EFiled: Dec 21 2021 11:55AM EST
Filing ID 67184696
Case Number 349,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CRODA INC.,	)	
	)	
Appellant,	)	
v.	)	C.A. No.: 349,2021
	)	
NEW CASTLE COUNTY,	)	On Appeal from C.A. 2020-0677-MTZ in the Court of Chancery of the State of Delaware
	)	
Appellee.	)	

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Justice Holland, in his treatise on the Delaware Constitution, explained that "if the title of a bill is such that it traps the unwary into inaction, it must be struck down as a violation of [the titling requirement]." *See* Justice Randy J. Holland, *The Delaware State Constitution*, 116-17 (Oxford Univ. Press, 2017). That statement is this case.

In August 2019, New Castle County conducted two public hearings on a proposed ordinance, Substitute No. 1 to Ordinance No. 19-046 (the "Ordinance," A-35-38), which was titled:

> To Amend New Castle County Code Chapter 40 ('Unified Development Code'), Article 3 ('Use Regulations') and Article 33 ('Definitions') *Regarding Landfills*.

(emphasis added). But while the title indicated the Ordinance was one "regarding landfills," the Ordinance did, in fact, much more. As written, the Ordinance converted *every* heavy industrial use in the "HI" (Heavy Industry) zone from a use permitted by right to a nonconforming use which can only be expanded or changed with the grant of a discretionary "conditional use" permit. Worse still, presumably because the title indicated the Ordinance was one only "regarding landfills," not a single HI-zoned property owner attended the public hearings. Instead, the only person to show up and speak against the ordinance was the owner of the County's sole landfill – even though the Ordinance affects *every* heavy industrial use.

Of course, given that the title of the Ordinance indicated it was one "regarding landfills," it should not be surprising that the only landfill owner in the County attended the hearing; and, given this title, it should not be surprising that no other HI-zoned property owner attended. After all, if you didn't own a landfill, there was no reason to think that your property interests might be affected and that you may want to investigate further and speak out against the Ordinance – an ordinance which threatens the expansion of every heavy industrial use in the County.

Appellant Croda Inc. owns and operates a chemical plant in New Castle County on land zoned "Heavy Industry" or "HI." But, because the Ordinance title did not disclose that it affected *all* HI-zoned property, Croda was unaware of the Ordinance when it was considered by the County and did not become aware of the Ordinance until June of 2020. Upon learning of the passage of the Ordinance, Croda filed suit in the Court of Chancery to strike the Ordinance for failure to comply with the applicable state law titling requirements – titling requirements put in place to protect property owners, such as Croda, from unknown and undisclosed potential changes to regulations governing their property.[1] Croda also brought federal claims for failure to provide procedural and substantive due process.

[1] The County, of course, has the right to change its zoning provisions, but before doing so, it must comply with applicable notice requirements – including a title which provides meaningful notice to those potentially affected. Once stricken, the County would be free to re-consider the matter, but any such new ordinance would

Following expedited discovery, the parties briefed their cross-motions for summary judgment. On October 13, 2021, the Court of Chancery issued two Orders (one dealing with the state law claims and one dealing with the federal claims). *See Croda, Inc. v. New Castle County*, 2021 WL 5023646 (Del.Ch.) ("*Croda I*") (rejecting the state law claims as untimely under 10 *Del.C.* §8126) (copy attached as Exhibit 1) and *Croda, Inc. v. New Castle County*, 2021 WL 5027005 (Del.Ch.) ("*Croda II*") (rejecting due process claims for lack of a "vested" property right) (copy attached as Exhibit 2).

In *Croda I*, the Court of Chancery erred, as a matter of law, in finding that the 60-day limitations period following publication of notice of the adoption of an ordinance created by 10 *Del.C.* §8126 absolutely barred Croda's state law claims – despite the fact that the Ordinance was mis-titled and provided no notice to property owners, thus preventing Croda from participating in the legislative process. In an earlier case, the Court of Chancery rejected such an absolutist reading of §8126, explaining "it is not intended to deny citizens a fair opportunity to challenge an adopted ordinance." *In re Kent County Adequate Public Facilities Ordinances Litigation*, 2009 WL 445611, at *7 (Del.Ch.) (the "*APFO* case").

In *Croda II*, the Court further erred as a matter of law with respect to Croda's

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have a proper title, so that Croda and other heavy industrial owners could be heard on the issue.

federal claims when it held that Croda was not entitled to due process protection because it had not established a *vested* property right. Due process protection, however, does not depend on a "vested" property right, and Croda was not bringing a vested rights claim. Rather, Croda was claiming that, as a matter of procedural due process, it was entitled to meaningful notice before the County could lawfully change the applicable zoning regulations.

As Chancellor Chandler once observed: "[N]otice requirements exist to make certain that a decision-making process is conducted in a fair and informed manner," and "[notice requirements] force those who exercise power to do so only after affirmatively inviting the views of parties deemed by the Legislature to be critical to a decision-making process." *Farmers For Fairness v. Kent County*, 2007 WL 1651931, *7 n. 38 (Del.Ch). And, as Justice Holland observed, if the title of a bill "traps the unwary into action," it must be struck down as a violation of the titling requirement. *See* Randy J. Holland, *supra*. Because Croda, as well as all other HI-zoned property owners in New Castle County, were denied any opportunity to appear and be heard on the Ordinance as a result of its misleading title, they were trapped into inaction and the Ordinance should be stricken. The Chancery Court erred when it held §8126 absolutely precluded Croda's state law claims despite the circumstances here, and it further erred in holding that Croda was not entitled to due process protection because it had not established a *vested* property right.

