IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSEPH KERNS and KATHLEEN KERNS, WILLIAM M. TORNEY and LOIS A. TORNEY, MAUREEN MOYER, and JOHN D. COFFMAN and MARTHA C. COFFMAN,	)	
and	)	Civil Action No. 1999-S
WAYNE M. ARGO, DONNA J. ARGO, STANLEY J. GUNIA, JOYCE JOHNSON, TERESA D. GIAMBRONE, and LEWIS M. HAYDEN and NEVILLE W. HAYDEN,	)	Class Action
On behalf of themselves and other similarly situated property owners, 9 Del. C. § 6519 persons and other persons being assessed for the payment of the "West Rehoboth Expansion of the Dewey Beach Sanitary Sewer District,"	)	
Plaintiffs,	)	
v.	)	
DALE R. DUKES, individually and as former Sussex County Government and Council President, GEORGE J. COLLINS, WILLIAM D. STEVENSON, SR., GEORGE B. COLE AND RALPH E. BENSON, individually and as Sussex County Council Members, ROBERT L. STICKELS, individually and as Sussex County Administrator, ROBERT L. WOOD, individually and as Sussex County Engineer, CHRISTOPHE A. G. TULOU,	)	

individually and as a former Delaware Department of Natural Resources and Environmental Control Secretary, GERALD L. ESPOSITO, individually and as then acting Director of Delaware Department of Natural Resources and Environmental Control, and EDWIN H. CLARK, II, individually and as then Secretary of Delaware Department of Natural Resources and Environmental Control,

and

FINLEY B. JONES, JR., individually and as Sussex County Government President and Council President, DALE R. DUKES, FINLEY B. JONES, JR., VANCE PHILLIPS and LYNN ROGERS, individually and as Sussex County Council Members, MICHAEL A. IZZO, individually and as Sussex County Engineer,

Defendants.

MEMORANDUM OPINION

Submitted: December 9, 2003
Decided: April 2, 2004

Francis J. Trzuskowski, Esquire of TRZUSKOWSKI KIPP & KELLEHER, P.A., Wilmington, Delaware, Attorneys for Plaintiffs

Dennis L. Schrader, Esquire of WILSON, HALBROOK & BAYARD, Georgetown, Delaware, and

David E. Brand, Esquire of PRICKETT JONES & ELLIOTT, P.A., Wilmington, Delaware, Attorneys for Defendants

PARSONS, Vice Chancellor.

Plaintiffs filed an action challenging the expansion of the Dewey Beach Sanitary Sewer System to include the West Rehoboth Area by Sussex County pursuant to 9 *Del. C.* Ch. 65. This Memorandum Opinion addresses Defendants' motion for summary judgment on the basis of the statute of limitations and the doctrine of laches.[1]

Sussex County's attempts to establish a new central sewer system west of the Dewey Beach Sanitary Sewer District were defeated in referendums in 1971 and 1985.[2] Plaintiffs aver that, in light of these prior defeats, Sussex County Council circumvented the requirements of 9 *Del. C.* Ch. 65 (Sanitary and Water Districts), and thereby violated the procedural and substantive due process rights of the residents of Sussex County by expanding an existing district rather than placing a proposal for a new sewer district before the voters in a referendum. Plaintiffs assert that the West Rehoboth Expansion encompasses a land mass significantly larger than the Dewey Beach Sanitary Sewer System, is not contiguous with the Dewey Beach District, and is not integrated with or in any way connected to the Dewey Beach System. Plaintiffs contend that the County Council's actions created a *new* district, rather than an *expansion* of the existing district, and thus the County's actions were subject to different statutory procedural requirements under Chapter 65. Those requirements included putting the *new* district to an election.

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1 Plaintiffs are no longer pursuing their claims against the state defendants. *See* Plaintiffs' Motion to Amend the Complaint for the Third Time and to Dismiss the State Defendants (D.I. 76), which the Court granted (D.I. 86). The Third Amended Complaint (the "Complaint") asserts no claims against the state defendants.

2 Unless otherwise noted, the facts recited in this Memorandum Opinion are drawn from the Complaint.

Defendants, who were sued in their individual and official capacities, filed a motion for summary judgment based on their statute of limitations and laches defenses. For the reasons set forth below, the motion will be granted.

I. FACTS

On October 20, 1989 Sussex County advertised a public hearing regarding the establishment of a proposed West Rehoboth Expansion of the Dewey Beach Sanitary Sewer District ("WRE"). At the hearing on November 2, 1989, a number of members of the affected public raised objections.

The Delaware Department of Natural Resources and Environmental Control ("DNREC") held public hearings on a proposed septic permit moratorium on August 30, September 1, and November 15, 1989 out of concern over contaminated groundwater. DNREC imposed a moratorium on all new septic system permits in the area to be encompassed by the WRE on December 20, 1989. The moratorium had the practical effect of phasing out septic systems in the WRE by prohibiting that alternative means of waste removal.

