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Case Number 349,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CRODA, INC.,	)	
	)	
Appellant,	)	C.A. No.: 349, 2021
	)	
v.	)	On appeal from C.A. 2020-06977-MTZ
	)	in the Court of Chancery of the State of
NEW CASTLE COUNTY,	)	Delaware
	)	
Appellee.	)	

APPELLEE'S CORRECTED ANSWERING BRIEF

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Dated: January 26, 2022

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NATURE AND STAGE OF PROCEEDINGS

On August 27, 2019, New Castle County Council ("Council") adopted Ordinance No. 19-046, as amended, (the "Ordinance"), which the New Castle County Executive approved on August 28, 2019. (A-035-37).

Appellant Croda, Inc. ("Croda") commenced ligation against Appellee New Castle County (the "County") before the Delaware Court of Chancery (the "Chancery Court") to challenge the Ordinance on August 17, 2020 with the filing of its Verified Complaint ("Complaint"). (A-015-52). In the Complaint, Croda asserted four causes of action: (1) in Count I, Croda sought a permanent injunction against enforcement of the Ordinance due to the alleged violation of 9 *Del. C.* § 1152(a) ("Section 1152(a)") through improper titling of the Ordinance; (2) in Count II, Croda sought a declaratory judgment that adoption of the Ordinance was arbitrary, capricious and illegal, and of no force or effect; (3) in Count III, Croda asserted a violation of its procedural due process rights under 42 U.S.C. § 1983; and (4) in Count IV, Croda asserted a violation of its substantive due process rights under 42 U.S.C. § 1983. The County filed its answer on September 8, 2020. (A-053-85).

Croda filed its motion for summary judgment on Counts I through III of the Complaint on November 20, 2020. (A-086-159). The County filed its opening and answering brief in support of its motion for summary judgment on Counts I through IV of the Complaint on December 21, 2020. (B-004-104). Croda filed its reply and

answering brief on January 8, 2021. (A-160-246). The County filed its reply brief on January 22, 2021. (B-107-163).

Following argument, held September 3, 2021 (B-164), Croda requested authority to file a supplemental letter, which the Chancery Court allowed. (B-165-66). Croda filed its supplemental letter on September 10, 2021. (A247-252). The County filed its supplemental letter on September 23, 2021. (B-167-72).

On October 28, 2021, the Chancery Court issued two decisions resolving the parties' motions for summary judgment. In the first, the Chancery Court held that Croda's state law claims in Counts I and II of the Complaint were barred by the statute of repose found at 10 *Del. C.* § 8126(a) ("Section 8126(a)").[1] In the second, the Chancery Court held that Croda failed to establish that it held a constitutionally protected property interest violated by the Ordinance and dismissed Counts III and IV of the Complaint.[2]

Croda appealed from *Croda I* and *Croda II* on November 2, 2021.

Croda filed its corrected opening brief (the "Opening Brief" or "OB") on December 21, 2021. This is the County's answering brief.

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[1] *Croda, Inc. v. New Castle Cty.*, 2021 WL 5023646 (Del. Ch. Oct. 28, 2021) ("*Croda I"*).

[2] *Croda, Inc. v. New Castle Cty.*, 2021 WL 5027005 (Del. Ch. Oct. 28, 2021). ("*Croda II"*)

SUMMARY OF ARGUMENT

1. Denied. The Chancery Court's decision in *Croda I* should be affirmed. The Delaware Supreme Court has rejected Croda's assertion that the statute of repose under Section 8126(a) is inapplicable due to an alleged statutory infirmity in the adoption of an ordinance, as has every other Delaware court. Allowing such an exception to Section 8126(a) conflicts with the plain language of the statute and undermines the purpose of the statute of repose: to bring prompt resolution and finality to disputes regarding zoning ordinances. Moreover, the title of the Ordinance did not violate Section 1152(a) under precedent interpreting the titling requirement found at Article II, Section 16 of the Delaware Constitution, which Croda insists should be applied to the Ordinance.

2. Denied. The Chancery Court's decision in *Croda II* should be affirmed. Croda has failed to establish a property right protected by Fourteenth Amendment procedural due process. Protected property rights for procedural due process are determined by state law. Delaware law is clear: a property owner has no vested right to any zoning classification, or to the continuation of a particular zoning or land use classification. Likewise, Croda does not have a protected property interest in state law titling requirements. Even if Croda had a protected property interest, the passage of the Ordinance constituted a legislative act that is not subject to procedural due process requirements under the Fourteenth Amendment.

3. Croda has waived any appealable issue concerning its substantive due process claim (Count IV) pursuant to Delaware Supreme Court Rule 14(b). In *Croda II*, the Chancery Court granted summary judgment to the County and dismissed Croda's substantive due process claim. Because Croda neither raised nor presented any argument in its Opening Brief concerning Count IV, Croda has waived any argument concerning the Chancery Court's dismissal of Croda's substantive due process claim.

STATEMENT OF FACTS

A. Croda's Atlas Point Property.

Croda owns and operates a chemical manufacturing facility (the "Atlas Point Facility") on land located in the County (the "Property") that is zoned Heavy Industry ("HI") under the County's zoning regulations, commonly known as the "Unified Development Code" or "UDC."[3] (A-017). The Ordinance has not affected Croda's right to continue its operations at its Atlas Point Facility as those operations existed on the date the Ordinance became effective. (A-076). Croda has not claimed a vested development right; stated differently, Croda did not have a land development or permit application for expansion or modification of the Atlas Point Facility pending with the County that would have been affected by adoption of the Ordinance. (A-247-248). The Ordinance does not classify heavy industry as a prohibited use (designated by an "N") in the HI zoning district. (A-019). Instead, in the future, Croda may expand and modify its operations at the Atlas Point Facility subject to compliance with applicable zoning regulations, including the Ordinance's special use permit requirements. (A-019).

[3] The UDC is chapter 40 the *New Castle County Code* and is available online at https://library.municode.com/de/new_castle_county/codes/code_of_ordinances?nodeId=CH40UNDECO (last viewed Jan. 21, 2022).

B. The Ordinance.

On April 30, 2019, the Ordinance was introduced before County Council. 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" (A-035).

Section 1 of the Ordinance amends the UDC, Article 3 ("Use Regulations") by adding provisions regarding Sold Waste Landfills as Section 40.03.323 of the UDC. (A-035-36). Section 2 of the Ordinance modified the Use Table found at Section 40.03.110 of the UDC to require special use permits in areas zoned Heavy Industry. (A-036). Section 3 of the Ordinance amends Section 40.33.270 of the UDC by adding "Solid Waste Landfills (NAICS 562212)" to the definition of "Heavy Industry" under the UDC. (A-037).[4] Section 4 provides that the Ordinance would become effective immediately upon adoption by Council and approval by the County Executive. (A-037).

Croda concedes that notice of introduction of the Ordinance was published in the *News-Journal* through publication of the title of the Ordinance as required under Delaware law. (A-021 ¶ 18; O.B. 6; *see also* B-065-67).

[4] Chemical manufacturing was already included in the definition of "Heavy Industry." (A-037).

On August 7, 2019, the New Castle County Planning Board (the "Planning Board") held a public hearing regarding the Ordinance. (A-021 ¶ 19). The Planning Board recommended approval of the Ordinance. (A-021 ¶ 22).

