EFiled: Sep 06 2019 02:05PM EDT
Filing ID 64170414
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 REPLY BRIEF

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NATURE OF PROCEEDINGS

The Appellee's (hereinafter "County") Answering Brief contends that the Appellant, Petitioner below (hereinafter "Petitioner") does not have a constitutional right to sewer. That is not correct. A property interest is a fundamental right with substantive due process protection. However, that does not address the issue of whether the County can discriminate and pick winners and losers. That does not address the fact that as alleged, Petitioner has been told to wait 20 years for sewer to be available in the vicinity and now that it is available, or will shortly be available literally next door, only the next door neighbors can utilize it. The crucial issue before this Court is whether the County can discriminate and provide sewer at public expense but only allow a chosen few to use it.

SUMMARY OF ARGUMENTS

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

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

STATEMENT OF FACTS

In its Statement of Facts, the County at page 7, in footnote 12, contends that Petitioner claims that "Toll Brothers/Warren and Richland . . . were granted sewer at public expense is false" because they "are required . . ." to complete the Developer Infrastructure Improvements." The County's agreements clearly state that "the County agrees to construct at its own cost and expense a force main . . . to Port Penn Road." (A59) The County seems to contend that the fact that they must pay for their own infrastructure improvements is a real hardship and a bargained win for the County. That is absurd. Of course, the developers must pay for their own infrastructure improvements within their project and to connect to the forced main. In fact, generally they would have to pay impact fees to pay for the cost of the forced main. They do not. The County for some reason gave them another freebie.

At page 8, the County states that Petitioner did not "contemporaneously objected to the execution of the Toll/Warren or the Richland settlement agreements." Of course, with the County's reputation for lack of transparency there would be no way for Petitioner to know what the County was agreeing to.

The County persists in attempting to justify its discriminatory sewer service by seeking to distinguish Petitioner's property as a "Low Density Residential Area" as if the favored properties of Toll Brothers/Warren and Lester's Richland were zoned

differently. It is undisputed that all the relevant properties in the Port Penn area are zoned low density residential. (A74) That is actually admitted by the County at page 29 of its brief wherein it states "All properties are zoned (S) Suburban."

At page 9, the County cites the Comprehensive Plan as providing that:

> This area is characterized as rural . . .
> 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.

As stated in the Opening Brief, the favored properties were designated as the New Community Development Area as a result of the County's manipulative scheme of providing that only:

> Sites which have been awarded sewer rights have been added to the New Community Development Zone. (A76)

That designation did not change their location. The 631 units and 131 units which will be provided sewer are still in the same "rural area" in the middle of cornfields, next door to Petitioner's property.

The County also quotes the Comprehensive Plan as providing that in the rural area "it is not financially feasible to provide public infrastructure to support development in the short term . . ." Nevertheless, the County is presently bringing sewer to this same rural area but only to be used by the favored owners.

The County states at page 9 that on May 16, 2017, Petitioner was advised that

"sewer is not available." However, sewer is now or shortly will be available in the Port Penn area since the County is currently constructing a forced main and providing sewer at public expense to the Port Penn area.[1]

[1] The construction plans provide for the construction of a forced main from Hyatts Corner Road underneath Route 1, in the conduit placed there when Route 1 was constructed, and along Route 13 to Port Penn Road.

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.

The County at page 12 contends that:

> 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 clam based on official acts that are inherently discretionary."

However, discretionary does not mean discriminatory. Discretionary does not give the County a license to discriminate and pick winners and losers. In *Delmarva Enterprises, Inc. v. Mayor & Council of City of Dover*, 282 A.2d 601 (Del.1971) 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.

Nevertheless, this Court held that in providing public utilities:

> it shall not discriminate among customers, but shall make its facilities available to all alike. (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, at page 20 seeks to distinguish *Delmarva* by asserting that:

> 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. 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.

In controlling public sewer, a public utility, the County is acting in a public utility capacity no different than Dover was as to water. More importantly, however, is the fact that by constructing a sewer main underneath Route 1 and along Route 13 to Port Penn Road, the County has created a sewer service area and pursuant to this Court's ruling in the *Delmarva* case, cannot discriminate as to who is allowed to connect to the sewer line and who is not.

Moreover, contrary to the County's contention, Petitioner is not seeking 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." On the contrary, Petitioner only seeks to "simply tap into [the] existing utility line" that the County at public expense has installed to Port Penn Road which is what the favored owners are required to do. Petitioner's utilization of the existing sewer line at Port Penn Road will not cost the County a penny more, but rather will produce additional income for the County which will serve to justify the substantial expense of constructing the force main to Port Penn Road.

The County does not dispute that 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 County, however, contends that the properties are not similar and/or that there is a rational basis for treating the properties different.

