



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

October 5, 2005

Richard L. Abbott, Esquire
Abbott Law Firm
724 Yorklyn Road, Suite 240
Hockessin, DE 19707

Max B. Walton, Esquire
Scott G. Wilcox, Esquire
Connolly Bove Lodge & Hutz LLP
1007 North Orange Street
P.O. Box 2207
Wilmington, DE 19899-2207

Re: Christiana Town Center, LLC v. New Castle County
C.A. No. 729-N
Date Submitted: March 21, 2005

Dear Counsel:

Plaintiff Christiana Town Center, LLC owns a parcel of approximately 70 acres near the Village of Christiana, Delaware. Its tract is the subject of a record major subdivision plan (the "Plan")¹ for the "Christiana Town Center," a large commercial shopping center.²

¹ Compl. Ex. A. The Plan was approved by Defendant New Castle County through its Department of Land Use, which also is a defendant in this action. The Defendants are collectively referred to as the "County."

² Plaintiff 395 Associates, LLC is the construction contractor for the project. For convenience, the Plaintiffs are collectively referred to as "Christiana."

On August 30, 2001, Frank E. Acierno, the principal of Christiana and its predecessor in interest with respect to the shopping center tract, entered into an entrance permit agreement for the Christiana Town Center with the Delaware Department of Transportation (“DelDOT”).³ That agreement, at paragraph 4, provides:

Prior to the issuance of any building permits for Phases 4, 5, 6, 7, 8, and 9, or any future phase, a realignment of the connector that replaces the temporary intersection at West Main Street with a curve in order to create a continuous road is required to be constructed and accepted by DelDOT. The owner/developer is responsible for the acquisition of right-of-way, the design and construction of the realigned connector. The Department of Transportation shall review and approve the construction plans for the realigned connector. No building permits for Phases 4, 5, 6, 7, 8, and 9, or any future phase shall be issued until written correspondence is received from DelDOT indicating acceptance of the realigned connector.

The terms of the entrance permit agreement, as its parties had agreed, were incorporated into the Plan. A note on the Plan provides:

The West Main Street connector (as shown on this Plan) shall be considered temporary and shall only serve as Phases 1, 2, and 3 of Christiana Town Center. Prior to the issuance of any building permits for Phases 4, 5, 6, 7, 8, and 9, or any future phase, a realignment of the connector that replaces the temporary intersection at West Main Street with a curve in order to create a continuous road is required to be constructed and accepted by DelDOT. The owner/developer is

³ Compl. Ex. B.

responsible for acquisition of right-of-way, the design and construction of the realigned connector. The Department of Transportation shall review and approve the construction plans for the realigned connector. No building permits for Phases 4, 5, 6, 7, 8, and 9, or any future phase, shall be issued until written correspondence is received from DelDOT indicating acceptance of the realigned connector.⁴

However, the realigned connector contemplated by the Note has not been constructed, apparently because DelDOT decided that it should not be built.

In the summer of 2003, Christiana applied to the County for a building permit for Phase 4 of the shopping center. The application was not approved. The principal reason for the County's action was the Note (and the obvious absence of the required connector). Christiana then sought a writ of mandamus from the Superior Court to compel the County to issue the building permit, but that effort failed.⁵ A few weeks later, on October 16, 2004, Christiana filed this action in which it seeks a permanent mandatory injunction requiring the County to issue the building permit for Phase 4 of the shopping center. The County has moved for dismissal of this action or, alternatively, for a stay. For the reasons set forth below,

⁴ Note 21 (or 23) to the Plan (the "Note"). With the various revisions to the Plan, the numbering of the note has changed. The text has not.

⁵ *Christiana Town Ctr., LLC v. New Castle County*, 2004 WL 2088032 (Del. Super. Sept. 16, 2004).

the Court concludes that a stay of this matter in favor of a related action filed by Christiana in this Court is appropriate.

