

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALRO ASSOCIATES, L.P.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 19544
	)	
NATHAN HAYWARD, III,	)	
Secretary of the Department of	)	
Transportation of the State of	)	
Delaware, and THE DEPARTMENT	)	
OF TRANSPORTATION OF THE	)	
STATE OF DELAWARE,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

**Date Submitted: April 1, 2003**

**Date Decided: October 31, 2003**

Richard H. Morse, Esquire, Larry J. Tarabicos, Esquire, and John E. Tracey, Esquire of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; Attorneys for Plaintiff.

Collins J. Seitz, Jr., Esquire, Matthew F. Boyer, Esquire, and Max B. Walton, Esquire of CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware; Attorneys for Defendants.

**JACOBS, JUSTICE\***

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\* Sitting by designation as Vice Chancellor under DEL. CONST. art. IV, § 13(2).

At issue in this case is a developer's right to develop its land where the effect of that development will be to increase congestion on an already overloaded portion of Delaware's highway system. The land proposed to be developed lies adjacent to Christiana Mall, the largest mall in Delaware, and is located within one-half mile of what is "arguably Delaware's worst traffic bottleneck"—the I-95/SR1 interchange.<sup>1</sup>

The plaintiff, Alro Associates, L.P., a Delaware limited partnership ("Alro"), seeks an order enjoining the Delaware Department of Transportation ("DelDOT") from withholding a Letter of No Objection to the proposed development. Alro's claim turns on the enforceability of an October, 1, 1992 settlement agreement between DelDOT and Alro's predecessor-in-interest, Albert H. Marta ("Marta"), wherein DelDOT agreed that it would not object to the development. Trial on the merits took place on October 22-24, 2002. This is the Opinion of the Court, following post-trial briefing. For the reasons discussed below, the Court concludes that the October 1, 1992 Settlement Agreement is an enforceable contract, but Alro will not be entitled to specifically enforce it. Instead, Alro will be remitted to its damages remedy in the Superior Court.

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<sup>1</sup> JX 109 (February 8, 2002 Letter of Secretary of Transportation Nathan Hayward III).

## **I. FACTS**

The facts, which are as found below, are largely undisputed.

### **A. The Parties and the Land**

During the late 1970's, DelDOT began work on a highway project to improve traffic flow at the interchange of Interstate Route 95 ("I-95") and State Route 7 ("SR 7"). The work was intended to alleviate severely congested traffic conditions on SR 7 around the Christiana Mall, which is a regional shopping mall. DelDOT proposed to construct a four-lane highway, which ultimately became State Route 1 ("SR1"). That highway included the interchange between SR1 and I-95.

DelDOT's plan was to construct a portion of the highway on approximately 41 acres situated on the western edge of 401.3 acres of undeveloped land jointly owned by Marta and Frank Acierno (the "Acierno/Marta Property"). That land abuts Christiana Mall to the north and Route 7 to the east. In 1988, DelDOT instituted condemnation proceedings against Marta and Acierno to determine just compensation for the land that the State was taking for that purpose. During the pendency of that proceeding, Marta filed an action in this Court to partition the land. At the same time, Marta also began settlement negotiations with DelDOT to

resolve the issue of just compensation with respect to his share of the jointly-owned land.

## **B. The Settlement Agreement**

Ultimately, DelDOT and Marta negotiated a settlement agreement, in which Marta agreed to accept as just compensation the sum of \$280,000, plus certain assurances by DelDOT relating to the future development of the land that had not been condemned (the "Settlement Agreement"). Those assurances included a promise that DelDOT would (i) widen "Road A" (which crosses over SR1), (ii) construct "Ramp T" (which would provide access to SR1), and (iii) "not object to the total development of Marta's one-half interest in the property."<sup>2</sup> The Settlement Agreement,

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<sup>2</sup> These assurances are contained in the third paragraph of the Agreement, which states in its entirety:

