

IN AND FOR NEW CASTLE COUNTY

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NOBLE, Vice Chancellor

I. INTRODUCTION

A developer, in 1987, purchased approximately 100 acres of undeveloped property in New Castle County, Delaware from landowners who, thirteen years earlier, had obtained exploratory sketch plan approval for the development of more than 600 residential units. The land remained fallow for many years afterwards. In an attempt to begin again the process of obtaining final approval for the subdivision project, the developer made several unsuccessful attempts to obtain approvals for the two remaining development stages—preliminary plan approval and final record plan approval. The developer was eventually informed by New Castle County (the “County”) that the exploratory sketch plan approval given to the developer’s predecessors in interest was still in effect and that, if the developer submitted a preliminary plan in compliance with environmental and traffic standards existing as of the exploratory sketch plan’s approval, then final record plan approval could be granted. The developer alleges that it relied on the County’s assurances and that, while on the cusp of final record plan approval, various County and State of Delaware (the “State”) officials conspired to push legislation through the General Assembly that would have the effect of preventing final approval of the subdivision project. Instead of having to comply with environmental and traffic standards in existence at the time its predecessors initiated the subdivision project, the developer must now comply with current

standards. The developer seeks injunctive and declaratory relief against both the County and the State to prevent the enforcement and application of the state law to its subdivision project, bringing claims based on a variety of theories—including vested rights, equitable estoppel, due process, equal protection, and unlawful taking. Before the Court are the County and State’s motions to dismiss.

II. BACKGROUND¹

On May 17, 2001, the Governor signed into law Senate Bill No. 143 (“SB 143”).² The law amended 9 *Del. C.* § 2659(c), which, as amended, provides, in part:

All subdivision or land development applications heretofore or hereafter filed or submitted to New Castle County that do not receive final approval from New Castle County government within 5 years from the date of application shall be subject to the environmental standards contained in Chapter 40, Articles 5 and 10, of the New Castle County Code, as may be amended, and the traffic impact standards contained in Chapter 40, Articles 5 and 11, of the New Castle County Code, as may be amended.³

* * *

Plaintiff Salem Church (Delaware) Associates (“Salem Church” or “Plaintiff”) is a Delaware general partnership owned by Frank E. Acierno

¹ The Background is drawn from the Amended Complaint and the documents duly incorporated in, or referenced by, the Amended Complaint.

² 73 Del. Laws, c. 33 (2001).

³ 9 *Del. C.* § 2659(c).

(“Acierno”).⁴ On July 21, 1987, Salem Church acquired approximately 100 acres (the “Parcel”) from owners who, in 1974 and following the County’s decision to rezone the lands to the category of Diversified Planned Unit Development, had obtained approval of an Exploratory Sketch Plan for a proposed subdivision development of 688 residential units and 25,000 square feet of commercial space.⁵ The Parcel became known as “French Park.”⁶ Salem Church’s predecessors in interest never obtained any further approvals for French Park’s development.⁷

Following its purchase of the Parcel, Salem Church made several unsuccessful attempts to obtain additional development approvals.⁸ According to the Amended Complaint (the “Complaint”), one of these attempts was made on July 1, 1999, when Salem Church formally requested recordation of the Record Major Subdivision Plan that it had submitted on September 21, 1988, after what it thought was approval of its Preliminary Plan on December 2, 1987.⁹ In response, the County informed Salem Church in a July 14, 1999 opinion letter (the “County Opinion Letter”) that it had never obtained Preliminary Plan approval and had

⁴ Plaintiff’s Amended Complaint (“Compl.”) ¶¶ 1, 14.

⁵ *Id.* ¶¶ 4–5.

⁶ *Id.* ¶ 5.

⁷ *Id.*

⁸ *Id.* ¶ 7.

⁹ *Id.* ¶ 8. To be precise, the June 1, 1999 letter from Plaintiff’s counsel to the County’s Department of Land Use never stated that Plaintiff’s Exploratory Sketch Plan was approved; instead, Plaintiff’s counsel noted that they had been “found acceptable.” Compl. Ex. 4.

never properly submitted a Record Major Subdivision Plan.¹⁰ Significantly, the County also informed Salem Church that the original Exploratory Sketch Plan submitted in 1974 was still active and that, after submission of a revised Preliminary Plan conforming to the rules and regulations existing as of the Exploratory Sketch Plan's submission in 1974, Final Record Plan approval for French Park could then be granted.¹¹ Salem Church was then advised that the County's Department of Land Use's (the "Department") decision was final and could be appealed to the County's Planning Board within twenty days.¹²

Later in 1999, Salem Church received additional direction by the County to proceed with submission of its Preliminary Plan, and, on or around June 14, 2000, an application and Preliminary Plan were submitted for the County's approval.¹³ The submission was based on the original Exploratory Sketch Plan's proposed number of residential units, although it did not call for any commercial development.¹⁴ After Salem Church's submission, a revised preliminary plan review comment letter was sent to Salem Church on March 28, 2001. That letter,

¹⁰ Compl. Ex. 5.

¹¹ Compl. ¶¶ 9–10.

¹² *Id.* ¶ 9; Ex. 5.

¹³ *Id.* ¶¶ 10–11. The Complaint incorporated several exhibits by reference. Two of them were the Department's "SLD-1 Form (Application for Plan Review)" and the Preliminary Plan for French Park. Exs. 7–8. The Plaintiff contends that the enacted legislation at issue emphasizes only "applications," not "plans." See *infra* Part IV.A.1.

¹⁴ Compl. ¶ 11.

according to Salem Church, granted Preliminary Plan approval for the French Park project and authorized the filing of a final record plan if certain technical requirements were satisfied.¹⁵

By May 15, 2001, Salem Church’s engineer had filed “virtually all of the remaining documents necessary to receive final record plan approval with the County.”¹⁶ Two days later, the Governor signed SB 143 into law.¹⁷ On May 30, 2001, in a letter to Salem Church’s engineer, County planner Charles D. McCombs, II, (the “McCombs Letter”) advised Salem Church that, in light of SB 143’s enactment, the Preliminary Plan approval for French Park had been rescinded.¹⁸ If Salem Church wished to obtain final record plan approval for French Park, it would have to comply with then-current environmental and traffic impact standards set forth in Articles 10 and 11 of the County’s Uniform Development Code—standards materially different from those prescribed in 1974

¹⁵ *Id.* ¶ 13. The Complaint simply states that the County “approved the Preliminary Plan” and “gave Salem Church the go ahead to file a final record plan for French Park.” *Id.* It does not relate that certain items were outstanding and required for French Park’s final record plan submission. This fact, although alluded later on by Salem Church in its Complaint, *see id.* ¶ 17, was reflected by the County engineer’s comment letter of March 28, 2001. Ex. 10. Although the Court may typically only consider facts alleged in the complaint on a motion to dismiss, it may also be proper to consider documents referred to in the complaint. *See In re GM (Hughes) S’holder Litig.*, 897 A.2d 162, 169 (Del. 2006). Here, the Court may consider the comment letter because it was both referred to in the Complaint and explicitly incorporated by reference. Compl. ¶ 13.

¹⁶ Compl. ¶ 17.

¹⁷ *Id.* ¶ 19.

¹⁸ *Id.* ¶ 20; Ex. 10.

and on which the original Exploratory Sketch Plan had been based.¹⁹ The McCombs Letter, unlike the County’s Opinion Letter, did not inform Salem Church that the Department’s decision was final and could be appealed to the Planning Board.

Salem Church alleges that, by the time SB 143 was enacted, it had already acquired a vested right to the specific French Park plan.²⁰ Central to Salem Church’s claims is its allegation that County and State officials acted “in bad faith, with an intent and motive to deny Salem Church its property rights and to carry out a political and personal vendetta against Acierno.”²¹ Specifically, the Complaint alleges that “[t]he County enlisted the assistance of State officials because the County knew it could not legally change the rules for French Park since the County Code and the County Opinion Letter had already ‘grandfathered’ French Park.”²² Salem Church states in its Complaint that SB 143 was “designed specifically to decimate the Preliminary Plan”²³ and was the product of a “conspiracy” among a

¹⁹ *Id.*

²⁰ *Id.* ¶ 19.

²¹ *Id.* ¶ 30; *see also id.* ¶ 15 (“ . . . State legislation was prepared and introduced in the Delaware General Assembly in order to attempt to take away the ability of Salem Church to receive final record approval for French Park. At all times, the County and State officials intended to deprive Salem Church of its vested rights to develop [the Parcel] in accordance with the 1974 rezoning and Exploratory Plan approvals, as well as the Preliminary Plan approval in 2001.”).

²² *Id.* ¶ 14.

²³ *Id.* ¶ 20.

small number of political allies, some of whom had an “extreme personal dislike of Acierno.”²⁴

As Salem Church saw it, “SB 143 did not have any effect on the previously approved Preliminary Plan.”²⁵ Therefore, on January 20, 2003, Salem Church’s counsel requested that the County complete its review of the final record plan for French Park.²⁶ On February 24, 2003, the County responded that it was the final decision of the Department that such a review would not be completed and that, should Salem Church wish to continue with the French Park plan, it would have to submit a revised exploratory sketch plan in conformity with current environmental and traffic impact standards.²⁷ On March 12, 2003, Salem Church appealed to the Planning Board to reverse the Department’s final decision.²⁸ On March 20, 2003, the County informed Salem Church that the Department’s decision, set forth in the McCombs Letter on May 30, 2001, was final and that its appeal was time-barred for not having been filed within twenty days of the McCombs Letter.²⁹

Relying upon representations the County made in the County Opinion Letter (that final record plan approval for French Park would be given if Salem Church

²⁴ *Id.* ¶ 16.

