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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 REPLY BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Substitute No. 1 to Ordinance No. 19-046 (the "Ordinance") 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). The Ordinance, however, affected every heavy industrial use in New Castle County, even though its title said it was one "regarding landfills." The County tells us this was not misleading because "the title of the Ordinance placed Croda on notice that the [Uniform Development Code ("UDC")] was being amended. That alone was sufficient." Ans.Br. at 24. But, the title was not sufficient to put Croda (or any other heavy industrial property owner) on notice of the proposed Ordinance's effects.

Under the County's view, every time that a property owner sees an ordinance that says the UDC is "being amended," the property owner can no longer rely on any other limitations or description in the title – even though a title might say the ordinance is one to amend the UDC "regarding landfills," the property owner cannot assume that the ordinance only pertains to landfills, and must carefully review the entire ordinance to ensure that no other changes are being made. Such a view makes a mockery of County Council's own rule that a title "shall clearly express the matter addressed . . . *for maximum public* notice" (emphasis added). Such a view ignores Justice Holland's admonition that if the title of a bill "traps the unwary into inaction,"

the bill must be stricken. *See* Randy J. Holland, The Delaware State Constitution (Oxford Univ. Press, 2017) at 116-17. Such a view cannot stand.

No one (including the County's own representatives) discussed anything other than landfills at the public hearings on the Ordinance – and this simple fact demonstrates that not only was the general public unaware of the Ordinance's actual effects, but the County itself was unaware as well.[1] Nothing in the County's Answering Brief justifies or supports the use of a misleading title to trigger the 60-day period of 10 *Del.C.* §8126(a) ("Section 8126"); and, of course, the Court of Chancery has, on at least one occasion, made clear that Section 8126 "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 addition to its state law claims, Croda also brought procedural and substantive due process claims, which the Court of Chancery rejected on the basis that Croda had not established a "vested right." But, as the case law cited in Croda's Opening Brief and herein makes clear, a "vested right" is not necessary to bring a due process claim, whether procedural or substantive.

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[1] Council's Attorney told the Planning Board that "the intent of this ordinance is to address currently existing landfills as well as future landfills." A-233. He explained to County Council that "the ordinance was created to set regulations around the landfills as a whole . . . for existing as well as future landfills." A-132.

ARGUMENT

I. AN ORDINANCE WITH A MISLEADING TITLE DOES NOT TRIGGER SECTION 8126'S 60-DAY LIMITATIONS PERIOD.

The 60-day window created by Section 8126 is premised on meaningful notice, not a game of gotcha. While the County makes numerous arguments in defense of the Ordinance's title, it makes no effort to explain how or why not a single Heavy Industrial ("HI") property owner, other than the owner of the County's only landfill, attended the public hearings or otherwise offered comment. Worse still, the County makes no effort to explain how or why its own personnel, in making their presentations and public comments, never once discussed, mentioned or even hinted at the Ordinance's broader application to all heavy industrial uses.[2] The County's attempts to justify the Ordinance's defective title and its arguments that Section 8126 should be applied regardless all fail.

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[2] One cannot help but suspect that the Ordinance's effect on every HI use, rather than just landfills, was an inadvertent scrivener's error or mistake in drafting. This would explain why the County never discussed the full impact of the Ordinance at any public hearing and why the title of the Ordinance indicated it was one "regarding landfills." Frankly, this explanation is more palatable than the alternative: that the County intended for the Ordinance to have broad effects, but chose a misleading title instead and never addressed the broad effects in an effort to get the Ordinance passed with little or no opposition from HI landowners. If this was the County's purpose, it succeeded; but, in doing so, it purposely violated state law as well as Council's own rule that a title provide "maximum public notice." Because we prefer to think the County would not purposely violate the law, we believe the Ordinance's effect on all HI uses was not intended, but an error in drafting.