Sussex County posted notices regarding the WRE boundaries on February 19 and 21, 1990. These notices did not set a date for a public hearing but indicated that written comments would be accepted by the Sussex County Engineering Department until March 12, 1990. On March 13, 1990, Sussex County Council noticed a meeting for March 20, 1990[3] indicating that the Sussex County Council would consider the expansion

[3] Sussex County Council changed the date of the meeting from Tuesday, March 20, 1990 to Thursday, March 22, 1990. Thus, the February 19 postings were not

of the Dewey Beach Sanitary Sewer System at the next County Council meeting.[4] Similar notices were published in the *Whale* and the *News Journal*, two local newspapers. None of the notices contained cost and assessment data. Such data would have been required for the establishment of a *new* district.[5] The notices did meet, however, the statutory informational requirements for the *expansion* of an existing district pursuant to section 6502(a). Although the March 13 notices were not posted within the expansion

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within the thirty (30) day window required by 9 *Del. C.* § 6502(b). Plaintiffs note that fact in their Complaint, but do not challenge the timeliness of the February 21 posting. *Id.* Because Plaintiffs action is time barred, and there was sufficient constructive notice for accrual and to preclude tolling, the Court need not address Plaintiffs' challenges to the technical sufficiency of the notices.

[4] Plaintiffs note that the March 13, 1990 notice and the published notices did not indicate where the County Council meeting would be held, did not set an independent date for a public hearing on the expansion and did not specifically invite public comment. The notice, included in the Appendix to Defendants Opening Brief in Support of their Motion for Summary Judgment filed on May 9, 2002 ("DOB App.") at A49-50, states:

> The Sussex County Council will consider extending the Dewey Beach Sanitary Sewer District to include the West Rehoboth Expansion [a map is included] at its next scheduled meeting. For further information, please contact the Sussex County Engineering Department, Planning and Permits Division, Post Office Box 589 Georgetown, DE 19947 – (302) 855-7719.

The Court understands that today Sussex County Council meetings generally are held at the Council Chambers in the Sussex County Administrative Office Building. *See* http://www.sussexcounty.net. Plaintiffs presented no evidence to suggest that the County Council held the March 22, 1990 meeting in some unusual location or that any interested citizen would have had difficulty determining the location of the meeting.

[5] *See* 9 *Del. C.* §§ 6502(a), 6505(b).

area of the proposed expansion district, they were posted within the district that was to be expanded.

On March 22, 1990, Sussex County Council adopted Resolution No. R-013-90 establishing the WRE. The Council adopted Ordinance 685 on June 5, 1990 to provide for the assessment of a $2,000 sewer capitalization fee. No public election was held regarding the WRE Resolution of March 22, 1990. If the Resolution had related to a new sewer district, 9 *Del. C.* § 6506 would have required that an election be held no later than September 22, 1990.

A group of residents of Sussex County, Citizens for Affordable Sewers, filed an action in Superior Court in June 1993 to mandate the election they claimed was required under 9 *Del. C.* § 6506.[6] Plaintiffs assert that this action was voluntarily dismissed in July 1993, before the filing of any responsive pleading, based on an agreement with one or more of the defendants that it was premature and that the right to oppose any proposed sewer district on the basis of cost concerns would be preserved. Plaintiffs did not present any records supporting this averment and do not argue that this action relates back to the 1993 action in Superior Court. Defendants dispute Plaintiffs' characterization of the disposition of the 1993 action. Defendants assert that the case was dismissed with

[6] *Citizens for Affordable Sewers v. Sussex County Council*, C.A. No. 93C-06-010 (Del. Super. June 1993).

prejudice, dispute the alleged basis for the dismissal and deny that there was any agreement about preserving the right to challenge the cost of the WRE.[7]

On November 16, 1993, Sussex County Council adopted Ordinance No. 936, amending Ordinance No. 685 and lowering the capitalization fees for the WRE. On July 22, 1995, the Council began mailing capitalization fee bills to landowners in the WRE. Construction of Phases I and II of the WRE were completed by December 29, 1995.[8] Although Construction on the third and final phase did not start until after Plaintiffs filed their initial complaint in the District Court,[9] it is now complete.[10]

Plaintiffs brought an action in the United States District Court for the District of Delaware challenging the creation of the WRE on March 4, 1996.[11] The district court granted defendants' motion to dismiss on November 8, 1996.[12] After first certifying a question of law to the Delaware Supreme Court, the Court of Appeals for the Third Circuit affirmed the dismissal on July 24, 1998.[13] Thereafter, Plaintiffs filed the present

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7 *See* Plaintiffs' Answering Brief ("PAB") Appendix ("App.") at B-00118 (Order on Plaintiffs' Stipulation of Dismissal) ("the above captioned lawsuit is dismissed with prejudice").

8 PAB at 10.

9 *Id*.