²⁵ *Id.* ¶ 28.

²⁶ *Id.* ¶ 24.

²⁷ *Id.* ¶ 25; Ex. 20.

²⁸ *Id.* ¶ 26; Ex. 21.

²⁹ *Id.* ¶ 27; Ex. 22.

submitted a revised Preliminary Plan conforming to County Code provisions that existed in 1974), Salem Church incurred substantial engineering, legal, and governmental application fees. At bottom, Salem Church alleges that, but for the enactment of SB 143, final record plan approval for French Park was a virtual certainty.³⁰

III. CONTENTIONS

Confronted with the choice of abandoning its plans for French Park or bringing them into compliance with existing environmental and traffic standards, Salem Church has petitioned this Court to estop equitably and permanently enjoin the County and the State (collectively, the “Defendants”) from enforcing SB 143 against the French Park plan. Salem Church also seeks a declaratory judgment to the same effect. Salem Church brings claims based on the vested rights and equitable estoppel doctrines, and has also raised several discrete constitutional claims based on procedural and substantive due process, equal protection, and unlawful governmental takings. Salem Church also seeks a declaratory judgment to the effect that SB 143 did not affect its right to move forward with the approval process for the Exploratory Sketch Plan from 1974.

The Defendants have moved to dismiss this action on two grounds: (1) the claims set forth in the Complaint are not ripe; and (2) the Complaint fails to state

³⁰ *Id.* ¶ 30.

claims for which relief may be granted, justifying its dismissal as a matter of law. With respect to Salem Church's constitutional claims and its request that the Court construe SB 143 in its favor, the Defendants argue that they are not ripe because Salem Church has failed to exhaust available administrative remedies. As to all claims, the Defendants also argue that Salem Church's allegations, as set forth in the Complaint, cannot be read to sustain such causes of action.

IV. ANALYSIS

As noted, the Defendants have moved to dismiss the Complaint under Court of Chancery Rule 12(b)(1) on ripeness and exhaustion grounds and under Court of Chancery Rule 12(b)(6), for Salem Church's failure to state claims upon which relief can be granted.

A. *Motion to Dismiss Under Court of Chancery Rule 12(b)(1)*

Both the County and the State have moved, pursuant to Court of Chancery Rule 12(b)(1), that the Court dismiss Salem Church's claims as barred by the ripeness doctrine.³¹ "Ripeness, the simple question of whether a suit has been brought at the correct time, goes to the very heart of whether a court has subject

³¹ *E. Shore Envtl., Inc. v. Kent County Dep't of Planning*, 2002 WL 244690, at *3 (Del. Ch. Feb. 1, 2002). It is the Plaintiff's burden to demonstrate that subject matter jurisdiction exists. See, e.g., *Christiana Town Ctr., LLC v. New Castle County*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003) (citations omitted); *Buckson v. Town of Camden*, 2001 WL 1671443, at *3 (Del. Ch. Dec. 4, 2001) (citing DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2-3[a], at 2-17 (2000)).

matter jurisdiction.”³² A chief purpose of the ripeness doctrine is the conservation of judicial resources.³³ Closely related to the ripeness doctrine, the doctrine of exhaustion often serves as a precondition for a finding of ripeness.³⁴ That doctrine provides that “where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will either review any action by the agency or provide an independent remedy.”³⁵ The Defendants contend that Salem Church could have, and, thus, should have, appealed to the County Planning Board the Department’s determination that SB 143 precludes further processing of its original French Park application.

The exhaustion of administrative remedies is not a jurisdictional or an absolute requirement; it is a judicially created doctrine, which courts exercise discretionally.³⁶ *Levinson v. Delaware Compensation Rating Bureau, Inc.*³⁷ teaches that Delaware law strongly favors exhaustion of administrative remedies before seeking judicial intervention.³⁸ The oft-cited policy rationale for the

³² *Bebchuck v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006).

³³ *Tenneco Automotive Inc. v. El Paso Corp.*, 2001 WL 1641744, at *6 (Del. Ch. Nov. 29, 2001) (citing *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987)).

³⁴ See *Eastern Shore*, 2002 WL 244690, at *5, *7.

³⁵ *Id.* at *5 (citation omitted).

³⁶ Thus, even though the Defendants have moved under Court of Chancery Rule 12(b)(1), the question is not whether the Court has subject matter jurisdiction, which it does, but whether, as the result of the exercise of the Court’s discretion, it should exercise that jurisdiction under the circumstances presented here.

³⁷ 616 A.2d 1182 (Del. 1992).

³⁸ *Id.* at 1189–90.

doctrine's application "is one of maintaining the proper relationship between the courts and administrative agencies."³⁹ In other words, the doctrine seeks to relieve courts from having to interfere with an administrative body's "sifting process" when issues have yet to run their course and when an administrative body might resolve the dispute without unnecessary or premature judicial action.⁴⁰

1. Exhaustion with Respect to Salem Church's Vested Rights and Due Process Claims

For the exhaustion doctrine to be applicable in this case, Salem Church must first have had an available administrative remedy before it challenged the County's interpretation and application of SB 143 in this forum. Section 40.31.510 of the County's Unified Development Code provides that an applicant may appeal within twenty days an adverse decision pertaining to its application to the agency or board conferred with jurisdiction to hear the appeal.⁴¹ Table 40.30.110 expressly

³⁹ *Id.* at 1187.

⁴⁰ *See id.*; *see also Eastern Shore*, 2002 WL 244690, at *5 (noting that "[t]he purpose of the exhaustion-of-remedies requirement is to 'prevent judicial interference in the administrative process and to allow the agencies an opportunity to develop a complete factual record, apply their expertise and discretion, and possibly resolve the conflict without judicial intervention'") (citing 5 BASIL J. MEZINES ET AL., ADMINISTRATIVE LAW § 49.01 (Matthew Bender, 2001)).

⁴¹ Specifically, County Code § 40.31.510 states that "[a]n applicant pursuing approval of a land use application who is aggrieved by a finding, decision, or interpretation of a decision maker made in response to review of such application may appeal such action to the jurisdictionally approved agency pursuant to Table 40.30.110." The applicant shall cause the appeal to be filed within twenty days of the written decision, and "no appeal to a court of law or equity may be taken until all remedies made available by [Chapter 40 of the New Castle County Code] have been exhausted."

provides the County Planning Board with jurisdiction to hear appeals with respect to major subdivision review decisions.⁴²

On May 30, 2001, Salem Church was informed, by way of the McCombs Letter, that, because of SB 143's enactment, French Park's Preliminary Plan approval had been rescinded and that the French Park application had become subject to the then-current environmental and traffic requirements set forth in Articles 10 and 11 in the Unified Development Code. Salem Church did not timely appeal McComb's determination to the Planning Board. The County cites this failure as precluding Salem Church from bringing forth its claims here and argues that courts uniformly recognize that claims such as those asserted by Salem Church cannot be ripe until the agency makes a final decision as to how it will apply the statute or regulations at issue to the land in question.⁴³ Salem Church, however, has cited several grounds why an appeal to the Planning Board was unnecessary, notably that: the Planning Board lacked authority under the Delaware Code to hear administrative appeals concerning subdivision plans; no appeal was required under County Code § 40.31.510; and, under the *Eastern Shore* decision,

⁴² See NCC Code Table 40.30.110. The French Park project was a major subdivision.

⁴³ See *Eastern Shore*, 2002 WL 244690, at *7 ("For a constitutional challenge to a land-use decision to be ripe, the local governmental authorities must arrive at a final, definitive position regarding how they will apply the regulations at issue to the particular land in question.") (citations and alterations omitted); see also *Acierno v. Mitchell*, 6 F.3d 970, 974 (3d Cir. 1993) (noting that when an applicant fails to take available appeals, its constitutional claims will be found to be unripe).

an appeal to the Planning Board was unnecessary because it is vested only with jurisdiction to consider appeals of decisions based on County Code provisions, not constitutional claims. As an initial matter, the Planning Board did have the authority to consider an appeal of the Department's decision and that—absent other considerations—is the proper starting point for a party wishing to challenge a decision by the County during the major subdivision review process.⁴⁴

⁴⁴ First, despite Salem Church's assertion that the County Code does not authorize the creation of an administrative appeal mechanism for review of decisions on subdivision plans, the General Assembly, pursuant to 9 *Del. C.* § 1101, has given the County broad statutory authority to enact policies and procedures that the General Assembly could have authorized by specific enumeration. That is, under the State's "home rule" statutes, the County is given great flexibility to discharge its functions, except as otherwise limited by the State's Constitution or its statutes. See *Schadt v. Latchford*, 843 A.2d 689, 691 (Del. 2004); *Green v. Sussex County*, 668 A.2d 770, 774 (Del. Super. 1995), *aff'd*, 667 A.2d 1319 (Del. Aug. 2, 1995) (TABLE) ("[W]ith the increasingly complex and fluid problems arising today which must be resolved by local government, the General Assembly has enacted home rule statutes which in many cases override pre-existing, specific statutory grants of power, the purpose of which is to give local governments the flexibility required to discharge their functions."). Although Salem Church correctly notes that 9 *Del. C.* § 1304 does not expressly delegate to the Planning Board an appeal function, there is nothing in that statute, other statutes, or the Constitution that prohibits the Planning Board from hearing administrative appeals either. Thus, the County properly granted the Planning Board jurisdiction to hear appeals of subdivision plan applications, including staff decisions.