On August 27, 2019, County Council held a public hearing on the Ordinance and subsequently adopted the Ordinance. (A-022 ¶ 23).

Notice of adoption of the Ordinance was published on August 31, 2019. (B-072-74).

C. Croda Failed to Challenge the Ordinance Within the 60-Day Period Imposed by Section 8126(a).

Section 8126(a) of title 10 of the Delaware Code imposes a 60-day filing requirement for any challenge to an ordinance affecting zoning. Specifically, Section 8126(a) 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, or any regulation or ordinance relating to subdivision and land development, or any amendment thereto, enacted by the governing body of a county or municipality, is challenged, whether by direct or collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which such adoption occurred, of notice of the adoption of such ordinance, code, regulation, map or amendment.[5]

[5] 10 *Del. C.* § 8126(a).

The 60-day period under Section 8126(a) expired on October 30, 2019. Croda did not file the Complaint until August 17, 2020. The Complaint was not filed within the 60-day period under Section 8126(a).

ARGUMENT

I. AN ALLEGED STATUTORY INFIRMITY IN THE ADOPTION OF AN ORDINANCE DOES NOT PRECLUDE APPLICATION OF SECTION 8126(a) TO THAT ORDINANCE AND, IN ANY EVENT, THE TITLE OF THE ORDINANCE SATISIFED SECTION 1152(a).

A. Question Presented: Whether Section 8126(a) Bars an Untimely Challenge to an Ordinance Based on an Alleged Statutory Infirmity?

In the Chancery Court, the County asserted that Section 8126(a) barred Croda's state law claims and there is no exception to application of Section 8126(a) due to an alleged violation of Section 1152(a). (B-024-33; B-117-129). In *Croda I*, the Chancery Court correctly held that Section 8126(a) applied to Croda's state law claims premised upon Section 1152(a).[6] The County also argued that the title of the Ordinance did not violate Section 1152(a). (B-033-37; B-131-33). The Chancery Court did not rule on that issue.

B. Standard of Review.

The Chancery Court's decision granting summary judgment in *Croda I*, holding that Section 8126(a) applied to Croda's state law claims, is subject to *de novo* review.[7] The Chancery Court did not decide whether the title of the Ordinance violated Section 1152(a).[8]

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[6] *See Croda I*, 2021 WL 5023646, at *5.

[7] *See, e.g., Salzberg v. Sciabacucchi*, 227 A.3d 102, 112 (Del. 2020).

[8] *See Croda I*, 2021 WL 5023646, at *4-5.

C. Merits of the Argument.

The purpose underlying the statute of repose found in Section 8126(a) is to achieve "prompt resolution of land use challenges."[9] This Court and every other Delaware court to have considered the question of whether an alleged infirmity in the adoption of an ordinance precludes the application of Section 8126(a) has held, either directly or tacitly, that it does not. There is no authority for Croda's assertion that a violation of Section 1152(a)'s titling requirement[10] would prevent the running of the 60-day period under Section 8126(a), and Croda's position is contrary to the purpose of Section 8126(a). Furthermore, applying precedent regarding the Delaware Constitution's titling requirement—as Croda insists should be done—establishes that the title of the Ordinance did not violate Section 1152(a).

1. Croda's Assertion that Section 8126(a) is Inapplicable if Section 1152(a) Was Violated is Contrary to the Purpose of Section 8126(a) and Decades of Delaware Precedent.

Croda's argument regarding Section 8126(a), distilled to its essence, is that Section 8126(a) does not apply if Section 1152(a) was violated in the adoption of an

[9] *Murray v. Town of Dewey Beach*, 67 A.3d 388, 390-91 (Del. 2013).

[10] The relevant portion of Section 1152(a) states: "No 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).

ordinance.[11] This Court effectively rejected Croda's argument in *Murray*. It should do so again here.

In *Murray*, the town of Dewey Beach resolved litigation regarding a building permit through a settlement agreement, which set forth a process for approval of the requested building permit, among other things.[12] The town council adopted a resolution approving the settlement agreement as well as a record plat plan and building permit.[13] Four property owners sued to enjoin enforcement of the settlement agreement more than sixty days after notice of adoption of the resolution was published.[14]

The plaintiffs in *Murray* argued that Section 8126(a) was inapplicable because they were only challenging the town's authority to enter into the settlement agreement and because they were challenging a resolution, not an ordinance. This Court characterized the issues presented by the plaintiffs as "whether the manner in which a zoning amendment is accomplished affects the applicability of the 60-day statute of repose."[15] This Court concluded it did not, and that the plaintiff's

[11] *See generally* OB 18-22.

[12] 67 A.3d at 389.

[13] *Id.*

[14] *Id.* at 390.

[15] *Id.* at 391.

arguments "ignore[d] the purpose of a statute of repose, and elevate[d] form over substance."[16] In rejecting the *Murray* plaintiffs' argument, this Court stated:

> There is a strong policy favoring prompt resolution of land use challenges. Uncertainty about the validity of a zoning decision is disruptive to the community as well as the developer. Section 8126 reflects that policy by providing an extremely short period during which an interested party may challenge a zoning decision…. [T]he name given to a document that amends a [municipality's] zoning regulation is immaterial. The statute should be read broadly to accomplish its purpose. It should not be limited in a way that "leads to an unreasonable or absurd result not contemplated by the legislature…." Where the choice of language has no bearing on the substantive result, the name of a document should not be allowed to defeat the purpose of the statute.[17]

Every other Delaware court to consider an argument that was either the same or similar to Croda's has also rejected it, directly or tacitly. These cases include:

- *Council of South Bethany*—the Chancery Court, in *dicta*, expressly rejected the argument that an ordinance "adopted without compliance with … statutorily mandated publication requirements, is void *ab initio*, and that, therefore, no challenge thereto can be barred by" Section 8126.[18] The court

[16] *Id.*

[17] *Id.* at 391 (citing *of Council of S. Bethany v. Sandpiper Dev. Corp., Inc.*, 1986 WL 13707 (Del. Ch. Dec. 8, 1986); *Bay Colony P'ship v. Cty. Council*, 1984 WL 159382, at *2 (Del. Ch. Feb. 1, 1984); quoting *Newtowne Vill. Svc. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 175 (Del. 2001)).

[18] 1986 WL 13707, at *2.

found that "proposition refuted by" Section 8126 itself, "which does not carve out any exception for claims based upon alleged statutory invalidity."[19]

- *Sterling Property Holdings, Inc. v. New Castle County*—rejected arguments that Section 8126(a) is inapplicable if the "ordinance is invalid because the County lacked the authority to adopt it" or if the plaintiff lacked knowledge of the effect of the ordinance.[20]
- *Fields v. Kent County*—held that Section 8126(a) would have applied to a claim asserting a violation of 9 *Del. C.* § 4110(h)-(i) but for relation back under Chancery Rule 15.[21]
- *Commissioners of the Town of Slaughter Beach v. County Council of Sussex County*—held that Section 8126(a) would apply to claim challenging ordinance title under 9 *Del. C.* § 7002(m)(1), but that the plaintiff's claim was timely filed.[22]

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[19] *Id.*

[20] 2004 WL 1087366, at *4 (Del. Ch. May 6, 2004)

[21] 2006 WL 345014, at *4-6 (Del. Ch. Feb. 2, 2006). Sections 4110(i)(1) and 1152(a) of title 9 of the Delaware Code are nearly identical, with section 4110(i)(1) applying to Kent County. *See* 9 *Del. C.* §§ 1152(a) & 4110(i).