10 Defendants' Opening Brief ("DOB") at 5.

11 *Kerns v. Dukes*, C.A. No. 96-113 MMS (D. Del. Mar. 4, 1996).

12 *Kerns v. Dukes*, 944 F. Supp. 1214 (D. Del. 1996).

13 *Kerns v.* Dukes, 153 F.3d 96 (3d Cir. 1998). The certified question was, "[t]o what extent does the jurisdiction of Delaware's courts (whether taken singly or in

action on July 13, 1999 taking advantage of the savings statute and claiming relation back to the filing of their action in federal court.[14] Plaintiffs amended their complaint on July 10, 2001 and again on June 10, 2002.

Plaintiffs' Complaint alleges:

(1) Defendants violated Plaintiffs' procedural due process rights guaranteed by the Fourteenth Amendment of the United States Constitution; Article I, Sections 8 and 9 of the Constitution of the State of Delaware of 1897; and 42 U.S.C. §§ 1983 and 1988 when Sussex County created the WRE and mandated connections and fees without proper notice ("Count I");

(2) Defendants violated Plaintiffs' substantive due process rights guaranteed by the Fourteenth Amendment of the United States Constitution; Article I, Sections 8 and 9 of the Constitution of the State of Delaware of 1897; and 42 U.S.C. §§ 1983 and 1988 by denying Plaintiffs the right to vote on the creation of the WRE pursuant to 9 *Del. C.* § 6506 and establishing assessments and fees without providing landowners with adequate notice and an opportunity to be heard ("Count II"); and

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combination) encompass Plaintiffs' claims, and to what extent are Delaware's courts able to provide such relief as those claims, if sustained, would entail?" The Opinion of the Supreme Court is reported at 707 A.2d 363 (Del. 1998).

[14] 10 *Del. C.* § 8118. Section 8118 applies to cases filed in federal court and dismissed on jurisdictional grounds. *See Frombach v. Gilbert Assoc.*, 236 A.2d 363 (Del. 1967); *Howmet Corp. v. City of Wilmington*, 285 A.2d 423 (Del. Super. 1971); *Sorensen v. Overland Corp.*, 142 F. Supp. 354 (D. Del. 1956). Notably, Plaintiffs did not seek relation back to the 1993 Superior Court action.

(3) Defendants failed to comply with a required duty as set forth in 9 *Del. C.* Ch. 65 to hold an election in conjunction with the creation of the WRE ("Count III").

Defendants moved for summary judgment on May 9, 2002, arguing that Plaintiffs' claims are untimely. Specifically, Defendants contend: (1) Plaintiffs' civil rights claims, Counts I and II, are barred by the two year statute of limitations of 10 *Del. C.* § 8119; (2) Plaintiffs' claim for failure to hold an election pursuant to 9 *Del. C.* Ch. 65, Count III, is barred by the three year statute of limitations of 10 *Del. C.* § 8106; and (3) Plaintiffs' claims are barred by the equitable doctrine of laches. In response, Plaintiffs argue that Sussex County waived the statute of limitations and laches defenses by failing to file their motion for summary judgment as a preliminary motion under the July 28, 2000 scheduling order and that their claims are timely.

II. STANDARD

Summary judgment is appropriate if the evidence of record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[15] All well-pled facts must be viewed in the light most favorable to the nonmoving party.[16] If the moving party properly supports its motion, the burden shifts to the adverse party to demonstrate that material issues of fact exist and that summary judgment is

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[15] Ch. Ct. R. 56; s*ee, e.g., Gilbert v. El Paso Co.,* 575 A.2d 1131, 1142 (Del. 1990); *Goss v. Coffee Run Condo Council*, 2003 WL 21085388, at *5 (Del. Ch. Apr. 30, 2003).

[16] Ch. Ct. R. 56; *Gilbert*, 575 A.2d at 1131.

inappropriate.[17] Unsupported factual assertions and inferences are insufficient to withstand summary judgment when the movant adduces evidence that, if not rebutted, entitles it to summary judgment.[18]

In this case, because the action was not filed until after the limitations period expired, Plaintiffs bear the burden of presenting factual evidence demonstrating that, when the facts are viewed most favorably to them, their claims are not barred by the statute of limitations or laches[19] Similarly, Plaintiffs bear the burden on their contention that Defendants waived those defenses.

III. ANALYSIS

A. Statute of Limitations

A statute of limitations is not binding on a court of equity.[20] However, the Court of Chancery generally applies the legal statute of limitations by analogy.[21] The time fixed by the legal statute of limitations is deemed to create a presumptive time period for purposes of the Court's application of the equitable doctrine of laches absent

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17 *Goss*, 2003 WL 21085388, at *5.

18 *See, e.g., In re Wheelabrator Tech. S'holder Litig.*, 663 A.2d 1194, 1199-1200 (Del. Ch. 1995).