Second, Salem Church asserts that an administrative appeal of the County's decision in the McCombs Letter was unnecessary because County Code § 40.31.510 states that an applicant "may," not "shall," appeal to the Planning Board. The County expected that appellate administrative relief would be sought in advance of judicial involvement: Section 40.31.510 makes plain that "no appeal to a court of law or equity may be taken until all remedies made available by [Chapter 40] have been exhausted." The exhaustion doctrine, however, is premised upon available administrative review; a disgruntled applicant cannot so facily avoid an administrative appeal because the administrative regulation uses "may" instead of shall as a right to an appeal is conferred.

Finally, Salem Church cites the Court's decision in *Eastern Shore* to argue that an appeal to the Planning Board was unnecessary because it was vested only with jurisdiction to consider appeals of decisions based on County Code provisions, not constitutional claims. See *Eastern Shore*, 2002 WL 244690, at *5–*6 (finding that the rationale for the exhaustion doctrine does not apply where the issues do not involve administrative expertise). In that decision, however, the

The question in this case centers not on whether the Planning Board could have found an action by the State, enactment of SB 143, unconstitutional—it could not have—but on whether the Planning Board could have arrived at a determination that SB 143 did not apply to French Park. Or, as the County puts it, if Salem Church “took an appeal to the Planning Board regarding the Department’s subdivision interpretation, the Planning Board might have agreed with [Salem Church’s] arguments and might have reversed the decision.”⁴⁵

Because the exhaustion doctrine is one of discretion, the strong presumption favoring exhaustion may be overcome by a showing that the interest of justice so requires.⁴⁶ One circumstance where courts may refrain from requiring exhaustion is if administrative review would be futile.⁴⁷ The burden of showing that an administrative review would be futile is, necessarily, a high one,⁴⁸ and Delaware

Court found that exhaustion was unnecessary only where the plaintiff was not challenging the substantive correctness of an administrative body’s decision. *Id.* at *6 (citing *Kejand, Inc. v. Town of Dewey Beach*, 1996 WL 422333, at *3 (Del. Ch. July 2, 1996)). The plaintiff in *Eastern Shore* was not required to exhaust administrative remedies through the Board of Adjustment because the plaintiff never challenged the “substantive correctness” of the Department of Planning’s decision, but rather claimed detrimental reliance on earlier advice by a county official that its intended use had specifically been “grandfathered.” *Id.* at *2, *6. Unlike the plaintiff in *Eastern Shore*, however, Salem Church clearly challenges the substantive correctness of the County’s interpretation of SB 143. See Compl. ¶ 28 (stating that “SB 143 did not have any effect on the previously approved Preliminary Plan” and did not affect the County’s obligation to approve and record it”).

⁴⁵ Def. County’s Reply Br. in Supp. of Its Mot. to Dismiss Pl.’s Compl. (“County’s Reply Br.”) at 36.

⁴⁶ See *Levinson*, 616 A.2d at 1190 (citation and quotation omitted).

⁴⁷ *Id.*; see, e.g., *Toll Bros. v. Wicks*, 2006 WL 1829875, at *8 (Del. Ch. June 21, 2006).

⁴⁸ See *Kejand, Inc. v. Town of Dewey Beach*, 1996 WL 422333, at *3 (Del. Ch. July 2, 1996) (stating that there must be a “clear showing of futility”).

courts have often rejected futility arguments.⁴⁹ For the reasons that follow, the Court concludes that the unique facts permit a finding that an appeal to the Planning Board would have been objectively futile. Thus, Salem Church's claims, other than its takings claim, cannot be dismissed under the doctrines of ripeness or exhaustion of administrative remedies.

Determining futility, in this instance, starts with the language of the statute. The parties accept the well-settled principle that, in construing a statute, the plain meaning of the words chosen by the General Assembly controls.⁵⁰ The parties, however, do not agree on the plain meaning of SB 143. Salem Church argues that SB 143's emphasis is on "applications," not "plans," and that this means the French Park plan remained unaffected because Salem Church filed its "application" on June 14, 2000, not in 1974. The application to which Salem Church refers is the "SLD-1 Form (Application for Plan Review)," that Salem Church filed as part of its revised preliminary plan review.⁵¹ The effect of Salem Church's interpretation is that it would not have had to comply with current environmental and traffic standards so long as it received final record plan approval by June 14, 2005, five years after applying for Preliminary Plan approval.

⁴⁹ See, e.g., *Levinson*, 616 A.2d at 1190–91; *Hundley v. O'Donnell*, 1998 WL 842293, at *2, n.5 (Del. Ch. Dec. 1, 1998); *Kejand*, 1996 WL 422333, at *3.

⁵⁰ See *Cantina v. Fontana*, 884 A.2d 468, 471 (Del. 2005).

⁵¹ Compl. ¶ 11; Ex. 7.

The County counters by pointing out that an application has three distinct parts—exploratory, preliminary, and final record plan—and that “[u]nless all three stages are completed, there is no ‘subdivision’ of land, the application is not completed, and there is no final approval.”⁵²

The exploratory plan for French Park was submitted by Salem Church’s predecessors in interest in 1974.⁵³ Salem Church was informed in the County’s Opinion Letter in 1999 that the 1974 exploratory plan was still in effect and that what was next required was a preliminary plan, which Salem Church filed on June 14, 2000 in accordance with standards existing at the time the exploratory plan was approved in 1974. Based on that sequence of facts as pleaded, the SLD-1 Form that Salem Church filed in 2000 (in conjunction with its revised preliminary plan) was one of three component parts to a subdivision application. Salem Church’s reading of SB 143 to allow that the five-year time frame to start anew whenever approval is sought for any of the separate steps in the subdivision or land development process would contravene the language and purpose of SB 143, as expressed by the General Assembly.

SB 143 is not ambiguous—it provides that all unapproved subdivision applications “heretofore or hereafter” that have not received final approval from

⁵² County’s Reply Br. at 36.

⁵³ Compl. ¶ 5.

the County within five years from the date of application must comply with current County environmental and traffic impact standards. It is undisputed that, when SB 143 was enacted on May 17, 2001, Salem Church had yet to receive final record plan approval and the application for French Park had been filed decades earlier.⁵⁴ With these facts, the Planning Board could not have read SB 143 as not applicable to the French Park plan; thus, an appeal by Salem Church seeking an alternative interpretation would have been futile.

Salem Church also claims that 9 *Del. C.* § 2659(c), as amended by SB 143, has no effect over the French Park plan because of § 2659(b),⁵⁵ which provides that “[n]othing in this subchapter shall serve to invalidate any comprehensive plan, land development regulation, land use, development, development order or development permit which presently exists or which hereafter validly comes into existence prior to the date when full compliance with this subchapter is required.”⁵⁶

The shortcoming of Salem Church’s argument is that it has not held (and has never held) any of the approvals itemized in Section 2659(b). For example, the “development permit” to which Section 2659(b) refers is defined to include “any building permit, zoning permit, subdivision approval, rezoning, certificate of occupancy, special exception, variance or any other official action of local

⁵⁴ Compl. ¶ 17, Ex. 13; Pl.’s Ans. Br. in Opp’n to County’s Second Mot. to Dismiss at 36–37.

⁵⁵ Compl. ¶ 42.

⁵⁶ 9 *Del. C.* § 2659(c). See Compl. ¶ 42.

government having the effect of permitting the development of land.”⁵⁷ Salem Church never received “subdivision approval” and was never the beneficiary of “any other official action of local government having the *effect* of permitting [the Parcel’s] development” In short, the focus of Section 2659(b) is to avoid invalidating specific final approvals, including final subdivision approvals. With respect to its efforts to obtain approval to develop French Park, Salem Church had achieved nothing more than satisfying certain interim, discrete stage requirements. In short, 9 *Del. C.* § 2659(b) affords no protection to Salem Church because Salem Church had nothing to protect within its scope.

Moreover, the legislative history reveals that SB 143 was intended to apply to subdivision applications for projects, such as French Park, that did not obtain final record plan approval within five years of application. On May 3, 2001, one of the sponsors of the legislation stated on the Senate floor:

Senate Bill 143 applies only to New Castle County and it basically allows for a sunset provision on land use that the applications have not been completed within five years. It allows for environmental and traffic consideration to take place when the plans have not been approved within that time frame. There are approximately four areas currently in New Castle County that this would apply to. It would also apply forward in setting a five-year limit on any new plans that would apply. One of these has been publicized very recently in the paper, and you know, unfortunately, if you have some plans that are filed 30 years ago and never acted on and then 30 years later, you come down the road, the environmental

⁵⁷ 9 *Del. C.* § 2652(8).

impact on our land and our citizens has changed considerably, and so has the traffic in the area.⁵⁸

On May 10, 2001, another sponsor of the legislation, stated on the House floor that:

. . . in a nutshell, what this legislation would do would provide the subdivision or land development applications that do not receive final approval within five years of the date of application—they will be subject to the new constraints under the Unified Development Code adopted several years ago in New Castle County.⁵⁹

As he further explained:

I am faced, along with [other legislators serving districts in the area of French Park] with an impending situation in the Route 40 corridor area where a subdivision plan that was filed in 1974 and has laid fallow for 30 years is about to proceed and result in 688 apartments and townhouses being constructed in an area that is . . . environmentally sensitive, in an area that where infrastructure cannot support that type of growth, in an area where dynamics have completely changed in that 30 years.⁶⁰

Finally, the General Manager of the County’s Department of Land Use stated on the House floor that “[SB 143] only applies to applications, not to recorded plans. Once that plan is recorded, it goes on.”⁶¹ The legislative history could not be clearer, given the statements made when SB 143 was before the General Assembly, that SB 143 was intended to apply to the French Park plan which had

⁵⁸ See Unofficial Senate Debate Tr., Pl.’s J.A. to Briefs in Supp. of Its Mot. to Compel and in Opp’n to the State’s Mot. to Dismiss (“Pl.’s J.A.”) Ex. 12A at 2–3.