[22] 1983 WL 142509, at *5 (Del. Ch. Nov. 16, 1983). Sections 7002(m) and 1152(a) of title 9 of the Delaware Code are nearly identical, with 7002(m) applying to Sussex County. *See* 9 *Del. C.* §§ 1152(a) & 7002(m)(1).

- *Green v. County Council of Sussex County*—held that Section 8126(a) would apply to any claims asserting violations of 9 *Del. C.* § 7002(m)(1)).[23]
- *Bay Colony Partnership*—in *dicta*, stating that the finding that Sussex County violated 9 *Del. C.* § 7002(m) by granting conditional use permit by resolution rather than ordinance would not apply to conditional use permits granted more than 60 days prior to the Court's decision pursuant to Section 8126.[24]

In short, there is no Delaware precedent whatsoever to support Croda's theory that Section 8126(a) is inapplicable to violations of Section 1152(a). Croda's position is inimical to the purpose underlying Section 8126(a)—as recognized by this Court in *Murray*—and contrary to three decades of Delaware precedent rejecting the same or similar arguments as that advanced by Croda.

2. Croda's Arguments in Support of its Position Fail.

Croda makes three arguments in support of its unsustainable assertion that Section 8126(a) does not apply if Section 1152(a) is violated. *First*, that the Chancery Court's decision in *In re Kent County Adequate Public Facilities Ordinance Litigation*, 2009 WL 445611 (Del. Ch. Feb. 11, 2009) [hereinafter *APFO*] excused Croda from application of Section 8126(a).[25] *Second*, that Section 8126(a)

[23] 415 A.2d 481, 485 (Del. Ch. 1980), *aff'd sub nom. Carl M. Freeman Assoc., Inc. v. Green*, 447 A.2d 1179 (Del. 1982).

[24] 1984 WL 159382, at *6.

[25] OB 19-22.

is not, in fact, a statute of repose.[26] *Third*, that Section 8126 must be interpreted *in pari materia* with Section 1152(a) and doing so subordinates Section 8126(a) to Section 1152(a).[27] All of these arguments fail, and none overcome the purpose of Section 8126(a) and the precedent discussed above.

a. The *APFO* Decision Does Not Excuse Croda from Application of Section 8126(a).

Croda's argument regarding Section 8126(a) hinges primarily on its inaccurate reading and application of the *APFO* decision. In *Croda I*, the Chancery Court found *APFO* entirely distinguishable from this case, as should this Court.[28]

Croda claims the *APFO* court held that Section 8126(a) did not apply to the claims brought by the *APFO* plaintiffs due to "unique" and "unusual" circumstances, and that Croda too faced "unique" and "unusual" circumstances when it failed to timely challenge the Ordinance.[29] Croda never explains how its failure to timely challenge the Ordinance due to an alleged titling defect under Section 1152(a) is any more "unique" or "unusual" than similar failures by litigants in cases such as *Murray* or *Sterling Property Holdings*, to which Section 8126(a) was held applicable.

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[26] *Id.* 19.

[27] *Id.* 22.

[28] *Croda I*, 2021 WL 5023646, at *4.

[29] OB 19-20.

The "unique" and "unusual" circumstance in *APFO*, which led the Chancery Court to hold that Section 8126(a) did not apply, was that the ordinance being challenged was not effective on the date that notice of its adoption was published; it would not become effective unless and until legislation was passed by the General Assembly.[30] Thus any challenge to the ordinance before it became effective would not have been ripe for adjudication.[31]

The *APFO* court's holding that Section 8126(a) should not be used to "deny citizens a fair opportunity to challenge an adopted ordinance" was premised upon the fact that the *APFO* plaintiffs were painted into a corner—challenge an ordinance that has not become law yet and have their case dismissed as unripe or wait to challenge the ordinance until it was effective but after the 60-day period under Section 8126(a) had lapsed. Croda faced no such predicament here; the Ordinance became effective upon its adoption, by its own terms. (A-037). Croda's resort to *APFO* is inapt and should be rejected.

b. Section 8126(a) is a Statue of Repose.

Croda asserts that Section 8126(a) is not a statute of repose.[32] That is, Croda asserts that every Delaware court to have considered Section 8126(a) a statute of

[30] *See APFO*, 2009 WL 445611, at *6.

[31] *Id.*

[32] OB 19 ("If Section 8126 is truly a statute of repose, as the Court of Chancery characterized it….").

repose[33] lacked the wisdom discovered by Croda in the *APFO* case, which Croda claims renders Section 8126(a) a mere suggestion, dependent upon the plaintiff's circumstances. This extraordinary argument should be rejected out of hand.

A statute of repose "will extinguish both the remedy and the right" and "is a substantive provision which may not be waived because the time limit expressly qualifies the right which the statute creates."[34] In *Murray*, this Court recognized that under Section 8126(a) a plaintiff's claims are "extinguished 60 days after the [municipality] gave public notice…."[35] Clearly, this Court recognized Section 8126(a) as a statute of repose.

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[33] *See, e.g., Murray*, 67 A.3d at 391 (referring to Section 8126 as a statute of repose, twice); *Sterling Property Holdings, Inc.*, 2004 WL 1087366 at *passim* (referring to Section 8126 as a statute of repose 41 times); *APFO*, 2009 WL 445611, at *6 (describing Section 8126 as a statute of repose repeatedly); *Fields*, 2006 WL 345014 at *passim* (referring to Section 8126 as a statute of repose 31 times); *Council of S. Bethany*, 1986 WL 13707, at *2-3 (referring to "the policy of repose which underlies the statute").

[34] *Cheswold Vol. Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984) (citations omitted).

[35] 67 A.3d at 391. *See also Fields*, 2006 WL 345014, at *4 (Section 8126 is "a statute of repose that cuts off parties' rights to bring actions challenging the legality of such amendments after expiration of the prescribed time limit"); *JP Morgan Chase Bank N.A. v. Ballard*, 213 A.3d 1211, 1236 (Del. Ch. 2019) (in *dicta*, stating Section 8126 "precludes legal challenges by those whose harm was discovered and accrued after the sixty days have passed").

c. Section 8126 Cannot be Subordinated to Section 1152(a) Through Invocation of *In Pari Materia*.

Croda insists that the titling requirement set forth in Section 1152(a) must be read into Section 8126(a) through application of the statutory construction doctrine of *in pari materia*.[36] This assertion fails for at least three reasons.

First, *in pari* materia is a rule of statutory construction and resort to *in pari materia* is only appropriate when a statutory provision is ambiguous.[37] There is nothing ambiguous about Section 8126(a). Croda claims that Section 8126(a) is ambiguous because preventing Croda from challenging the title of the Ordinance through application of Section 8126(a) would lead to an absurd result.[38] By Croda's circular reasoning, extinguishing any claim under Section 1152(a) through application of Section 8126(a) renders Section 8126(a) absurd and ambiguous. According to Croda, Section 8126(a) doing exactly what Section 8126(a) is intended to do—bring finality to zoning ordinances by extinguishing untimely claims

[36] OB 22.