According to the Complaint, the realigned connector was not constructed for a simple reason: DelDOT precluded it. Christiana asserts that DelDOT concluded that the realigned connector Christiana had agreed to build no longer fit in DelDOT's plans for the area. Christiana was ready to proceed with construction of the connector when, by letter dated June 20, 2002, the Secretary of DelDOT directed Mr. Acierno to cease work on the connector.⁶ The Secretary wrote that decisions made by DelDOT with respect to routing plans in the area had "[made] the Note . . . work no longer necessary, nor desirable."⁷ The Secretary commented further that:

[Christiana's] Record Plan calls for the completion of the previously approved West Main Street re-alignment as a precondition to the issuance of New Castle County building permits for Phases 4-9 of your project. In view of the changed circumstances described above, DelDOT will waive this requirement after we have successfully completed the acquisition of the land associated with Phases 8 and 9. At that point, we will be pleased to intercede on [Christiana's] behalf to amend the Record Plan and request New Castle County to allow

⁶ Compl. Ex. E.

⁷ *Id.*

[Christiana] to proceed with Phases 4-7, on the assumption that [Christiana] will have met all other preconditions of the Record Plan.⁸

After an unproductive exchange of correspondence,⁹ Christiana responded by filing an action in this Court against DelDOT in which it sought (1) an order of specific performance of the entrance permit agreement that would require DelDOT to review and approve the plans for the realigned connector and to accept the realigned connector after satisfactory construction, (2) to enjoin DelDOT from failing to review and grant approval for the construction plans for the realigned connector and from declining to accept the realigned connector upon its successful construction, and (3) a permanent injunction prohibiting DelDOT from attempting to modify the plans for the realigned connector and from condemning any lands of Christiana to allow for modifications to the connector.¹⁰ That action, filed on or about July 3, 2002, remains pending.¹¹

⁸ The Secretary expanded upon his reference to the acquisition of land associated with Phases 8 and 9 by indicating that DelDOT would need those lands for construction of the revised road system. He informed Mr. Acierno that the acquisition would be accomplished either in accordance with a DelDOT appraisal or through condemnation.

⁹ Compl. Ex. G-I.

¹⁰ *Christiana Town Ctr., LLC and Frank E. Acierno v. State of Delaware, Dep't of Transp.*, C.A. No. 19731 (Del. Ct. Ch., New Castle County) (the "Other Litigation").

¹¹ A review of the docket of C.A. No. 19731 reveals that a scheduling order is in place and that the scheduling order calls for trial in December 2005.

In the Complaint in this action, Christiana contends that the County may not continue to hold it to the terms of the Note because it has been legally prohibited from complying with the Note and, thus, compliance has become impossible or impracticable. Although the status of the building permit will not be resolved in the Other Litigation, the continuing efficacy of the Note (and, more particularly, the corollary provisions of the entrance permit agreement) will be addressed and most likely resolved.¹²

The question before the Court now is whether, as a matter of judicial economy and fairness, the continuing viability of the Note should be resolved in this action or whether this Court should defer to the Other Litigation where the parties to the entrance permit agreement will directly litigate its import. The Court, in this action, cannot, as a practical matter, resolve the duties of the County without

¹² The Complaint is dedicated to a review of DeIDOT's conduct under the entrance permit agreement and the Note. Only very brief mention is made of the other grounds set forth by the County for refusing the application for a building permit: the absence of an engineer's seal on one form; the need for perimeter control inspection; and a question about a building certification affidavit. The role of these additional issues in this dispute is, at most, minimal, being far outweighed by the presence of the Note and the problems associated with it. In short, this action is fairly viewed as one addressing Christiana's entitlement to a building permit from the County in the face of the express terms of the Note and the County's duties with respect to assuring (or waiving) compliance with the Note in light of the ongoing dispute between DeIDOT and Christiana.

directly confronting questions involving the continuing viability of the Note and the ability of DeIDOT to impose its will on Christiana despite the express terms of the entrance permit agreement.

This is not an instance where the County is considering the consequences of a private restriction. Instead, Christiana's challenge focuses on the regulatory reality that approvals from several governmental agencies are typically required in order to develop a large commercial project. As a matter of prudent and efficient administration of governmental review of the development process, coordination among the various public agencies is a significant public policy consideration.¹³ In a sense, this case frames the question of when, if ever, may one governmental entity authorize a private activity that is expressly prohibited as a result of an agreement between the private entity and another public entity. More specifically, should a building permit, generally viewed as the final step of approval for construction, be issued when there is no final agreement with respect to highway access arrangements. It is perhaps worth noting that Christiana has not sought the County's conditional approval, *i.e.*, an approval dependent upon resolution of its

¹³ See, *e.g.*, 29 Del.C. § 9201.

dispute with DelDOT. Instead, it seeks unfettered approval by the County to begin construction of Phase 4.