The Department, in consideration of Marta's voluntary execution and delivery of the Deed and Permanent Easement Agreement instruments as referred to in paragraph 2 hereof agrees that Marta shall have access to SR 7 via the interchange at the points of access shown and identified on the drawing attached hereto as Exhibit G. In the event that the future legal development of Marta's lands, as permitted under the existing November 23, 1982 Declaration of Restrictions (or such Restrictions as amended in accordance with the terms of paragraph 6), causes an unsatisfactory level of traffic congestion at the interchange, then the Department shall design and widen Road A to four lanes and construct Ramp T as indicated on Exhibit G. Design and construction of such future improvements by the Department will occur at no further cost to Marta and is intended to accommodate 100% of the development allowed under the November 23, 1982 Declaration of Restrictions. *The Department hereby assures Marta that it will not object to the total development of Marta's one-half interest in the property even if the demand for development occurs prior to the completion of the widening of Road A or construction of Ramp T by the Department.* The Department agrees to coordinate with Marta and plan for funding necessary to construct the widening of Road A and Ramp T to accommodate Marta's development of his lands. If, however, the Department is without funds to undertake the widening of Road A and the construction of Ramp T when required, the Department agrees that Marta may provide the necessary funds from his own resources, whereupon the Department will proceed with the appropriate design and construction as though the funding were its own. Any such funding by Marta

which was executed on October 1, 1992, enabled DelDOT to avoid paying Marta a condemnation award having a potential magnitude of tens of millions of dollars.<sup>3</sup> Thereafter, on April 3, 1995, this Court entered an order partitioning the Acierno/Marta Property.

### **C. The Development Plans Progress**

On January 26, 1998, Marta (who is now deceased, but was at that time the general partner of Alro) transferred his (now-partitioned) interest in the property to Alro for purposes of developing on that property a project known as Christiana Retail Center Phase 2 (“CRCP2”). At some time before mid-January, 1998,<sup>4</sup> Alro filed an exploratory sketch plan with the New Castle County Department of Land Use—the first step in the process of obtaining approval of a record major land development plan. New Castle County next determined that under the Unified Development Code (“UDC”), a traffic impact study (“TIS”) was required before County approval could be given. Under the UDC, New Castle County and DelDOT must jointly determine the “area of influence” that defines the scope of the TIS and that identifies specific intersections which would be impacted by the proposed development.

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would be without prejudice to his right to seek and obtain full reimbursement plus interest from the Department at a later date.

*See* JX 3; Agreement of Settlement, October 1, 1992 at para. 3 (emphasis added).

#### **D. TIS Scoping Meetings**

On January 22, 1998, representatives of New Castle County and DelDOT held an initial “scoping” meeting to determine the area of influence.<sup>5</sup> After further meetings, the initial area of influence was determined in a scoping meeting held on March 10, 1999. That area of influence, which is reflected in the minutes of that meeting,<sup>6</sup> initially included “merge and weave” areas of the I-95/SR1 interchange. On July 20, 1999, however, after additional meetings and after receiving input from Alro and the County attorney, DelDOT issued revised minutes of the scoping meeting which reflected that the I-95/SR1 interchange had been eliminated from the scope of the TIS.<sup>7</sup>

Alro submitted the completed TIS to DelDOT in November, 1999. For reasons not altogether clear from the record, additional meetings were held in March of 2000, including a March 20, 2000 meeting between representatives of DelDOT and Alro. At the March 20 meeting, DelDOT reaffirmed its commitment to build “Road A” and “Ramp T.”<sup>8</sup> It also agreed to respond to the outstanding issues presented by the November, 1999 TIS. On March 21, 2000, another scoping meeting took place, at

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<sup>3</sup> Tr. at 215-16.

<sup>4</sup> The parties have inexplicably failed to provide the exact date of the application.

<sup>5</sup> See DX 48.