[37] *See Richardson v. Bd. of Cosmetology & Barbering*, 69 A.3d 353, 357 (Del. 2013) (recognizing *in pari materia* as a "rule of statutory construction") (citations omitted); *Salzberg*, 227 A.3d at 118 ("courts do not resort to other statutes if the statute being construed is clear and unambiguous") (quotation omitted); Norman Singer & Shambie Singer, 2B Sutherland Statutory Construction § 51:1 (7th ed. 2021) [hereinafter *Sutherland*] ("Consonant with the basic rule on the use of extrinsic aids, courts do not resort to other statutes if the statute being construed is clear and unambiguous.") (citing, among other authority, *Salzberg*; *Dupont v. Mills*, 196 A. 168 (Del. 1937)).

[38] OB 21.

challenging those ordinances—is absurd. As discussed above, every Delaware court to have considered the argument that statutory invalidity excuses the plaintiff from application of Section 8126(a) has rejected Croda's circular logic.[39] This Court should decline Croda's "invitation to manufacture an ambiguity merely to achieve a result which [Croda] believes is fairer than the result required by" Section 8126(a).[40]

Second, Section 8126(a) "may not be tolled," even to achieve the ends of other statutory provisions.[41] Thus, in *Admiral Holding*, the Superior Court held that "the generous language" of 10 *Del. C.* § 1902 allowing transfer of cases filed in the wrong court could not be relied upon to subordinate "the policy behind § 8126," which "must be applied strictly."[42] Croda has failed to identify any authority upon which the policy behind Section 8126(a) can be subordinated to the titling requirement in Section 1152(a).

Third, Croda incorrectly asserts that "statutes related to the same subject are … to be read *in pari materia*."[43] On the contrary, "[w]hen determining whether to

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[39] *See supra*, Part I.C.1.

[40] *United States v. $734,578.82 in United States Currency*, 286 F.3d 641, 658 (3d Cir. 2002) (declining to find ambiguity necessary to apply rule of lenity).

[41] *Admiral Hldg. v. The Town of Bowers*, 2004 WL 2744581, at *2 (Del. Super. Ct. Oct. 18, 2004).

[42] *Id.* (citing *Council of Civic Orgs. of Brandywine Hundred, Inc. v. New Castle Cty.*, 1991 WL 279374, at *5 (Del. Ch. Dec. 26, 1991)).

[43] OB 22.

construe two statutes *in pari materia*, the critical issue is the characterization of the object or **purpose** of the statute, rather than the characterization of the subject matter."[44] According to Croda, the purpose of Section 1152(a) 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 to be heard thereon by petition or otherwise…."[45] According to this Court, the purpose of Section 8126 is "prompt resolution of land use challenges."[46] Croda fails to articulate how Sections 1152(a) and 8126(a) share a common purpose. Instead, Croda blithely asserts that the two statutes share the same subject, and, therefore, Section 8126(a) should be subordinated to Section 1152(a) under the guise

[44] *State v. Lillard*, 521 A.2d 1110, 1114 (Del. Super. Ct. 1986) (citation omitted; emphasis supplied). *See also Tabas v. Crosby*, 444 A.2d 250, 255 (Del. Ch. 1982) (statutes that "serve a different function and purpose" cannot be read *in pari materia*); *Arscht v. St. Bd. of Pension Tr.*, 1985 WL 189272, at *3 (Del. Super. Ct. Sept. 16, 1985) ("Statutes are *in pari materia* when the … have the same purpose or object.") (citation omitted); *Sutherland*, § 51:3 ("Characterization of the object or purpose is more important than characterization of subject matter to determine whether different statutes are closely enough related to justify interpreting one in light of the other.") (citing *State v. Hollobaugh*, 297 A.2d 395, (Del. Super. Ct. 1972)).

[45] OB 16 (quoting *Klein v. Nat'l Pressure Cooker Co.*, 64 A.2d 529, 532 (Del. 1949)).

[46] *Murray*, 67 A.3d at 391. *See also Sterling Property Holdings, Inc.*, 2004 WL 1087366, at *3 (Section 8126 is "designed to promote predictably in land use matters").

of *in pari materia*.[47] This Court should reject that argument for the reasons stated above.

3. The Title of the Ordinance Does Not Violate Section 1152(a).[48]

Croda asserts that "[c]ourts apply cases interpreting the titling requirements under the Delaware Constitution[49] to the titling requirements applicable to counties,"[50] but fails to apply that case law to the Ordinance. Application of those cases to the Ordinance establishes that the Ordinance did not violate Section 1152(a).

It is well-established that the Delaware "constitutional requirement of particularization in the title of legislation is less rigid in the case of amendatory acts

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[47] Even if Croda were correct in looking to the subject of Section 1152(a) and 8126(a) rather than their purpose, the statutes should not be read *in pari materia*. The subject of Section 1152(a) is **all** legislation adopted by New Castle County Council, while Section 8126(a) deals specifically with legislation "relating to zoning, or any amendment thereto, or any regulation or ordinance relating to subdivision and land development," and applies to all three Counties. Croda's invocation of *in pari materia* incorrectly seeks to interpret a specific statute through a general statute. *Cf. Turnbull v. Fink*, 668 A.2d 1370, 1377 (Del. 1995) (if statutes cannot be reconciled, "the specific statute must prevail over the general") (citations omitted).

[48] Like the Chancery Court, this Court need not reach the issue of whether the title of the Ordinance violated Section 1152(a) because Croda's claims premised upon Section 1152(a) are barred by Section 8126(a).

[49] *See* Del. Const. Art. II, § 16.

[50] OB 16 (citing *Farmers for Fairness v. Kent Cty.*, 940 A.2d 947, 955 Del. Ch. 2008)).

rather than original legislation."[51] "An amendatory act may by its title refer generally to the Act it amends, leaving it to those interested to ascertain the particulars in which the amendment changes the original enactment."[52] A statute "should not be invalidated unless the circumstances … show[] beyond doubt" that the titling requirement has been violated.[53]

The *Slattery* Court and courts applying *Slattery* have consistently rejected arguments such as Croda's that a statute amending an existing statute violated the constitutional titling requirement because the title failed to address a particularity of the statute. To summarize these cases:

- *Slattery*—this Court rejected the argument that a statute titled "An Act to Amend Chapter 47, Title 16 Delaware Code, Pertaining to Criminal Offenses of Sale, Possession and Use of Narcotic Drugs and Dangerous Drugs and Prescribing Penalties for Such Violations" failed to provide the defendant

[51] *Drake v. State*, 1996 WL 343822, at *2 (Del. Jun. 13, 1996) (citing *State v. Slattery*, 263 A.2d 284, 285 (Del. 1970)). *See also Mekler v. Delmarva Power & Light Co.*, 1975 WL 1268, at *3 (Del. Ch. Dec. 11, 1975) (applying *Slattery*; citation omitted); *Del. Solid Waste Auth. v. All-Rite Rubbish Removal, Inc.*, 1988 WL 1017749, at *2 (Del. Comm. Pl. Ct. Aug. 25, 1988) (applying *Slattery*). *Cf. Farmers for Fairness*, 940 A.2d at 957 (recognizing "the well-settled proposition that the title of legislation amending an existing act only need to refer generally to the act it amends") (citation omitted).