SUMMARY OF ARGUMENT

1. Although 10 *Del.C.* §8126 ordinarily requires a challenger to bring suit within 60 days of publication of legal notice of a land use action, this 60-day timeframe does not start to run where the title of the ordinance (the only public notice concerning the ordinance) fails to comply with the titling requirements of 9 *Del.C.* §1152 and New Castle County Council Rule 2.2.1. "Although the purpose of §8126 is to promote order, finality, and certainty to adopted legislation, it is not intended to deny citizens a fair opportunity to challenge an adopted ordinance." *In re Kent County Adequate Public Facilities Ordinances Litigation*, *supra*, *7.

2. By failing to provide a fair and adequate title which disclosed the true effects of the Ordinance, New Castle County denied Croda and all other HI-zoned property owners procedural due process by giving them no reason to believe the Ordinance would affect them. The Court of Chancery erred by requiring Croda establish a "vested" property right in order to bring a procedural due process claim – Croda is not claiming that it is exempt from any change to the County's zoning requirements (the gravamen of a "vested" rights claim); rather, as a matter of procedural due process, Croda is entitled to meaningful notice of an intended change to such requirements prior to the change so that it could be heard on the subject before passage of any adverse ordinance.

STATEMENT OF FACTS[2]

Croda owns and operates a chemical manufacturing facility in New Castle County, on the site commonly known as "Atlas Point." Croda purchased the Atlas Point site in 2006, although it has been in operation since at least 1937. The site has been zoned "HI" (Heavy Industry) since before Croda purchased it. Presently, Croda manufactures between 300 and 400 specialty chemical products at its batch production facilities at Atlas Point. In addition, in 2018, Croda completed construction of a new facility on the site that became the first in the United States licensed to manufacture ethylene oxide using biofuels instead of petroleum products.

New Castle County adopts a deceptively titled ordinance and no HI-zoned property owner appears at the public hearings.

On April 30, 2019, the Ordinance was introduced before New Castle County Council. As with all proposed ordinances, New Castle County published a notice in the Delaware *News-Journal* newspaper that listed the title of the Ordinance and stated that the Ordinance would be subject to public hearings before the New Castle County Planning Board and New Castle County Council.[3] The title of the Ordinance, which is the only part of the Ordinance set forth in any public notice,

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[2] Unless otherwise indicated, all facts are taken from Croda's Verified Complaint and the County's Answer in this matter, which appear in the record at A-15 and A-53 respectively. None of the facts are in dispute.

[3] State law requires New Castle County to publish notice of such hearings. *See* 9 *Del.C.* §§1152, 1153.

appeared in newspaper advertisements as follows:

> To Amend New Castle County Code Chapter 40 ("Unified Development Code"), Article 3 ("Use Regulations") And Article 33 ("Definitions") *Regarding Landfills*.

(emphasis added). However, while the title indicated the Ordinance was one only "regarding landfills," Section 2 of the Ordinance affects *all* heavy industry uses in the County.[4] The following table, included in Section 2 of the Ordinance, struck out the "Y" (meaning a use is permitted) in the "Heavy Industry" row of the table and replaced it with an "S" (meaning the use is required to obtain a special use permit).

Table 40.03.110A. General Use Table									Table 40.03.110B. General Use Table							Table 40.03.110C. General Use Table	
Zoning District (Urban and Suburban-Transition Character) Y=permitted, N=prohibited, L=limited review, S=special use review, A=accessory									Zoning District (Suburban and Special Character)							Additional Standards (all districts)	
Land Use	TN	ST	MM	ON	OR	CR	BP	I	CN	S	SE	NC	HI	EX	SR	Parking	Limited & Special Use Standards
...																	
Industrial Uses									**Industrial Uses**							**Industrial Uses**	
Heavy industry	N	N	N	N	N	N	N	N	N	N	N	N	~~Y~~ S	N	N	Table 40.03.522	Section 40.03.323.
...																	

[4] Sections 1 and 3 of the Ordinance do deal exclusively with landfills. Section 1 added a new section to the County Code limiting landfills to 140 feet in height and requiring all requests for increased landfill height to go through an environmental review process. Section 3 added landfills to the list of heavy industry uses. Previously, the County Code did not identify a landfill as a heavy industrial use.

The change from "Y" to "S" in the table converted every "Heavy Industry" use in the "HI" zone from a permitted use to a conditional special use. As a result, no new heavy industrial use of a property can occur unless the owner receives a discretionary "special use permit" from the New Castle County Board of Adjustment.[5]

Not only did the Ordinance require a special use permit for any *new* heavy industrial uses, the Ordinance also transformed all existing heavy industrial uses into "nonconforming" uses, meaning that any attempt to expand or enlarge an existing heavy industrial use would also require the property owner to go before the Board of Adjustment and secure a special use permit.[6] This decision (to grant or deny any

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[5] Under the County Code (or "UDC" for "Unified Development Code"), the Board of Adjustment can grant or deny a special use permit or place special conditions on the use as part of granting an approval. *See generally* UDC §§40.31.430, 431. Before adoption of the Ordinance, any heavy industry use was permitted as a matter of right so long as it met all technical requirements, such as setback, height, landscaping, traffic, and other restrictions.

[6] The UDC defines "nonconforming use" as:

> [a] use of land or use of a building/structure lawfully existing at the time this Chapter or a subsequent amendment to this Chapter became effective which does not conform to the use requirements of the district in which it is located.

See UDC §40.33.300. The UDC further states that: "[n]onconforming use of a building or structure or lot *shall not be extended or enlarged*." *See* UDC §40.08.130.A (emphasis added). Thus, as a result of the Ordinance, a property owner must now obtain a special use permit from the Board of Adjustment (so the use would no longer be nonconforming) before making any change or expansion to an existing heavy industrial use.

expansion or extension of a nonconforming use), like the decision to grant a special use permit in the first instance, is entirely discretionary. In contrast, prior to the passage of the Ordinance, an existing heavy industry user could expand or modify the use of its property subject only to compliance with applicable zoning regulations (e.g., height, setback, landscaping, traffic); now, even a slight expansion is subject to discretionary review and could be denied.[7] And, even if the County grants the special use permit, the County is free to include substantial restrictions on the use (such as limiting or preventing further expansion, mandating a "lower intensity of use," or other conditions which may or may not be financially or operationally feasible). *See* UDC §40.31.431.