<sup>6</sup> See DX 55.

which DelDOT recommended that Alro submit a revised TIS that would address additional traffic scenarios.<sup>9</sup> Alro submitted a revised, final TIS on May 15, 2000. The I-95/SR1 interchange was not within the scope of the final TIS.<sup>10</sup>

Thereafter, DelDOT reaffirmed its October 1, 1992 contractual commitment to improve the “Road A” interchange in its July 31, 2000 TIS Comment Letter. That letter included a statement that they (DelDOT) “are prepared to undertake the design of the improvements.”<sup>11</sup> In that letter, DelDOT also commented on the other improvements it determined were needed to provide an adequate level of service at the intersections identified as within the area of influence. Based on DelDOT’s July 31, 2000 letter and the assurances given by DelDOT in the October 1, 1992 Settlement Agreement, Alro determined that it had the financial wherewithal to complete the prescribed improvements. Alro also decided at that point to proceed with the planned development of CRCP2.

#### **E. DelDOT’s Efforts to Improve the I-95/SR1 Interchange**

Throughout this process, DelDOT continued to study the conditions along the I-95 corridor—and in particular, the I-95/SR1 interchange—

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<sup>7</sup> See JX 62.

<sup>8</sup> See JX 69.

<sup>9</sup> See DX 70 and DX 72.

<sup>10</sup> See JX 75.

intending to develop plans to alleviate the increasingly severe traffic congestion at that interchange. In late 2001, DelDOT commissioned a study of the traffic on the I-95/SR1 interchange under various scenarios, including scenarios with current and projected traffic, and with and without CRCP2 and two other proposed developments adjacent to the Christiana Mall. That study, which was summarized in a report dated February 5, 2002,<sup>12</sup> divided the traffic patterns into eight separate movements and concluded that at the date of that study's completion, three of those traffic movements were "in failure."<sup>13</sup> The report further concluded that the addition of the three proposed retail developments (including CRCP2) would put all eight movements "in failure" by 2005.<sup>14</sup> The trial testimony of transportation consultant William K. Hellmann establishes that the congestion is not just an issue of convenience, but also, and more importantly, it is a safety issue because, "as congestion goes up, accidents go up."<sup>15</sup> Secretary of Transportation, Nathan Hayward III, testified that having the interchange in failure for significant amounts of time would be

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<sup>11</sup> See JX 77 at p. 13.

<sup>12</sup> See JX 105.

<sup>13</sup> *Id.* at p. 6.

<sup>14</sup> *Id.* at p. 12.

<sup>15</sup> Trial Tr. (Hellmann) at 446.



not only “intolerable,” but also would also make that interchange “one of Delaware’s unsafest sections of road.”<sup>16</sup>

On February 8, 2002, the DelDOT Secretary sent to New Castle County a letter outlining the traffic congestion problems and the results of the DelDOT study. Secretary Hayward’s letter recommended that the County deny or defer the three record major development requests then under consideration, including CRCP2, because of the already severe congestion at the I-95/SR1 interchange, and the projected (by 2005) failures if the development was permitted to go forward. Secretary Hayward also wrote to the Army Corps of Engineers and the Department of Natural Resources and Environmental Control (DNREC) on April 16, 2002,<sup>17</sup> to express DelDOT’s reservations about the CRCP2 plan. As a result of those letters the Army Corps of Engineers and DNREC have not approved Alro’s permit applications.

On April 29, 2002, Charles Baker, General Manager of the New Castle County Department of Land Use, wrote to Secretary Hayward seeking clarification of DelDOT’s position on CRCP2. Mr. Baker’s letter stated that the County lacked legal authority to deny the plan on the basis of the I-95/SR1 interchange, because that interchange had not been

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<sup>16</sup> Trial Tr. (Hayward) at 373-4.

identified as being within the area of influence for the TIS.<sup>18</sup> On May 13, 2002, Hayward wrote to Baker, confirming that DelDOT would not issue a Letter of No Objection to the proposed CRCP2 development. As discussed elsewhere, the effect of that letter was to halt the entire County development approval process.