Contrary to the County's contention, all of the related properties are low density residential. 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 manipulative scheme of improperly awarding sewer to only the favored properties and then using that as a criteria for placing them in the Development Area. However, they are still in the middle of cornfields adjoining Petitioner's property.

The County also alleges that to satisfy the rational basis the Petitioner "must also identify a fundamental right which has been violated."

In *Enquist v. Oregon Dept. Of Agriculture*, 553 U.S. 591 (2008) the Supreme Court in dealing with a "class of one" discrimination case stated:

> In *Olech [Willowbrook v. Olech*, 528 U.S. 562 (2000)], a property owner had asked the village of Willowbrook to connect her property to the municipal water supply. Although the village had required only a 15-foot easement from other property owners seeking access to the water supply , the village conditioned Olech's connection on a grant of a 33-foot easement. Olech sued the village, claiming the village's requirement of an easement 18 feet longer than the norm violated the Equal Protection Clause because it alleged that she had "been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." 528 U.S. at 564 (citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), and *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.,* 488 U.S. 336 (1989).

The Court noted that "that case involved the government regulation of property." It went on to explain that the:

> . . . the Fourteenth Amendment "requires that all persons subjected to . . . legislation shall be treated alike, under the circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

In citing *Olech* the Supreme Court recognized that the discriminated owner had a fundamental property right. Obviously, if water connection is a fundamental right, public sewer constructed at public expense must necessarily also be a fundamental right.

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

> In *DeBlasio*, [*DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995)], the Third Circuit concluded that mere "ownership is a property interest worthy of substantive due process protection."

The County contends that Petitioner could have developed its property by using septic system.

However, as alleged in the Complaint in paragraph 36 the County "precluded a private sewer system or septic system" because Petitioner's property was in a sewer district. In paragraph 35, the Complaint alleges that "developments in a Sewer District could only be served by public sanitary sewer service." (A22)

The county cites *Warren v. New Castle County*, 2008 WL 2566947, (D. Del. June 26, 2008) decision to support its position that the county would allow septic

system. In *Warren*, the Court noted that Toll Brothers could use "individual septic system. In fact, although it had no obligation to do so, the County explicitly advised Toll of the availability of the septic system option in its November 20, 2007 letter rejecting the Port Penn preliminary plan."

However, nowhere is the County's letters rejecting Petitioner's plan was the Petitioner informed that it could use septic system. On the contrary, 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)

The County 2003 Resolution correctly noted that:

> **WHEREAS**, the implementation of a sewer system in southern New Castle County is a necessary component of good land use planning and is consistent with the tenets of the States Livable Delaware program; and
>
> **WHEREAS**, the installation of sewer in southern New Castle County will provide better protection for the environment by substantially reducing the pollution of groundwater resulting from leaking septic systems.

The refusal to allow any septic systems is corroborated by former Councilman Weiner's 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." (A77)

Obviously, the rising water should cause more concern with septic systems rather than public sewer. Floating septic fields are certainly neither pleasant nor good for the environment.

The allegations in the Complaint and the disputed facts and circumstances can only be resolved by discovery.

The County also contends that the suits filed by Toll/Warren and Lester provided a rational basis for the resulting settlement agreements.

The County, at page 21, states that a justification for the settlement was that "many of the required sewer infrastructure improvements would be paid for by the developers." As previously discussed, a developer paying for his own infrastructure is not only standard but obviously required. That could not have been a valid justification. The County refers to the "pre-arranged" friendly Richland suit that was never litigated but makes no effort to explain or justify a reason the County would agree to such a questionable arrangement.

The County does contend that "these averments do not negate every conceivable rational basis for the County's actions" and lists all the various possible reasons for their decision to provide sewer at public expense for Toll/Warren and Lester. Of

course, that also does not preclude that the County's decision could have been political as the County is prone to do. Obviously, only discovery can reveal the real reason.

The County's actions are at best questionable, illogical and unorthodox. There is no logical reason to allow 631 units in the middle of a cornfield and provide sewer at public expenses but preclude adjoining properties to also have public sewer. The facts of this case require discovery.

Moreover, if the suits were a rational basis for the settlements that no longer existed when the plans expired per the agreements and Court Orders. At that point, the favored properties were on equal footing with the other surrounding properties in Port Penn. The County, nevertheless, in footnote 55, at page 22 contends that the "sewer connection for Toll's plans would remain in place until July 1, 2021." That deadline dealt with the infrastructures to be in place and 2 houses connected. It had nothing to do with the expiration or approval of the plans. A59

The express provisions in the Toll/Warren settlement agreement of November 29, 2010, and the Court Order provides that the plan would expire in 42 months, on May 29, 2014.