19 *See In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *3-*6 (Del. Ch. July 17, 1998) (dismissing claims for failure to file within the statutory period and placing the burden of demonstrating defenses to the statute of limitations on the plaintiff).

20 *E.g., Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

21 *See, e.g., id.*; *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989).

circumstances that would make the imposition of the time bar unjust.[22] If the claim is barred under the statute of limitations, the Court need not engage in a traditional laches analysis.[23]

Constitutional claims, like any other claims, can be time barred.[24] Thus, the only issues on this motion are whether Plaintiffs' claims are time barred and, if so, whether Defendants have waived their time bar defenses.

1. Civil Rights Claims

Sussex County argues that Plaintiffs' civil rights claims are barred by 10 *Del. C.* § 8119. State law determines the applicable statute of limitations for claims brought under 42 U.S.C. § 1983.[25] Civil rights claims are characterized as personal injury actions for purposes of determining the statute of limitations.[26] In Delaware, the statute of limitations for personal injury actions is two years.[27]

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22 *U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993).

23 *Atlantis Plastics*, 558 A.2d at 1064 ("[W]here the analogous statute of limitations at law period has run, a plaintiff will be barred from bringing suit without the necessity for the Court to engage in traditional laches analysis.").

24 *Block v. North Dakota*, 461 U.S. 273, 292 (1983); *Bd. of Regents v. Tomanio*, 446 U.S. 478 (1980); *Soriano v. United States*, 352 U.S. 270 (1957); *Hall v. Yacucci*, 723 A.2d 839 (Table), 1998 WL 986030, at *1 (Del. 1998).

25 *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985); *Hall*, 1998 WL 986030, at *1.

26 *Wilson*, 471 U.S. at 280; *Hall*, 1998 WL 986030, at *1.

27 10 *Del. C.* § 8119; *see also Hall*, 1998 WL 986030, at *1.

The United States Supreme Court made clear in *Wilson v. Garcia, supra*, that "[o]nly the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law."[28] Federal law determines when a section 1983 claim accrues.[29] For that purpose, federal law applies the "time of injury rule: when the plaintiff 'knows or has reason to know' of the injury that is the basis of his action."[30]

The critical issue for purposes of application of the statute of limitations is whether Plaintiffs' injury accrued when the Sussex County Council passed Resolution No. R-013-90 "expanding" the sewer district on March 22, 1990 or not until residents were assessed costs for the WRE beginning July 22, 1995.

Plaintiffs allege they suffered damages as a result of the assessment of costs of a public works project authorized by Resolution No. R-013-90. The fact that Sussex County did not actually charge Plaintiffs for this project until a later date is irrelevant for purposes of accrual of the claim and application of the statute of limitations. Plaintiffs knew or had reason to know of their injury at the time the County Council adopted the resolution. The meeting where that occurred was noticed by both postings and

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28 471 U.S. at 269.

29 *Marker v. Talley*, 502 A.2d 972, 975 (Del. Super. 1985). The date on which Plaintiffs commenced litigation on the underlying claims is March 4, 1996, the date of the federal Complaint. The statute of limitations is tolled pursuant to 10 *Del. C.* § 8118 as to the subsequent state court actions because Plaintiffs refiled in the Court of Chancery within one year of the dismissal of the federal action.

30 *Marker*, 502 A.2d at 975 (quoting *Pauk v. Bd. of Trustees*, 654 F.2d 856, 859 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982)). *See also Rawlings v. Ray*, 312 U.S. 96 (1941); *Zelenznick v. United States*, 770 F.2d 20, 23 (3d Cir. 1985); *Helton v. Clements*, 832 F.2d 332, 334 (5th Cir. 1987).

publication, open to the public, and a matter of public record.[31] At the latest, Plaintiffs knew or had reason to know of their injury by six months after that meeting when the County failed to hold an election as Plaintiffs contend was required by 9 *Del. C.* § 6506. Plaintiffs had the right to seek relief in the courts of Delaware when Sussex County Council passed Resolution No. R-013-90 in March 1990.[32] Had Plaintiffs brought their action at that time or shortly thereafter, much of the damages they now claim could have been avoided.

Plaintiffs argue that the statutory notice provided for the WRE under the expansion provisions failed to satisfy due process for the creation of a new district, and thus the statute of limitations should be tolled.[33] Plaintiffs misunderstand the issue raised by Defendants' motion. The issue is whether Plaintiffs knew or had reason to know of

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[31] *See Paul Scotton Contracting Co. v. Mayor*, 314 A.2d 182, 187 (Del. 1973); *In re ML/EQ Real Estate P'ship Litig.*, 1999 WL 1271885, at *6 (Del. Ch. Dec. 20, 1999). Constructive knowledge is sufficient to prove that the statute of limitations was not tolled for purposes of summary judgment or that the doctrine of laches is applicable. *See Id.*, at *2.

