

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

SAM GLASSCOCK III  
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE  
34 THE CIRCLE  
GEORGETOWN, DELAWARE 19947

October 22, 2013

Gerald A. Lechliter  
44 Harborview Road  
Lewes, DE 19958

Ralph K. Durstein, Esquire  
Delaware Department of Justice  
Carvel State Office Building  
820 North French Street  
Wilmington, DE 19801

William E. Manning, Esquire  
Richard A. Forsten, Esquire  
Michael A. Denote, Esquire  
Whitney W. Deeney, Esquire  
Saul Ewing LLP  
222 Delaware Avenue, Suite 1200  
Wilmington, DE 19899

Re: *Gerald A. Lechliter v. Del. Dep't of Natural Resources and  
Envtl. Control et al.*  
Civil Action No. 7939-VCG

Dear Litigants:

The University of Delaware Wind Turbine (the “Turbine”) is the most imposing structure in the City of Lewes. It weighs over 300 tons.<sup>1</sup> The tower itself is 256 feet tall, counting neither the nacelle nor the added reach of the 144-foot-long sails.<sup>2</sup> It can be seen from anywhere in town, and far at sea. To some, no doubt, it is an engineering marvel, or a piece of industrial sculpture. To others, including the Plaintiff here, the Turbine is a hulking giant that must be opposed. The Plaintiff has had a run at this giant before, in the original incarnation of this

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<sup>1</sup> *UD's Wind Turbine: Specs and Data*, UNIVERSITY OF DELAWARE, [www.ceoe.udel.edu/lewesturbine/specs.shtml](http://www.ceoe.udel.edu/lewesturbine/specs.shtml) (last visited Oct. 21, 2013).

<sup>2</sup> *Id.*

action, and in the Federal action in favor of which this matter was stayed. Now, unlike his literary predecessor,<sup>3</sup> the Plaintiff mounts not a frontal attack, but a flanking action, tilting not at the Turbine itself but at the construction of an access road designed to run nearby, with this temporary restraining order request as his Rocinante. Like the good Don, however, his effort, at this stage at least, is for naught; he cannot show irreparable harm, and so is entitled to neither expedition nor a temporary restraining order.

The original Complaint in this action alleges a number of illegalities in the permitting, funding and construction of the Turbine. It alleges a conspiracy among the Defendants to construct the Turbine illegally (Counts I and II); a conspiracy to defraud the Lewes City Treasury and misuse public land (Count II); violations of the Freedom of Information Act (Counts III and IV); and claims sounding in nuisance, negligence and fraud (Counts VI and VII).<sup>4</sup> The Complaint seeks an injunction ordering the removal of the Turbine, among other requests for relief.<sup>5</sup> Pertinent to the expedited relief currently requested, Count VII of the Complaint charges the Delaware Department of Natural Resources and Environmental Control (“DNREC”) and the University of Delaware (“UD”) with “gross and wanton negligence [creating] a public safety hazard for citizens by approving [the

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<sup>3</sup> See Miguel de Cervantes, *The Ingenious Gentleman Don Quixote of La Mancha* (Tobias Smollett trans., Barnes & Noble Classics 2004) (1605).

<sup>4</sup> The Complaint also states a claim against DNREC for allowing illegal hunting on public trust land (Count V).

<sup>5</sup> Compl. ¶¶ 320-37.

University’s] realignment of the connector road,” an access road running from Pillottown Road to New Road, near the Turbine.<sup>6</sup> That Count provides that:

DNREC established a setback distance from the turbine for a public road but approved a number of UD-requested realignments that put the roadway of the existing public road and planned connector road closer than the setback of 615 feet. The present roadway puts citizens walking or driving it in harm’s way.<sup>7</sup>

In the relief section of the Complaint, the Plaintiff pleads:

330. DNREC eliminated certain proposed locations for the turbine because these sites were too close to the turbine [sic] and, therefore, a public hazard.

331. DNREC allowed UD to dictate a new roadway that passes impermissibly close to the turbine according to the safety standards established by DNREC.

332. The Delaware taxpayers should not be forced to fund a public hazard which is a misuse of public funds.

333. Equity also supports this relief.<sup>8</sup>

While the term “this relief”—referenced in Paragraph 333 as a remedy for the improper placement of the current and “new roadway” (the “Planned Roadway”)—is unclear, it presumably refers to the Plaintiff’s request that I issue an injunction to remove the Turbine. A fair reading of the Complaint is that the Plaintiff alleges that both the existing roadway and the Planned Roadway are

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<sup>6</sup> *Id.* at 68.

<sup>7</sup> *Id.* at ¶¶ 310-11.

<sup>8</sup> *Id.* at ¶¶ 330-33.

impermissibly or illegally proximate to the Turbine, and that I should therefore order removal of that structure.