A. None Of The Cases Cited By The County Regarding Section 8126 Involve A Defective Title.

In its Answering Brief, the County observes that in no case has a procedural irregularity in the passage of a land use ordinance overcome Section 8126's 60-day period. Ans.Br. at 11-15. But the cases cited all dealt with various procedural issues such as whether a rezoning was improperly implemented by resolution rather than ordinance. None of the cited cases addressed notice to the public and whether the 60-day period of Section 8126 should apply in the absence of notice. The challengers in those cases all had notice. Because none of the cases cited by the County deal with the failure to provide notice (whether by title or otherwise), the cases offer no support for the County's position.

B. In At Least One Instance, The Court Of Chancery Has Stayed The 60-Day Time Period.

In the *APFO* case, the Chancery Court allowed a suit to continue, notwithstanding the lapse of Section 8126's 60-day period. The County attempts to distinguish the facts in the *APFO* case as "unique" and "unusual"– but so are the facts here. In the *APFO* case, the Court observed that it would have been absurd to require the plaintiffs to file suit to challenge an ordinance that, at the time of filing, was not effective and might never become effective. The Court found that this "cannot be what the General Assembly intended" and so allowed the *APFO* suit to proceed, notwithstanding the lapse of 60 days. Whether one characterizes the facts

in the *APFO* case as "unique" or "unusual," the Court recognized that exceptions would apply. So too here. It "cannot be what the General Assembly intended" to allow a title which did not provide notice to affected property owners to trigger the 60-day period to challenge the Ordinance. As the *APFO* case makes clear, Section 8126 is not an absolute bar to challenging an ordinance outside of the 60-day period.

C. Whether A Statute Of "Repose" Or "Limitations," Section 8126 Requires A Valid Ordinance Title.

In its Answering Brief, the County cites a number of cases that refer to Section 8126 as a "statute of repose." Ans.Br. at 18. However, other cases (not cited by the County) refer to the section as a "statute of limitations."[3] But, regardless of whether the statute is one of limitations or repose, the relevant inquiry is the same: does the Ordinance title provide sufficient notice to trigger the 60-day period? If, as the *APFO* Court decided, applying the 60-day window in a way that deprives affected landowners a meaningful opportunity to challenge the ordinance "cannot be what the General Assembly intended," then the limitations/repose distinction is irrelevant for this case. As this Court observed in *Murray v. Town of Dewey Beach*, 67 A.2d 388, 391 (Del. 2001), when discussing claims made after Section 8126's 60-day

[3] *See, e.g., BC Development Associates v. New Castle County Council*, 1988 WL 130634 * 2 (Del.Ch.), *aff'd in part, rev'd in part*, 567 A.2d 1271 (Del. 1989); *Town of South Bethany v. Nagy*, 2006 WL 4759866 *7 (Del.Ch.); *Concord Towers, Inc. v. McIntosh Inn of Wilmington, Inc.*, 1997 WL 525860 *2 (Del.Ch.).

period had run, the claims there "were extinguished 60 days *after the Town gave public notice*" (emphasis added). The observation that the 60-day period commences "after . . . public notice" is the key to this case.[4] In *Murray*, the plaintiffs had notice; here they did not. Because the title to the Ordinance indicated it was one only "regarding landfills," the County never provided the "public notice" necessary to start the 60-day period.

D. Section 8126 Cannot Be Read And Applied Independently From Other Laws Requiring Proper Titles.

The County argues that Section 8126's 60-day period to challenge an ordinance following publication of the title should not be read in conjunction with other statutes, such as the titling requirements, since those statutes do not share a common purpose. Ans.Br. at 20-22. Specifically, the County observes that Section 8126 is designed to promptly resolve land use matters, while the purpose of titling requirements is to apprise the public of the nature of pending legislation. *Id.*

That argument is misplaced, as the statutes at issue do share a common purpose. Section 8126 requires the County to publish an effective notice in order to trigger the 60-day period. Similarly, the title requirements of Title 9 and the County

[4] The *Murray* Court, like the *APFO* Court, also observed that Section 8126 should not be read "in a way that 'leads to an unreasonable or absurd result not contemplated by the legislature.'" *Murray*, 67 A.2d at 391. It is unreasonable and absurd to suggest a misleading title triggers the 60-day window, and such result could not have been "contemplated by the legislature."