[52] *Slattery*, 263 A.2d at 285.

[53] *Klein*, 64 A.2d at 532.

with notice that the General Assembly had divested the Court of Common Pleas of jurisdiction over certain drug cases.[54]

- *Drake*—this Court rejected the argument that a statute titled "An Act to Amend Title 11 of the Delaware Code Relating to Certain Sexual Offenses" was unconstitutional because it failed to identify specific sections of the Delaware Code being amended.[55]
- *Mekler*—the Chancery Court rejected the argument that a statute titled "An Act to Amend Title 30, Delaware Code, by Creating a New Chapter Relating to Taxes on Certain Public Utilities" failed to inform utility ratepayers that the law allowed utilities to pass along the cost of tax increases to ratepayers.[56]
- *All-Rite Rubbish Removal, Inc.*—the Court of Common Pleas rejected the argument that a statute titled "An Act to Amend Chapter 63 of Title 7 of the Delaware Code Pertaining to Hazardous Waste Management and Chapter 64 of Title 7 of the Delaware Code pertaining to the Delaware Solid Waste Authority" violated the titling requirement because the title referenced only

[54] 263 A.2d at 285.

[55] 1996 WL 343822, at *2

[56] 1975 WL 1268, at *3.

hazardous waste, while the ordinance impacted the disposal of non-hazardous waste.[57]

Here, the title of the Ordinance placed Croda on notice that the UDC was being amended. That alone was sufficient under *Slattery* to satisfy the constitutional noticing requirement. But the title went further, and placed Croda on notice that the Use Regulations section of the UDC was being amended. Croda's argument that the reference to "Regarding Landfills" at the end of the title excused Croda from looking any further is precisely the argument rejected in *Mekler* and *All-Rite Rubbish Removal, Inc.*—that the reference to one thing in a title limits a statute to that one thing. Furthermore, a reasonable reader not engaged in a litigation-driven reading of the title of the Ordinance would recognize that the phrase "Regarding Landfills" referred to "Article 33 ("Definitions")."

Croda resorts to hyperbole, arguing that County Council could have given the Ordinance "any title," in an effort to conjure an absurd result if its challenge to the Ordinance fails.[58] Of course, County Council did not give the Ordinance "any title;" it identified the sections of the County Code being amended, which under *Slattery* and its progeny was sufficient to place Croda on inquiry notice regarding the contents of the Ordinance. More absurd is Croda's assertion that inclusion of the

[57] 1988 WL 1017749, at *2.

[58] OB 21.

words “Regarding Landfills” to describe the definitions being amended in the title of the Ordinance violated Section 1152(a) when, under *Slattery* and its progeny, exclusion of those words altogether would have passed constitutional muster because all that was necessary was to refer generally to the UDC.

Although the Court need not reach the question of whether the title complied with Section 1152(a), applying precedent regarding the Delaware constitutional titling requirement to the Ordinance, as Croda requests, establishes that the title of the Ordinance did not violate Section 1152(a).

II. CRODA FAILED TO ESTABLISH THAT IT HAS A PROPERTY INTEREST SUBJECT TO THE PROTECTIONS OF PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

A. Question Presented: Whether the Chancery Court Correctly Dismissed Croda's Procedural Due Process Claim Because Croda Failed to Establish a Protected Property Interest.

In its cross motion for summary judgment on Counts III and IV of the Complaint, the County argued, in part, that Croda's federal due process claims are barred because Croda failed to establish a constitutionally protected property interest that was infringed by the County—a threshold requirement to bring a Fourteenth Amendment due process claim. (B-037-28). In *Croda II,* the Chancery Court correctly granted summary judgment to the County, finding Croda had no vested property right to a zoning classification and rejecting Croda's broad proposition that the common law right to the use and enjoyment of one's property is a constitutionally protected property interest sufficient to anchor a procedural due process claim.[59]

B. Standard of Review.

The Chancery Court's decision in *Croda II* granting summary judgment to the County and dismissing Croda's procedural due process claim is subject to *de novo* review.[60]

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[59] *Croda II*, 2021 WL 5027005, at *5-6.

[60] *See, e.g., Salzberg*, 227 A.3d at 112.

C. Merits of the Argument.

The Chancery Court correctly dismissed Croda's procedural due process claim (Count III) by finding that Croda failed to establish a property interest protected by procedural due process under the Fourteenth Amendment. Even if this Court were to conclude that Croda had a protected property interest, it should nevertheless affirm the dismissal of Count III because the protections of procedural due process do not apply to legislative acts, such as the adoption of the Ordinance.[61]

1. Croda Failed to Establish a Constitutionally Protected Interest Sufficient to Anchor a Procedural Due Process Claim.

To prevail on a procedural due process claim, Croda must prove (1) that a person acting under color of state law, (2) deprived it of a constitutionally protected property interest, and (3) the State procedure for challenging the deprivation does not satisfy the requirements of procedural due process.[62] Croda failed to meet the threshold requirement of establishing a protected property interest.

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[61] Although the Chancery Court did not reach this issue, the County raised this argument below. *See* B-043-32.

[62] *See e.g., DeBlasio v. Zoning Bd. of Adjustment,* 53 F.3d 592, 597 (3d Cir. 1995), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Twp. of Warrington,* 316 F.3d 392 (3d Cir. 2003).

a. Croda Cannot Establish a Vested Property Right Under Delaware Law.

Property interests for purposes of procedural due process are created, defined, and developed by state law.[63] To be entitled to the protections of procedural due process, a plaintiff must establish a property interest (derived from state law) in which he has more than "an abstract need or desire for it" or "a unilateral expectation of it."[64] Rather, a plaintiff must have a "legitimate claim of entitlement to it."[65]

Croda contends the Chancery Court conflated vested rights with due process —Croda is wrong.[66] The vested rights doctrine is just one tool, and in this case the correct tool, that Delaware courts employ to determine whether a property owner has acquired a legitimate claim of entitlement to a property interest.[67] In the zoning

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[63] *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). *See also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J. concurring) (explaining that property interests protected by procedural due process are derived from state law while substantive rights are created only by the Constitution); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 857 (1987) ("It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights. '[A]s a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer.'") (quoting *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J. concurring)).

[64] *Roth*, 408 U.S. at 577.

[65] *Id.*

[66] OB 23.

[67] *See Salem Church (Del.) Assoc. v. New Castle Cty.*, 2006 WL 2873745, at *14 n.132 (Del. Ch. Oct. 6, 2006) [hereinafter "*Salem Church*"] (noting that plaintiff's

context, "the vested rights doctrine reflects principles of property and constitutional law, and focus on whether the owner's reliance upon an existing zoning classification is so substantial as to constitute a vested right that cannot be abrogated by government regulations."[68] The concept of vesting is not limited to zoning but is also used to determine whether other types of property interests are constitutionally protected for the purposes of establishing a procedural due process claim.[69]

Delaware courts have long held that a property owner has no vested right to any comprehensive plan designation or zoning classification, nor in the continuation of a particular zoning or land use classification.[70] This Court recently summarized

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procedural due process claim may be related to the vested rights claim but discussing them separately for the sake of clarity). *Cf. Wilm. Materials, Inc. v. Town of Middletown*, 1988 WL 135507, *7 (Del. Ch. Dec. 16, 1988) (discussing that equitable estoppel and vested rights are similar as both doctrines provide a property owner protection based the owner's good faith reliance in local government conduct).