And yet, despite this dramatic impact on all heavy industrial uses – impact which could, in the Board's discretion, prohibit any expansion at all – the Ordinance's title merely described the Ordinance as one "Regarding Landfills." The synopsis to the Ordinance, too, only discussed landfills, and did not disclose that all

[7] In general, in considering whether to grant or deny a special use permit, the Board of Adjustment is directed to consider a number of factors including (1) that the use meets all specified requirements in the code; (2) that the use is consistent with the Comprehensive Development Plan; (3) that the use is compatible with the character of the land in the immediate vicinity; (4) that the design minimizes the adverse effects, including visual impact on adjacent lands; (5) that the use minimizes adverse impacts on the environment or government services; and (6) that the intensity of the use shall not exceed that permitted by Article 5. A lower intensity may be mandated based upon the record. UDC § 40.31.430.

heavy industrial uses would be changed from "conforming" to "non-conforming" and would require a special use permit for any changes or expansions. (A-38).

Not only did the title and synopsis to the Ordinance fail to discuss anything other than landfills, but the public testimony concerning the Ordinance before the Planning Board and County Council both focused solely on landfills, and there was no mention – not one – of the Ordinance's effect on heavy industry uses. Indeed, not even the County itself, in describing the Ordinance at the various public hearings, ever mentioned that it impacted all heavy industrial uses. At the August 7 Planning Board hearing, County Council's attorney testified that "the intent of this ordinance is to address currently existing landfills as well as future landfills." *See* Planning Board Hearing Transcript, page 20, lines 22-24 (A-233). Similarly, at the August 27 County Council public hearing, he said "the ordinance was created to set regulations around the landfills as a whole . . . for existing as well as future landfills." *See* County Council Hearing Transcript, page 27, lines 15-19 (A-132). At neither public hearing did anyone from the County speak of any intent for the Ordinance to apply to or effect anything other than landfills – even though the Ordinance, as drafted, had the potential to prohibit the expansion of any existing heavy industry use and to prohibit any new heavy industry use anywhere in New Castle County.

One might think that, given this far-ranging impact of the Ordinance, many, if not all, heavy industrial property owners would seek to weigh in on this

potentially-crippling legislation. However, not a single owner of HI-zoned property (other than the owner of the landfill, whose property was being added to the list of "heavy industry" uses for the first time) appeared before either the Planning Board or County Council. Not a one. This lack of participation on the part of HI-zoned property owners, which threatens their abilities to expand their existing uses, might seem surprising – except that the only public notice concerning the Ordinance identified it solely by title, and that title said it was "regarding landfills."

Croda's facility is now a non-conforming use and Croda's future plans for its property are now at risk.

Croda purchased its Delaware facility in 2006, and has operated it since that time. *See* Manuelli Aff. ¶ 4 (A-135). Croda has already invested $565 million in its plant and facility and, prior to learning of the Ordinance, had plans to invest another $185 million over the next four years. *Id.* These improvements will, among other things, reduce Croda's greenhouse gas emissions and carbon footprint; but those plans are now called into question and have been postponed as a result of the Ordinance. *Id.*

Croda learns of the Ordinance's true effects on June 17, 2020.

Croda knew nothing of the Ordinance's effects until June 17, 2020, when its Senior Corporate Counsel, who is based in New Jersey, received an unsolicited email from Delaware attorney Shawn Tucker alerting Croda to the impact of the Ordinance on Croda's operations. *See* Manuelli Aff. at ¶¶ 2-3 (A-134-35); Tucker Aff. ¶¶ 2-3

(A-137); for a copy of the June 17, 2020 email *see* Ex. 1 to Tucker Aff. (A-140). Mr. Tucker had previously represented Croda on zoning and land use issues, although he was not working on any matters for Croda at the time of his email. Manuelli Aff. at ¶ 2 (A-134); Tucker Aff. at ¶¶ 7-8 (A-138).

Following Croda's receipt of the Tucker email, Croda retained Mr. Tucker to advise it regarding the ramifications of the Ordinance. Manuelli Aff. at ¶ 3 (A-135). Concerned that the Ordinance would now prohibit or at least substantially impact Croda's ability to proceed with future planned upgrades and expansions of its facility, Croda filed this lawsuit on Monday, August 18, 2020 – approximately 60 days after first learning of the Ordinance's true effects.

ARGUMENT

I. 10 *DEL.C.* §8126 DOES NOT PROHIBIT CRODA'S SUIT BECAUSE THE CHALLENGED ORDINANCE DID NOT PROVIDE A FAIR AND MEANINGFUL TITLE AS REQUIRED BY APPLICABLE LAW.

A. Question Presented: Is A Mis-Titled Ordinance Nevertheless Entitled To The Protection Of The 60-Day Limitations Period Of 10 *Del.C.* §8126?

In the Court of Chancery, Croda argued at length that the 60-day period of limitations set forth in 10 *Del.C.* §8126 does not apply here, where the title of the Ordinance provides no notice (let alone fair or meaningful notice) of the Ordinance's true effects. *See, e.g.,* A-24-25, 103-110, 173-184.

B. Standard of Review: *De Novo* Review Applies To The Interpretation Of The Statute At Issue (10 *Del.C.* §8126).

The interpretation of statutes is a legal question, which this Court reviews *de novo*. *See, e.g., Delaware Solid Waste Authority v. Delaware Dept. of Natural Resources and Environmental Control,* 250 A.3d 94, 105 (Del. 2021); *Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020); *Dambro v. Meyer*, 974 A.2d 121 (Del. 2009); *State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659 A.2d 215 (Del. 1995).