During the interval between Alro's receiving the July 31, 2000 and August 4, 2000 TIS Comment Letters and Secretary Hayward's February 8, 2002 letter recommending the denial or deferral of Alro's development request, Alro had invested \$1.9 million in design and development costs. That was in addition to the \$400,000 that Alro expended on the application process between the July 20, 1999 scoping memorandum and its receipt of the July and August 2000 TIS Comment Letters.

## **II. THE PARTIES' CONTENTIONS AND THE ISSUES PRESENTED**

Alro's primary claim is that the October 1, 1992 Settlement Agreement precludes DelDOT from taking any action to obstruct the development of CRCP2, and that Secretary Hayward's letter recommending that the County deny or defer approving CRCP2 constitutes action which impermissibly obstructs that development. Alro further

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<sup>17</sup> See JX 118.

<sup>18</sup> See JX 119.

contends that if it is determined that improvements to the I-95/SR1 interchange are required before Alro can fully develop its property, then DelDOT must be ordered to make those improvements now.

Alternatively, Alro contends that DelDOT cannot now withhold a Letter of No Objection to the development plan, because DelDOT is estopped from opposing the plan on the basis of congestion at the I-95/SR1 interchange. The reasons are that (i) DelDOT determined that the area of influence for the TIS did not include that interchange, and (ii) DelDOT later made recommendations for mitigating traffic congestion in other areas that were part of the TIS.

Lastly, Alro contends that the Equal Protection Clause of the United States Constitution precludes DelDOT from invoking the I-95/SR1 interchange traffic as a basis for blocking CRCP2 development approval, because DelDOT is treating Alro differently from similarly situated landowners whose projects DelDOT did not object to.

In response, DelDOT maintains that the October 1, 1992 Settlement Agreement does not contractually prohibit DelDOT from recommending that New Castle County deny or defer approval of CRCP2 pending improvements to the I-95/SR1 interchange. Nor (DelDOT argues) does the Settlement Agreement obligate DelDOT to construct improvements on that

interchange. DelDOT argues that it never made any contractually binding promise to Alro that DelDOT would issue a final Letter of No Objection respecting transportation matters that impact CRCP2.

Lastly, DelDOT contends that Alro's claim is not ripe for adjudication, because Alro has not received a final denial of the development plan from New Castle County. DelDOT further contends that Alro's Equal Protection claim fails because DelDOT had a rational basis for recommending that the County deny or defer granting approval for the development of CRCP2.

These contentions give rise to four issues. First, are Alro's claims appropriate for adjudication in this Court at this time? Second, in recommending that New Castle County deny or defer approval for CRCP2, did DelDOT breach the October 1, 1992 Settlement Agreement, and if so, what is the appropriate remedy? Third, if DelDOT did not breach the Settlement Agreement, is DelDOT nonetheless estopped from objecting to the CRCP2 development plans? Fourth, and finally, does the Equal Protection Clause bar DelDOT from denying approval of Alro's proposed development?

These contentions are now addressed. Because the Court determines that DelDOT has breached the Settlement Agreement and that DelDOT's

defenses lack merit, it does not reach Alro's alternative claims of estoppel and equal protection.

### **III. ANALYSIS**

#### **A. Ripeness/Exhaustion of Administrative Remedies**

The Court first addresses DelDOT's threshold argument that this controversy is not "ripe for adjudication" because Alro has not sought, nor has it been denied, final approval of its development plan from New Castle County. The argument runs as follows: under the UDC, Alro must first seek final approval from the County for its development plan. If approval is denied, Alro must then appeal to the County Planning Board.<sup>19</sup> The UDC provides that an appeal "may only be taken based on a final decision, not the recommendation of an agency" and that no appeal to a court may be taken until the UDC-prescribed remedies are first exhausted.<sup>20</sup> This recital of DelDOT's argument makes it plain that the defense DelDOT is asserting is not one of ripeness. Rather, DelDOT's defense is failure to exhaust administrative remedies. As properly understood, that defense lacks merit.