Council Rules concern notice. In all cases, the goal is the same – to put affected persons on notice so they are able to appear and be heard. If the Ordinance's title was defective because it didn't provide the required notice for purposes of Section 1152 and Council Rules, then it was also defective for purposes of Section 8126. Indeed, it would be illogical to suggest that an ordinance's title is defective for titling purposes but somehow sufficient for purposes of Section 8126

E. Cases Upholding Titles For Other Bills Are Readily Distinguishable Because Those Titles Were Not Misleading.

The County also attempts to defend the Ordinance's title with four cases upholding various bills passed by the General Assembly. Ans.Br. at 21-25. A cursory review of these cases, though, demonstrates their inapplicability.

For example, in *Drake v. State*, 1996 WL 343822 (Del. 1996), the appellant challenged his conviction, in part, on the basis that a bill titled "An Act to Amend Title 11 of the Delaware Code *Relating to Certain Sexual Offenses*" (emphasis added) did not specify the individual code sections being amended. The Court rejected this notion, explaining that "The title of the legislation . . . provides sufficient notice of the broad scope of the bill and is framed in a way that would lead a reasonable person who is interested in the subject matter of the legislation into a deeper 'inquiry into the body of the bill.'" *Id.* at 2.

In our case, however, the Ordinance's title told a reasonable person that the Ordinance was one "regarding landfills." A reasonable person *not* interested in

landfills would *not* have been led to pursue a "deeper inquiry" into the body of the Ordinance, as is evidenced by the fact that the only property owner to speak out about the Ordinance at the public hearings was the owner of the only landfill in the County.

The other cases the County cited are also inapposite. In *State v. Slattery*, 263 A.2d 284 (Del. 1970), the challenged legislation's title indicated the bill was "*pertaining to* criminal offenses of sale, possession and use of narcotic drugs and dangerous drugs and prescribing penalties for such violations" (emphasis added). Similarly, in *Del. Solid Waste Auth. v. All-Rite Rubbish Removal, Inc.,* 1988 WL 1017749 (Del.Comm.Pl.Ct.), the statute title indicated it was "*pertaining to* the Delaware Solid Waste Authority" (emphasis added); and, in *Mekler v. Delmarva Power & Light Co.*, 1975 WL 1268 (Del.Ch.), the statute title in question said it was "*Creating a New Chapter Relating to Taxes* on Certain Public Utilities" (emphasis added). In each case, the Court found the statute provided adequate notice. These cases provide no support for the County's position.

F. Mere Mention That The UDC Was Being Amended Does Not Save The Ordinance's Title.

Finally, the County claims that the title here is sufficient because "the title of the Ordinance placed Croda on notice that the UDC was being amended." Ans.Br. at 24. The County further claims that the phrase "regarding landfills" at the end of

the Ordinance only applied to Article 33 of the UDC. Any fair reading of the Ordinance title, however, compels a different conclusion. 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). Commonsense tells the reader that the changes to both Article 3 and Article 33 regard landfills. Indeed, no one – including the County – ever suggested otherwise. This reading is not only commonsense, it comports with the rules of grammar and statutory construction as well.

The rules of grammar and statutory construction provide that a pre- or post-modifier to a list of items applies to the entire series. *See generally* Garner & Scalia, Reading Law: The Interpretation of Legal Texts §19 (2012). For example, with the phrase "unreasonable searches and seizures," the word "unreasonable" is held to modify both "searches" and "seizures." *Id.* Similarly, with the phrase "corporations and partnerships registered in Delaware," the phrase "registered in Delaware" applies to both "corporations" and "partnerships." *Id.* Thus, with the title "Article 3 ('Use Regulations') And Article 33 ('Definitions') Regarding Landfills," the phrase "Regarding Landfills" applies to both Article 3 and Article 33.