C. Merits Of The Argument: In The Absence Of A Fair And Meaningful Title, Croda's Challenge Was Timely Brought.

Ordinarily, Title 10, Section 8126 creates a 60-day window in which to challenge a local government's land use decision, which 60 days begin to run following publication of notice of the land use decision, including adoption of

zoning ordinances. However, the key to the start of the 60-day window is notice. Section 8126 "is not intended to deny citizens a fair opportunity to challenge an adopted ordinance." *APFO, supra*, at *7. Because the title here is deficient, §8126 does not prohibit Croda's suit, and the Ordinance should be stricken.

1. The title of the Ordinance, telling the public it was one "regarding landfills," is insufficient as a matter of law.

To begin, no one should seriously question whether the title to the Ordinance provided fair and meaningful notice to the owners of "HI" (Heavy Industry) zoned property. It did not. The Ordinance is titled:

> To Amend New Castle County Code Chapter 40 ("Unified Development Code"), Article 3 ("Use Regulations") And Article 33 ("Definitions") *Regarding Landfills*.

(emphasis added). Yet even though the title states that the Ordinance is one "regarding landfills," the Ordinance actually applies to *every* heavy industrial use. It requires *every* new heavy industrial use and *every* expansion of any existing heavy industrial use to obtain a special use permit from the New Castle County Board of Adjustment – and the Board has the discretion to deny such a request outright or to impose any and all conditions which it might feel appropriate. Whether one thinks this good policy or not, all should agree that it is a dramatic departure from the previous regulations, which allowed new and expanded heavy industrial uses as a matter of right, so long as such uses complied with all other requirements set forth in the code (*e.g.*, height, setback, landscaping, traffic, etc.).

To prevent surprises and sudden changes in the law without meaningful opportunity for the public to be informed and heard, the General Assembly has imposed certain requirements on New Castle County regarding the titles of and process for adoption of proposed ordinances. Among these protections, Title 9, Section 1152 of the Delaware Code states that:

> [n]o ordinance, except those relating to the budget or appropriation of funds and those relating to the adoption or revision of the County Code shall contain more than 1 subject *which shall be clearly expressed in its title*.

9 *Del.C.* §1152(a) (emphasis added).[8] Consistent with this directive, County Council has adopted its own rule, which states that the title of any ordinance "shall clearly express the matter addressed in the legislation *for maximum public notice*." N.C.C. Council Rule 2.2.1 (emphasis added) (A-48).

The requirement that the subject of an ordinance "be clearly expressed in its title" "for maximum public notice" finds its genesis in the Delaware Constitution, which has titling requirements for legislation in the General Assembly. In Article II, Section 16, the Delaware Constitution requires that a bill be limited to one subject

[8] Another protection in the Delaware Code can be found at Title 9, Section 2607, which states that changes to "any . . . provision of any zoning regulation" must go through a notice and public hearing process, including publishing a notice in a newspaper of general circulation in the County containing "the time and place of hearing, and . . . the nature of the proposed change." Such notice is meaningless, of course, if the title of the ordinance is misleading or defective such that potentially affected property owners are not put on notice.

"which shall be expressed in its title." The "principal object" of this constitutional titling requirement "is that the title of the Act when published shall be sufficiently comprehensive to give to the people, as well as to the members of the Legislature, fair and reasonable notice of the subject matter of the legislation proposed, thus preventing deception by the inclusion of provisions of which the title gives no intimation whatsoever." *Klein v. Nat'l Pressure Cooker Co.*, 64 A.2d 529, 532 (Del. 1949); *see also Opinion of the Justices*, 194 A.2d 855, 856 (Del. 1963) ("Fundamentally, [the titling requirement] is designed to prevent deception of the general public and the members of the General Assembly by titles to bills which give no adequate information of the subject matter of the bills."). One of the purposes of the titling requirement is to "fairly apprise the people through publication of legislative proceedings as is usually made of the subjects of legislation that are being considered, in order that they may have [the] opportunity of being heard thereon by petition or otherwise, if they shall so desire." *Klein*, 64 A.2d at 532.

Courts apply cases interpreting the titling requirements under the Delaware Constitution to the titling requirements applicable to counties. *See, e.g., Farmers For Fairness v. Kent County*, 940 A.2d 947, 955 (Del.Ch. 2008) (applying decisions interpreting the titling requirements of Article II, Section 16 of the Delaware Constitution to titling requirements applicable to Kent County under Title 9 of the Delaware Code). Moreover, the Delaware Supreme Court has made clear that: "The

[local government] must act within the scope of its grant of power [and] cannot disregard the procedural safeguards which the General Assembly imposed." *Carl M. Freeman Assoc., Inc. v. Green*, 447 A.2d 1179, 1181-2 (Del. 1982) (citations omitted); *see also New Castle County Council v. BC Development Associates*, 567 A.2d 1271, 1275 (Del. 1989) ("it is axiomatic that delegated power may be exercised only in accordance with the terms of its delegation"); *Fields v. Kent County,* 2006 WL 345014, *3 (Del.Ch.) ("full compliance with the conditions imposed on the exercise of [zoning] power is essential"); *O'Neill v. Town of Middletown*, 2006 WL 2041279, *8 (Del.Ch.) (explaining that while a local government has substantial flexibility in exercising its land use authority, it must follow "a process which, in this State, is designed to achieve fairness and regularity in the resolution of frequently difficult land use decisions").

Here, the title of the Ordinance does not satisfy the titling requirements. The Ordinance's application to all heavy industry uses is not "clearly expressed in its title," 9 *Del.C.* §1152, and fails to "provide maximum public notice." N.C.C. Council Rule 2.2.1. Any reasonable person reading the title of the Ordinance would conclude that the Ordinance concerns only landfills. Thus, not surprisingly, the only landowner who appeared at the hearings on the Ordinance was the County's sole landfill operator. No other heavy industry property owner spoke at either public hearing on the subject, and the County never produced any evidence indicating it

was even contacted by such a property owner. Indeed, the County itself never said at either public hearing that the Ordinance applied to anything other than landfills.