⁵⁹ See Unofficial House Debate Tr., Pl.’s J.A. Ex. 12B at 3.

⁶⁰ *Id.* at 4. French Park’s Exploratory Sketch Plan showed 688 residential units. French Park is in the “Route 40 corridor.”

⁶¹ *Id.* at 7.

not yet been fully approved. In sum, the County's Planning Board simply could not have arrived at a different interpretation as to how the Parcel would be affected; any appeal by Salem Church would have been a futile one.⁶²

⁶² Although there may be some doubt as to whether the doctrine of exhaustion of administrative remedies may be invoked to preclude judicial review of a vested rights claim, *see, e.g., Nathan v. Martin*, 317 A.2d 110, 111 n.1 (Del. Super. 1974) (noting that the Court has not been called upon to determine whether exhaustion of administrative remedies is not a prerequisite to a vested rights claim), there is no compelling reason why a vested rights claim should be treated differently from other similar claims. *See, e.g., Hanson Aggregates Southeast, Inc. v. City of Raleigh*, 2004 WL 1725745, at *3–*4 (N.C. Ct. App. Aug. 3, 2004); *Southwest Remediation, Inc. v. City of Tucson*, 36 P.3d 1208, 1214 (Ariz. Ct. App. 2001). The Planning Board could not have reviewed Salem Church's vested rights claim as such. At most, it could have concluded that SB 143 did not apply to French Park, thereby obviating all of Salem Church's problems which it alleges resulted from enactment of SB 143. Under different circumstances, the Planning Board might have concluded that the French Park plans could have gone forward as a result of statutory or regulatory interpretation or by resolving certain factual disputes in a manner favorable to the landowner; under those different circumstances, judicial deference to the administrative process might have been appropriate. Indeed, one can envision circumstances where it may make a difference if the controlling legislative act is one of the State or one of the County because the Planning Board, one would assume, has greater latitude in interpreting and applying the County Code. *See, e.g., State Farm Auto. Ins. Co. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995) ("Although the interpretation of a regulation is ultimately a question of law for a court to decide, substantial weight and deference is accorded to the construction of a regulation enacted by an agency which is also charged with its enforcement."); *Thomson v. Dep't of Transp.*, 1988 WL 61554, at *2 (Del. May 19, 1988) ("Judicial deference is usually given to an administrative agency's construction of its own rules in recognition of its expertise in a given field."). Because the source of Salem Church's frustration is state legislation, a county agency, within our governmental hierarchy, *see, e.g., 4th Generation Ltd. v. Bd. of Adjustment of the City of Rehoboth Beach*, 1987 WL 14867 (Del. Super. July 16, 1987) (noting "the well-settled rule that a municipality cannot act in conflict with state laws"), has no apparent authority to avoid the obvious consequences of a state statute and, thus, any claim that, in this instance, the Planning Board could have fairly resolved the dispute is illusory.

The State also contends that the claims against it should be dismissed because of Salem Church's failure to exhaust County administrative remedies. With the conclusion that exhaustion of County administrative remedies for County purposes was not required, it follows that the State cannot successfully invoke the exhaustion doctrine either. In short, no relief for constitutional violations by the State can be provided by any County agency, in part because the Planning Board, for example, lacks the expertise, the experience, and the jurisdiction to address such questions. As Salem Church argues, "but for the actions of the State in approving SB 143, the French Park plan would have been finally approved a short time [after SB 143's enactment]." Pl.'s Ans. Br. in Opp'n to Def. State of Delaware's Mot. to Dismiss at 13. That allegation forms

2. Exhaustion with Respect to Salem Church's Takings Claim

Salem Church also brings a takings claim.⁶³ Section 40.31.600 of the County's Uniform Development Code expressly requires that "[a] landowner who has been denied all or substantially all economically viable use of property through the application of [County law] may apply for relief *after* exhausting all other available avenues of appeal to a County body."⁶⁴ Salem Church has not alleged that it brought a beneficial use appeal, as provided for by § 40.31.600. Indeed, it argues that it was not required to seek such a determination before bringing its claim. The Court concludes otherwise. As noted by the United States Supreme Court:

a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.⁶⁵

the basis for the constitutional claims brought by Salem Church against the State, claims that the State may not now avoid simply by invoking ripeness notions.

⁶³ For present purposes, a "takings claim" challenges a regulatory scheme that deprives a landowner of all (or substantially all) beneficial use of its land. It should be differentiated from a vested rights claim, *see infra*, which seeks relief from governmental action that deprives the landowner of specific rights, otherwise authorized by regulatory acts, with respect to its property.

⁶⁴ NCC Code § 40.31.600 (emphasis added).

⁶⁵ *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339–40 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001)). *See also Murray v. State*, 124 P.3d 1261, 1269 (Or. 2005); *Molo Oil Co. v. City of Dubuque*, 692 N.W.2d 686, 693–94 (Iowa 2005).

The County, thus, could and did require a landowner, such as Salem Church, to seek a beneficial use review before asserting a takings claim. Accordingly, exhaustion of the remedy afforded by § 40.31.600 of the Unified Development Code was a necessary precursor to the filing of a takings claim and Salem Church's takings claim against the County, therefore, must be dismissed.⁶⁶

B. *Motion to Dismiss Under Court of Chancery Rule 12(b)(6)*

A motion to dismiss under Court of Chancery Rule 12(b)(6), requires the Court to accept the well-pleaded facts alleged in the complaint and to view those facts, and all reasonable inferences that may be drawn from them, in the light most favorable to the plaintiff.⁶⁷ The Court need not, however, accept as true conclusory allegations that are unsupported by facts contained in the complaint. Also, the Court may consider documents integral to the complaint and incorporated by reference therein.⁶⁸ Although the Court “is not required to accept every strained

⁶⁶ The State has also argued that Salem Church's taking claims against it are not properly before this Court. It, however, has identified no comparable State administrative procedure for ascertaining remaining beneficial use and has offered no reason why, if the State's conduct independently accomplished a taking, Salem Church should not be able to tender its claim at this time. The State properly points out that the more appropriate forum for a takings claim would be in the Superior Court with an inverse condemnation action. That does not necessarily deprive this Court of subject matter jurisdiction when the takings claim is part of a broader litany of woes that—if warranted—may be remedied in equity. Thus, the takings claim against the State will not be dismissed for failure to exhaust administrative remedies or lack of subject matter jurisdiction.

⁶⁷ *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 148–49 (Del. Ch. 2003).

⁶⁸ *Id.* at 49.

interpretation of the allegations proposed by the plaintiff,”⁶⁹ it may dismiss a claim only when it appears “with reasonable certainty that there is no set of facts which would entitle the plaintiff to relief.”⁷⁰

1. Vested Rights and Equitable Estoppel

Salem Church invokes the vested rights doctrine, as well as the equitable estoppel doctrine, in its effort to prevent SB 143 from precluding final record plan approval for its French Park plan.⁷¹ These doctrines, despite having distinct theoretical foundations, frequently overlap.⁷²

a. *Vested Rights*

According to Salem Church, by the time SB 143 was enacted, it had already obtained vested rights in its French Park plan.⁷³ The inquiry in determining whether one has a vested right claim is prescribed in *In re 244 Acres of Land v. Delaware Agricultural Lands Foundation*.⁷⁴ Rejecting the perceived rigidity of the “permit plus” approach that Delaware courts had relied upon since *Shellburne, Inc.*

⁶⁹ *In re GM (Hughes) S’holder Litig.*, 897 A.2d at 168.

⁷⁰ *Palese v. Del. State Lottery Office*, 2006 WL 1875915, at *2 (Del. Ch. June 29, 2006).

⁷¹ Compl. ¶ 37.

⁷² See *Wilmington Materials, Inc. v. Town of Middletown*, 1988 WL 135507, at *7 (Del. Ch. Dec. 16, 1988) (recognizing that, while the equitable estoppel doctrine derives from equity and the vested rights doctrine demonstrates principles of property and constitutional law, both may be applied interchangeably).

⁷³ Compl. ¶¶ 19, 22, 29, 30, 34, 37, 46.

⁷⁴ 808 A.2d 753 (Del. 2002).

v. Roberts,⁷⁵ the Delaware Supreme Court concluded that a new test was needed to consider more fairly “the complexity of present day real estate development.”⁷⁶ As the Court explained:

[T]he test should involve ‘a weighing of such factors as the nature, extent and degree of the public interest to be served by the ordinance amendment on the one hand and, on the other hand, the nature, extent and degree of the developer’s reliance on the state of the ordinance under which he has proceeded’⁷⁷

And “[in] the final analysis,” the Delaware Supreme Court concluded that “good faith reliance on existing standards is the test.”⁷⁸

In *In re 244.5 Acres*, the owner of a residential development challenged a fifty-foot setback requirement for any “new subdivision development” adjacent to agricultural preservation districts. Immediately after purchasing its property in May 1996, the developer incurred substantial engineering and consulting expenditures to develop its project. Shortly after incurring these costs and receiving conditional approval from the Dover Planning Commission, an owner of adjacent property filed an application to create an agricultural preservation district. That application received final approval and was recorded in February 1998 (and,

⁷⁵ 224 A.2d 250 (Del. 1966). In *Shellburne*, the Supreme Court ruled that the acquisition of a vested right requires more than issuance of a building permit. What is required is “a substantial change of position, expenditures, or incurrence of obligations, made lawfully and in good faith under the permit, before the land owner becomes entitled to complete the construction and to use the premises for a purpose prohibited by a subsequent zoning change.” *Id.* at 254.

