IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MARK W. FIELDS, NANCY FIELDS, HOWARD WIDDOES, HELEN KNIGHT, JONATHAN B. KIDD, MARY KIDD, JEFFREY HANSEN and LAURAN HANSEN,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 1096-K**
KENT COUNTY, a political subdivision of the State of Delaware, KENT COUNTY LEVY COURT, the governing body of Kent County, CHESWOLD VILLAGE PROPERTIES, LLC, a Delaware limited liability company, and CHURCH OF GOD IN CHRIST, INC., a Delaware religious non-profit corporation,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: September 26, 2005
Date Decided: February 2, 2006

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NOBLE, Vice Chancellor

A county government approved an amendment of its comprehensive development plan by resolution and not by ordinance. The amendment of the comprehensive plan was to make possible a rezoning for a shopping center. The rezoning was also adopted by resolution and not by ordinance. Indeed, it was adopted by the same resolution that approved the comprehensive plan amendment. The plaintiffs timely filed suit to challenge both the comprehensive plan amendment and the rezoning. They later sought to amend their complaint to assert a claim not initially set forth in their complaint: that amendment of the comprehensive plan and approval of the rezoning by resolution violated a statutory requirement that actions of county government having the force of law must be accomplished by ordinance. This claim, if permitted, succeeds on the merits. Challenges to amendments of comprehensive plans and rezonings, however, are subject to a statute of repose providing that no "action, suit or proceeding" may be "brought" after the expiration of 60 days following publication of notice of the amendment's approval. The claims the plaintiffs now seek to assert came after the running of the 60 days. The principal questions to be resolved are whether a claim not expressly set forth in the complaint may relate back to the filing of the complaint and whether the claim is time-barred for having been asserted after expiration of the period established by the statute of repose.

The parties have filed cross-motions for summary judgment. For the reasons that follow, the Court concludes that an amendment of the complaint is appropriate and that the county's amendment of its comprehensive plan is invalid for having been approved by resolution in violation of 9 Del.C. § 4110 (h)-(i). Therefore, the rezoning is of no effect, either.

I.

Plaintiffs Mark W. Fields, Nancy Fields, Howard Widdoes, Helen Knight, Jonathan B. Kidd, Mary Kidd, Jeffrey Hansen, and Lauran Hansen reside and own real property in Kent County, Delaware, adjacent to or near the site of the proposed shopping center.

Defendant Cheswold Village Properties, LLC ("CVP") owns approximately 57.23 acres bordering on the east side of U.S. Route 13, south of Simms Wood Road, and east of Cheswold, in Kent County, Delaware.[1] The 57.23 acres are comprised of three contiguous tracts—two relatively small and one large.[2] CVP now seeks to develop 33.52 of its 57.23 acres as the site of a shopping center, which will include a large retail store, approximately 200,000 square feet in size. In order to do so, the 33.52 acres must be properly zoned as BG (Business

[1] The Church of God in Christ, Inc., a Delaware religious non-profit corporation, was also named as a defendant. At the time the complaint was filed, the Church was owner of the 57.23 acres; however, CVP subsequently purchased the land from the Church.

[2] The two small parcels were 2.60 acres and 2.57 acres in size. The larger tract is approximately 52 acres in size.

General), a commercial classification. The two small tracts have already been zoned BG. The balance of the land necessary for the development, 28.35 acres (the "Parcel"), will come from the remaining large tract. Before the rezoning, 27.16 acres and 24.90 acres of the large tract were zoned IL (Light Industrial) and AC (Agricultural Conservation), respectively. The Parcel, all of which must be rezoned BG, is comprised of portions of both the IL- and AC-zoned lands. The two smaller tracts, combined with the Parcel, total the 33.52 acres required for the project.[3] In addition, before rezoning was sought, the map designation given the Parcel in the County's comprehensive development plan was "Industrial/Low Density Residential." It was first necessary to revise the Parcel's map designation in the comprehensive plan to "Commercial/Low Density Residential" in order for the rezoning to be consistent with the County's comprehensive plan.

The governmental defendants are Kent County, a political subdivision of the State of Delaware, and the Kent County Levy Court, which governs Kent County.

II.

On April 30, 2004, CVP submitted an application for Preliminary Land Use Service review, as required by 29 *Del.C.* §§ 9203 and 9204.[4] The Office of State Planning Coordination ("OSPC") provided its comments and conditional approval

[3] It was intended that the residue of 23.17 acres remain zoned AC.
[4] *See* Pls.' Opening Br. in Supp. of Their Mot. for Summ. J., Ex. 2

in a letter to CVP, dated June 18, 2004.[5] CVP then applied to Kent County for both rezoning and a comprehensive plan amendment with respect to the Parcel.[6] The County's Department of Planning Services provided a Staff Recommendation Report in support of both the rezoning and the comprehensive plan amendment.[7] On December 2, 2004, the County's Regional Planning Commission held a public hearing on the application and unanimously recommended approval.[8]

The Levy Court then conducted a public hearing on the proposal on December 21, 2004.[9] The plaintiffs' attorney raised several issues at the hearing, including the adequacy of the description of the Parcel used in the public notice of the rezoning and plan amendment, the adequacy of the Delaware Department of Transportation's review of the potential traffic impact that might result from the proposed land use decisions, and whether another public hearing was necessary for amendment of the comprehensive plan before the rezoning could occur.[10] After the close of public comment, the Levy Court simultaneously approved, by resolution, the proposed amendment of the comprehensive plan and the rezoning

[5] *See* Opening Br. of All Defs. in Supp. of Their Mot. for Summ. J., Ex. A.
[6] *See id.*, Ex. B.
[7] *See id.*, Ex. C.
[8] *See id.*, Exs. D and E.
[9] *See id.*, Ex. F.
[10] *See id*. at 57-66, 70-71.

by a vote of 6-1.[11] Notice of approval of the comprehensive plan amendment and the rezoning was published on January 15, 2005.[12]

The plaintiffs filed this action on February 14, 2005, to contest the rezoning of the Parcel.