Because the Ordinance was adopted with a deficient title, the Ordinance should be invalidated. Of course, should the Ordinance be invalidated, nothing prohibits the County from starting the legislative process anew, albeit with a more accurate title that will provide appropriate notice to all affected property owners so they can be heard on this issue.

2. 10 *Del.C.* §8126 does not bar Croda's challenge.

Ordinarily, Delaware law imposes a fairly short time frame in which to challenge a county or municipal land use decision. Title 10, Section 8126 provides a 60-day period, running from the date of publication of notice of adoption in a local newspaper. Specifically, the statute states:

> No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any ordinance, code, regulation or map, relating to zoning, or any amendment thereto . . . is challenged . . . shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation the County or municipality in which such adoption occurred, of notice of the adoption of such ordinance, code, regulation, map or amendment.

10 *Del.C.* §8126(a). The County argued below that this 60-day limit prohibited Croda from bringing its state law claims; and, the Court of Chancery agreed, stating that Croda "had sixty days from August 31, 2019 . . . to challenge Ordinance 19-046, regardless of any deficiency in its title." *Croda I* at *5.

In reaching this conclusion, the Court acknowledged the statement in the *APFO* case that "[a]lthough on the one hand the purpose of §8126 is to promote order, finality, and certainty to adopted legislation, it is not intended to deny citizens a fair opportunity to challenge an adopted ordinance," 2009 WL 445661 *7, but then explained that the *APFO* decision did not apply to Croda due to the "unique" and "unusual context" of the facts in the *APFO* case. *See Croda I* at *4.[9] However, this "distinction" proves Croda's point. If Section 8126 is truly a statute of repose, as the Court of Chancery characterized it, then the lawsuit in the *APFO* case should have been dismissed as untimely. It was not – precisely because, as the *APFO* Court observed, Section 8126 "is not intended to deny citizens a fair opportunity to challenge an adopted ordinance." The only interpretation which makes sense here, under these circumstances, which are also "unusual" and "unique," is to interpret Section 8126 as requiring a proper title for the 60-day period to commence. If an ordinance has a title which does not provide notice to those affected, the 60-day period does not start to run. Croda is entitled to a "fair opportunity" to challenge the

[9] In the *APFO* case, the notice was published, and there was no claim regarding improper title, or that the property owners affected were not on notice of the challenged ordinance. Rather, the "unique" situation in the *Adequate Public Facilities* case was the fact that the ordinance did not become effective unless and until the General Assembly adopted certain legislation, which did not occur until more than 60 days after the notice was published.

Ordinance. An ordinance title which "traps the unwary into inaction," cannot be the basis for the start of a 60-day period of limitations.

Put another way, in *Croda I*, the Court applied the 60-day period in the apparently mistaken belief that because Section 8126 was a "statute of repose," the Court could, under no circumstances, consider the defective title. Yet, at the same time, the Court acknowledged that there were "unique" and "unusual" circumstances which allowed the *APFO* Court to disregard the 60-day period in the *APFO* case. It can't be both. Either Section 8126 is an absolute bar under all circumstances (as the County argued), or, Section 8126 is not an absolute bar, as in the *APFO* case, meaning that the Court may consider the circumstances and relevant equities – and certainly nothing could be a more compelling circumstance or more relevant equity than a mis-titled ordinance. Where an ordinance is not properly titled, the 60-day period simply never starts to run.

This conclusion is bolstered by the Court's reasoning in the *APFO* case, in which the Court explained that where a "literal application of §8126 would work an absurd result," a court need not apply it. *Id.* *6; *see also Techmer Accel Holdings, LLC v. Amer*, 2010 WL 5564043, *6 (Del.Ch.) ("[t]he golden rule of statutory interpretation ... is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result. Thus,

the Court will reject any statutory construction incompatible with the intent of the General Assembly"); *Newtowne Village Service Corp. v. Newtowne Road Development Co., Inc.*, 772 A.2d 172, 175 (Del. 2001) ("Ambiguity may also be found if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature"). Nothing would be more absurd than to allow a misleading title, which does not provide fair or meaningful notice to those affected, to foreclose a challenge.

Ultimately, under the County's view, *any* title would start the 60-day period. For example, an ordinance titled "An Ordinance to amend the County Code regarding swing sets" might not only regulate swing sets, but could impose all sorts of restrictions on all sorts of properties and uses, with no ability for any property owner to challenge the ordinance once the 60 days have run. For the County, the 60-day clock starts to run as soon as notice of the adoption of the ordinance is published, regardless of whether the ordinance title "clearly expressed" the subject of the ordinance or not. Such an interpretation produces an absurd result "not contemplated by the legislature."

Not only is the result absurd, but it is contrary to the law's purpose. The General Assembly intended that the subject of a proposed ordinance "shall be clearly expressed in its title." 9 *Del.C.* §1152(a). Moreover, County Council's own Rules

state that the title of any ordinance "shall clearly express the matter addressed in the legislation *for maximum public notice*." NCC Council Rule 2.2.1 (emphasis added).

Statutes related to the same subject are, of course, to be read *in pari materia*. *Watson v. Burgan*, 610 A.2d 1364, 1368 (Del. 1992); *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 560 (Del. 1988). Section 8126 and Section 1152(a) should be read together. In order for the 60-day period of §8126 to begin, the ordinance title must "clearly express" the subject of the ordinance so that members of the public are fairly apprised of potential changes to the law. Just as the Court tolled the 60 days in the *APFO* case, the same result should occur here.