The defense rests on the incorrect assumption that this is a lawsuit challenging the denial of a development plan by the County. This proceeding, however, is not an administrative appeal from a denial of

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<sup>19</sup> See UDC 40.31.510, 40.30.110; Defendant's Post Trial Answering Brief at 32.

approval of a development plan by the County (or by DelDOT). Rather, this is an original action asserting a claim for breach of contract. In this setting, there is no requirement that administrative remedies be exhausted as a precondition to asserting the contract claim.<sup>21</sup> And, that contract claim is clearly ripe for adjudication at this time.<sup>22</sup>

#### **B. Has DelDOT Breached its Contract?**

The parties do not contest the validity of the October 1, 1992 Settlement Agreement between Marta and the Department of Transportation, nor do they contest that that agreement is legally binding. What the parties do contest is whether that contract affects DelDOT's decision to withhold its approval of Alro's development plan.

Alro relies on paragraph 3 of the Settlement Agreement which pertinently provides that the "Department [of Transportation] hereby assures Marta that it will not object to the total development of Marta's one-half interest in the property even if the demand for development occurs prior to the completion of the widening of Road A or construction of

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<sup>20</sup> UDC 40.31.510.

<sup>21</sup> *Heathergreen Commons Condominium Assoc. v. Paul*, 503 A.2d 636 (Del. Ch. 1985).

<sup>22</sup> Whether or not a claim is ripe for adjudication depends upon whether the facts underlying that claim are established and not subject to change, or whether they are not yet fully developed and are subject to change at a future time (*See Schick, Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235 (Del. Ch. 1987)). If the latter is the case, then the claim is not ripe. Here, all of the underlying material facts have come to rest and are not subject to change. The claim is that DelDOT's stated refusal to issue a letter of no objection breaches the October 1, 1992 Settlement Agreement. DelDOT's stated refusal to issue a no objection letter is an established fact. Accordingly, Alro's contract claim is ripe for adjudication.

Ramp T by the Department.” That language, Alro claims, contractually prohibits DelDOT from recommending that the County withhold its approval of the CRCP2 project until the improvements on the I-95/SR1 interchange are first completed.

The approval process contemplated by the UDC essentially gives DelDOT the power to block any major record development. Under the UDC, a developer must first submit an application for development approval to New Castle County. Once submitted, that application must then receive the approval of DelDOT (in the form of a “Letter of No Objection”), as well as the approval of specified other departments and agencies, *before* the County will grant its final approval of a major record development. Thus, under the current UDC regulatory regime, absent DelDOT’s Letter of No Objection, New Castle County cannot move forward the process for approving an application for a major development.

Secretary Hayward’s letter recommending that “New Castle County deny or defer the development requests...until such time as the state has the resources to allow DelDOT to contract for the needed improvements to these two major highways and the interchange [I-95/SR1] between them”<sup>23</sup> constitutes an “objection” to the proposed development within the meaning

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<sup>23</sup> Hayward Letter of February 8, 2002 at p. 4-5 See JX 109.

of Paragraph 3 of the Settlement Agreement. It is that objection that has blocked Alro from receiving the County's approval of the development plan. Accordingly, DelDOT has breached its Settlement Agreement with Marta—an agreement that Alro, as Marta's successor, is entitled to enforce.

DelDOT's contrary argument does not withstand scrutiny. DelDOT argues that the "will not object" language applies only in the limited case where Alro's development plans could not go forward because Road A has not yet been widened. That language (DelDOT argues) does not apply in circumstances—such as this case—where transportation issues that are unrelated to Road A preclude the full development of Alro's land. DelDOT urges that it never intended to waive its power to evaluate, in the future, problematic traffic areas, such as the I-95/SR1 interchange.