⁷⁶ *In re 244.5 Acres*, 808 A.2d at 757.

⁷⁷ *Id.* at 757–58.

⁷⁸ *Id.* at 758.

thus, the fifty-foot setback became applicable), four months before the developer received its final approval from the municipal authority. The developer brought suit, seeking, among other things, a declaratory judgment that the fifty-foot setback requirement did not apply to its property. The Superior Court found that the developer did not have a vested right because it lacked building permits when the preservation district was created and, thus, was a “new subdivision” subject to the setback requirement. The Delaware Supreme Court reversed, adopting a new formulation of the vested rights test and concluding that the developer’s project could “hardly be characterized as a ‘new subdivision’” when it had engaged in “extensive efforts” to secure all necessary approvals.

The vested rights analysis requires a balancing of interests—the public interest served by a particular law’s enforcement and the private interests of a plaintiff who has relied on the state of the law at the time it acted.⁷⁹ In assessing a regulation’s public benefit or purpose, Delaware courts have been willing to conclude that certain legislative enactments served a negligible public interest or were passed without any public purpose at all. For example, in *Wilmington Materials, Inc. v. Town of Middletown*,⁸⁰ this Court, noting the inequity that would result if it permitted retroactive application of a municipality’s last minute zoning amendment to prohibit concrete pipe plants, observed:

⁷⁹ See *id.* at 757–58.

⁸⁰ 1988 WL 135507 (Del. Ch. Dec. 16, 1988).

The Zoning Code amendment was not adopted out of “police power” considerations, *i.e.*, policy concerns for the health, safety or general or moral welfare of the community. Those broad issues had already been resolved when the Code was adopted in January, 1987, only 23 months before, after an extensive study and hearing process. Rather, the purpose for the zoning amendment, was to prevent a lawful use of the land by [the plaintiff], motivated by a vocal protest movement that included a petition signed by many objecting citizens.⁸¹

In *In re 244.5 Acres*, the Supreme Court found the public interest served by enforcement of the fifty-foot setback requirement “[was] minimal since the setback [was] not intended to preclude all development and the farmland activities sought to be promoted [were] already in place.”⁸² The public interest served by SB 143’s enactment, however, is far from minimal.

Section 2659(c), as amended by SB 143, requires that all new subdivision and land development applications more than five years old comply with current environmental and traffic impact standards as set forth in Chapter 40, Articles 5, 10, and 11 of the New Castle County Code.⁸³ The environmental standards of Articles 5 and 10 affect substantial concerns, such as floodplains, riparian buffers, wetlands, critical natural areas, air quality, sewers, recharge areas, drainageways, and spillage from above ground storage;⁸⁴ the traffic impact standards established in Articles 5 and 11 involve impact studies and traffic mitigation measures that

⁸¹ *Id.* at *9.

⁸² *In re 244.5 Acres*, 808 A.2d at 758.

⁸³ 9 *Del. C.* § 2659(c).

⁸⁴ NCC Code, ch. 40, Articles 5 and 10.

help “ensure that development occurs only where there are adequate transportation facilities in place, or programmed for construction.”⁸⁵ A review of the legislative history of SB 143 reveals that there was a strong public interest in addressing the impact of development on environmental and traffic conditions. When SB 143 was being considered before the General Assembly, several legislators cited concerns about the “miserable” state of traffic intersections and the potential for new development to exacerbate traffic congestion,⁸⁶ the need to curb development in “critical natural area[s]” because of downstream flooding,⁸⁷ and the need to balance growth with protection of the environment.⁸⁸ Even if, as the Complaint asserts, certain individual members of the General Assembly also had other motivations, this Court will not engage in an inquiry into individual motivations when the legislative history demonstrates that SB 143 was grounded in such strong public interest concerns.⁸⁹

Consideration of Salem Church’s private reliance interest is also necessary. Salem Church alleges that it has expended more than \$133,000 in engineering and

⁸⁵ NCC Code, ch., 40, Articles 5 and 11; NCC Code § 40.11.000.

⁸⁶ See Unofficial House Debate Tr., Pl.’s J.A. Ex. 12B at 10–11.

⁸⁷ See *id.* at 12.

⁸⁸ See Unofficial Senate Debate Tr., Pl.’s J.A. Ex. 12A at 20.

⁸⁹ Salem Church, in its Complaint, alleges that bad faith motives were the driving force behind SB 143’s enactment and casts aspersions on a number of County and State officials. Compl. ¶¶ 14–17, 21–22, 30. Even if the Court were to take the alleged motivations of the three legislators identified in the Complaint as true, the Court cannot ignore that SB 143 passed overwhelmingly in the General Assembly, with only two House members voting in opposition. See Unofficial Senate and House Trs., Pl.’s J.A. Exs. 12A, 12B.

government application fees.⁹⁰ The County disputes this calculation and asserts that, in any event, it is a “paltry sum when compared with the overall cost of the French Park project.”⁹¹ Salem Church also alleges that it relied on statements by County officials, particularly the County’s Opinion Letter in 1999 that final record plan approval could be received.⁹² In specific, the County Opinion Letter stated that Salem Church could submit a revised Preliminary Plan conforming “to the rules and regulations existing as of August 27, 1974.”⁹³

In balancing the public and private interests, the Court is reminded of the Delaware Supreme Court’s declaration in *In re 244.5 Acres*: “[i]n the final analysis, good faith reliance on existing standards is the test.”⁹⁴ Given this stage of the proceedings, the Court cannot conclude that Salem Church’s private interests are outweighed by the public interests behind SB 143, particularly when Salem Church alleges that, in reliance on the County’s Opinion Letter, it expended considerable resources, paid various fees, obtained substantial mortgage financing, and submitted a revised Preliminary Plan. When that plan was approved on

⁹⁰ Compl. ¶ 29.

⁹¹ Def. New Castle County’s Opening Br. in Supp. of Its Mot. to Dismiss Compl. (“County’s Opening Br.”) at 36; *see also* County’s Reply Br. at 32. *But see Wilmington Materials, Inc.*, 1988 WL 135507, at *8 (noting further that “[w]hat level of expenditure will suffice to constitute substantial reliance cannot be determined by any magic formula” and that any inquiry is fact specific and “must take into account all relevant circumstances”).

⁹² Compl. ¶ 11.

⁹³ Compl. Ex. 5.

⁹⁴ 808 A.2d at 757.

March 28, 2001, Salem Church was both informed that several other items needed to be addressed before it could receive record plan approval and warned that the Preliminary Plan would be considered expired “[i]f a complete Record Plan submission [was] not made within eighteen (18) months of [March 28, 2001].”⁹⁵ Most of the outstanding items, Salem Church alleges, were filed by May 15, 2001. Just two days later, however, SB 143 was signed into law.⁹⁶

For these reasons, the Court concludes that Salem Church has sufficiently pleaded facts that would indicate that it relied in good faith on the County’s statements of July 14, 1999 and March 28, 2001, and that its vested rights claim does not fail as a matter of law.

In addition to challenging the sufficiency of Salem Church’s vested rights allegation, the Defendants also argue that its vested rights claim fails because of the passage of time.

In contrast to *In re 244.5 Acres*, where the developer acted expeditiously, Salem Church and its predecessors have dawdled. This case, thus, in addition to the balancing of public and private developer interests, requires assessment of the effect of the pace of the development effort. After providing a chronological account of the principal efforts taken by the developer in *In re 244.5 Acres*, the

⁹⁵ Compl. Ex. 10.

⁹⁶ Ultimately, a motion to dismiss provides the Court with a poor forum for conducting a balancing test, especially because all reasonable inferences must be drawn in favor of the nonmoving party.

Delaware Supreme Court observed, “There is no indication, however, that the [developer] delayed its efforts to secure all approvals necessary to begin construction.”⁹⁷ Thus, delay may defeat a vested rights claim.

Securing approval of a subdivision in New Castle County involves, for current purposes, the submission and approval of three items: an exploratory plan, a preliminary plan, and a final record plan. In 1987, Salem Church purchased the Parcel, which had already been the subject of a proposed residential subdivision development. Thirteen years earlier, in 1974, the previous owners had obtained approval of an exploratory sketch plan for French Park. In its Complaint, Salem Church has acknowledged that no other approvals for French Park were obtained between 1987 and 1997. In early May 1999, Salem Church “once again began the process of seeking final subdivision plan approval for French Park.”⁹⁸ After meeting with County planning staff, Salem Church was informed in the County

⁹⁷ 808 A.2d at 757. It does not appear to be a new concept to consider delay in assessing vested rights claims. More than fifteen years ago, the Ninth Circuit held that a developer’s vested rights claim failed when “it did not act expeditiously enough in proceeding with the development [of its project].” See *Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1298 (9th Cir. 1990). The Ninth Circuit further noted that:

[A] government’s commitment to a ‘planned unit development’ is necessarily conditioned on the developer’s proceeding at a pace reasonably close to that contemplated at the time the project was approved. If the public is to be deprived of its power to control pollution and other problems caused by overdevelopment, it should be deprived only to the extent necessary to ensure private parties a reasonable degree of certainty about the legal status of their investments.