In sum, §8126 "is not intended to deny citizens a fair opportunity to challenge an adopted ordinance." Under the facts and circumstances here – facts and circumstances arising from the *County's failure* to properly title the Ordinance – Croda's lawsuit should be permitted to proceed and the Ordinance should be invalidated as its title did not give adequate notice to affected property owners. The County remains free, of course, to re-consider the Ordinance, and even re-enact it, but only with a proper title which provides proper notice, so that Croda (and likely others) have the opportunity to appear and be heard at the required public hearings, all as the General Assembly intended.

II. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW WHEN IT HELD THAT A "VESTED" RIGHT WAS NEEDED TO STATE A DUE PROCESS CLAIM – NO CASES HAVE EVER HELD THAT A "VESTED" RIGHT IS REQUIRED FOR A DUE PROCESS CLAIM.

A. Question Presented: Did The Court Of Chancery Mistakenly Conflate Cases Concerning Vested Rights With Cases Concerning Due Process?

Croda argued that it had a property right protected by due process throughout the briefing below. *See, e.g.,* A-111-15, 199-201, 249-51. Moreover, Croda specifically made the point that a "vested rights" analysis was not appropriate or necessary in evaluating a due process claim. *See* A-248, 252.

B. Standard of Review: The Court of Chancery's Erroneous Requirement Of "Vested" Rights For A Due Process Claim Is An Error Of Law Subject To *De Novo* Review.

The Court of Chancery's requirement that Croda possess a "vested" right in order to state a claim for a procedural due process violation is an error of law. Such issues are reviewed *de novo*. *Delaware Solid Waste Authority, supra; Salzberg, supra; Dambro, supra; Mundorf, supra*.

C. Legal Argument: The County's Failure To Provide Meaningful Notice (i.e., A Proper Ordinance Title) Violated Croda's Procedural Due Process Rights.

Even if this Court should find that Croda's state law claims are untimely under §8126 (they are not), Croda is still entitled to relief because the County's actions deprived Croda of its procedural due process rights in violation of 42 *U.S.C.* §1983,

and the statute of limitations applicable to a due process claim is two years. *See Council of Civic Organizations of Brandywine Hundred, Inc. v. New Castle County*, 1992 WL 24987, *3 (Del. Ch.); *Town of S. Bethany v. Nagy*, 2006 WL 1451528, *7 (Del.Ch.), *aff'd*, 918 A.2d 1170 (Del. 2007); *Baldini W., Inc. v. New Castle Cty.*, 852 F. Supp. 251, 255 (D. Del. 1994) ("constitutional challenges to zoning ordinances are not governed by § 8126(a)"); *Sterling Prop. Holdings, Inc. v. New Castle Cty.*, 2004 WL 1087366, *4 (Del.Ch.).

1. Croda states a claim for a procedural due process violation.

A procedural due process violation occurs when a person is deprived of their property or rights without access to appropriate procedural safeguards necessary to protect their rights. For example, a person may be required to surrender his or her driver's license, but only after such person has been afforded appropriate procedural safeguards. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971); *Plumer v. Maryland*, 915 F.2d 927, 931 (4th Cir. 1990). If the appropriate procedural safeguards are not provided, then a procedural due process violation can be said to have occurred – even if the surrender of the license is justified.

The elements necessary to prove a procedural due process violation are:

(1) person acting under color of state law;
(2) engages in conduct which deprives a person of rights, privileges or immunities secured by the Constitution or laws of the United States; and,
(3) the person deprived of right, privilege or immunity was not afforded an adequate opportunity to defend or safeguard their rights.

See, e.g., Goldberg v. City of Rehoboth Beach, 565 A.2d 936, 942 (Del.Super.), *aff'd*, 567 A.2d 421 (Del. 1989). Part of the procedural protection which makes up procedural due process is notice, or as this Court has put it: "[p]rocedural due process requires that '[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right *they must first be notified*.'" *Tsipouras v. Tsipouras*, 677 A.2d 493, 496 (Del. 1996) (emphasis added) *citing Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). In the land use and zoning context, this Court has observed that: "[w]hen enacting or amending zoning ordinances, the Council must provide its citizens with procedural due process, *i.e.*, adequate notice of the matter to be decided and an opportunity to be heard." *Citizens Coalition, Inc. v. County Council of Sussex County*, 773 A.2d 1018, 1023 (Del.Ch. 2000); *see also Salem Church (Delaware) Associates v. New Castle County*, 2006 WL 4782453, *14 ("a procedural due process claim requires proof that there was some protected property interest and that deprivation of that protected interest occurred *without notice and opportunity to be heard meaningfully*") (emphasis added); *Citizens for Smyrna-Clayton First v. Town of Smyrna*, 2002 WL 31926613, *7 (Del.Ch.) ("Procedural due process requires adequate notice to individuals concerned; an opportunity to be heard by a person potentially aggrieved; a decision reflecting the reasons underlying the result; and adherence to controlling law"); *Schweizer v. Board of Adjustment of City of Newark*,

980 A.2d 379, 385 (Del. 2009) ("A landowner is entitled to . . . procedural due process of law where a lawful land use may potentially be lost").

Here, Croda satisfies the three elements of a procedural due process claim. The County is a "person acting under color of state law." *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1977). The County engaged in conduct (passing a restrictive zoning code amendment) which deprived Croda of the ability to expand and modernize the previously permitted use of its property as a matter of right, converting its existing use to a nonconforming use. And, of course, in amending the County Code, the County mis-titled the Ordinance such that Croda was not afforded proper notice of the Ordinance's effects and, therefore, did not participate in the public process. Indeed, Croda was provided no meaningful notice at all, as any reader of the title of the Ordinance would conclude that the proposed amendments to the UDC were only "regarding landfills."

2. Prior Delaware case law establishes a procedural due process violation for failure to notify affected property owners.