In sum, the Ordinance's title does not satisfy the applicable titling requirements. Reasonable persons were *not* on notice. Since HI-zoned property owners were not on notice due to the defective title, Section 8126's 60-day period

never commenced. While it may be important to have certainty in land use regulation, that certainty cannot come at the expense of those members of the public affected by the change.[5] Section 8126 "is not intended to deny citizens a fair opportunity to challenge an adopted ordinance."

[5] Croda does not mean to suggest that affected property owners should have unlimited time to bring a challenge. At some point, laches will apply and an ordinance will be enforced notwithstanding a defective title. But laches does not apply here, where Croda brought suit within 60 days of learning of the Ordinance, and less than a year after it was passed.

II. "VESTED RIGHTS" ARE NOT A PREREQUISITE TO A PROCEDURAL OR SUBSTANTIVE DUE PROCESS CLAIM.

The County presents two main arguments in its answering brief with respect to Croda's due process claims, and both are wrong. First, the County argues that "vested rights" are necessary in order to bring due process claims. Second, the County suggests that the rights protected by substantive due process are not protected by procedural due process and vice versa. Both of these premises are incorrect, and the Chancery Court erred in dismissing both due process claims for lack of a "vested right."

A. A "Vested Right" Is Not Necessary To Bring A Procedural Due Process Claim (Or Any Other Type of Due Process Claim).

To succeed on a procedural due process claim, one must establish (i) that a person acting under state law, (ii) deprived a party of a protected right, (iii) without an adequate opportunity to defend or safeguard that right. *See, e.g., Goldberg v. City of Rehoboth Beach,* 565 A.2d 936, 942 (Del.Super.), *aff'd,* 567 A.2d 421 (Del. 1989). The focus of a procedural due process claim is on the procedure provided;[6] and procedural due process begins with notice. *See Tsipouras v. Tsipouras*, 677

[6] With a substantive due process claim, the first two elements are the same, but the third is different – the third element focuses on the interference with the right itself. If the interference is found to "shock the conscience," then a substantive due process violation is said to have occurred. *See, e.g., United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003).

A.2d 493, 396 (Del. 1996) ("[p]arties whose rights are to be affected . . . must first be notified"). This is the gravamen of Croda's claim. The title of the Ordinance did not provide notice.

Of course, as a prerequisite to a procedural due process claim, Croda must possess a right entitled to protection. And Croda does. The County states that 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' [but] must have a 'legitimate claim of entitlement to it.'" Ans.Br. at 28. Croda had just such a "legitimate claim of entitlement" prior to enactment of the Ordinance.

Prior to the enactment of the Ordinance, as the owner of a property zoned "HI," Croda had the right to use its property for any new heavy industrial use permitted by the UDC and to expand its existing use. With the passage of the Ordinance, however, Croda's right to use its property has been thrown into doubt. Now, Croda must obtain a "special use permit" either to start a new use or expand its existing use. Further, the County can simply refuse any special use permit in its discretion.[7] This is a substantial new restriction on Croda's ability to use its property

[7] In its brief, the County suggests that it does not have discretion and cites a general treatise, *American Jurisprudence 2nd*, for the proposition that if a property owner meets the criteria for a special use permit, the property owner is entitled to it. Ans.Br. at 31 n. 74. The problem with a "general" treatise, however, is that it speaks in generalities and without reference to actual code provisions. Different jurisdictions use terms differently and impose differing requirements. In this case, prior to adoption of the Ordinance, an HI-property owner could make use of its

– and this is exactly why the protections of procedural due process exist, so that persons have an opportunity to be heard before their rights are impacted. The County may be perfectly entitled to change the UDC, but, before doing so, it must provide procedural due process to those affected so that they have the opportunity to appear and be heard.