[68] *Wilm. Materials, Inc.*, 1988 WL 135507, at *7 (citing *Allen v. City and Cty. of Honolulu*, 571 P.2d 328, 329 (Haw. 1977)).

[69] *See, e.g., Kern Co. v. Town of Dewey Beach*, 1994 WL 89333, at *10 (Del. Super. Ct. Feb. 18, 1994) ("Because this property right was vested, plaintiff had a constitutionally protected property interest in remaining a part of the Town."); *Walton v. Bd. of Examiners of Psych.*, 1991 WL 35716, at *4 (Del. Super. Ct. Feb. 21, 1991) (no constitutionally protected right where no vested right in a license).

[70] *Kappa Alpha Educ. Found., Inc. v. City of Newark*, C.A. No. N19M-10-175 ALR (Del. Super. Ct. Dec. 17, 2019) (unreported) (citing *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 821–22 (Del. 2018)) (B-058); *Shellburne, Inc. v. Roberts*, 224 A.2d 250, 254 (Del. 1966); *Acierno v. Cloutier*, 40 F.3d 597, 620 n.17 (3d Cir. 1994); *Mayor & Council of New Castle v. Rollins Outdoor Advert., Inc.*, 475 A.2d 355, 360 (Del. 1984); *Reinbacher v. Conly*, 141 A.2d 453, 457 (Del. Ch. 1958).

Delaware law concerning the vesting of property rights and zoning changes as follows:

> We disagree with the Superior Court that rights vest only once and thereafter are immune to legislative action. A statute may retroactively reach property rights which have vested and may create new obligations with respect thereto, provided that the statute is a valid exercise of police power. As a general proposition, property owners and residents have no legal right to the continued existence of current zoning, either with respect to the zoning of nearby property or with respect to zoning of one's own property. Generally, a property owner has no vested right to have an existing zoning classification, or an existing zoning ordinance continue unchanged if the municipality rationally exercises its police power and determines that a change in zoning is required for the well-being of the community.[71]

Contrary to Croda's allegations,[72] when applying clearly established Delaware law, it is indisputable that Croda has no "vested property right" in the continuation of the UDC's zoning provisions as they existed prior to adoption of the Ordinance. The fact remains that the Property was zoned HI prior to adoption of the Ordinance and remains so after its adoption. The Property's current heavy industrial use continues and is not limited by terms of the Ordinance. Rather, as recognized by the Chancery Court, the Ordinance created a special use permitting procedure for *future* uses that is applicable to other similarly-zoned uses.[73] Croda's contention that

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[71] *Town of Cheswold*, 188 A.3d at 822 n. 48 (internal quotations and citations omitted).

[72] A-029 ¶ 53; A-031 ¶ 61.

[73] *Croda II*, 2021 WL 5027005, at * 6 (emphasis added).

a special use permit requirement for future use renders its current use as "non-conforming" (OB 1) is incorrect.[74] Regardless, even if adoption of the Ordinance resulted in the Property's status changing to nonconforming— it remains that Croda does not a have vested right to a zoning classification.[75]

b. Croda's Reliance on Authority Addressing Property Interests Under Substantive Due Process is Misplaced.

Croda's asserted property interest is premised upon "the right to use one's property," which Croda argues is "protected by the Constitution."[76] Croda fails to cite any authority that recognizes the "right to use one's property" free from reasonable government regulation as a protected property interest under Fourteenth Amendment *procedural* due process. Instead, Croda relies upon cases addressing *substantive* due process. Croda improperly conflates property interests protected by

[74] *See* 83 AM. JUR. 2D *Zoning and Planning* § 828 (2020) ("Where a zoning ordinance authorizes a business as a special use, such authorization is tantamount to a legislative conclusion that the use is appropriate in the district…. When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, prima facie, he or she is entitled to it.").

[75] A use that becomes nonconforming through the adoption of a zoning ordinance may lawfully continue. *See* 9 *Del. C.* § 2610; *New Castle Cty. Code* §§ 40.08.000-431. It is well-established, however, that a zoning ordinance may convert a lawful use to nonconforming status and require amortization of the nonconforming use so long as the regulation bears a substantial relation to the health, safety and welfare of the public. *See Rollins Outdoor Advert.*, 475 A.2d at 360. Croda does not contend, and the Ordinance does not require, amortization of the Property.

[76] OB 31.

substantive due process with property interests protected by procedural due process— they are not the same.

Well-established precedent defines protected property interests differently depending on whether the alleged deprivation is based upon procedural due process *or* substantive due process.[77] Substantive due process protects fundamental rights established by the United States Constitution, while procedural due process protects property interests that originate under state law.[78] While arguing that it has a protected property interest for purposes of procedural due process, Croda relies on cases, or portions of cases, in which a court was analyzing the existence of a property interest under *substantive* due process and challenges to alleged deprivations of fundamental rights protected by the United States Constitution.[79] For example:

- *Buchanan v. Warley*—the United States Supreme Court reviewed an ordinance that ran "counter to the limitations of the federal Constitution."[80]

[77] *See, e.g.*, *Ewing*, 474 U.S. at 229 (1985); *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 140 (3d Cir. 2000).

[78] *Ewing*, 474 U.S. at 229 *(*citing *Roth*, 408 U.S. at 577). *See also Nicholas* 227 F.3d at 142 (3d Cir. 2000).

[79] *See* OB 31. Despite arguing before the Chancery Court that treatises are not law (A-176-77), Croda also relies on a law review article. OB 31 (citing *Zoning*, 91 Harv. L. Rev. 1427 (1978)).

[80] 245 U.S. 60, 74 (1917).

- *Sisk v. Sussex County*—the Delaware District Court found that the plaintiff asserted a protected property interest in the use and enjoyment of her leased land for her substantive due process claim.[81]
- *DeBlasio*—the Third Circuit Court of Appeals addressed whether ownership of property is of "particular quality of a property interest" worthy of substantive due process protection.[82]
- *Acierno v. New Castle County*—the Delaware District Court determined for the purposes of substantive due process whether a property owner had a protected property interest in the zoning classification of his land when it was subjected to a legislative down-zoning.[83]

These cases indicate that the use and enjoyment of one's land may constitute a property interest worthy of *substantive due process* protection under the Fourteenth Amendment if there is deprivation of one's use and enjoyment of land that is caused by: (1) non-legislative government action that "shocks the conscious"; or, (2) legislative action affecting a fundamental right under the United States Constitution.[84] Croda has not raised any such claim on appeal. Ultimately, these

[81] 2012 WL 1970879, *4 (D. Del. Jun. 1, 2012).

[82] 53 F.3d at 600-01.

[83] 2000 WL 718346 *3 (D. Del. May 23, 2000).