Lest there be any doubt about whether a due process violation occurred here, one need only read the Superior Court's decision in *Bohemia Mill Pond v. New Castle County Planning Board* 2001 WL 1221685 (Del.Super.) (copy attached to complaint and appearing in the appendix at A-50), *aff'd*, 792 A.2d 198 (Del. 2002) (Table), which makes clear that improper notice deprives property owners of their right to procedural due process. In the *Bohemia Mill Pond* case, a property owner

obtained subdivision approval for a residential development in the early 1990s. A few years later, in 1997, New Castle County engaged in a massive re-write of its zoning and subdivision codes, resulting in the adoption of the "Unified Development Code." Among the numerous changes, additions, and new requirements, the County created a "sewer impact fee" on all new residential construction even in residential subdivisions where construction had already started. Property owners could seek an exemption from this fee, but had to file for such exemption by December 31, 1998 (a date later extended to March 31, 1999). The Bohemia Mill Pond developer did not timely apply for an exemption, and when the developer applied after the deadline, the exemption request was denied as untimely. The developer then appealed to the Superior Court, alleging that the County had never provided adequate notice of the deadline (or the code change) – in violation of procedural due process. The County argued that there had been newspaper notice of the adoption of the UDC itself,[10] but the property owner argued that notice should have been sent to all property owners affected by the new sewer impact fee requirement. The Superior Court found, and this Court affirmed, that mere newspaper notice of the new code was insufficient. Specifically, the Superior Court found that:

> [the property owner's] procedural due process rights were violated when it was not given proper notice of the impact fees and thus was denied an opportunity to be heard on the matter.

[10] The newspaper notice of the adoption of the new code did not include a specific mention of the sewer impact fee requirement or the deadline to seek an exemption.

2001 WL 1221685, *3.

Here, Croda, like the property owner in *Bohemia Mill*, never received notice of the change to County law. The newspaper notice of the Ordinance was deficient because the title of the Ordinance was deficient. The only notice the County provided to the general public – the title of the Ordinance – was misleading, since it indicated to all property owners (other than the owner of the landfill at issue) that the amendment would not affect them. It is no accident that no HI-zoned property owner (other than the owner of the landfill at issue) appeared before the Planning Board or County Council to protest the Ordinance or seek changes to it. None were on notice of the impact to their properties lurking in the Ordinance. As a result, Croda, along with every other HI-zoned property owner in the County, was denied proper notice – the minimum requirement of procedural due process. And because Croda and other affected property owners did not receive proper notice, they did not have the chance to be heard.

3. The Court of Chancery erroneously rejected Croda's due process claims for lack of a "vested" right; but Croda is not advancing a vested rights claim – it is advancing a due process claim.

During oral argument, the Court of Chancery asked the parties about *In re: 244.5 Acres of Land*, 808 A.2d 753 (Del. 2002), a case not cited by either party in their briefs. Because the case had not been cited by the parties, the Court allowed

the parties to make short post-argument submissions addressing the case. Ultimately, the Court stated that "[u]nder Delaware law, zoning may support a protected property interest if the property owner holds a 'vested right' as defined by common law." *Croda II* at *4. The Court ultimately concluded that Croda had not demonstrated a "vested right," and therefore lacked any basis for a due process claim. *Id.* at *6. Croda respectfully submits, however, that the Court conflated two very different concepts – vested rights and procedural due process.[11]

To begin, the *244.5 Acres* case concerned a claim for vested rights – not a claim advanced here by Croda. In a vested rights case, there has been a lawfully-made change to a land use regulation, but a property owner argues that the change should not apply to their property because the owner has substantially relied, in good faith, on the pre-existing regulation such that application of the change would be inequitable and the property owner should therefore be allowed to continue under the pre-existing regulation. In the *244.5 Acres* case, the property owner had expended some $312,479.88 on obtaining a land use approval when the law was changed, but the Superior Court rejected the vested rights claim because the property

[11] In its complaint, Croda brought claims for violations of procedural due process (Count III) and substantive due process (Count IV). A-29-31. However Croda only moved for summary judgment on its procedural due process claim. The County cross-motioned for summary judgment on both claims. The Chancery Court's erroneous holding regarding "vested rights" resulted in its granting summary judgment on both counts to the County.

owner had not obtained a building permit at the time the new regulation was adopted. *Id.* at 755. This Court, however, reversed, finding that the requirement of an actual building permit (or, indeed, any final approval) was not appropriate, and held that "[i]n the final analysis, good faith reliance on existing standards is the test." *Id.* at 758. The Court went on to observe that:

> In a given situation, the issuance, or non-issuance, of a building permit may be evidence of reliance, or lack thereof. In cases, as here, where developers expend large sums of money on the pre-permit process, it would be inequitable to leave an applicant to the vagaries of the unanticipated actions of other governmental entities during the extended process required by local authorities.

Id. Because the Court decided the matter on state law grounds, the Court did not address the Superior Court's rejection of the property owner's due process claim regarding lack of notice, nor did it need to. *Id.* at 756.

Here, Croda is *not* bringing a "vested rights" claim. Croda is *not* claiming that the County cannot apply a properly adopted zoning change to its property. Rather, Croda *is* claiming that the lack of notice resulting from the mis-titled Ordinance denied Croda procedural due process. For purposes of procedural due process, one need not have a "vested" right to continue with a project, but one does need (as with all due process claims) a protected right – and Croda has such a right.

At common law, one had the unfettered right to use one's property for any purpose, subject only to the doctrine of nuisance – that is, a property owner could use its land as such owner saw fit, so long as that use did not constitute a "nuisance"

with respect to another's property. As the United States Supreme Court observed in 1926, when first upholding zoning laws generally, zoning laws flow from this doctrine and are designed to make sure that compatible uses occur in the same area. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387-88 (1926) ("A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard"). But while the right to use one's property may be subject to regulation, property rights *are* protected by the Constitution. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (property rights include rights to acquire, use and dispose of property, and the Constitution protects these rights); *see also Zoning*, 91 HARV. L. REV. 1427, 1515-16 (1978) ("the existence of the common law property interest must be recognized by affording land owners [due] process rights prior to the exercise of the regulatory power"); *Sisk v. Sussex County*, 2012 WL 1970879 *4 (D.Del.) (use and enjoyment of land is a protected due process interest); *DeBlasio v. Zoning Bd. Of Adjustment*, 53 F.3d 592, 600-601 (3d Cir. 1995) (ownership and use of land entitled to due process protection); *Acierno v. New Castle County*, 2000 WL 718346 *3 (D.Del.) (same).