III.

In their complaint, the plaintiffs asserted three claims for which they sought injunctive and declaratory relief: the rezoning was alleged to be invalid for (1) failure to provide proper public notice, (2) failure to adhere to proper procedures in amending the County's comprehensive plan, and (3) failure to perform a proper Traffic Impact Study for the Parcel.[13] With respect to the second claim, the plaintiffs, in their complaint, focused on certain alleged violations of statutorily-compelled comprehensive plan amendment review procedures involving the OSPC.

In the Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment, however, an additional basis for the plaintiffs' requested relief came forth: that the amendment of the comprehensive plan and the rezoning were invalid for having been approved by oral resolution and not by ordinance as required by 9 *Del.C.* § 4110(h)-(i). The plaintiffs now propose to amend their

[11] *See id.* at 74-75, 77-78. The resolution was identified by the designation for CVP's application for rezoning and amendment of the comprehensive plan: CZ-04-11.
[12] *See* Compl., Ex. 8.
[13] *See* Compl. ¶¶ 32, 33, 34, & 39.

complaint in order to assert claims on these additional grounds and, should amendment be permitted, contend that relief should follow on this basis.[14] Because the Court concludes that the plaintiffs may amend their complaint to assert their claim that amendment of the comprehensive plan was approved by the Levy Court in violation of 9 *Del.C.* § 4110(h)-(i) and that they prevail on that basis, it is unnecessary to address their other substantive claims.

A. *Standard Applicable on Cross-Motions for Summary Judgment*

Under Court of Chancery Rule 56, summary judgment may be granted only when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law.[15] When deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that no material question of fact exists.[16] A party opposing summary judgment, however, "may not rest upon the mere allegations or denials of [his] pleading, but . . . , by affidavits or as otherwise provided in [Court of Chancery Rule 56] must set forth specific facts showing that there is a genuine issue for trial. If [he] does not so respond,

[14] It should be noted that the plaintiffs did not file a motion to amend their complaint; however, the additional claims were briefed by both parties and argued at the hearing on the cross-motions for summary judgment. The parties treated the matter as if a motion to amend had been effectively filed, and, therefore, the Court follows the parties' approach in addressing the various issues.

[15] Ct. Ch. R. 56(c); *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004).

[16] *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. Ch. 2005) (citing *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979)).

summary judgment, if appropriate, shall be entered against [him]."[17] In the context of the pending cross-motions for summary judgment, the material facts are not in dispute.[18]

B. *Revision of Comprehensive Plan by Resolution or Ordinance*[19]

As set forth above, the Levy Court voted overwhelmingly in favor of the motion providing for amendment of the County's comprehensive plan, including the plan's maps, with respect to the Parcel from "Industrial/Low Density Residential" to "Commercial/Low Density Residential" and for the Parcel's rezoning from IL and AC to BG. The amendment, however, was accomplished by oral resolution and not by ordinance. The General Assembly requires that "[a]ll actions of the county government which shall have the force of law shall be by ordinance."[20] It also has established a procedural scheme for the enactment of

[17] Ct. Ch. R. 56(e).
[18] *See* Ct. Ch. R. 56(h).
[19] In the usual course, a court will resolve a dispute over whether a claim may be asserted before it considers the merits of that claim. In this instance, however, development of the substantive issue and the policies underlying it will assist in understanding the dispute over whether amendment of the complaint to bring forward the substantive issue should be permitted.
[20] 9 *Del.C.* § 4110(h) (emphasis added). "Delaware courts have distinguished between ordinances and resolutions, as do hornbooks of municipal government." *Freedman v. Longo*, 1994 WL 469159, at *3 (Del. Ch. Aug. 10, 1994); *see also Piekarski v. Smith*, 153 A.2d 587, 591 (Del. 1959). For discussion of the distinctions between ordinances and resolutions, see generally 5 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 15:2 (3d ed. 2004); 2 C. DONALD SANDS, MICHAEL E. LIBONATI & JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 11.14 (1997). In brief, an ordinance generally is a more formal and solemn enactment of municipal government, required for matters that are more permanent and deliberative in nature. A resolution generally addresses matters that are temporary, special, or ministerial in nature. "An ordinance is distinctively a legislative act . . . ." 5 MCQUILLIN, *supra*, § 15:2. Moreover, "[w]henever the controlling law directs the legislative body to do a particular thing in a certain

ordinances, which provides, *inter alia*, that any proposed ordinance "shall be introduced in writing and in the form required for final adoption."[21]

By statute, the land use maps of the County's comprehensive plan (and any amendments thereto) are endowed with the force of law.[22] Therefore, the amendment to the comprehensive plan was required to have been adopted by ordinance, not oral resolution.[23]

Land use regulation is a power delegated to counties and other municipalities by the General Assembly.[24] As a consequence, full compliance with the conditions imposed on the exercise of that power is essential.[25] The adoption

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manner[,] the thing must be done in that manner." *See id.* at § 15:2-3; *see also* 2 Sands & Libonati, *supra*, § 11.14.

[21] 9 *Del.C.* § 4110(i). This subsection sets forth a detailed procedural scheme with numerous requirements.

[22] *See* 9 *Del.C.* § 4959(a) (providing, in pertinent part: "After a comprehensive plan . . . has been adopted by . . . Levy Court in conformity with this subchapter, the land use map or map series forming part of the comprehensive plan as required by this subchapter *shall have the force of law*, and no development . . . shall be permitted except in conformity with the land use map or map series . . . ." (emphasis added)).