The Toll Brothers/Warren's agreement and the accompanying Court Order provided:

> As part of the litigation, Developer's Plans have been subject to several status quo orders that were designed to prevent expiration of the Plans. The County agrees to allow Developer a period of one year from the date that this agreement is fully executed and the consent order has been docketed by the Court, with two available three (3) month extensions - for a total of eighteen (18) months - to submit a complete record plan application. Thereafter, Developer must complete the processing 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) (A60)

The District Court Order similarly provides that:

> If for any reason the Plans are not recorded within forty-two (42) months, the Plans shall expire. (A64)

The Lester (Richland) agreement of January 24, 2011 and the accompanying Chancery Court Order provided:

> As part of the litigation, Richland's Plan has been subject to the March 7, 2008 status quo order, which is designed to prevent expiration of the Plan. The County agrees to allow Richland a period of twenty-four (24) months to complete the processing of the Plan currently pending in the County land development process. If final approvals are not received within twenty-four (24) months of the date of this Agreement, the application for the Plan shall be considered expired. (Emphasis added) (A64)

It is difficult to understand how plans that expired and voided on January 24, 2013 can nevertheless remain valid for five more years so as to allow Lester to record the Richland plans on January 23, 2018 and that the Toll/Warren plans would still be valid, especially since there has been no change in the plans or development option.

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.

The County contends that Petitioner's taking claim "is not ripe because Port Penn did not seek a beneficial use appeal."

The County contends that a Board of Adjustment appeal is necessary because it can "grant variances or waiver allowed by law." Of course, the County's adamant refusal to provide sewer is not subject to a variance or waiver. The County also contends that the Board of Adjustment appeal is necessary so as to allow the County to determine if Petitioner has been denied "all economical or productive use of the

land." The County contends that Petitioner "does not allege that it has been denied all economically viable use of the land because it cannot – it may unquestionably develop its property using septic systems."

As previously stated and alleged in the Complaint Petitioner was precluded from using septic systems since it was in a sewer district zone and was told that it had to wait until sewer was in the vicinity.[2]

As stated in the Opening Brief and alleged in the Complaint, the County's goal is to preclude development so as to obtain open space for free. That is corroborated and supported by former Councilman Weiner "for the record" statement that they should do "everything that we can to prevent sewering."

The County, at page 20, footnote 54, asked the Court to take judicial notice of the following pending litigation by property owners that were part of the Port Penn Assemblage that Toll Brothers was purchasing until the economic downturn:

> *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.

It is interesting that the County was willing to provide sewer at public expense

[2] Presently, Petitioner may not use septic system since the County has placed a moratorium on septic systems.

to Toll Brothers but not to some of the individual farmers and property owners. The County's dealing with these owners demonstrates the County's manipulation and collusion in their effort to obtain open space for free

Interestingly, in the Glen Allen Farm, LLC complaint which the Court can also take judicial notice of it is alleged that "Meyers along with at least one current member of Council . .. . have been colluding [presumably secretly] . . . as part of a Faustian scheme." Given the County's conduct, a Board of Adjustment appeal is clearly futile.

This Court is the only forum that can curtail the County's bad faith conduct, collusion and manipulation to obtain open space for free and pick winners and losers in land development.

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.

The County contends that it did not create a private sewer district as a result of its agreements to provide sewer at public expense for Toll/Warren and Lester only. However, constructing a forced main to Port Penn Road for the sole reason of providing sewer in the middle of cornfields for those three owners only without allowing neighboring or even adjoining properties to use the sewer is in reality creating a private sewer district. Merriam-Webster definition of private is "intended for or restricted to the use of a particular person, group or class." It is admitted and

even argued by the County that the entire sewer system is being constructed by the County at public expense for the restricted use of Toll/Warren and Lester only. If it were public and not private, it could be used by other similarly situated property owners

The County also contends that it is not engaged in "contract zoning" in violation of the ruling in *Hartman v. Buckson and The Town of Camden*, 467 A.2d 694 (Del. Ch. 1983). The County argues that the zoning has not changed and that "all properties are zoned (S) Suburban." That may be literally correct but as a practical matter, the zoning has changed as a result of the County's manipulation by creating a New Community Development Area.

In fact, the County has repeatedly contended that the Toll/Warren and Lester properties are in New Community Development Area while Petitioner's property is a low density residential area. At page 8, the County states:

> The Port Penn property is *not* in the "New Community Development Area." Rather it is designated as a Low Density Residential Area.

The County at page 9 then goes on to state that "the Comprehensive Plan designates that area as "rural" and the County "will continue efforts to create zoning designations to minimize new development in the Low Density Residential Area."

Moreover, the Plan provides that in this rural area:

> . . . it is not financially feasible to provide public infrastructure to support development in the short term.