[32] *See, e.g., Kahn v. Seaboard Corp.*, 625 A.2d 269 (Del. Ch. 1993) ("Any such wrong [under the contract] occurred at the time that enforceable legal rights against Seaboard were created. Suit could have been brought immediately thereafter."); *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 834 (Del. 1992)(holding tort claim for negligent procurement of insurance coverage accrues at time of contracting, not at the time of uninsured loss).

[33] Counties must strictly comply with statutory notice provisions for land use regulation. S*ee Carl M. Freeman Assoc., Inc. v. Green*, 447 A.2d 1179, 1181 (Del. 1982); *Riley v. Banks*, 62 A.2d 229, 234 (Del. Super. 1948). However, noncompliance does not excuse litigants from filing their claims challenging a county's actions in a timely manner pursuant to the applicable statute of limitations.

their injury more than two years before they filed their original complaint. As discussed above, the Court finds that the undisputed evidence demonstrates that they did.

Not surprisingly, Plaintiffs seek to save their cause of action by arguing that the creation of and assessments for the WRE were continuing wrongs. If there is a continuing wrong, the cause of action is timely so long as the last act evidencing the continuing wrong falls within the limitations period. That is, the cause of action does not accrue until the last act of the continuing wrong. Generally, all the elements of a cause of action must be present before the cause of action will accrue.[34] However, where suit can be brought immediately and complete and adequate relief is available, a cause of action cannot be tolled as a continuing violation.[35] The only element missing from Plaintiffs' cause of action at the time the Resolution passed was significant money damages giving Plaintiffs an incentive to bring their action. Injunctive relief, however, was available to *prevent* or reduce any damages.[36] The WRE is not a continuing wrong. The wrong, if

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[34] To the extent that the continuing wrong doctrine prevents accrual, federal law applies. *Marker*, 502 A.2d at 975. To the extent Plaintiffs rely on a tolling doctrine, state law governs. *Wilson*, 471 U.S. at 269. The result is the same under either body of law. *Compare Poling v. K. Hovnanian Enter.*, 99 F. Supp. 2d 502, 511 (D.N.J. 2000) *with Price v. Wilmington Trust Co.*, 1995 WL 317017, at *2 (Del. Ch. May 19, 1995).

[35] *Kahn*, 625 A.2d at 271; *Re: Kirkwood Kin Corp. v. Dunkin' Donuts, Inc.*, 1997 WL 529587, at *8 n.5 (Del. Super. Jan. 29, 1997). *See also Cowell v. Palmer Township*, 263 F.3d 286, 293 (3d Cir. 2001) (noting that a "continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.").

[36] *See, e.g., Cowell*, 263 F.3d at 292-93; *Kaufman*, 603 A.2d at 834; *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv.*, 1996 WL 506906, at *15 (Del.

any, was the Sussex County Council's adoption of the Resolution to create the WRE on March 22, 1990, and its failure to classify it as a new district and hold an election six months thereafter.

On their face, Plaintiffs' civil rights claims are time barred. Thus, unless the statute of limitations was tolled or the defense was waived, the civil rights claims (Counts I and II) will be dismissed.

2. Statutory Claims

Defendants argue that Plaintiffs' claim in Count III is barred by 10 *Del. C.* § 8106. This section states, "no action based on a statute . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . ."

Under Delaware law, a cause of action accrues when the wrongful act occurs.[37] Plaintiffs argue that the limitations period did not begin to run until July 22, 1995, the date on which the County first began to bill the residents of the WRE. Defendants argue that it began to run when Resolution No. R-013-90 passed on March 22, 1990, or alternatively, upon the expiration of the six month period thereafter without any election as Plaintiffs contend was required pursuant to 9 *Del. C.* § 6506(a). Under the latter theory, the limitations period would run from September 22, 1990.

Ch. Sept. 3, 1996) (rejecting an argument that the statute of limitations is tolled until actual damages caused by the asserted wrongs have been found to exist).

[37] *Kaufman*, 603 A.2d at 834; *Fike v. Ruger*, 754 A.2d 254, 261 (Del. Ch. 1999), *aff'd*, 752 A.2d 112 (Del. 2000) ("A cause of action accrues at the moment of the wrongful act.").

Plaintiffs' argument overlooks the simple fact that significant damages could have been avoided with injunctive relief. Had Plaintiffs wished to challenge the WRE on statutory grounds, they should have done so within three years of the allegedly improper act or omission, not on the much later date when they received assessments for that allegedly improper act.[38]

On its face, Plaintiffs' statutory claim is time barred. Thus, unless the statute of limitations was tolled or the defense was waived, Count III will be dismissed.

3. Tolling

The statute of limitations will be tolled in certain instances to prevent self-dealing by a fiduciary or fraudulent concealment.[39] Not surprisingly, Plaintiffs contend that self-dealing and fraudulent concealment warrant tolling in this action. The Court will address these arguments in turn.