For convenience, the land use maps forming part of the County's comprehensive plan are referred to simply as "the comprehensive plan" or "the plan" in this memorandum opinion. Thus, when references are made to the amendment of the County's comprehensive plan by the Levy Court, this should be understood as the Levy Court's amendment of the comprehensive plan map providing the relevant land use designations for the Parcel.

[23] A similar conclusion would result with respect to the rezoning as well because a rezoning also has "the force of law." *See, e.g.*, *Bay Colony, Ltd. v. County Council of Sussex County*, 1984 WL 159381, at *2 (Del. Ch. Dec. 5, 1984) ("It is clear that a rezoning has the force of law . . . and that [the provision comparable to 9 *Del.C.* § 4110(h)-(i) applicable to Sussex County] applies to zoning matters." (citing *Wilmington Trust Co. v. Caratello*, 385 A.2d 1131, 1133 (Del. Super. 1978); *Green v. County Council of Sussex County*, 415 A.2d 481, 483 (Del. Ch. 1980), *aff'd sub nom. Carl M. Freeman Assocs., Inc. v. Green*, 447 A.2d 1179 (Del. 1982))).

[24] *Cf. New Castle County v. BC Dev. Assocs.*, 567 A.2d 1271, 1275 (Del. 1989).

[25] *See, e.g.*, *id.* ("However, it is axiomatic that delegated power may be exercised only in accordance with the terms of its delegation."); *Carl M. Freeman Assocs., Inc.*, 447 A.2d at 1181-

of a formal comprehensive plan is a necessary condition for the exercise of the County's regulatory power over land use.[26] By employing an oral resolution, instead of an ordinance, in approving the amendment to the comprehensive plan, the Levy Court impermissibly diverged from the procedural requirements imposed on the exercise of the County's delegated regulatory powers.[27]

Furthermore, in granting the County's comprehensive plan the force of law, the General Assembly also established that "no development . . . shall be permitted

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82 (holding that county must "conform strictly" to statutory procedures). Moreover, in *Carl M. Freeman Associates, Inc.*, the Supreme Court held that, with respect to the adoption of zoning ordinances, "substantial compliance" with statutorily required procedures was insufficient, since "zoning ordinances are in derogation of common law property rights, [there must be] strict compliance with the [legislated] procedures." *Id.* at 1182 (alterations in original); *see also Green*, 415 A.2d at 485 (explaining that "issue . . . [was] whether the mandate of the statute was followed" and that "it therefore makes no difference whether the act of the Council in approving the rezoning was termed a motion, a resolution, or an ordinance"). *But cf.* 5 MCQUILLIN, *supra* note 20, § 15.2 (suggesting that an enactment complying in all respects but caption would be sufficient).

The Court's holding, here, is limited to the issue before it—*i.e.*, the convergence of the statutory requirement that County actions having the force of law be enacted by ordinance and the statutory mandate that its comprehensive plan, an essential component of its delegated law use regulation powers, have the force of law.

[26] *See* 9 *Del.C.* § 4953(b) (requiring County preparation of conforming comprehensive plan); 9 *Del.C.* § 4960(a).

[27] The defendants also contend that the requirements of 9 *Del.C.* § 4110 are merely directory, and not mandatory. Reply Br. of All Defs. in Supp. of Their Mot. for Summ. J. ("Defs.' Reply Br.") at 21-22. In support of this, they cite *Carl M. Freeman Associates, Inc.* for the proposition that "[a]s against the government, [the word 'shall'] is to be construed as 'may' unless a contrary intent is manifest." 447 A.2d at 1181 (quoting BLACK'S LAW DICTIONARY 1541 (rev. 4th ed. 1968)). In that decision, however, the Supreme Court went on to find such contrary intent "implicitly manifest" in the statute at issue, especially because the statute "provide[d] for compliance with the due process requirement of notice . . . ." *See id.* Similarly, given the repeated use of the word "shall" throughout the statute at issue, as well as the fundamental nature of the statute in defining the county government's powers and the detail with which ordinance procedure is set forth by subsection (i), the Court declines to hold 9 *Del.C.* § 4110 merely directory. Indeed, the statute held to be mandatory in *Carl M. Freeman Associates, Inc.*, 9 *Del.C.* § 7002(m), is the corresponding version of 9 *Del.C.* § 4110(i) applicable to Sussex County.

except in conformity with the [comprehensive plan's] land use map or map series . . . ."[28] Should the amendment of the County's comprehensive plan be found invalid, then it follows that only development consistent with the comprehensive plan in force prior to the amendment may be permitted.[29] Therefore, because the shopping center CVP currently seeks to develop on the Parcel would be inconsistent with the County's prior plan's designation of "Industrial/Low Density Residential," such development could not be permitted to proceed without proper amendment of the plan. Moreover, zoning regulation by the County must be in conformity with its comprehensive plan.[30] As a

[28] 9 *Del.C.* § 4959(a) (also providing that "no development, as defined in this subchapter, shall be permitted except in conformity . . . with land development regulations enacted to implement the other elements of the adopted comprehensive plan"); *see also* 9 *Del.C.* § 4952 (defining "development" and "land development regulations").

[29] Invalidation of the amendment would result in the plan's reversion to its pre-amendment composition with respect to the matters attempted to be addressed by the amendment. *Cf. Comm'rs of Town of Slaughter Beach v. County Council of Sussex County*, 1983 WL 142509, at *2 (Del. Ch. Nov. 16, 1983).