Of course, Toll/Warren and Lester properties are located in the same rural area and would be subject to the effort to "minimize new development" and not have access to "public infrastructure." Nevertheless, Toll/Warren was approved for 631 units and Lester's properties for 131 units in the same "rural" area and have "public infrastructure" at public expense. As a result of the County's manipulation, the County created a New Community Development Area for these properties, while adjoining properties are designated as "rural" with no ability for development or public sewer. That is essentially a rezoning of the Toll/Warren Lester property which was done as a result of the County's settlement agreements. Consequently, it is hard to argue that this is not akin to a change of zoning and therefore contract zoning in violation of the ruling in *Hartman*.

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.

Petitioner's equitable estoppel claim was based on several factors and/or representations by the County that it relied on to its detriment. Initially, Petitioner relied on the County's designation of Port Penn as a sewer district with the County's resulting commitment to provide sewer. Petitioner also relied on the County's representations for 20 years that its development plan would be approved when sewer was in the vicinity. Petitioner also relied on the County's Land Use General Manager that it was not necessary to file suit because if sewer was brought to Port Penn it

would be made available to all owners in the area. Petitioner also relied on the County Executive's statement upon taking office that sewer would be available to all property owners in Port Penn fairly and equally. Despite all these representations, it now clear that the County's goal is to have open space and is going to do "everything" it can to obtain open space for free.

The County argues that "since 2000, the County has consistently advised Port Penn that no sewer service is available." However, the County does not address the County's commitment to provide sewer by designating the area as a sewer district and the fact that Petitioner was told for 20 years to wait until sewer was in the vicinity for its plan to be approved.

The County contends that reliance on the Land Use General Manager was not reasonable and seems to also assert that reliance on the County Executive was also not reasonable. The County ignores the fact that the County can only act through its officials and if you cannot rely on the General Manager or County Executive, who can you rely on?

The County contends that because Petitioner "did not spend money in reliance on an alleged statements of a County official, there is no viable estoppel claim." That statement was in reference to not filing suit but as alleged Petitioner also relied on the County Executive's statement and had an engineer file a new application with the

resulting expenses.

Petitioner contends that being misled for 20 years that sewer was coming and relying on same spent thousands of dollars on engineering, fees, traffic impact studies, etc., as a result in equity the County should be estopped from denying sewer that it has constructed in the area at public expense.

The County contends that even if Petitioner had filed suit, it is speculative whether Port Penn would have won or the County would have been willing to settle. That, of course, ignores the fact that Toll/Warren did not win but still were awarded sewer at public expense and Lester (Richland) filed a pre-arranged friendly suit and without any litigation whatsoever was provided with sewer at public expense. It is alleged that this was a political decision which is certainly concerning and requires discovery.

Petitioner contends that being misled for 20 years that sewer was coming and that its plan would be approved when sewer was "in the vicinity" resulted in acquiring a right to have its plan approved now that sewer is in the vicinity, which would be inequitable to reject. *Salem Church (Del.) Assocs. v. New Castle County,* 2006 WL2873745.

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.

The County contends that Petitioner's brief only mentions the term "substantive due process on three occasions" as if the number of times an issue or right is mentioned is important. The County seems to believe that quantity is better than quality and that may be the reason why the County cites 99 cases in its Answering Brief.

Whether there is a fundamental right to sewer or not in the abstract is not the crucial issue in this case. However, there is a fundamental right to sewer as previously

discussed. There is also an equal protection right against discrimination as established by this Court in the *Delmarva* decision and by the Supreme Court in the *Engquist* decision citing *Olech*.

Moreover, the law is clear that a substantive due process claim exists if the government's conduct "shocks the conscience." The County, however, contends that the County's conduct does not shock the Court's conscience. The County contends the official's conduct must be "egregious" such as "corruption, self dealing or bias against a minority group." The definition of egregious, however, is much more encompassing. It has been defined as "extremely bad."

In this case, it is alleged in the Complaint that the County is precluding development as a scheme to obtain open space for free. That constitutes "self dealing." That is corroborated by former Councilman Weiner's statement that he and other members of Council would do everything they could to avoid sewering and development and as a result keep the property as open space without the County paying for it. That constitutes "self dealing" by the County.

The County has an obligation to follow the Delaware and U.S. Constitution and pay for what it wants or takes. It wants open space but does not want to pay for it and by precluding development, it obtains open space without paying for it. That is self dealing and egregious. That alone should shock the Court's conscience. The

County's discriminatory conduct in providing sewer for three property owners only, and thereby granting them a monopoly should shock the conscience.

The County's subsequent manipulating and scheming to create a New Community Development Plan for their benefit should also shock the Court's conscience. What is also shocking and egregious is the County's blatant violation both of the terms of their agreements and the District Court and Chancery Court Orders that clearly provided that the plans expired after a certain time.

CONCLUSION

The allegations contained in the Complaint and the related facts and circumstances entitle the Petitioner to discover and offer evidence in support of Petitioner's claim. It is clear that it is conceivable that Petitioner's claims are valid which would preclude dismissal of the Complaint. For that reason and the reasons stated herein the Chancery Court's dismissal should be reversed.

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