And, because the County may change the UDC, possession of "vested rights" is not a prerequisite to a procedural (or substantive) due process claim. Under the doctrine of "vested rights," a government *cannot* change the rules applicable to a property owner for a particular use of its property where the property owner has acted in good faith reliance on the existing standards with respect to a particular project.[8] Procedural due process does not exist to protect "vested rights" because where a property owner has vested rights, a change in an applicable ordinance would

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property so long as the owner complied with the actual, specific regulations (setback, height, noise, etc.). Now, the Board of Adjustment may impose conditions and restrictions of its own and may deny the special use entirely if it finds (based, for example, on testimony from opponents) that the use is not "compatible" with the immediate area. *See* UDC §§40.31.430, 431. There is no entitlement under the UDC to a special use permit and the citation to *American Jurisprudence 2d* is misplaced.

[8] For example, in *In re: 244.5 Acres of Land*, 808 A.2d 753 (Del. 2002), a change to a particular land use regulation was held not to apply to a property owner who had already made substantial expenditures in good faith reliance on the existing regulations prior to the change.

not apply regardless of the procedure followed.[9] If Croda had "vested rights" in the continuing use of its property before the Ordinance was passed, free from the special use permit requirement, procedural due process would not matter – because the change wrought by the Ordinance would not apply to Croda.

Again, Croda has not brought a vested rights claim. Croda is not claiming that the County cannot make changes to the UDC because of "vested rights." Rather, Croda acknowledges that the County can make changes – but only after the County affords Croda (and all other affected property owners) procedural due process. As this Court has said, those affected "must be notified." *Tsipouras, supra.*

In its Opening Brief, Croda identified two Delaware cases where courts have observed that procedural due process protection applies in the land use setting and changes to applicable zoning provisions. *See Citizens Coalition, Inc. v. County Council of Sussex County*, 773 A.2d 1018, 1023 (Del.Ch. 2000); *Schweizer v. Board of Adjustment of City of Newark*, 980 A.2d 379, 385 (Del. 2009). In neither of these cases were "vested rights" alleged. The County fails to discuss these cases in its Answering Brief; and, these cases, standing alone, are enough to justify a reversal of the Chancery Court's decision in *Croda, Inc. v. New Castle County,* 2021 WL 5027005 *6 (Del.Ch.) ("*Croda II*").

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[9] And so, for example, having found vested rights, the *244.5 Acres* Court did not address the procedural due process allegation.

Croda, though, went further and also cited a number of decisions recognizing the use of property as protected by substantive due process. *See* Op.Br. at 30-31 *citing Buchanan v. Warley*, 245 U.S. 60 (1917) *Sisk v. Sussex County*, 2012 WL 1970879 (D.Del.); *DeBlasio v. Zoning Bd. Of Adjustment*, 53 F.3d 592 (3d Cir. 1995); *Acierno v. New Castle County*, 2000 WL 718346 (D.Del.). The County acknowledges that these cases identify a protected property right for substantive due process purposes, Ans.Br. at 32-34, but then claims that rights protected by substantive due process are not protected by procedural due process and vice versa. In this regard, the County is wrong.

B. Rights Protected By Substantive Due Process Are Also Protected By Procedural Due Process.

In *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 141 (3d Cir. 2000), cited by the County on page 32 of its Answering Brief, the Third Circuit observed that "not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." Put another way, if a right is protected by substantive due process, it is also protected by procedural due process *See, e.g., Singleton v. Cecil*, 176 F.3d 419, 428 (8th Cir. 1999) (if employee has right protected by substantive due process, that right is also protected by procedural due process).

Because Croda's right to the use and enjoyment of its property is protected by substantive due process in accordance with *Buchanan, Sisk, DeBlasio,* and *Acierno*,

Croda's right is also protected by procedural due process. The Chancery Court erred in concluding that a "vested right" was needed for any due process claim.