[30] *See* 9 *Del.C.* § 4953(a)(3) ("The County shall have the power and *responsibility* . . . [t]o implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements thereof." (emphasis added)); 9 *Del.C.* § 4953(a)(3)(a); 9 *Del.C.* § 4952(2) ("Whenever in this subchapter land use regulations are required to be in accordance with the comprehensive plan, such requirements shall mean only that such regulations must be in conformity with the applicable maps or map series of the comprehensive plan."). *See also* 9 *Del.C.* § 4952(13) (defining "land development regulations"). *Cf. Blake v. Sussex County Council*, 1997 WL 525844, at *4 (Del. Ch. July 15, 1997)**.** *But compare* 9 *Del.C.* § 4903(a), *with* 9 *Del.C.* § 6904(a). *But see also* 9 *Del.C.* § 4922(b). The Court concludes that the County's zoning regulations must conform to the provisions of the County's comprehensive plan for, to hold otherwise, would, *inter alia*, create an unsustainable result given the legislative intent manifest in Subchapter II of Title 9, Chapter 49, and thereby violate traditional canons of statutory interpretation.

The defendants also appear to be in agreement with the view that the County's zoning regulations and comprehensive plan must be consistent. Indeed, the arguments they raise in their defense implicitly recognize this requirement of conformity. Moreover, the defendants explicitly

consequence, a determination by this Court that the comprehensive plan amendment is invalid will similarly, and necessarily, invalidate the rezoning to BG as inconsistent with the "Industrial/Low Density Residential" comprehensive plan designation in force before the plan amendment. Therefore, if the plaintiffs' challenge to the County's use of a resolution instead of an ordinance to amend the plan is properly before the Court, the requested relief should be granted to the plaintiffs.[31]

C. *Amendment of Complaint to Assert New Contentions in View of Statute of Repose*

1. Threshold Issues: Court of Chancery Rule 15(a)

In order for a party to amend its pleading, the Court must first determine whether amendment is permitted under Court of Chancery Rule 15(a), which provides that a party may amend its complaint by leave of the Court and that such "leave shall be freely given when justice so requires." While the standard articulated by the Rule indicates that leave to amend is to be liberally conferred, it remains a matter of the Court's discretion to grant such motions. In exercising that discretion, the Court considers certain factors, which include bad faith, undue

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acknowledge in their opening brief that "where a proposed rezoning is inconsistent with the comprehensive plan, the comprehensive plan must be amended." *See* Opening Br. of All Defs. in Supp. of Their Motion for Summ. J. at 24.

[31] The plaintiffs have standing to maintain this action because they are owners of lands adjacent to the rezoned Parcel or in close proximity to it. The defendants have not challenged standing as such, but they do question whether the plaintiffs hold a right of action capable of remedying the wrongs they assert with respect to violations of the plan amendment review provisions. These issues are not implicated in the present analysis.

delay, dilatory motive, repeated failures to cure by prior amendment, undue prejudice, and futility of amendment.[32]

Although the defendants do not frame their argument as such, in essence, they contest amendment of the plaintiffs' complaint to assert their new claims on the ground that such amendment would be futile because they are time-barred by a statute of repose. If both of the plaintiffs' new claims fail to relate back to the date of filing of their complaint, the statute of repose would act as an absolute bar to assertion of the new claims. The Court finds no other basis on which leave to amend should not, on these facts, be freely granted to the plaintiffs. Therefore, in order that leave to amend not be futile, the Court must answer the question of whether Court of Chancery Rule 15(c)(2) allows the plaintiffs' new claims to relate back to the filing of the complaint and thereby avoid the statute of repose.

2. Relation Back of the Plaintiffs' New Contentions

The plaintiffs first raised the issue of the County's compliance with §§ 4110(h) & (i) in their answering brief—approximately seven-and-one-half months following publication of notice of the amendment's approval.[33] Challenges to comprehensive plan amendments are subject to a statute of repose that cuts off parties' rights to bring actions challenging the legality of such amendments after

[32] *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *N.S.N. Int'l Indus., N.V. v. E.I. duPont de Nemours & Co.*, 1994 WL 148271, at *8 (Del. Ch. Mar. 31, 1994).
[33] *See* Pls.' Ans. Br. in Opp. to Defs.' Mot. for Summ. J. ("Pls.' Ans. Br.") at 32-33.

expiration of the prescribed time limit. By 10 *Del.C.* § 8126 (the "Statute of Repose" or the "Statute"),

> [n]o action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any ordinance, code, regulation or map, relating to zoning, or any amendment thereto . . . enacted by the governing body of a county . . ., is challenged, whether by direct or collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county . . . in which such adoption occurred, of notice of the adoption of such ordinance, code, regulation, map or amendment.

Specifically, the Statute of Repose permits no "action, suit or proceeding" to be "brought" after 60 days following the date of publication of notice of the amendment's adoption.[34] Nevertheless, the plaintiffs now seek to amend their complaint in order to contend that the amendment of the County's comprehensive plan and the rezoning violated statutory mandate because they were not adopted by ordinance.

The defendants, however, argue that the complaint may not be amended because the claims are barred by the Statute of Repose. In addition, the defendants

[34] The Statute does not expressly make reference to comprehensive plan amendments. Nevertheless, its terms do provide, *inter alia*, that no challenge shall be brought to "the legality of any ordinance, . . . regulation or map, relating to zoning, or any amendment thereto . . . ." *Id.* Because the comprehensive plan amendment was required to be approved by ordinance, was an amendment to the comprehensive plan map, and was clearly related to zoning, the Statute of Repose applies to the plaintiffs' challenge. *Cf. Bay Colony Ltd. P'ship v. County Council*, 1984 WL 159382, at *2 (Del.Ch. Feb. 1, 1984). Moreover, the policy behind the Statute of Repose—providing the confidence in the finality of land use decisions to allow for investment—would be defeated by a contrary interpretation.

argue that relation back concepts embodied in Court of Chancery Rule 15(c)(2) cannot be invoked to salvage them.[35]

Court of Chancery Rule 15(c)(2) provides that:

> [a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading . . . .

In performing analysis under Court of Chancery Rule 15(c)(2), "[t]he crucial consideration is whether [the defendants] had notice from the original pleadings that the plaintiff[s'] new claim might be asserted against [them]."[36] In this instance, the defendants argue that the plaintiffs' complaint provided them with no notice of the claims the plaintiffs now seek to assert sufficient to satisfy the requirements of Rule 15(c)(2).

This Court has previously employed relation back doctrine in determining whether a party's complaint may be amended to assert an additional claim after the running of the Statute of Repose. In *Commissioners of the Town of Slaughter*

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[35] Defs.' Reply Br. at 18-21. The plaintiffs now seek to challenge the rezoning both because the rezoning procedure was flawed and because the comprehensive plan amendment procedure was similarly deficient. If the Court determines that the plaintiffs' claim challenging the County's violation of 9 *Del.C.* § 4110 with respect to the amendment of its comprehensive plan relates back to the date of filing of the plaintiffs' original complaint under Court of Chancery Rule 15(c)(2), then, as discussed above in Part III(B), the rezoning will be found invalid (assuming amendment of the complaint is permitted)—thereby making unnecessary consideration of whether the plaintiffs' claim asserting violation of 9 *Del.C.* § 4110 with respect to adoption of the rezoning, itself, could relate back, as well.

[36] *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 972 (Del. Ch. 2001) (citing *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1065 (Del. Ch. 1988); 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* § 1497).

Beach v. County Council of Sussex County,[37] the plaintiffs sought to amend their complaint to assert a "new count" challenging a rezoning because the County Council had failed to comply with statutory notice requirements for adoption of rezoning ordinances.[38] The Court held that the plaintiffs could amend their complaint in order to assert the new claim because they had satisfied the requirements for relation back. The Court reasoned that "the key to the matter under the present [circumstances] would appear to be whether the new claim to be asserted in the amended pleading arose out of the transaction set forth in the original pleading."[39] Quoting Court of Chancery Rule 15(c)(2), the Court further explained that, when the new claim "ar[ises] out of the conduct, transaction or occurrence," the amendment would relate back to the date of the filing of the complaint and § 8126 would present no bar to amendment.[40]

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[37] 1983 WL 142509 (Del. Ch. Nov. 16, 1983).
[38] *See id.* at *1 - *2.
[39] *Id.* at *2.
[40] *Id.* at *2 - *3. The Court notes that the opinion in *Slaughter Beach* provides that, "[i]f the test [under Rule 15(c)(2)] is met, the intervening running of a *statute of limitations* does not constitute a bar to the amendment." *Id.* at *3 (emphasis added). This language is clearly intended to refer to § 8126, however. In reaching its conclusion that the test of Rule 15(c)(2) applies, the opinion in *Slaughter Beach* relies on principles of federal civil procedure. *See id.* (citing 51 AM. JUR. 2D *Limitation of Actions* § 220; 35A C.J.S. *Federal Civil Procedure* § 338). Indeed, the majority approach under federal civil procedure principles, as well as the approach adopted by a majority of state jurisdictions, has, in practice, drawn no effective distinction between statutes of limitation and statutes of repose for purposes of "new claim" amendments. *See, e.g.*, *Acierno v. New Castle County*, 2000 WL 718346, at *9 (D. Del. May 23, 2000) (citing *Neuner v. C.G. Realty Capital Ventures-I, L.P. (In re Sharps Run Assocs., L.P.)*, 157 B.R. 766, 784 (D. N.J. 1993)); 2 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 13.1, at 297 (1991). *See generally* note 41, *infra*.

The parties to this litigation agree that relation back doctrine provides the applicable framework for analysis of whether the plaintiffs' attempt to amend their complaint is barred by the Statute of Repose.[41] As a preliminary matter, it is clear

[41]In their reply brief, the defendants presented compliance with Court of Chancery Rule 15(c)(2) as their primary opposition to the new claims raised by the plaintiffs' answering brief. *See* Defs.' Reply Br. at 17-21. The defendants' other argument, that 9 *Del.C.* § 4110 is directory only, is addressed at note 27, *supra*. By their arguments that notice may be discerned from the complaint, the plaintiffs, at the argument on the cross-motions for summary judgment, expressed their implicit agreement that Rule 15(c)(2) provides the appropriate framework for analysis, as well.

Moreover, relation back analysis is widely applied in the context of new claims amendments in the face of a statute of repose as a matter of federal civil procedure (to which our civil procedure closely adheres), especially when new federal claims are asserted. *See, e.g., Acierno*, 2000 WL 718346, at *9; *Meyerson v. Wickes Co., Inc. (In re Ivan Boesky Sec. Litig.)*, 882 F. Supp. 1371, 1381 (S.D.N.Y. 1995) (explaining that relation back permitted in face of statute of repose because, *inter alia*, Fed. R. Civ. P. 15(c) "is not a tolling doctrine"). *But see Resolution Trust Corp. v. Olson*, 768 F. Supp. 283, 285 (D. Ariz. 1991). The Statute of Repose should be viewed as a substantive (and not merely procedural) provision. *Cf. Cheswold Vol. Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984) (holding 10 *Del.C.* § 8127 substantive and explaining distinction between statutes of limitation and statutes of repose (quoting *Bolick v. Am. Barmag Corp.*, 293 S.E.2d 415, 418 (N.C. 1982))). This, however, does not necessarily impair application of relation back analysis. *See Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 364 S.E.2d 380, 383 (N.C. 1988) ("We hold that the determination of whether a claim asserted in an amended pleading relates back does not hinge on whether a time restriction is deemed a statute of limitation or repose. Rather, the proper test is whether the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences which formed the basis of the amended pleading. If the original pleading gave such notice, the claim survives by relating back in time without regard to whether the time restraint attempting to cut its life short is a statute of repose or limitation."). The substantive right granted by the Statute is to be free from litigation after a date certain without commencement of an action—*i.e.*, to preclude application of tolling principles to preserve a plaintiff's claim. *See, e.g., In re Sharps Run Assocs., L.P.*, 157 B.R. at 785 ("Statutes of repose are directed towards eliminating equitable tolling and other methods of extending limitations periods. Relation back of the receiver's crossclaim to the original complaint under . . . [Fed. R. Civ. P. 15(c)(2)] frustrates no legitimate policy behind statutes of repose . . . ."); *In re Ivan Boesky Sec. Litig.*, 882 F. Supp. at 1381. Therefore, the right is not materially impaired by application of Rule 15(c)(2) where an action was commenced within the period of repose. Compare this analysis with the distinct issue of joinder of necessary parties, note 53, *infra*.