[84] *See United Artists*, 316 F.3d at 399-404 (discarding the improper motive test and holding that the "shocks the conscious" test should be used to analyze non-legislative

cases are inapplicable for the proposition that the use of one's property is a protected property interest for *procedural* due process, which is Croda's only remaining due process claim.[85]

c. Croda's Reliance on *Bohemia Mill Pond* is Misplaced.

Relying on the Superior Court's decision in *Bohemia Mill Pond*,[86] Croda argues that the failure to provide notice is, in and of itself, sufficient to establish a procedural due process violation.[87] This argument misses the point entirely. Croda must first establish a protected property interest, *then* establish that the procedure violated due process.[88]

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government conduct for substantive due process claims). *See also Nicholas*, 227 F.3d at 139-40 (summarizing Third Circuit substantive due process jurisprudence and explaining the legislative and non-legislative threads of substantive due process analysis).

[85] Croda has not appealed the Chancery Court's ruling granting summary judgment to the County and dismissing Croda's substantive due process claim thereby leaving only Croda's procedural due claim for this Court's consideration on appeal. *See infra*, Part III.

[86] *Bohemia Mill Pond v. New Castle Cty. Planning Board*, 2001 WL 1221685 (Del. Super. Ct. Oct. 1, 2001), *aff'd*, 2002 WL 392333 (Del. Mar. 6, 2002).

[87] OB 24-28.

[88] *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 42 (1999) ("Only after finding deprivation of a protected property interest does this Court look to see if the State's procedures comport with due process.") (citing *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976)); *In re New Maurice J. Moyer Acad.*, 108 A.3d 294, 317-18 (Del. Ch. 2015) (quoting *Sullivan*).

In addition to failing to establish a property interest subject to procedural due process protection, *Bohemia Mill Pond* is factually distinguishable and legally inapplicable Croda's claims. Most obvious is the fact that in *Bohemia Mill Pond*, the Defendant/Appellee (that also happened to be the County) conceded that the developer had a protected property interest.[89] Furthermore, the *Bohemia Mill Pond* court found that individual notice was necessary because the affected property owners could be readily identified where they had already obtained building permits or land development approval from the County's Department of Land Use.[90] Here, Croda disclaimed any right to individual notice regarding the Ordinance,[91] and never alleged that it had a permit pending with the County to expand the Atlas site. In fact, Croda only vaguely alleges ***future*** expansion efforts, not actual projects pending at the time the Ordinance was adopted.[92] Thus, Croda failed to establish that actual notice regarding the Ordinance was either feasible or necessary.

Insofar as that Croda contends that titling requirements of Section 1152(a) and New Castle County Council Rule 2.2.1 confer upon it a property interest protected by the Fourteenth Amendment, Croda is incorrect. The United States Supreme Court

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[89] *Bohemia Mill Pond*, 2001 WL 1221685, at *2.

[90] *Id.*

[91] A-196 ("Croda is not arguing that the lack of individual mailed notice to all heavy industry property owners in this case constitutes a due process violation….").

[92] A-017-18 ¶ 7; OB 11-12.

explained in in *Olim v. Wakinekona* that a "State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right."[93] It follows that "[t]he process afforded by state law is not relevant in determining whether there is a state created right that triggers due process protection."[94] Even if Croda had sufficiently alleged that adoption of the Ordinance deprived it of a property interest subject to due process protection, the scope of the process required by the Constitution would not be defined by County or State law —but by federal law.[95] Neither the titling requirements nor an alleged violation of those requirements gives rise to the protections of procedural due process under the Fourteenth Amendment.

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[93] 461 U.S. 238, 250–51 (1983) (footnote omitted). *See also Steele v. Cicchi,* 855 F.3d 494, 508-09 (3d Cir. 2017) ("a valid due process claim will not automatically follow from [a] failure to abide by [certain] procedural requirements"); *United States v. Jiles*, 658 F.2d 194, 200 (3d Cir. 1981) ("The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension.") (quoting *Slotnick v. Staviskey*, 560 F.2d 31, 34 (1st Cir. 1977)); *Hayes v. Muller*, 1996 WL 583180, at *7 n.5 (E.D. Pa. Oct. 10, 1996) ("a state does not violate an individual's federal constitutional right to procedural due process merely by deviating from its own established procedures") (quoting *Lewis v. Dist. of Columbia Bd. of Parole,* 788 F. Supp. 14, 15 (D.D.C. 1992)).

[94] *Griffin v. Vaughn*, 112 F.3d 703, 709 n.3 (3d Cir. 1997).

[95] *See Steele*, 855 F.3d at 509 ("a court must determine the level of process due by drawing from federal constitutional law, not from state laws, regulations, or policies").

2. Procedural Due Process Protections Do Not Apply to Legislative Acts.

It has long been held that legislative acts, such as adoption of the Ordinance, cannot form the basis for a procedural due process claim.[96] In *Bi-Metallic Investment Co.*, the United States Supreme Court unanimously rejected a landowners' assertion that constitutional due process required the landowner be afforded an opportunity to be heard prior to a state board's vote that would increase the property tax valuations of all property in the city.[97] Justice Holmes observed:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard…. There must be a limit to individual argument in such matters if government is to go on.[98]

This premise is not limited to state and federal legislative actions but applies equally to zoning code amendments made by local governments.[99]

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[96] *Bi-Metallic Inv. Co. v. St. Bd. of Equalization*, 239 U.S. 441 (1915). *See also Salem Church*, 2006 WL 2873745, at *14 n.134 (applying the rule that legislative acts cannot form the basis of a federal procedural due process claim to a procedural due process claim brought under the state constitution).

[97] *See Bi-Metallic Inv. Co.*, 239 U.S. at 444-46.

[98] *Id.* at 445.

[99] *See, e.g., Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (power to zone or rezone by amendment of a zoning ordinance is legislative in nature); *Rogin v. Bensalem Twp.*, 616 F.2d 680, 694 (3d Cir. 1980) ("Inasmuch as the Supervisors,

Adoption of the Ordinance can be viewed only as a legislative act that cannot be challenged by alleging a deprivation of procedural due process. First, Delaware law requires that zoning code amendments be made by ordinance, and the legislative powers of the County belong to County Council.[100] Second, section 2 of the Ordinance applies to all property within the HI zoning district, not merely to Croda. By requiring a special use permit, Council recognized that "[c]ertain land uses and development present unique conditions with respect to their relationship with the community."[101] And, Council codified its policy of regulating such uses, including but not limited to heavy industry, to minimize their adverse impacts not only on the surrounding community but also on the public's health, safety and welfare.[102]

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in passing the zoning amendments, were acting in a legislative capacity, [developer] has no procedural due process claim against their actions.").

[100] 9 *Del. C.* §§ 1146, 1153(a), 2601. *See also Willdel Reality, Inc. v. New Castle Cty.*, 281 A.2d 612, 614 (Del. 1971) (finding that zoning is a legislative action); *Shellburne, Inc. v. Buck*, 240 A.2d 757, 758 (Del. 1968) (explaining that the exercise of Council Council's zoning power is legislative in character).

[101] *New Castle Cty. Code* § 40.31.430(A).