Plaintiffs assert that the Sussex County Defendants are fiduciaries of their constituents. However, Plaintiffs point to no self-dealing. Thus the self-dealing exception does not apply.

Plaintiffs also contend that Defendants fraudulently concealed the nature of the WRE. Specifically, they assert that they were misled as to the fact that a new district

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[38] *See, e.g., City of Newark v. Edward H. Richardson Assoc.*, 375 A.2d 475, 477 (Del. Super. 1977); *Paul Scotton Contracting*, 314 A.2d at 187.

[39] *In re Maxxam, Inc. Federated Dev. S'holder Litig.*, C.A. Nos. 12111 & 12353, mem. op. (Del. Ch. June 21, 1995) (Jacobs, V.C.).

rather than an expansion district was created and as to the non contiguous[40] nature of the WRE.

Fraudulent concealment requires knowledge of the alleged wrong and affirmative acts to conceal the wrong.[41] Plaintiffs' argument concerns the concealment of information regarding the proper legal classification of the WRE, not the facts pertaining to the WRE. Defendants did not have a duty to provide Plaintiffs with legal advice.[42] The statute of limitations would be tolled under this theory only if Plaintiffs could not have discovered their rights by the exercise of due diligence.[43] Plaintiffs' ignorance of a cause of action because of its legal nature does not affect the date on which the action accrues and does not toll the statute of limitations on the basis of fraudulent concealment.[44]

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40 Defendants' original map used the centerline of the Lewes-Rehoboth canal as one boundary of the expansion district. In fact, the federal government owns the canal; thus the land of the expansion is separated by a federal waterway. The competing theories as to whether the land is, or is not contiguous are that: (1) the land is not contiguous because the canal separates the two portions; or (2) the land is contiguous because the County owns the land beneath the waterway. The Court need not address this issue to dismiss Plaintiffs' claims of untimeliness.

41 *Shockley v. Dyer*, 456 A.2d 798, 799 (Del. 1983).

42 *See Kahn v. Caporella*, 1994 WL 89016, at *7 (Del. Ch. Mar. 10, 1994); *see also, Clark v. State*, 287 A.2d 660 (Del. 1972) (citizens of the State of Delaware are presumed to know the rules of law of the State).

43 *Shockley*, 456 A.2d at 799.

44 *See City of Newark*, 375 A.2d at 477 ("[P]laintiff's ignorance of a cause of action does not affect the date on which the action accrues and does not toll the running of the statute of limitations against it.").

Finally, Plaintiffs argue that published notice is insufficient to satisfy due process when the addresses of the affected residents are known. They contend that this deficiency justifies tolling the statute of limitations. As noted above, the issue on this motion is whether Plaintiffs' claims are time barred, not the substantive merits of their claim that due process was violated. The Delaware Supreme Court has held that:

> The law is clear that a property owner who knew, or should have known, that work was being done on a local improvement to his benefit and that assessment therefore was likely, but who fails to object until the improvement is completed, will be barred from later attacking the assessment. Such knowledge on the part of the assessed landowners precludes a later attack by them on notice procedures.[45]

As noted above, Plaintiffs had at least constructive knowledge of the Sussex County Resolutions they now challenge.

Plaintiffs' civil rights claims in Counts I and II are time barred by 10 *Del. C.* § 8119. Plaintiffs' statutory claim in Count III is time barred by 10 *Del. C.* § 8106. The statute of limitations began to run at the time of Plaintiffs' knowledge or constructive knowledge of the alleged wrong, which was in 1990 at the time of the Resolution. Unless Defendants waived their time bar defenses, Defendants' motion for summary judgment based on the statute of limitations must be granted.

B. Doctrine of Laches

The Court need not engage in a laches analysis because Plaintiffs' claims are barred under the statute of limitations.[46] The equitable doctrine of laches, however,

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[45] *Paul Scotton Contracting*, 314 A.2d at 187 (citations omitted).

[46] *See, e.g.*, *Atlantis Plastics*, 558 A.2d at 1064.

provides an additional justification for granting Defendants' motion for summary judgment.

Laches will bar a claim if the claimant had actual or constructive knowledge of the claim and the claimant's unreasonable delay in bringing the claim results in prejudice to the defendants.[47] Plaintiffs claim that they did not have knowledge of their claim because the notice was insufficient for a new district and the Resolution was misleading because it characterized the WRE as an expansion rather than a new district.

As discussed in the analysis of the statute of limitations defenses, the issue is Plaintiffs' actual or constructive knowledge of their claims, not the substantive merits of Plaintiffs' due process challenges to the statutory notice. When viewed in that light, Plaintiffs had notice of their cause of action. The County Council's Resolution was a matter of public record.[48] Plaintiffs acknowledge that objections were raised at the Council meeting on November 2, 1989 and that a suit was filed challenging the WRE in June 1993. Furthermore, whether or not the notice provided was statutorily sufficient for purposes of an expansion of an existing district,[49] the Court concludes that it was

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47 *Fike*, 752 A.2d at 113; *Paul Scotten Contracting*, 314 A.2d at 187.