Notwithstanding the above, by applying rules of statutory construction, and accommodating the terms employed by the Statute, the better view may well be to hold the requirements of the Statute satisfied on commencement of a plaintiff's suit in the context of amendments for "new

that the plaintiffs' claim arises out of the same "conduct, transaction or occurrence." The plaintiffs, in their complaint, challenged the procedure employed in revising the comprehensive plan; approval of the amendment to the comprehensive plan is the conduct or transaction challenged now. The defendants, however, contend that the plaintiffs new claim "now comes too late in the day."[42] Specifically, they argue that the plaintiffs' complaint provides no "notice . . . that the plaintiffs' new claim might be asserted."[43]

Of course, the plaintiffs did not focus specifically on the Levy Court's failure to comply with the requirements of 9 *Del.C.* § 4110(h)-(i) in their complaint; however, this does not necessarily preclude relation back as the defendants would hope.[44] In addition, the defendants argue that the plaintiffs'

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claims." *Compare* 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 61:1 (6th ed. 2001 rev.), *and Shaw v. Merchs.' Nat. Bank*, 101 U.S. 557, 565 (1879), *with Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930). *See also* 3A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 72:3, at 707-08 (6th ed. 2003 rev.). In that instance, then, laches or estoppel, *see, e.g.*, *Council of S. Bethany v. Sandpiper Dev. Corp.*, 1986 WL 13707, at *3 (Del. Ch. Dec. 8, 1986), or the default statute of limitations, *see* 10 *Del.C.* § 8106, would likely provide the Court with the appropriate tools for analyzing a plaintiff's motion to amend. This reasoning, of course, would not extend to motions for joinder of additional parties after expiration of the Statute's time limit. *See* note 53, *infra*.

[42] Defs.' Reply Br. at 18.

[43] *Id.* (quoting *Telxon Corp.*, 792 A.2d at 972). For a discussion of the standard for relation back under Rule 15(c)(2) of the Federal Rules of Civil Procedure, see generally 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1497 (2d ed. 1990).

[44] *See Slaughter Beach*, 1983 WL 142509, at *2. Indeed, the Court in *Slaughter Beach* permitted amendment, even though the plaintiffs' complaint in that case failed to allege violation of the specific statute on which the plaintiffs' new claim relied, because the plaintiffs' complaint charged improper notice "during the course of the rezoning procedure." *Id.* This was held sufficient notwithstanding the complaint's focus on improper notice at the Planning and Zoning

complaint only challenges "alleged deficiencies in . . . OSPC's comprehensive plan review."[45] Although this is the primary focus of the plaintiffs' complaint with respect to the improper procedure in amending the comprehensive plan, the complaint's language is sufficient to place the defendants on notice that other,

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Commission stage, instead of at the hearing of the County Council, which the plaintiffs' subsequent claim challenged. *See id.*

The defendants attempt to distinguish (and thereby bar) the new claim the plaintiffs seek to assert in this litigation from the subsequent claim brought in *Slaughter Beach* by highlighting the Court's view that the plaintiffs' additional claim in that case

> [was] not so much an attempt to add a new and separate cause of action [which might be barred under § 8126] as it is an effort to allege a new theory of relief in support of their original charge that the rezoning . . . was invalid due to defective notice on the part of the County.

Id. The Court, however, ultimately chose to abjure grounding the test for amendment on "an academic discussion of [distinctions between] a new theory versus a new cause of action," and instead held that Rule 15(c)(2) framed the sole analysis necessary. *Id.* at *2 - *3.

The opinion in *Slaughter Beach* does not explicitly address the additional element of relation back analysis set forth in the text above—*i.e.*, that some notice that the new claim might be asserted must be found in the original pleadings, as well. Were this somewhat higher burden not required of the plaintiffs, it is certain that the "new claim" satisfies the requirements expressly set forth by the terms of Rule 15(c)(2) and would be therefore permitted without the necessity of further discussion.

[45] Defs.' Reply Br. at 19 ("Plaintiffs only alleged deficiencies in the public notice, DelDOT's traffic review, and OSPC's comprehensive plan review."). With respect to amendment of the comprehensive plan, Count I of the plaintiffs' complaint provides:

> The County's comprehensive plan has the force of law, and no use of property shall be permitted absent compliance therewith pursuant to 9 *Del.C.* § 4959. In addition, any amendment proposed to the County's comprehensive plan must be submitted to the State pursuant to 9 *Del.C.* §§ 4958 and 4960. Revisions and amendments to the comprehensive plan are subject to review pursuant to 29 *Del.C.* §§ 9103 and 9203. Because the necessary procedure was not followed by Kent County prior to its purported adoption of an amendment to its comprehensive plan, the amendment is not valid. Therefore, the purported rezoning is likewise invalid and of no legal force or effect.