Id. at 1299. The court also concluded that the developer’s estoppel claim could not be asserted when it “did not proceed at a pace even reasonably close to that anticipated.” *Id.*

⁹⁸ Compl. ¶ 8.

Opinion Letter of July 14, 1999 that the exploratory plan of 1974 was still in effect, that French Park had yet to receive preliminary and record plan approvals, and that Salem Church could proceed by submitting a revised preliminary plan that conformed to rules and regulations existing as of 1974. Salem Church was subsequently advised on October 15, 1999 to “proceed ahead with the preliminary plan” and to “start as soon as [it could] so there are no problems.”⁹⁹ On June 14, 2000, Salem Church submitted its revised preliminary plan.

Salem Church argues that the County’s Opinion Letter in 1999 and its filing in 2000 serve as the pertinent reference points in judging whether there was unreasonable delay. The Defendants’ view is that the reference point is much earlier; that Salem Church’s situation is in stark contrast to the developer’s in *In re 244.5 Acres*, where all necessary approvals had been secured within a two-year period.¹⁰⁰ The Defendants, thus, argue that, under the new vested rights test articulated in *In re 244.5 Acres*, Salem Church’s vested rights claim is time-barred.

The short answer to the timeliness debate is that, at this stage of the proceedings, Salem Church enjoys the benefit of all favorable inferences. Determination of whether Salem Church unreasonably delayed in securing necessary approvals (and thereby lost any rights that may have previously been

⁹⁹ Compl. Ex. 6.

¹⁰⁰ It is undisputed that Salem Church had obtained no approvals for at least a ten-year period following its purchase of French Park in 1987. *See id.* ¶ 7.

obtained) requires a more fact-intensive inquiry and cannot be resolved on a motion to dismiss.¹⁰¹

b. *Equitable Estoppel*

Salem Church also contends that the Defendants should be equitably estopped from applying SB 143 to the Preliminary and Final Record Plans for French Park.¹⁰² The County Opinion Letter of July 14, 1999, in which the County indicated that Salem Church could submit a revised preliminary plan, serves as the pertinent reference point for Salem Church's alleged reliance and its estoppel claim.

Equitable estoppel arises “when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.”¹⁰³ To establish estoppel, Salem Church must demonstrate by clear and convincing evidence that: (1) it lacked knowledge or the means of discovering

¹⁰¹ Cf. *Ohrstrom v. Harris Trust Co.*, 1998 WL 44983, at *1 n.13 (Del. Ch. Jan. 28, 1998) (acknowledging that it would be inappropriate to raise an affirmative defense of laches in a motion to dismiss where such a defense suggests a factual inquiry) (citing *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 503 (Del. Super. 1982) (“An essential element for application of the doctrine of laches is a finding of unreasonable delay. Such a factual question is usually only properly disposed of by summary judgment after discovery or at trial.”)) (internal citation omitted); see also *Khanna v. McMinn*, 2006 WL 1388744, at *25 (Del. Ch. May 9, 2006) (“The motion to dismiss, with respect to the Defendants' affirmative defense of laches, is reviewed under Court of Chancery Rule 12(b)(6). Because the Court is unable to discern with reasonable certainty from the complaint that laches applies, the Court cannot grant the Defendants' motion on this ground at this time.”).

¹⁰² Compl. ¶¶ 31–35.

¹⁰³ *Walton v. Beale*, 2006 WL 265489, at *4 (Del. Ch. Jan. 30, 2006) (quoting *Wilson v. Am. Ins. Co.*, 209 A.2d 902, 903–04 (Del. 1967)).

the truth of the facts in question, (2) it reasonably relied on the conduct of the parties—the State and the County—against whom estoppel is being asserted, and (3) suffered a prejudicial change in position in reliance on the conduct.¹⁰⁴ In the context of land development, Delaware courts have also recognized equitable estoppel claims where (1) a party, acting in good faith, upon some act or omission of the government, and (2) makes a substantial change of position or incurs extensive obligations and expenses, and (3) it would be highly inequitable or unjust to impair or destroy rights that the landowner has acquired.¹⁰⁵

Application of the doctrine of equitable estoppel to governmental actions is rare.¹⁰⁶ Generally, courts will not depart from their traditional cautiousness in applying the doctrine “unless there are *exceptional* circumstances which make it *highly* inequitable or oppressive to enforce the regulations.”¹⁰⁷

¹⁰⁴ See *Copeland v. Kramarck*, 2006 WL 2521444, at *3 (Del. Ch. Aug. 23, 2006) (citing DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11.1 (2005)).

¹⁰⁵ See *DiSabatino v. New Castle County*, 781 A.2d 698, 702 (Del. Ch. 2000); *Wilmington Materials*, 1988 WL 135507, at *6; *Miller v. Bd. of Adjustment of Dewey Beach*, 521 A.2d 642, 645–46 (Del. Super. 1986).

¹⁰⁶ See *Acierno v. New Castle County*, 2000 WL 718346, at *10 (D.Del. May 23, 2000) (noting that “Delaware courts have approved its application in only a handful of cases”). Special deference has been given to legislative enactments “adopted to protect the public.” *Kejand, Inc. v. Bd. of Adjustment of the Town of Dewey Beach*, 1993 WL 189536, at *3 (Del. Super. Mar. 19, 1993), *aff’d*, 634 A.2d 938 (Del. 1993) (TABLE) (noting that equitable estoppel will not be invoked “where to do so would render ineffective the operation of a policy adopted to protect the public”).

¹⁰⁷ *Miller*, 521 A.2d at 646 (emphasis added); see *Two South Corp. v. City of Wilmington*, 1989 WL 76291, at *7 (Del. Ch. July 11, 1989) (“However, because of the public interest involved—particularly where the governmental body acts in furtherance of its police power—the estoppel doctrine is applied cautiously, and generally only where the circumstances require its application

The Court, for the limited purpose of evaluating Salem Church’s equitable estoppel claim, assumes that, but for enactment of SB 143, the County, perhaps as a result of the County Opinion Letter or the March 28, 2001 “approval,” would have been precluded from relying upon the passage of time to reject the French Park plans.¹⁰⁸ There is, however, no basis for equitable estoppel against the State because the State did nothing upon which Salem Church relied. In the absence of conduct upon which there has been reliance, the elements of equitable estoppel cannot be satisfied.¹⁰⁹ Moreover, because the subsequently enacted state law required certain conduct by the County—in this instance, rejection of the French Park application—the County could not have avoided its obligation to comply with State law by asserting that it promised some permit to Salem Church or, more specifically, that it is otherwise estopped from abiding by state law. It is fundamental that municipalities must act in accordance with state law.¹¹⁰ In sum, Salem Church has alleged no basis for an equitable estoppel claim against the State

to prevent manifest injustice.”) (citations omitted); *see also Motiva Enters. LLC v. Secretary of the Dept. of Natural Res. & Envtl. Control*, 745 A.2d. 234, 250 (Del. Super. 1999) (recognizing that “courts have applied the reasoning and rationale of traditional equitable estoppel against the government very narrowly” and that some courts in the context of estoppel against the government have required a showing of “affirmative misconduct”).

¹⁰⁸ Indeed, without the intervention of SB 143, the equitable estoppel claim would have survived a motion to dismiss by the County.

¹⁰⁹ It should be noted that even the County Opinion Letter may be read as conditioned upon intervening State law.

¹¹⁰ *See, e.g., 4th Generation Ltd.*, 1987 WL 14867 at *8.

and, because of the supremacy of state law, it has no equitable estoppel claim against the County either.¹¹¹

2. Due Process Claims

a. *Substantive Due Process*

Salem Church alleges that the Defendants engaged in a scheme to prevent French Park from achieving final approval, with the passage and application of SB 143, thereby depriving Salem Church of substantive due process.¹¹²

Salem Church supports its substantive due process claims¹¹³ with allegations that the County's actions were in bad faith and "of such an extreme and egregious nature that they 'shock the conscience.'"¹¹⁴ In particular, Salem Church cites the personal animus toward Acierno by "[o]ne of the chief County proponents

¹¹¹ To the extent that Salem Church suggests that County and State conduct (including the alleged motivations of various state legislators) leading to enactment of SB 143 implicates equitable estoppel principles, see Part IV.B.2.a *infra*.

¹¹² Compl. ¶¶ 16, 30.

¹¹³ See, e.g., *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) (quoting *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000)) (holding "non-legislative state action violates substantive due process if 'arbitrary, irrational, or tainted by improper motive,' or if 'so egregious that it 'shocks the conscience'" (emphasis added)); *Blain v. Twp. of Radnor*, 167 Fed. Appx. 330, 333 (3d Cir. 2006) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)) ("In land-use cases, only executive action that 'shocks the conscience' constitutes a substantive due process violation."); *United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA*, 316 F.3d 392, 399–400 (3d Cir. 2003) (holding that "executive action violates substantive due process only when it shocks the conscience"); see also *Mirzakhali v. Chagnon*, 2000 WL 1724326, at *19 n.77 (Del. Ch. Nov. 9, 2000) (noting that a "more difficult burden" might apply to substantive due process claims and citing *Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994), for the proposition that a plaintiff must show that governmental employees acted with "conscience shocking behavior" to sustain a substantive due process claim).