48 *See* Sussex County Council Resolution No. R-013-90 at PAB App. B94-99.

49 Defendants argue that the posting was "in the district" and sufficient for purposes of 9 *Del. C.* § 6502(a), because the posting was in the pre-existing part of the district rather than the expansion part of the district (or the new district). In light of the other forms of constructive notice present in this case, *i.e.*, public hearings, county resolutions, published notice, etc., the Court need not reach this issue of statutory interpretation.

sufficient to provide Plaintiffs at least constructive notice of the Resolution six years before they brought this action.

In holding that the statute of limitations applied and was not tolled, the Court has rejected Plaintiffs' purported justifications for failing to timely file this action, including their arguments that they were misled as to the legal nature of the WRE and that they were not assessed fees for the WRE until 1995. The Court likewise rejects these arguments as support for a finding that Plaintiffs' delay was excusable or reasonable.[50]

Perhaps most significantly in this case, Plaintiffs' unreasonable delay in bringing suit prejudiced the County. The County expended significant sums of money from the public treasury between the adoption of the WRE Resolution in 1990 and the filing of Plaintiffs' suit in 1996. The courts have recognized that such expenditures constitute prejudice. For instance, in *Tusso v. Smith* the Court of Chancery noted that a taxpayer action for injunctive relief against expenditure of public funds for planning and construction of a controlled-access highway through Wilmington on the ground that the authorizing statute was invalid was barred by the doctrine of laches, even if the authorizing statute might have been invalid, where significant expenditures on planning the highway were made prior to the filing of the action.[51] As the Court explained:

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[50] Plaintiffs claim that when the action in the Superior Court was dismissed in 1993, the right to oppose any proposed sewer district on the basis of cost concerns was preserved. Plaintiffs produced no evidence, however, to support this averment in response to Defendants' motion for summary judgment. Defendants supported their contrary understanding by citing the Order on the Stipulation of Dismissal in the 1993 case. *See* note 6, *supra*.

[51] 156 A.2d 783, 788 (Del. Ch. 1959).

> A court of equity does not look with favor on one who unjustifiably delays suit until drastic changes of position have been taken in reliance on the transaction or act of which complaint is tardily made. This principle carries even greater force when delay in attacking the legality of the collection and spending of public monies will result in grave public injury were the relief sought to be granted.[52]

This statement is as appropriate today, in this taxpayer action seeking to avoid paying for a sewer project after it was substantially completed, as it was in 1959 when Vice Chancellor Marvel dismissed an untimely challenge to the construction of what is today Interstate 95.

Plaintiffs further contend that the illegally created sewer district is a continuing wrong that did not manifest itself until December 19, 1995, when the fees were assessed. However, Plaintiffs could have avoided the damages of which they now complain by filing an action for injunctive relief. Furthermore, the alleged damages are the result of the County's decision to undertake a significant public works project. Plaintiffs' argument would require this Court to accept the premise that Plaintiffs did not know that they would have to pay for the public works project when the Sussex County Council passed the Resolution approving it.[53] The postings, public meetings, public record and published notices put Plaintiffs on at least constructive notice of the WRE. Based on those items, Plaintiffs had sufficient information to bring suit seeking complete and

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[52] *Id.* (citations omitted).

[53] At the latest, Plaintiffs' claim accrued six months after the date of the Resolution because 9 *Del. C.* § 6506 mandates that the election Plaintiffs contend they were entitled to occur within six months after the resolution authorizing a new sewer district. *See supra*, V.A.1.

adequate relief as early as 1990 and certainly before significant expenditures were made from the public treasury.

Thus, even if the statute of limitations were not dispositive, the doctrine of laches bars Plaintiffs' claims.

C. Waiver

Plaintiffs contend that even if the statutes of limitations and the doctrine of laches are applicable, Defendants waived those defenses. Plaintiffs base that argument on Defendants' alleged failure to comply with the scheduling order of July 28, 2000 for briefing and filing preliminary motions and assert that Defendants' motion for summary judgment is "manifestly unfair" at this point in the litigation.

Preliminarily, it is important to note the limited nature of Plaintiffs' waiver argument. Plaintiffs do not contend, for example, that Defendants have waived the right to pursue any statute of limitations or waiver defense altogether. Nor do Plaintiffs contend that Defendants failed to assert those defenses in a timely manner. Indeed, they could not make that argument because Defendants first asserted their limitations and laches defenses in their answer to the original complaint.[54] Rather, as Plaintiffs' counsel conceded at the argument on December 9, 2003, to the extent Defendants waived anything by not filing their motion for summary judgment sooner, it was only the right to seek resolution of those defenses on preliminary motions. The defenses still would be available at trial.

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[54] D.I. 32.