Compl. ¶ 33. Similarly, Count II of the complaint states: "Kent County's rezoning of the Parcel was in violation of State and County law. Specifically, approval of the [motion for rezoning and amendment of the comprehensive plan] was invalid on the grounds of . . . lack of compliance with legal requirements regarding amendments to the comprehensive plan." *Id.*, ¶ 39.

related aspects of the plan amendment process might be subsequently challenged.[46] Indeed, the complaint provides that the resolution amending the County's comprehensive plan "was invalid on the grounds of . . . lack of compliance with legal requirements regarding amendments to the comprehensive plan . . . ."[47] In addition, the complaint sets forth that, "[b]ecause the necessary procedure was not followed by Kent County prior to its purported adoption of an amendment to its comprehensive plan, the amendment is not valid."[48] These words indicate that the plaintiffs are challenging the process by which the comprehensive plan was amended.[49] Though the complaint does not set forth the precise claim the plaintiffs

[46] The plaintiffs' specific references to statute can be read as juxtaposed with (and not delimited by) the general language of the complaint described in greater detail in the text, *infra*.
[47] Compl. ¶ 39.
[48] Compl. ¶ 33. The defendants quote this language in their opening brief. *See* Opening Br. of All Defs. in Supp. of Their Motion for Summ. J. at 15. In the context of their arguments that the plaintiffs must demonstrate a private right of action to challenge violations by state agencies of the comprehensive plan amendment review process, the defendants contend that the plaintiffs, in their answering brief, claim they are challenging "the rezoning itself" and not the "comprehensive plan amendment process." Defs.' Reply Br. at 11. While the plaintiffs do recite that their action is a challenge to the rezoning, *see* Pls.' Ans. Br. at 24, this mischaracterizes the plaintiffs' statement if taken out of its context in the private right of action debate and applied to the issue of notice of potential claims. Though neither party attempts this, the Court addresses this potential issue for the sake of clarity. In the following portion of their answering brief, the plaintiffs go on to make clear that they view the plan's amendment as not "legally effective" for violation of process, rendering the rezoning inconsistent with the pre-amendment plan and, therefore, invalid. *See* Pls.' Ans. Br. at 24-25. Moreover, the plaintiffs raise their new claims regarding failure of the plan amendment process for violation of 9 *Del.C.* § 4110 in the same brief. *See id.* at 32-33. The plaintiffs' simultaneous narrowing of their claims in one respect and attempt at expansion of them in a different, but related, respect, then, does not preclude the claim at issue.
[49] The defendants cite this Court's decisions in *In re ML/EQ Real Estate Partnership Litigation* 1999 WL 1271885 (Del. Ch. Dec. 21, 1999), and *Scott Fetzer Co. v. Douglas Components Corp.* 1994 WL 148282 (Del. Ch. Apr. 12, 1994), for support. The facts of those cases, however, are distinguishable from those of the present litigation. For example, the plaintiffs' complaint in

now seek to assert, the language employed in the pleading does satisfy the requirements of Rule 15(c)(2) in this context.[50]

Inquiry into whether to permit relation back under Rule 15(c)(2) inherently involves the potential for analysis of claims falling across a wide spectrum. At the ends of the spectrum, the analysis is not difficult. As the potential claims approach its median, however, a degree of discretion is left to the Court to determine whether notice of claims is reasonably provided by plaintiffs' original pleadings. In this instance, the complaint expressly challenges the procedure employed by the County in amending its comprehensive plan. While the precise theory on which the plaintiffs now rely is not squarely presented by the complaint, the defendants should reasonably have been on notice that the plan's amendment process was "in

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ML/EQ Real Estate Partnership notably omitted one of three relevant transactions and otherwise failed to address facts at issue, strongly suggesting, under the totality of the circumstances, that the plaintiffs had "no gripe" about the issue they later sought to assert as an amended claim. *See* 1999 WL 1271885, at *12. It should also be noted that, in addition to the complaint's "total silence" with respect to one of the three transactions, the plaintiffs had also effectively admitted that their claims as to a second were otherwise time-barred regardless of the Court's conclusions as to relation back. *Id.* In *Scott Fetzer Co.*, the Court rejected relation back because the new claims the plaintiffs sought to assert implicated grounds widely different from those relied on in the original complaint—*i.e.*, assumption of workers' compensation liability in contrast to assumption of environmental remediation liability. *See* 1994 WL 148282, at *6. The only tie that could have been said to exist with the claims set forth in the complaint was that they arose from the same asset purchase agreement. Without more, this was clearly insufficient to constitute notice of potential new claims. The Court ruled that the new claims failed even to arise out of the same conduct, transaction, or occurrence set forth in the initial complaint. The Court views the claim the plaintiffs now seek to assert as presenting none of the concerns raised by the cases described above.

[50] The Court's analysis here is consistent with that of the United States District Court in determining whether to permit relation back of a plaintiff's new claim in the context of § 8126. *See Acierno*, 2000 WL 718346, at *9.

play" and that, during the course of litigation, a new but related grounds for challenge might arise.

To an extent, the Court's analysis must also be informed by the policy interests underlying the Statute of Repose. On these facts, however, the Court views permitting the amendment as presenting no material conflict with the policy interests the Statute seeks to protect. The Court acknowledges that statutes of repose, especially where real property rights are concerned, are primarily intended to grant certainty to parties potentially subject to litigation—*i.e.*, that they are free from the threat of litigation over their interests and may plan and act accordingly.[51] Recognition of this policy is supported by the narrow window allowed under the Statute for the commencement of challenges to amendments of a comprehensive plan.[52] The policy interests implicated by the present litigation, however, may be distinguished. CVP, the primary private defendant in this litigation, had notice of the challenge to the rezoning and to the amendment of the comprehensive plan and

[51] The running of the Statute without the commencement of litigation permits parties to rely on the settled nature of their interests, thereby enhancing parties' ability to plan for the future, enter into commercial relationships, and make investment decisions. *See, e.g.*, *Sterling Prop. Holdings, Inc. v. New Castle County*, 2004 WL 1087366, at *5 n.25 (Del. Ch. May 6, 2004).