¹¹⁴ Compl. ¶¶ 16, 30.

of [SB 143],” the New Castle County Executive.¹¹⁵ Even in the “plaintiff-friendly” context of a motion to dismiss, Salem Church has not alleged facts that would support its substantive due process claim against the County. Courts have generally held that even if a municipality is guided by political motivations, unrelated to an application, that is not enough to “shock the conscience” under a substantive due process analysis, particularly where the municipality, as the County here, can justify its actions as related to some legitimate goal.¹¹⁶ Furthermore, it was the General Assembly, not the County, that passed SB 143 and thereafter the County necessarily was under the obligation to follow State law and apply 9 *Del. C.* § 2659(c).¹¹⁷ For these reasons, Salem Church has not stated a substantive due process claim against the County.

¹¹⁵ *Id.* ¶ 16.

¹¹⁶ See, e.g., *Thornbury Noble, Ltd. v. Thornbury Twp.*, 112 Fed. Appx. 185, 188 (3d Cir. 2004). As for the County’s actions in lobbying for SB 143’s enactment, the County argues that it is protected from suit under the *Noerr-Pennington* doctrine. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), which has been held to protect both private persons and government officials’ First Amendment right to petition any branch of government. See *Mariana v. Fisher*, 338 F.3d 189, 199–200 (3d Cir. 2003). Salem Church argues that the doctrine is inapposite because no Delaware court has ever applied it, but it has offered no persuasive reason for this Court to ignore its principles. As the Third Circuit recognized in *Mariana*, the petitioning of one’s government is “crucial” to a modern democracy. *Id.* at 200. Certain County officials may have been motivated by considerations other than environmental and traffic safety, but the Court will not inquire further into the County’s motives for advocating enactment of SB 143. See *Pennington*, 381 U.S. at 670 (“*Noerr* shields . . . a concerted effort to influence public officials regardless of intent or purpose.”); *Structure Bldg. Corp. v. Abella*, 873 A.2d 601, 603 (N.J. Super. 2005) (finding irrelevant defendants’ motives in lobbying a planning board). Indeed, restraint is particularly appropriate where it has been shown that there was at least some legitimate purpose for bringing incomplete subdivision plans into compliance with modern environmental and traffic standards.

¹¹⁷ See *4th Generation Ltd.*, 1987 WL 14867, at *8 (noting “the well settled rule that a municipality cannot act in conflict with state laws”).

Second, with respect to the State, Salem Church has failed to state a substantive due process claim because the Complaint is bereft of facts which would support a conclusion that the State lacked a rational basis in enacting SB 143. The inquiry into whether a certain statute complies with substantive due process notions centers on finding some rational relationship to a legitimate government interest.¹¹⁸ As the Delaware Supreme Court recognized, “[w]ithin these limits, the court will not assume to disturb the legislative action. . . . With the policy or wisdom of the act [being of] no concern.”¹¹⁹ The consequence is that there is a “strong presumption of validity and those attacking the rationality of the legislative classification have the burden to negate *every* conceivable basis which might support it.”¹²⁰

SB 143 amended the state statutes through which the County has been delegated land use authority in order to assure compliance with current environmental and traffic standards—standards that applied to all unapproved subdivision applications older than five years and not solely to Salem Church’s; standards closely related to the public health and welfare. Statutes of this nature have been accorded considerable deference by the courts as being within the

¹¹⁸ *Rogin v. Bensalem Twp.*, 616 F.2d 680, 689 (3d Cir. 1980).

¹¹⁹ *State v. Hobson*, 83 A.2d 846, 855–56 (Del. 1951) (internal citations omitted).

¹²⁰ *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993) (internal citations and quotations omitted) (emphasis added); see *Hobson*, 83 A.2d at 856.

purview of the State’s police powers.¹²¹ Therefore, as a matter of law, the State’s enactment of SB 143 cannot serve as a basis for Salem Church’s substantive due process claim when the State was acting within its legitimate police powers.

Furthermore, Salem Church’s allegations of conspiracy and bad faith legislative efforts—colorful as they are—are immaterial. As Salem Church’s briefing explains, “The [General Assembly’s] transcript of debate regarding SB 143 clearly establishes that the specific focus of the legislation was to stop and kill French Park’s final approval”¹²² The Court, however, may take note of other portions of the transcripts.¹²³ What is evident from these transcripts is that legislators, in addition to recognizing that properties other than French Park would also be affected by the legislation, noted concerns about environmental effects and traffic congestion and the need to update standards that were more than two decades old.¹²⁴ Such expressions of legislative intent are more than sufficient to

¹²¹ See *e.g.*, *Acierno v. New Castle County*, 2000 WL 718346, at *5 (D.Del. May 23, 2000) (recognizing that the alleviation of traffic is a legitimate government interest); *ALRO Assocs., L.P. v. Hayward*, 2003 WL 22594526, at *9 (Del. Ch. Oct. 31, 2003) (stating that efforts to alleviate traffic congestion on public highways is manifestly a proper exercise of the State’s police power); *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 906 (Del. 1994) (“The purpose of environmental regulation is to protect the public and ensure the environmental quality of our natural resources.”).

¹²² Pl.’s Ans. Br. at 26–27.

¹²³ See *In re GM (Hughes) S’holder Litig.*, 897 A.2d at 170 (“The trial court may also take judicial notice of matters that are not subject to reasonable dispute.”); see also D.R.E. 201(b) (providing that a “judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”).

¹²⁴ See Unofficial Senate Debate Tr., Pl.’s J.A. Ex. 12A at 6–11, 13–15, 17, 19–20; Unofficial House Debate Tr., Pl.’s J.A. Ex. 12B at 4, 11–14.

satisfy the substantive due process requirement that legislation bear a rational relationship to a legitimate government interest.¹²⁵

Specifically, Salem Church's Complaint alleges that State and County elected officials had the "intent and motive" to prevent final record plan approval for French Park by passing SB 143.¹²⁶ Allegations of sheer political motives driving passage of SB 143, however, are insufficient as a matter of law to prove affirmative misconduct.¹²⁷ The Court need not inquire into the motives of individual legislators in passing an act of the General Assembly, let alone one that has passed overwhelmingly. The General Assembly, acting within its authority, retains "full and unrestrained authority to exercise its discretion in any manner it seeks fit in its wisdom or even folly to adopt."¹²⁸ Accordingly, Salem Church's substantive due process claim against the State fails.

b. *Procedural Due Process*

The Court now turns to whether Salem Church has sufficiently alleged facts to plead a procedural due process violation under Article I, §§ 7 and 9 of the

¹²⁵ See *Prices Corner Liquors, Inc. v. Del. Alcoholic Beverage Control Comm'n.*, 1995 WL 716802, at *2 (Del. Super. Nov. 13, 1995) (citing *Nebbia v. New York*, 291 U.S. 502 (1934); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980)).

¹²⁶ Compl. ¶ 30.

¹²⁷ As the Supreme Court stated in *Arbour Park Civic Ass'n v. City of Newark*, "when citizens and the governing authorities have a difference of opinion as to the desirability of municipal action, courts will not inquire into the motives of [legislators] . . . in making a determination as to the validity of an ordinance enacted within the scope of such legislative body's legitimate and properly exercised powers." 267 A.2d 904, 906 (Del. Ch. 1970).

¹²⁸ *State v. Schorr*, 131 A.2d 158, 161 (Del. 1957); see also *Hellman v. State*, 784 A.2d 1058, 1068 (Del. 2001) ("Courts are not super-legislatures and it is not a proper judicial function to decide what is or is not wise legislative policy.") (citation omitted).

Delaware Constitution.¹²⁹ A procedural due process claim requires proof that there was some protected property interest and that deprivation of that protected interest occurred without notice and opportunity to be heard meaningfully.¹³⁰

First, Salem Church alleges that, at the time SB 143 was enacted, it had already acquired a vested right in the French Park plan.¹³¹ For purposes of deciding whether Salem Church has adequately pleaded a procedural due process claim, the Court may assume, without deciding, that Salem Church had reached a point in which it had an actual property interest.¹³²

Second, Salem Church alleges that it was denied “advance notice or opportunity to be heard in order to contest the interpretation of SB 143 . . . and [that] no post-deprivation administrative appeal . . . was available.”¹³³ Salem Church has not sufficiently alleged that it was denied notice or an opportunity to challenge the County’s decision in the McCombs Letter to rescind Preliminary Plan approval of French Park. County Code § 40.31.510 expressly provided an appeal right—a right that Salem Church chose not to exercise timely.

Additionally, with respect to the State’s actions, Salem Church’s allegation that it was not properly given notice or a pre-deprivation hearing is without merit.

¹²⁹ Compl. ¶ 37.

¹³⁰ See *Adjile, Inc. v. City of Wilmington*, 2005 WL 1139577, at *7 (Del. May 12, 2005).

¹³¹ Compl. ¶ 19.

¹³² It may be that the procedural due process claim which Salem Church seeks to assert is related to the vested rights claim discussed above. The Court differentiates, hopefully for clarity, between the vested rights claim and a procedural due process claim. *Cf. supra* note 63.

¹³³ Compl. ¶ 20.