Although the use and enjoyment of one's property is entitled to protection, this does not mean that local governments cannot regulate land uses. They can. And they are free to change those regulations. But, before a local government can change the rules regarding the use of property, due process must be afforded. *See, e.g.,*

Nasierowski Brothers Inv. Co. v. City of Sterling Heights, 949 F.2d 890, 896-97 (6th Cir. 1991) (city's failure to provide notice to property owner prior to rezoning violated procedural due process); *Harris v. County of Riverside*, 904 F.2d 497, (9th Cir. 1990) (county violated property owner's procedural due process rights by rezoning property without notice to the property owner); *Moreland Properties, LLC v. City of Thornton*, 559 F.Supp.2d 1133, 1158, 60-61 (D.Colo. 2008) (property owner had protected property interest in zoning classification of land, such that city violated procedural due process by imposing an overlay zone on property without prior notice).

While courts sometimes state (and the County argued below) that there is no "right" to a "continued zoning classification," that observation misses the point – before the zoning classification can be altered (that is, before the right to use one's property in accordance with the existing rules can be changed), one must be afforded due process.

As to what those due process requirements might be, Delaware Courts have explained that the exact procedures which will satisfy due process vary on a case-by-case basis. *See, e.g., Goldberg*, 565 A.2d at 942. Fundamentally, due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id. citing Mathews v. Eldridge*, 424 U.S. 319 (1976). Here, the General Assembly has essentially determined what process is due, and it is fairly minimal –

an adequately-titled ordinance, and a public hearing on the ordinance which is preceded by a public notice stating the title of the ordinance. 9 *Del.C.* §§1152, 1153.[12] Because the County failed to provide a proper title for the Ordinance, no "HI" (heavy industry) property owners were on notice that the Ordinance would impact the use of their properties, and so no such property owners attended the hearings.

In sum, *244.5 Acres* has no application here nor does the doctrine of "vested rights." Croda is not bringing a vested rights claim, but, rather, a procedural due process claim. Proof of a "vested right" is not required in order to succeed on a procedural due process claim. To the extent that the County in *Bohemia Mill Pond* conceded the existence of a protected property interest, it was right to do so. One always has a protected property interest in the use of one's property in accordance with existing regulations, and one is always entitled to procedural due process protection, however minimal, before that right is lost or diminished– the protection may be modest, as it is here, but it must be provided.

[12] The County has previously argued that the mere failure to follow procedures required by state law does not constitute a due process violation. That may be true. State law may require more process than required by the due process clause – but *some* process must be afforded, and here, with no notice because of the defective title, *no* process was afforded.

CONCLUSION

The title of a proposed ordinance is important. The title informs the public, and gives notice to the property owners whose properties and related property rights are or may be affected. Recognizing this importance, County Council's own rules provide that a title should provide "*maximum* public notice" (emphasis added). Justice Holland said it best: "[i]f the title of a bill is such that it traps the unwary into inaction, it must be struck down as a violation of [the titling requirement]." And here, in this case, under these facts, this is exactly what must happen. The Ordinance "must be struck down." Its title did not provide the required notice.

Chancellor Chandler also recognized the importance of notice requirements:

> In the context of legislative or administrative action, notice requirements exist to make certain that a decision-making process is conducted in a fair and informed manner. Where the Legislature has required that notice be given to landowners before a regulatory enactment, it has presumably done so in order to require regulators to face those who shall be burdened (or favored) by a measure. Those who promulgate regulations often may not wish to provide such notice, as it is generally these same constituents who will, in the fullness of time, be asked whether or not the regulators should be returned to a position of power. Notice requirements force those who exercise power to do so only after affirmatively inviting the views of parties deemed by the Legislature to be critical to a decision-making process.

Farmers For Fairness v. Kent County, 2007 WL 1651931, *7 n. 38 (Del.Ch.). Here, County Council, whether intentionally or not, did not invite the views of heavy industry property owners, even though it was required to do so.

At the public hearings concerning the Ordinance, no one spoke about anything other than landfills. No heavy industry property owner (other than the owner of the landfill under attack) appeared before either the Planning Board or County Council. County Council's own attorney stated that the Ordinance was aimed at landfills. No one ever contradicted his statement at either public hearing. And yet the Ordinance does a great deal more. It affects *every property zoned for* heavy industry use, even though the title states it only concerns landfills. The Ordinance, as titled, does not provide the "maximum" public notice which Council's Rules require; indeed, the title provided no meaningful notice to anyone at all (other than the single private property owner in the County that has a landfill).

Under these circumstances, the Court of Chancery erred in holding that Section 8126 barred Croda's claim. Section 8126 "is not intended to deny citizens a fair opportunity to challenge an adopted ordinance." Further, the lack of notice constitutes a procedural due process violation, a claim which may be brought notwithstanding the lack of a "vested" right.

Ultimately, the Ordinance should be declared void. If County Council wishes to re-enact the Ordinance, which it remains free to do, it should start the process over with an ordinance that has a clear title – but this time, all affected property owners will have proper notice and the opportunity to appear and defend their interests. Then, after hearing from affected property owners, perhaps Council will modify the

Ordinance, or limit its application to landfills. Whatever County Council ultimately decides, with a proper title, the ordinance will not be passed until those property owners whose rights are potentially affected will have had the opportunity to be heard, thus ensuring the protections afforded by procedural due process – which is what the titling requirements imposed by the General Assembly intend.

Respectfully submitted,

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December 21, 2021