made in the Complaint in Count I – the substantive due process count. A23, ¶39. Yet, Petitioner's brief only mentions the term "substantive due process" on three occasions. Port Penn lightly uses the term "substantive due process" in its appeal papers because, as it must concede, it cannot meet the rigorous standards required to state a substantive due process claim.

---

[96] *Martsolf v. Christe*, 552 Fed.Appx. 149, 150 (3d Cir. 2013)(citing *James v. City of Wilkes–Barre*, 700 F.3d 675, 679 (3d Cir. 2012)).

As the Court of Chancery correctly held, provision of water and sewer service is not a fundamental right worthy of substantive due process protection.[97] Port Penn does not cite a single case that holds to the contrary. Absent a violation of a fundamental right (and none is alleged here), Port Penn has no constitutionally protected right upon which to bring a substantive due process claim.[98]

The dismissal of the claim should also be affirmed because no executive action of the County[99] shocks the conscience.[100] Port Penn contends that statements made by a former member of County Council, providing a contingent right to sewer service for Toll's Plans and Pennfield as set forth in the settlement agreements, and the extension of expiration of deadlines for Toll's Plans and Pennfield's land use applications constitute an "arbitrary and discriminatory abuse of power." OB 35. Port Penn further contends that the County acted with "ill-will toward development by Petitioner," (OB 37), and that the County's actions can

---

97 *See supra* notes 36, 37, 39.

98 Because Port Penn did not raise the fundamental constitutional right issue in its opening brief, it has waived any ability to make a contrary contention in its reply.

99 The responsibility for developing "plans for public facilities and infrastructure including sanitary sewers," preparing "designs and specifications for all types of public facilities and infrastructure including sanitary sewers," and the job of managing and maintaining "public facilities and infrastructure[,] sanitary sewers and treatment facilities," is the responsibility of the Department of Public Works. 9 *Del. C.* § 1341. These responsibilities are executive administrative functions which are performed pursuant to the parameters set by County Council. Port Penn agrees. OB 37.

100 *In re New Maurice J. Moyer Acad., Inc.*, 108 A.2d 294, 322 n.186 (Del. Ch. 2015), *Salem Church*, 2006 WL 2873745, at *13 n.113.

"can only be justified by a personal desire to favor [other property owners] for some improper reason." OB 37.

These allegations are all founded on claims of improper motives.[101] Improper motives cannot state a substantive due process claim as a matter of law.[102] Port Penn's allegations must "shock the conscience" and that standard applies to "only the most egregious official conduct," such as "corruption, self-dealing, or bias against a minority group."[103] Even if a municipality is guided by political motivations, unrelated to an application, that is not enough to 'shock the conscience' under a substantive due process analysis."[104] Allegations of maligning and muzzling property owners, selective application of regulatory requirements, coercion, and the use of homosexual slurs by a government actor all have been

---

101 Port Penn alleges that "the County is engaged in bad faith if not fraud by intentionally precluding development. . .". OB 36. The newly minted fraud allegations are not contained in the four corners of the Complaint and they otherwise do not meet the requirements of Court of Chancery Rule 9. Moreover, pursuant to Court of Chancery Rule 15(aaa), the Complaint cannot be amended at this time to add a new cause of action.

102 *United Artists*, 316 F.3d 402 (holding that land use disputes "should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives.").

103 *Sisk v. Sussex Cnty.*, 2012 WL 1970879, at *4 (D. Del. June 1, 2012) (citing *Eichenlaub*, 385 F.3d at 285-86).

104 *Salem Church*, 2006 WL 2873745, at *13 (citing *Thornbury Noble, Ltd. v. Thornbury Twp.*, 112 Fed.Appx. 185, 188 (3d Cir. 2004)).

held not to state a claim for substantive due process under the shock the conscience standard.[105]

Port Penn's allegations pale in comparison, and do not state a substantive due process claim under the shocks the conscience test.[106] The Court of Chancery's dismissal of the substantive due process/arbitrary action claim should be affirmed.

[105] *Shamrock Creek, LLC v. Borough of Paramus*, 2014 WL 4824353, at *4 (D.N.J. Sept. 25, 2014) (citing cases).

[106] The actions of the County cannot be deemed egregious conduct which shocks the conscience when the County is not required to provide sewer service at all. *See supra* notes 25, 39, 47-48.

CONCLUSION

The County respectfully requests that the decision of the Court of Chancery be affirmed.

CONNOLLY GALLAGHER LLP

/s/ Max B. Walton
Max B. Walton (Bar No. 3876)
Kyle Evans Gay (Bar No. 5752)
267 East Main Street
Newark, DE 19711
(302) 757-7300

-and-

NEW CASTLE COUNTY OFFICE OF LAW

/s/ Brian J. Merritt
Brian J. Merritt (Bar No. 3982)
Assistant County Attorney
New Castle County Government Center
87 Reads Way
New Castle, DE 19720
(302) 395-5130

Dated: August 21, 2019

Attorneys for Appellees