C. Procedural Due Process Does Apply To Some Legislative Acts – Particularly Those Involving Land Use.

The County also argues that because zoning is characterized as a legislative action, procedural due process does not apply because procedural due process does not apply to legislative acts. Ans.Br. at 37-39. But, this argument paints with too broad a brush. Although zoning can be considered legislative, courts have recognized that, in the zoning context, procedural due process protections do apply. In addition to *Citizens Coalition* and *Schweizer*, discussed above, Croda cited several federal decisions in its Opening Brief where courts found procedural due process violations for lack of notice to affected property owners regarding zoning actions.[10] As with the Delaware state court decisions, the County is silent with respect to these federal cases in its Answering Brief. The failure to properly title the Ordinance, so as to provide notice to affected property owners, violates due process even if the zoning process is considered legislative.

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[10] Op.Br. at 32 *citing Nasierowski Brothers Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 896-97 (6th Cir. 1991); *Harris v. County of Riverside*, 904 F.2d 497, (9th Cir. 1990); *Moreland Properties, LLC v. City of Thornton*, 559 F.Supp.2d 1133, 1158, 60-61 (D.Colo. 2008).

D. *Bohemia Mill Pond* is applicable and precedential; failure to provide notice violates procedural due process.

The County claims that *Bohemia Mill Pond v. New Castle County Planning Board,* 2001 WL 1221685 (Del.Super.), *aff'd*, 792 A.2d 198 (Del. 2002), is inapplicable because in that case New Castle County conceded the existence of a protected property right, while here it has not. Ans.Br. at 35. The County has made no effort, however, to explain why it made the concession in *Bohemia Mill Pond*, and not here, nor how the protected right in *Bohemia Mill Pond* differs from Croda's right here. In fact, as discussed above, and in Croda's Opening Brief, there are numerous cases which hold that the use of property is protected by procedural *and* substantive due process. That the County chose to make a concession in *Bohemia Mill Pond*, while here it has not, does not mean *Bohemia Mill Pond* is inapplicable

The County also suggests that *Bohemia Mill Pond* is distinguishable because the Court there found that individual notice was possible "because the affected property owners could be readily identified," while here, Croda is not arguing for individual notice to all affected property owners. Ans.Br. at 35. This is the proverbial distinction without a difference. If the County wants to send notice to all HI-zoned property owners, it easily can[11] – but the relevant comparison between this case and *Bohemia Mill Pond* is lack of notice. *Bohemia Mill Pond* found a

[11] One need only look at the County's zoning map to identify all the properties zoned "HI," a not too difficult task.

procedural due process violation because the County failed to provide notice to affected property owners. The same is true here, and the same result should apply.

E. Croda Is Not Arguing That The County's Failure To Follow Statutorily-Required Procedures Creates Its Due Process Rights.

Finally, the County observes that the mere failure to follow statutorily-required procedures does not, in and of itself, create a procedural due process claim. Ans.Br. at 35-36. This claim, though, misses the point. Procedural due process begins with notice. *Tsipouras*, *supra.* The fact that state law also requires notice does not mean notice is not required for due process. In *Jocham v. Tuscola County*, 239 F.Supp.2d 714 (E.D.Mich. 2006), the District Court made this point explaining:

> Citizens do have limited procedural due process rights with respect to legislative action. . . . the legislative process does provide some procedural protection, and *the enforcement of legislation "passed" in violation of state law can violate the procedural due process rights of the affected citizens*.

Id. at 726 (citations omitted); *see also Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991) ("Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with the procedures established in the state constitution and statutes"). Ordinarily, of course, courts dispose of challenges to legislation on state law grounds if possible, thus avoiding potential constitutional claims. *See, e.g. Spicer v. Hilton*, 618 F.2d 232, 239 (3d Cir. 1980); *see also New Castle County Council v. BC Development Assoc.*, 567 A.2d 1271, 1278 (Del. 1989).

III. THE DISMISSAL OF CRODA'S SUBSTANTIVE DUE PROCESS CLAIM SHOULD BE REVERSED FOR THE SAME REASON THAT THE DISMISSAL OF THE PROCEDURAL DUE PROCESS CLAIM SHOULD BE REVERSED – "VESTED RIGHTS" ARE NOT NECESSARY FOR A DUE PROCESS CLAIM.