In passing SB 143, the General Assembly was, not surprisingly, acting in a legislative capacity. Legislative acts, though, cannot form the basis for a procedural due process claim.¹³⁴ In *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*,¹³⁵ Justice Holmes explained:

Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption . . . [g]eneral 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.”¹³⁶

In addition, SB 143 did not target only French Park. It was general in nature, applying to “[a]ll subdivision or land development applications heretofore or hereafter” filed that have failed to receive final approval within five years from the date of application.¹³⁷ In short, Salem Church was entitled to no more notice or opportunity to be heard than anyone else.

Accordingly, the Complaint fails to state a claim with respect to procedural due process and cannot withstand Defendants’ motion to dismiss.

¹³⁴ *Rogin*, 616 F.2d at 693 (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441 (1915)) (“Long ago, the Supreme Court decided that the protections of procedural due process do not extend to legislative actions.”); see also *Jocham v. Tuscola County*, 239 F. Supp. 2d 714, 726 (D. Mich. 2003) (observing that “the legislative process itself provides all the process that is due” and that no authority “indicat[es] that citizens have the constitutional right to hold a legislature at rapt attention for five minutes in order to criticize policy with which they disagree”).

¹³⁵ 239 U.S. 441 (1915).

¹³⁶ *Id.* at 445. This analysis was, of course, in the context of federal due process rights. Salem Church has offered no reason for why Delaware’s view would be different.

¹³⁷ Compl. Ex. 12; 73 Del. Laws. c. 33 (S.B. 143).

3. Equal Protection Claim

Salem Church also brings forth an equal protection claim against the State for its “intentional decision to single out the French Park plan for elimination based upon a bad faith desire to advance officials’ political interests and harm Acierno.”¹³⁸ The basis for this claim is a “class of one” theory, in which a plaintiff asserts intentionally different treatment from others similarly situated and a lack of a rational basis for that different treatment.¹³⁹ In *Rogin v. Bensalem Township*,¹⁴⁰ the Third Circuit noted that, in bringing an equal protection claim based on the passage and application of various zoning amendments, a plaintiff would have to show that the amendments “so lack[ed] rationality that they constitute[d] a constitutionally impermissible denial of equal protection.”¹⁴¹ Although SB 143 concerned subdivision and land development applications, and not zoning, the Court would similarly require of Salem Church that, in alleging an equal protection violation by SB 143’s passage and subsequent application, it plead facts sufficient to show that SB 143 lacked *any* rational basis. Salem Church has not done so.

As explained earlier, in passing SB 143, members of the General Assembly legitimately could have plausibly, rationally, and reasonably based their decision

¹³⁸ Pl.’s Ans. Br. at 18.

¹³⁹ See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (recognizing and applying the “class of one” theory in an equal protection claim).

¹⁴⁰ 616 F.2d 680 (3d Cir. 1980).

¹⁴¹ *Id.* at 688 (citation omitted).

on both existing and emerging environmental and traffic concerns of constituents, and the need to require older subdivision plans that had yet to receive final record plan approval to comply with current standards.¹⁴² The rational basis review which the Court undertakes does not require (or allow) it “to judge the wisdom, fairness, or logic of legislative choices.”¹⁴³ Salem Church appears to be inviting the Court do exactly that.

Furthermore, it is difficult to discern how Salem Church could sustain an equal protection claim when it was hardly in a class of its own. SB 143, by its terms, applied to “all” subdivision plans that had been unapproved for more than five years and, as the transcript of the General Assembly’s debate reveals, legislators were aware that properties other than French Park were likely to be affected.¹⁴⁴ Accordingly, the Court concludes that Salem Church has failed to allege facts which set forth an equal protection claim.

4. Takings Claim

Salem Church also contends that the State and County’s actions constituted an unlawful taking under Article I, § 8 of the Delaware Constitution.¹⁴⁵

¹⁴² See *supra* note 124.

¹⁴³ See *Acierno*, 2000 WL 718346, at *6 (citing *FCC v. Beach Commc’ns*, 508 U.S. 307, 313 (1993)).

¹⁴⁴ See *supra* note 124.

¹⁴⁵ Compl. ¶ 37; Pl.’s Ans. Br. at 13, 19–20. As set forth in Part IV.A.2 *supra*, Salem Church failed to exhaust administrative remedies made available by the County to determine whether a “taking” occurred.

Under Delaware law, takings claims generally take two forms: an actual physical taking by the government, or a regulation that denies all economically beneficial or productive use of the land.¹⁴⁶ Salem Church characterizes the Defendants’ alleged taking as confiscatory in nature, and not merely regulatory, because of the effect SB 143’s enactment had on what Salem Church considers to be its vested property right in the French Park plan.¹⁴⁷

A fair reading of the Complaint indicates, however, that Salem Church’s takings claim is essentially a regulatory one—the enactment and enforcement of SB 143 are alleged to have affected Salem Church’s proposed use. Here, the *sine qua non* for a regulatory takings claim by Salem Church would be a showing that § 2659(c), as amended by SB 143, leaves the Parcel without economic or productive value.¹⁴⁸ This, of course, has not been alleged by Salem Church in its Complaint. SB 143 requires Salem Church to bring its more (much more) than five year old plan into compliance with the County’s current environmental and traffic impact standards, which, not surprisingly, are different from those that existed in 1974. There is no allegation by Salem Church that SB 143 renders the

¹⁴⁶ See *Wilmington Hospitality, LLC v. New Castle County*, 2004 WL 2419157, at *2 (Del. Super. Oct. 4, 2004); *State v. Booker*, 1992 WL 240386, at *2 (Del. Super. Sept. 2, 1992).

¹⁴⁷ Pl.’s Ans. Br. at 19. As to the differences between a takings claim and a vested rights claim, see *supra* note 63.

¹⁴⁸ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (recognizing that “a regulation which ‘denies all economically beneficial or productive use of land’ will require compensation under the Takings Clause”) (citations omitted); see also *supra* note 146.

Parcel worthless; indeed, Salem Church has not even alleged that the costs of complying with current standards would be prohibitive. In short, there is no total taking.

To the extent that Salem Church alleges a temporary or partial taking,¹⁴⁹ the Court notes that, where a regulation imposes limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may still have occurred depending on several factors.¹⁵⁰ These factors, set forth by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*,¹⁵¹ include (1) a regulation's economic effect on the landowner, (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the government action.¹⁵² Salem Church's allegations do not bring its takings claims within the ambit of *Penn Central*.

First, Salem Church does not allege how the application of SB 143 to its Parcel impacts it economically. Presumably, it would be more costly for Salem Church to comply with current environmental and traffic impact standards, but beyond the bare allegation that it has suffered a taking the Court cannot conclude

¹⁴⁹ Salem Church's Answering Brief to the State's Motion to Dismiss stated that its Complaint "contains averments that allege a temporary taking of Acierno's property rights for more than four (4) years" See Pl.'s Ans. Br. at 14.

¹⁵⁰ See *Palazzolo*, 533 U.S. at 617.

¹⁵¹ 438 U.S. 104 (1978).

¹⁵² See *id.* at 124; see also *Wilmington Hospitality, LLC v. New Castle County*, 2005 WL 1654024, at *3 (Del. Super. May 24, 2005) (considering the *Penn Central* factors in determining whether a temporary or partial regulatory taking has occurred).

that SB 143 fell just short of eliminating all economically beneficial use of its Parcel.

Second, it cannot fairly be determined from the Complaint how Salem Church's intended use of its Parcel is so bound up with its investment-backed expectations that a statutory change—in this case, one governing the “lifespan” of a subdivision application before it must comply with new, or current, environmental and traffic impact standards—invariably results in a taking. In other words, mere compliance with a regulation that may be objectionable to a landowner does not automatically establish a taking. As the Supreme Court in *Penn Central* recognized, the argument that developers “may establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.”¹⁵³

Finally, the character of the government regulation does not support a finding that SB 143 resulted in a temporary taking. As noted previously, the record indicates that there was a rational basis behind the enactment of SB 143, notably concerns about the effect on the environmental and traffic conditions with increased development. Even Salem Church has acknowledged that the additional environmental and traffic impact regulations imposed by SB 143 might even have

¹⁵³ *Penn Central*, 438 U.S. at 124 (citations omitted).

a beneficial public effect.¹⁵⁴ Any argument by Salem Church that SB 143 is distinct from other development legislation because of the alleged “conspiracy” between certain State and County officials pushing for its enactment, however, is insufficient to support a finding that, as a matter of law, SB 143 resulted in a regulatory taking.

Accordingly, Salem Church has failed to allege the facts necessary to sustain a takings claim.

V. CONCLUSION

For the foregoing reasons, the Amended Complaint will be dismissed except with respect to Salem Church’s vested rights claim.¹⁵⁵ An implementing order will be entered.

¹⁵⁴ See Pl.’s Ans. Br. at 49.

¹⁵⁵ With the conclusion in Part IV.A.1 *supra*, that SB 143 precludes County approval of the French Park plan, Salem Church’s motion for partial summary judgment on its request for a declaratory judgment as to the applicability of SB 143 to French Park is denied. As for Salem Church’s motion to compel discovery, limited discovery is appropriate for Salem Church to better develop the factual basis for its vested rights claim. Permitted discovery would *not* include, for example, investigation of the reasons for enactment of SB 143. As explained previously, courts do not inquire into the motives of individual legislators when the legislature has acted within the scope of its legitimate and properly exercised powers. See *Arbour Park*, 267 A.2d at 906; 5 McQUILLIN MUN. CORP. § 16.90 (5th ed. 1996). See also DEL. CONST. art II, § 13 (1897); *Shellburne*, 238 A.2d at 337.