I find this argument unpersuasive. DelDOT has presented no contemporaneous evidence that supports its narrow reading of Paragraph 3. The relevant language of the Settlement Agreement is broad, and, when viewed in context, was reasonably designed to further Marta's objective at the time the parties settled their dispute in 1992. In exchange for DelDOT's promise not to object to Marta's full development of the non-condemned portion of the property, Marta was willing to forego his claim for a significant just compensation award and accept only \$280,000.



DelDOT's proposed interpretation of that language finds no persuasive support in the Settlement Agreement or the trial record. If accepted, it would unduly narrow the scope of the Settlement Agreement and would deprive Alro of what Marta bargained for.

To express it in somewhat different terms, in exchange for Marta's agreement not to seek a condemnation award above \$280,000, and to avoid incurring the considerable risk of a much higher condemnation award, DelDOT assured Marta that it would "not object to the total development of Marta's one-half interest in the property even if the demand for development occurs prior to the completion of the widening of Road A or construction of Ramp T by the Department."<sup>24</sup> In so agreeing, the parties contemplated that (a) the development would be built, (b) the traffic would likely become too congested before Road A could be widened, (c) the fact that Road A had not been widened would normally be a barrier to building the shopping center, but (d) in this case, DelDOT would not object to the full development "even if" the demand for development occurred before the widening of Road A.

Nothing in the contract limits DelDOT's "will not object" covenant to the scenario where the development is proceeding, but Road A is not yet

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<sup>24</sup> Agreement of Settlement, dated October 1, 1992 at para. 3 (JX 3).

built. The building of Road A is not a limitation or condition of that covenant. Rather, it serves only to underscore its breadth and all-inclusive nature. That conclusion is buttressed by the position taken by the State in a case that arose out of the condemnation of the Acierno/Marta property—in *Acierno v. State*.<sup>25</sup>

In *Acierno v. State*, the Delaware Supreme Court affirmed a Superior Court condemnation award of \$266,000 to Acierno for his undivided one-half interest in the portion of the Acierno/Marta Property that had been condemned for the SR1 and I-95/SR1 interchange project. In that proceeding, Acierno had sought a multi-million dollar award. In denying Acierno's claim, the Court determined that Acierno had received special benefits from the construction of the roadway on his property, and that he would receive additional benefits when the Road A and Ramp T improvements were constructed. Those nonmonetary benefits, the Court concluded, justified a much reduced award.<sup>26</sup>

Based on DelDOT's representation that it was fully committed to making the Road A and Ramp T improvements, the Supreme Court, in *Acierno v. State*, found that the special benefits being conferred on the

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<sup>25</sup> 643 A. 2d 1328 (Del. 1994).

<sup>26</sup> *Id.* at 1333-5.

property were neither speculative nor remote.<sup>27</sup> The improvements the Court recognized as necessary to “obtain full development of [the Acierno/Marta] property as zoned”<sup>28</sup> are the same improvements that DelDOT promised to Marta in the Settlement Agreement. DelDOT’s litigating position enabled the State to avoid a condemnation award to Acierno that could have amounted to millions of dollars.

DelDOT’s position in *Acierno* is consistent with a broad reading of its “will not object” covenant in the Settlement Agreement but is inconsistent with the position that DelDOT is taking here. In *Acierno*, Chief Engineer Raymond Harbeson testified that, without the improvements to the Road A interchange, the road could not accommodate full development of the Acierno/Marta property, but *with* the improvements that DelDOT had contractually promised, the full development of the property would be feasible. For that reason, those promised improvements added significant value to the property. In this case, DelDOT now advances the argument that the full development of the property cannot be accomplished without improvements to the entire I-95/SR1 interchange. That argument is inconsistent with the position on which it prevailed in *Acierno*.

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<sup>27</sup> *Id.* at 1334.