[102] *Id.* § 40.31.431. Heavy industry uses are not the only uses subject to special use review. For example, depending on the zone, the UDC requires special use permits for myriad uses that present unique conditions with respect to the surrounding community including outdoor recreation facility exterior lighting, and depending on the zoning district, protective care facilities, agricultural support and rural services, heavy retail and services, major utilities, and outdoor parking structures. *See id.* § 40.03.110 ("General Use Table").

Consideration of this policy is echoed in the Ordinance's recitals and synopsis.[103] The inclusion of uses allowed in the HI zoning district as the types of uses requiring a special use permit constitutes a general statement of County policy rather than a specific application of that policy to a particular landowner.[104] Third, Council followed procedures necessary to adopt the Ordinance.[105] Thus, the Ordinance may not be challenged by alleging a deprivation of due process.

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[103] A-244, A-246. The recitals and the synopsis explain:

> The zoning regulation established by this Ordinance … is designed to avoid threats to health and general welfare….
>
> This regulation has been made … with a view to protecting and promoting desirable living conditions, sustaining the stability of neighborhoods, protecting property against blight and depreciation, conserving the property value of homes and buildings, and encouraging the most appropriate use of land and structures in New Castle County.

[104] *See Acierno*, 40 F.3d at 611 (distinguishing between County Council's legislative powers exercised through the adoption of new zoning laws and amendments thereto from its administrative functions exercised through enforcement of existing zoning laws); *Rogin*, 616 F.2d at 693 n.60 (discussing the legislative-administrative distinction for bodies that function in both capacities); *Shellburne, Inc. v. New Castle Cty.*, 293 F. Supp. 237, 244 (D. Del. 1968) ("the members of the County Council were acting within the scope of legitimate legislative activity when they voted to rezone plaintiff's property").

[105] *See Acierno*, 40 F.3d at 614 (explaining the "important distinction between general adherence to legislative procedure for the purposes of taking legislative action as a matter of federal law, as opposed to full compliance with all technical requirements for such legislative action to be valid under state or county law" and finding that titling issues do not defeat the classification of a legislative act).

In *Salem Church*, a procedural due process challenge to Delaware legislation was rejected based on this long-standing rule.[106] A developer claimed it was not properly provided notice or a pre-deprivation hearing before the General Assembly adopted state legislation that would frustrate its ability to secure County approval for a pending land development application that had been in the review stages for years.[107] The District Court found that the General Assembly was acting in its legislative capacity when they adopted the legislation.[108] Because it was a legislative act, procedural due process was not required and the Court found that developer was entitled to no more notice or opportunity to be heard than anyone else.[109]

Croda cannot rely on *Bohemia Mill Pond* to support its argument that adoption of the Ordinance may be challenged on procedural due process grounds. In *Bohemia Mill Pond*, the County was enforcing an existing zoning ordinance when it rejected the developer's exemption request as untimely; [110] thus, the challenged action can only be categorized as a non-legislative or administrative. [111] Additionally, unlike

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[106] 2006 WL 4782453, at *14-15.

[107] *Id.* at *14.

[108] *Id.* at *15.

[109] *Id.* The court noted that that the procedural due process analysis is the same under state and federal law.

[110] *Bohemia Mill Pond*, 2001 WL 1221685, at *1.

[111] *See Rogin*, 616 F.2d at 693 n.60 (explaining administrative acts involve the application of legislative policy to an individual landowner).

here, the protected property interest was conceded.[112] Ultimately, like the state legislation in *Salem Church*, adoption of the Ordinance was a legislative action and cannot be challenged by alleging a deprivation of procedural due process.

[112] *Bohemia Mill Pond*, 2001 WL 1221685, at *2.

III. CRODA ABANDONED ITS SUBSTANTIVE DUE PROCESS CLAIM.

A. Question Presented: Whether Croda Abandoned its Substantive Due Process Claim?

Although Croda did not seek summary judgment regarding its substantive due process claim asserted in Count IV of the Complaint, the County moved for summary judgment on that claim (B-045-51; B-105), which the Chancery Court granted.[113]

B. Standard of Review.

Whether Croda complied with Delaware Supreme Court Rule 14(b) is a question of law for this Court to decide in the first instance.

C. Merits of the Argument.

Delaware Supreme Court Rule 14(b)(vi)(A)(3) provides "[t]he merits of any argument that is not raised in the body of opening brief shall be deemed waived and will not be considered by the Court on appeal." While Croda raised a substantive due process claim in Count IV of the Complaint,[114] it has not included any argument in its Opening brief concerning the Chancery Court's grant of summary judgment to the County on Count IV. To preserve arguments concerning any aspect of its substantive due process claim on appeal, Croda must have raised the issue in both

[113] *Croda II*, 2021 WL 5027005, at *6.

[114] A-031.

the Summary of Argument and pursue it in the Argument portion of its Opening Brief.[115] Croda has not done so. Rather, Croda only addresses its procedural due process claim in the Opening Brief. The Summary of Argument references only procedural due process[116] and the Legal Argument is limited to procedural due process issues.[117] Furthermore, in identifying "clear and exact references" to where each question was preserved for appeal,[118] Croda only cites to arguments before the Chancery Court made in support of its procedural due process claim.[119] Croda's reference to its substantive due process claim in footnote 11 of the Opening brief is insufficient to preserve the issue on appeal.[120] Accordingly, Croda has waived its substantive due process claim and this Court should not consider it on appeal.[121]

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[115] Del. Supr. Ct. R. 14(b)(iv), (vi)(A)(1). *See also Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004).

[116] OB 5 ¶ 2.

[117] *Id.* 23-33. The argument headings of II.C (OB 23), II.C.1 (OB 24), and II.C.2 (OB 26) refer to "procedural due process." While the argument heading of II.C.3 does not use the phrase "procedural due process," Croda's argument addresses procedural due process and does not refer to substantive due process. *See id.* 30, 33.

[118] Del. Supr. Ct. R. 14(b)(vi)(A)(1).

[119] *See* OB 23 (citing A-111-15; A-199-201; A-249-51).

[120] *See Lum v. State*, 101 A.3d 970, 971–72 (Del. 2014) ("Arguments in footnotes do not constitute raising an issue in the 'body' of the opening brief."); *Murphy v. State*, 632 A.2d 1150, 1152 n. 2 (Del. 1993) ("The rules of this Court provide that footnotes shall not be used for argument and, a fortiori, should not be used to raise claims of error.").

[121] *See* Del. Supr. Ct. Rule 14(b)(vi)(A)(3). *See also Roca.*, 842 A.2d at 1242.

CONCLUSION

The Chancery Court correctly granted summary judgment in favor of the County on Counts I and II of Croda's Complaint because Croda's state law claims—including its claims premised on the title of the Ordinance under Section 1152(a)—were extinguished pursuant to the statute of repose under Section 8126(a). Therefore, this Court should affirm *Croda I*.

The Chancery Court also correctly granted summary judgment in favor of the County on Counts III and IV of Croda's Complaint. Croda failed to establish a property interest subject to procedural due process protection under the Fourteenth Amendment. Even if Croda had establish a protected property interest, Count III was subject to dismissal because procedural due process does not apply to legislative acts, such as adoption of the Ordinance. Furthermore, Croda has abandoned its substantive due process claim (Count IV) on appeal by failing to address that issue as required by Delaware Supreme Court Rule 14(b). Accordingly, this Court should also affirm *Croda II*.

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