[52] *See, e.g.*, *Lynch v. City of Rehoboth*, 2004 WL 1238405, at *4 (Del. Ch. May 28, 2004) (Master's Report); *see also Council of Civic Organs. of Brandywine Hundred, Inc. v. New Castle County*, 1993 WL 390543, at *6 (Del. Ch. Sep. 21, 1993), *aff'd*, 637 A.2d 826 (Del. 1993) (TABLE); *Sandpiper Dev. Corp., Inc.*, 1986 WL 13707, at *2; *see also Carl M. Freeman Assocs., Inc.*, 447 A.2d at 1182. *Cf. Greczyn v. Colgate-Palmolive***,** 869 A.2d 866, 874 (N.J. 2005) ("Even statutes of repose . . . 'need not necessarily be construed rigidly. [Precedent has] confirmed that our 'approach to substantive statutes of limitations has evolved to one that recognizes that their application depends on statutory interpretation focusing on legislative intent and purposes.'" (citations omitted)).

was actively confronting the challenge. It was, therefore, already exposed to the vagaries of litigation, and, thus, the Statute's purposes have not been frustrated. Upon commencement of this litigation, CVP could no longer expect refuge from the challenge now before the Court.[53]

Moreover, the plaintiffs point to a fundamental violation of the requirements for county government actions having the force of law—a violation the defendants do not seriously dispute. Indeed, this is not merely a violation of the prescribed requirements particular to amendments of the County's comprehensive plan; instead, this is a violation of the basic procedural conditions for the exercise of county powers in the enactment of measures having the force of law.[54] As

[53] Instances in which a plaintiff seeks to amend her complaint to assert an additional claim, as here, must be distinguished from the more common case involving amendment for joinder of necessary parties. *Compare* Ct. Ch. R. 15(c)(2), *with* Ct. Ch. R. 15(c)(3) (setting forth, even by its express terms, more restrictive test for relation back). In the latter case, the bar to joinder of necessary parties following expiration of the Statute of Repose (and resultant dismissal of the action) is taken as axiomatic. *See, e.g.*, *S. New Castle County Alliance, Inc. v. New Castle County Council*, 2001 WL 855434, at *1 (Del. Ch. July 20, 2001) ("[I]f this Court finds that there are indispensable parties whose joinder is required, their joinder at this stage would be legally precluded by § 8126."); *Lynch*, 2004 WL 1238405, at *4 (though briefly mentioning Rule 15, remarking that absence of indispensable party would "be grounds to dismiss"). This approach rests, in large part, on the view that the Statute of Repose is "jurisdictional and . . . cannot be waived." *See S. New Castle County Alliance, Inc.*, 2001 WL 855434, at *1. This result is derived from the understanding that joinder of a third-party, after the running of the Statute, would be tantamount to a new (and therefore barred) "action" from the perspective of the absent additional party (who should be permitted the benefit of her repose under the terms of the Statute). The adding of new parties may be distinguished from the adding of new claims in part because in the latter context the Court already has jurisdiction over the litigants and the timely-filed litigation.

[54] *See* 9 *Del.C.* § 4110(h) (providing that it applies to "*all* actions of the county government which shall have the force of law" (emphasis added)). *Compare Bay Colony, Ltd.*, 1984 WL 159381, at *3, *5 ("Action by ordinance is necessary in order to provide the numerous procedural safeguards which insure public participation and more reasoned and orderly Council conduct. . . . [Rezoning] must not be . . . done without meticulous following of all procedural

described above, Delaware case law recognizes the General Assembly's clear interest in seeing municipal governments adhere to the basic conditions on the exercise of their delegated powers. Recognition of this interest is reinforced by the terms and structure of the statute. Section 4110(i) of Title 9 sets forth a detailed procedural scheme for the enactment of ordinances; and, furthermore, in enacting 9 *Del.C.* § 4110, the legislature clearly distinguished between enactment by "resolution" and by "ordinance," expressly recognizing the distinction by the terms of the statute.[55]

Thus, the plaintiffs' challenge to the use of a resolution to adopt the amendment of the comprehensive plan satisfies the standards of Court of Chancery Rule 15(c)(2) and relates back.[56]

* * *

In summary, the plaintiffs' action was timely commenced. The defendants fail to demonstrate any material prejudice that would result from amendment of the complaint. While the Court acknowledges that a finding of notice of the present claim was perhaps not entirely preordained in light of the focus of the plaintiffs' original pleading, the foregoing considerations regarding the high level of

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safeguards."), *with Sandpiper Dev. Corp.*, 1986 WL 13707, at *3 (demonstrating balance to be struck between strict compliance requirements and interests in repose when reviewing land use matters).

[55] *See, e.g.*, 10 *Del.C.* § 4110(k).

[56] It is thus not necessary to determine whether plaintiffs' claim as to use of a resolution to implement a rezoning would relate back under Court of Chancery Rule 15(c)(2).

compliance with conditions on the exercise of delegated powers required by the legislature, coupled with the original pleading's express indications of the areas of intended challenge, weigh substantially in the plaintiffs' favor. Therefore, the Court grants the plaintiffs' request for amendment of the complaint and concludes that the plaintiffs' claim relates back to the date of filing of their complaint. As a result, the plaintiffs have earned summary judgment because the amendment of the County's comprehensive plan was not implemented by ordinance as required by statute, and, thus, the rezoning was also defective.

IV.

Accordingly, the plaintiffs are entitled to summary judgment. The amendment of the comprehensive plan is declared invalid for violation of statutory law and the rezoning is declared invalid because it was not consistent with the controlling comprehensive plan. The defendants' motion for summary judgment is denied. Counsel are requested to confer and to submit a form of order to implement this memorandum opinion.