### C. The Appropriate Remedy

Having determined that DelDOT has breached its contract with Alro's predecessor, the Court must next confront the critical and most difficult issue, which is what relief is appropriate—specific performance (which would amount to an injunction requiring DelDOT, *inter alia*, to issue a Letter of No Objection) or contract damages? That issue arises because of the gravity of the public interest that DelDOT's position implicates.

A party that contracts with an agency of the State that is authorized by law to enter into contracts has all of the remedies under a contract that any private citizen would have against another private citizen.<sup>29</sup> The remedy that Alro seeks here is specific performance that would take the form of an injunction directing DelDOT (i) to issue a Letter of No Objection, (ii) to construct the improvements recommended in the TIS comment letters and (iii) to withdraw the objections it made to the County, the Army Corps of Engineers, and DNREC. The injunction being requested would also include an order directing DelDOT to make the necessary improvements to the I-95/SR1 interchange, if those improvements were found to be a precondition for County approval.

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<sup>28</sup> *Id.* at 1335.

It is Alro's burden to show that it is entitled to mandatory injunctive relief by clear and convincing evidence.<sup>30</sup> Permanent injunctive relief may be granted where there is no adequate remedy at law, where the balance of the equities favors the moving party, and where success on the merits has been demonstrated.<sup>31</sup>

In this case, the conceptual framework for evaluating the appropriateness of the requested remedy exists within the rubric of the irreparability of the threatened harm and the balance of equities. When analyzing these two prerequisites, courts strive to assess the real-world impact of the requested injunctive relief.<sup>32</sup> In this case that analysis compels the conclusion that although DelDOT has breached its contract with Alro, the harm to the public interest that would be occasioned by mandatory injunctive relief outweighs Alro's private interest in having its contract specifically enforced.

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<sup>29</sup> *George & Lynch, Inc., v. State*, 197 A.2d 734, 736 (Del. 1964).

<sup>30</sup> *In re IBP, Inc., Shareholders Litigation*, 789 A.2d 14, 52 (Del. Ch. 2001).

<sup>31</sup> *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972).

<sup>32</sup> *H.F. Ahmanson & Co. v. Great W. Fin. Corp.*, 1997 Del. Ch. LEXIS 84 (Del. Ch. 1997).

1. *Irreparable Harm*

A threat of irreparable harm will be deemed to exist where the injury cannot be adequately compensated in damages<sup>33</sup> or where an award of money damages would fail to do justice.<sup>34</sup>

Alro contends that it will suffer irreparable harm unless the requested injunctive relief is granted, because it holds real property for development—an asset that by nature is unique. Alro further contends that the ability to use its property is also unique, and that it will be prevented from using its property in the chosen manner, unless the requested injunction is granted. That harm, Alro argues, cannot be adequately compensated in damages.

For present purposes I assume, without deciding, that a multi-year delay of Alro's development of CRCP2 until the SR-2/I-95 interchange problem is remedied will cause Alro irreparable harm. Even if that is the case, I am persuaded that the balance of the equities weighs in DelDOT's favor.

2. *The Balance of Equities*

The final factor to be considered is the balance of equities. That factor requires the court to balance the harm that will befall Alro if

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<sup>33</sup> *State v. Delaware State Educational Association*, 326 A.2d 868 (Del. Ch. 1974).

injunctive relief is denied against the risk of harm that would be occasioned to the public if the injunction is granted.

Each side maintains that the balance of the equities weighs in its favor. Alro asserts that if prevented from developing its property because of the I-95/SR1 interchange, it will be completely prohibited from developing its property for "at least nine years,"<sup>35</sup> and will result in its having wasted years of effort and millions of dollars that were invested in CRCP2. It is manifest that the harm to Alro if equitable relief is denied would be considerable.