Stays most frequently are granted to avoid duplication of efforts and waste of resources when the same cause of action is being litigated between the same parties in more than one court.¹⁴ Stays, however, may also be granted in deference to another proceeding even though the other proceeding is not between the same parties and the issues are not identical.¹⁵ Although done on an infrequent basis, a stay in the latter context is appropriate if it will either resolve or greatly simplify the issues in the action to be stayed.¹⁶ “However, where the parties are not identical, there appears to be greater reluctance in granting a stay, and instead the court’s ‘discretion will be used sparingly and only upon a clear showing by the moving party of hardship or inequity so great as to overbalance all possible inconveniences of delay to his opponent.’”¹⁷ Here, I am satisfied that resolution of the debate between Christiana and DelDOT will eliminate all, or virtually all, of

¹⁴ See, e.g., *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 283 (Del. 1970).

¹⁵ See, e.g., *Lanova Corp. v. Atlas Imperial Diesel Engine Co.*, 64 A.2d 419, 420 (Del. Super. 1949).

¹⁶ *Id.*

¹⁷ *Crusader Enters., Inc. v. Delaware Comm’n on Massage Establishments & Adult Bookstores*, 1978 WL 22000 (Del. Ch. Sept. 1, 1978) (quoting *Lanova Corp.*, 64 A.2d at 420).

the issues posed by this litigation.¹⁸ The Other Litigation was filed by Christiana more than a year before it filed this action.¹⁹ Because Christiana chose to address the status of the Note and the entrance permit agreement in the Other Litigation and because resolution of that question carries substantial consequences for this litigation, it would be a waste of resources to determine Christiana's rights and obligations with respect to the Note in separate actions. Resolution of that question would be particularly cumbersome in this action; because the other party to the entrance permit agreement, DeIDOT, is not a party in this litigation, and the burden of responding to Christiana's contentions regarding the Note would

¹⁸ See *DiSabatino v. Liddicoat*, 1987 WL 8461 (Del. Ch. Mar. 26, 1987) (staying Court of Chancery action in favor of Family Court action because "Chancery action may become moot when the Family Court rules on the matters now before it . . . or that some of [its] rulings . . . may be binding on this court or may significantly limit the issues to be tried in this court"). Cf. *Harbor Finance Partners v. Sunshine Mining and Refining Co.*, 1996 WL 74728 (Del. Ch. Feb. 16, 1996). In *Harbor Finance*, the Court examined the defendant's motion to stay a Court of Chancery action in deference to a pending federal action using factors identical to those employed in a *forum non conveniens* analysis. *Id.*, at *2-*4. Not surprisingly, when evaluated in the context of an application for a stay in deference to another action filed in the same court, many of those factors, including choice of law, access to evidence, ability to compel witness attendance and view premises, are consistent with the granting of a stay.

¹⁹ It is tempting to view this action as ancillary to the dispute between DeIDOT and Christiana in the Other Litigation. If Christiana prevails here and obtains the necessary building permit from the County, then DeIDOT would, presumably, seek to prohibit construction by Christiana because of the terms of the entrance permit agreement. The net effect would likely be a shifting of the burden: in the Other Litigation, Christiana presumably has the burden of demonstrating entitlement to escape the terms of the entrance permit agreement; if this Court mandates the issuance of the building permit, then DeIDOT would, presumably, be required to come forward and bear the burden of demonstrating the right to enforce the agreement.

October 5, 2005
Page 10

necessarily fall upon the County.²⁰ Finally, it should be noted that because of the timing of the filing of the two actions, the Other Litigation will likely be concluded first. With an opportunity to conserve resources without any material prejudice to Christiana, the Court, in the exercise of its discretion, concludes that a stay is appropriate.

Accordingly, this action is stayed pending resolution of the Other Litigation. For good cause, any party may seek to vacate this stay.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

²⁰ By County ordinance, notations on a record plan “shall have the effect of restrictive covenants and shall run with the land covered by the record plan.” NCC Code § 40.31.810