In its decision regarding the due process claims, the Chancery Court dismissed both claims for the same reason – a lack of a "vested right." *Croda II,* 2021 WL 5027005 *6. However, as explained above, one does not need a "vested right" in order to bring a claim for due process, whether procedural or substantive. Indeed, the County admitted in its Answering Brief that several of the cases cited by Croda hold the use and enjoyment of property is protected by substantive due process. Ans.Br. at 32-34, *discussing Buchanan, Sisk, DeBlasio,* and *Acierno*. These cases make clear that the Chancery Court erred in *Croda II*, as even the County concedes use and enjoyment of property is protected by substantive due process.

The County nevertheless asks this Court to uphold the dismissal of the substantive due process claim because, the County says, Croda only raised the substantive due process dismissal in a footnote, and therefore waived the argument. Ans.Br. at 42. But the County misses the point. The "vested rights" error was the basis for the dismissal of both due process counts. In its Opening Brief, Croda observed that Chancery Court's error applied to both due process claims, explaining:

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

Op.Br. at 3-4. Later, Croda noted that "[t]he Chancery Court's erroneous holding regarding 'vested rights' resulted in its granting summary judgment on both counts to the County." Ans.Br. at 29 n. 11.[12] Put another way, if the Chancery Court improperly dismissed the procedural due process claim for lack of a "vested right," it made the same error with respect to the substantive due process claim. Croda was making one argument – "vested rights" are not necessary to bring a due process claim – and the argument applies to both the procedural and substantive due process claims. Nothing was waived. Nothing was lost. Either the Chancery Court erred in concluding that "vested rights" are required to bring due process claims, or it did not.

The requirement that arguments not be made in footnotes exists: "[to] help to ensure fairness by giving the other party a fair opportunity to respond to a fully formed argument [and] prevent litigants from circumventing page length restrictions." *Lum v. State*, 101 A.3d 970, 927 (Del. 2014). Here, though, neither

[12] In addition, Croda also wrote that "[t]he Chancery Court . . . further erred in holding that Croda was not entitled to due process protection because it had not established a vested property right." Op.Br. at 4. And, in the heading to the argument concerning due process, Croda wrote: "No Cases Have Ever Held That A 'Vested' Right Is Required For A Due Process Claim." Op.Br. at 23. Croda was not limiting its argument concerning vested rights to procedural due process alone.

concern exists. There was no issue with page length (or word count), nor is there the absence of a "fully formed argument." Croda developed its argument regarding "vested rights" at length in its Opening Brief. That Croda stated the argument applies to both due process claims in a footnote, rather than the text, is of no moment. The County suffers no prejudice from the observation being made in a footnote as compared to the main text, and, indeed, the County has responded at length to the vested rights argument in its Answering Brief.

In sum, the Chancery Court erred when dismissing both of Croda's due process claims for lack of a "vested right." Establishment of a vested right is not a prerequisite to a substantive or procedural due process claim.

CONCLUSION

New Castle County passed an Ordinance "regarding landfills." At public hearings, no property owner, other than the owner of the only landfill in the County, appeared at any public hearing on the Ordinance. Even the County itself never described the Ordinance as regulating anything other than landfills. Nevertheless, the County tells this Court that property owners should have been on notice that the Ordinance could (and did) do far more.

In the absence of a meaningful title, Croda, and all of its fellow HI-zoned property owners, were lulled into complacency. Section 8126(a) "is not intended to deny citizens a fair opportunity to challenge an adopted ordinance." And yet, that is what the County's actions in mis-titling the Ordinance would have this Court do. The Court of Chancery's decision should be reversed, and the Ordinance declared invalid for violation of the titling requirements. The County can easily start the process anew – but with the public participation of all of those affected, rather than just the County's sole landfill owner.

The Chancery Court's decision regarding procedural and substantive due process must also be reversed. "Vested rights" are not required for a property owner to bring a due process claim, whether procedural or substantive. The Court of Chancery's decision on these claims, if not reversed, will lead to great injustice (and confusion) in future cases.

Respectfully submitted,

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