That harm to Alro must be balanced against the harm that could be occasioned to the public if equitable relief were granted. DelDOT is the governmental agency entrusted with the duty of ensuring a working transportation system throughout the State. The intended beneficiaries of that system are the citizens of Delaware, as well as all others who travel I-95, which is a critically important regional artery. The duties entrusted to DelDOT, namely, to assure the adequacy and safety of our public highways, are inherently governmental functions that can be discharged only by the State under its police powers in furtherance of the general

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<sup>34</sup> *Derwell Co. v. Apic, Inc.*, 278 A.2d 338 (Del. Ch. 1971).

<sup>35</sup> Presumably based on the State's estimate that it would take at least 4 years to construct the Road A improvements, and that monies to fund the improvements are not contained in the six-year Capital Transportation Plan.

welfare.<sup>36</sup> An adequate highway system is critically important to the public welfare,<sup>37</sup> not only to promote convenience and mobility, but also to assure the personal safety and to prevent accidents and injury to all persons who use our State's highways. Congested, failing intersections, involving high-speed corridors will inevitably lead to accidents and injury.<sup>38</sup>

As noted, control of access to highways is manifestly a proper exercise of the State's police power.<sup>39</sup> The public interest in having a properly functioning system of highways is safeguarded by DelDOT's exercise of that police power, in conjunction with the County, by regulating access to highways under the UDC.

It has long been recognized that a court of equity may decline to specifically enforce the contractual rights of a private litigant where enforcement would defeat a public right that protects and benefits all members of the community.<sup>40</sup> In certain cases "rights purely public" will

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<sup>36</sup> *State Highway Dep't v. Delaware Power & Light Co.*, 167 A.2d 27 (Del. 1961); see also *Brunswick & Topsham Water Dist. v. W. H. Hinman Co.*, 136 A.2d 722 (Me. 1957); *Southern Bell Tel. & Tel. Co. v. Commonwealth*, 266 S.W.2d 308 (Ky. 1954); *County Council For Montgomery Co. v. Lee*, 148 A.2d 568 (Md. 1959); *Handlan-Buck Co. v. State Highway Commission*, 315 S.W.2d 219 (Mo. 1958); *Almond v. Gilmer*, 51 S.E.2d 272 (Va. 1949).

<sup>37</sup> *Id.*

<sup>38</sup> See notes 15-16, *supra*.

<sup>39</sup> See, e.g. *State Highway Dep't v. Delaware Power & Light Co.*, 167 A.2d 27 (Del. 1961); *McKenna v. State Highway Commission*, 135 N.W.2d 827 (Wis. 1965);

<sup>40</sup> 1 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 251 (5th ed. 1941), and cases cited therein.



command such force that they must be found to override the private interest of a single litigant.<sup>41</sup> In my view, this is such a case.

Here, although Alro has established DelDOT's breach of the contract, the effect on the public if injunctive relief were granted would be significant and adverse. To grant the injunctive relief Alro requests would prevent DelDOT from completing what the record undisputedly shows are badly needed improvements to the highly congested and dangerous I-95/SR1 interchange, before Alro undertakes a shopping mall expansion that would further exacerbate that congestion and the risk of injury to the traveling public. The Court is fully respectful of the importance to Alro of its contract right to develop its property without objection by DelDOT. In these circumstances, however, Alro's private interest in developing its land on its desired timetable is outweighed by the State's legitimate exercise of its police power to assure the safety of Delaware's public highways. DelDOT should not be hobbled in the performance of that critical public duty.

This result should not be viewed as ruling that DelDOT is free to breach its lawful contracts. DelDOT is not free to do that. But in these circumstances, the price DelDOT must pay for its breach should be

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<sup>41</sup> *Id.*

measured in dollars that a jury finds are legitimately owed to Alro as a consequence, rather than by stripping DelDOT of its power to improve dangerous, overcrowded public highways. That is, Alro must be remitted to its damages remedy in the Superior Court.

#### **IV. CONCLUSION**

Counsel for the parties shall confer and submit a form of final Order that implements the rulings in this Opinion.