Evaluation of Plaintiffs' waiver argument requires a review of the various scheduling orders. The scheduling order of July 28, 2000 states that "preliminary motions" should be filed by October 2, 2000.[55] After entry of that scheduling order, Plaintiffs' counsel wrote letters encouraging Defendants to file promptly any preliminary motions, including any motions based on the statute of limitations defenses.[56] Defendants only response was to request that the deadline for preliminary motions be extended to November 13, 2000.[57] On October 27, 2000 the parties stipulated to the dismissal of certain defendants and to the amendment of the complaint.[58] The stipulation specifically stated, "[b]y agreeing to this modification of the pleadings, Defendants are not waiving any defenses."

On November 1, 2000, former Vice Chancellor Jacobs entered a new scheduling order that reset the deadline for dispositive motions for June 15, 2001.[59] Before that due date arrived, Plaintiffs moved to amend the complaint again.[60] Plaintiffs' second amended complaint was filed on July 10, 2001.[61] On February 27, 2002, Plaintiffs moved to amend the complaint a third time and to dismiss their claims against the state

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55 D.I. 28.

56 *See, e.g.*, PAB App. at B-147-48.

57 PAB at 14.

58 D.I. 39.

59 *Id*.

60 D.I. 46.

61 D.I. 64.

defendants.[62] On or about May 1, 2002, the parties filed, and former Vice Chancellor Jacobs approved, a stipulated scheduling order including, among other things, a schedule for Defendants to move for summary judgment.[63] In accordance with that scheduling order, Defendants filed their motion for summary judgment on May 9, 2002. On May 28, 2002, former Vice Chancellor Jacobs granted Plaintiffs' motion to dismiss the state defendants and amend their complaint for a third time.[64] Plaintiffs filed their third amended complaint on June 10, 2002.[65]

As the proponents of the waiver argument, Plaintiffs bear the burden of proof. The evidence of record, however, does not reflect a clear understanding by the parties as to which scheduling order was controlling or as to exactly when a case dispositive motion on an affirmative defense that admittedly required discovery had to be filed. In fact, the stipulation and order of November 1, 2000, explicitly states "Defendants do not waive any defenses." It is difficult to understand how Plaintiffs could stipulate that "Defendants do not waive any defenses" in November of 2000 and contend that actions or inactions of Defendants during that same time frame did constitute a waiver. Furthermore, the July 28, 2000 scheduling order was superceded by the November 1, 2000 and May 1, 2002 scheduling orders.[66] Because the July 28, 2000 scheduling order was stale and Plaintiffs

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62 D.I. 76.

63 D.I. 78.

64 D.I. 86.

65 D.I. 90.

66 D.I. 39, 78.

filed three amended complaints thereafter, Plaintiffs' reliance on that order is misplaced and unpersuasive.

Plaintiffs cite *Carberry v. Redd*[67] to support their argument that permitting Defendants to raise the statute of limitations defense would be "manifestly unfair" in light of their failure to file the pending motion as a preliminary motion under the July 28, 2000 scheduling order and because it would "render nugatory years of trial preparation and make a travesty of the time and money expended by all concerned."[68] Defendants counter that they repeatedly put Plaintiffs on notice of their intention to raise the defenses of laches and the statute of limitations, and discovery by both parties took place on these issues after Plaintiffs claim the defenses were waived.

Carberry is not apposite, however. There the defendant did not give notice of its intent to assert a statute of limitations defense until over six months after the close of discovery. In this case, the defenses were asserted in the answer to the original complaint, noted in the stipulation permitting Plaintiffs' third amended complaint, and pursued in discovery propounded by both parties. In fact, Defendants' motion for summary judgment was filed before Plaintiffs' third amended complaint, and discovery continued through the filing of Plaintiffs' reply brief.

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[67] 1977 WL 9561, at *2 (Del. Ch. Jan. 19, 1977).

[68] PAB at 14-15.

Plaintiffs' assertion that a case dispositive defense at this stage of the litigation would be manifestly unfair is illogical. A case dispositive motion at any stage of litigation, if granted, renders nugatory the time and money expended by the opposing party. In this case, fact discovery on the merits remains open and neither side appears to have taken any expert discovery. In all likelihood, therefore, disposing of this case on summary judgment based on meritorious statute of limitations and laches defenses, as opposed to deferring a decision until after trial, will save significant time and expense for all parties, as well as judicial resources.

In summary, Plaintiffs make only a conclusory and self-serving assertion of waiver relying on a vague and stale scheduling order. They cite just one case that is clearly inapposite to make an unpersuasive argument that a case dispositive motion is unfair because it would negate the money and effort that Plaintiffs spent in bringing this litigation. Even when the facts are viewed in the light most favorable to Plaintiffs with all inferences drawn in their favor, the time bar defenses are not waived.

IV. CONCLUSION

For the reasons stated above, and to avoid wasteful expenditures by both parties, Defendants' motion for summary judgment will be granted. Defendants should submit an appropriate Order.