This action was stayed by a Stipulation of the parties, entered as an Order on June 24, 2013, pending the resolution of a motion to dismiss the Federal action also brought by this Plaintiff in the District of Delaware.<sup>9</sup> The Federal action involves the same facts and issues present here, and the motion to dismiss is still pending. Nonetheless, on October 11, 2013, the Plaintiff moved for a temporary restraining order in this action to prevent construction of the Planned Roadway referred to in Paragraphs 330 through 333 of the Complaint. According to the Plaintiff's Brief in Support of the Temporary Restraining Order, the Planned Roadway will connect "New Road to Pilottown Road to ease access of boat traffic to the new boat ramp in the vicinity of Roosevelt Inlet."<sup>10</sup> According to the Plaintiff, "DNREC established an exclusion zone for public roads in this area because of hazards related to the Turbine."<sup>11</sup> Allegedly, the existing road is itself illegally placed, and the Planned Roadway—together with an adjacent "bike/walking path"—will put "even a larger portion of that roadway within the turbine danger zone."<sup>12</sup> The Plaintiff alleges that construction of the Planned

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<sup>9</sup> *Lechliter v. University of Delaware et al.*, Case No. 12-cv.0016.

<sup>10</sup> Pl.'s Combined Br. in Support of His Mots. for a Temporary Inj. Ordering DNREC to Halt Construction of the Connector Road & for an Expedited Hearing at 1.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

Roadway commenced in the first week of October 2013.<sup>13</sup> The Plaintiff generally contends that construction of the Planned Roadway in the “danger zone” is illegal, and consequently, it would be unusable; therefore, its construction is a waste of funds. That is the only harm alleged in the Plaintiff’s brief.

As noted above, by Stipulation, the parties sought a stay of this action, including those allegations involving construction of the Planned Roadway. I adopted that Stipulation as an Order of this Court. The Plaintiff has now moved to expedite the proceedings, for a TRO enjoining construction, and implicitly, to lift the stay; argument on his motions was heard yesterday.

In order to prevail on a motion for expedited relief, a plaintiff must demonstrate a colorable claim and threatened imminent irreparable harm, such that the threat of harm justifies the costs to the litigants and the court of an expedited proceeding.<sup>14</sup> To demonstrate entitlement to a temporary restraining order, a plaintiff must show some likelihood of success on the merits, a threat of imminent irreparable harm, and that the threatened harm outweighs the harm faced by the defendant should the court grant the relief sought.<sup>15</sup> Common to both motions, therefore, is the necessity that a plaintiff demonstrate a threat of imminent and irreparable harm. Such a demonstration is lacking here.

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<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Ehlen v. Conceptus, Inc.*, 2013 WL 2285577, at \*2 (Del. Ch. May 24, 2013); *Cnty. of York Employees Ret. Plan v. Merrill Lynch & Co., Inc.*, 2008 WL 4824053, at \*5 (Del. Ch. Oct. 28, 2008).

<sup>15</sup> *Arkema Inc. v. Dow Chem. Co.*, 2010 WL 2334386, at \*1 (Del. Ch. May 25, 2010).

I assume for purposes of analysis that the State has begun the construction of a new connector road that is illegally placed. The Plaintiff is a vigorous, intelligent and knowledgeable advocate of that proposition, as he demonstrated at oral argument.<sup>16</sup> Assuming the stay in this action is ultimately lifted, and assuming his action survives case-dispositive motions, the Plaintiff will have an opportunity to prove his substantive assertions, including this one, at trial. Nothing in the proposed construction risks irreparable harm to the Plaintiff's interests, however. Any such construction on the State's part is with full knowledge of the allegations and requests for relief in the Complaint. If the Plaintiff is correct, any harm can be remedied by an order from the Court enjoining public use of the roadway, and the State has implicitly accepted this risk. In fact, the very relief requested in the Plaintiff's Complaint is removal of the Turbine itself, which would eliminate any "danger zone" and thus leave the Planned Roadway usable even under the Plaintiff's theory of the case. The Plaintiff points out, however, that equitable relief may leave a portion of the Planned Roadway unusable, and argues that, in that instance, the funds spent on its construction would amount to irreparable harm to him as a taxpayer. First, assuming, without deciding, that the Plaintiff is a

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<sup>16</sup> The Plaintiff alleged numerous other problems with the process that led to construction of the Planned Roadway at oral argument.

taxpayer and that that status confers standing,<sup>17</sup> any resulting harm is far too attenuated and speculative to amount to cognizable irreparable harm to the Plaintiff's interests.<sup>18</sup> Restraining orders and preliminary injunctions are extraordinary remedies, which equity will only countenance to prevent substantial and tangible harm.<sup>19</sup> A plaintiff cannot demonstrate irreparable harm for TRO purposes merely by making a colorable assertion that a public expenditure will prove to be improvident and thus inimical to his interests as a taxpayer.

At oral argument, the Plaintiff argued that he faces irreparable harm if the Planned Roadway is constructed because he will be tempted to walk down it, subjecting himself to the risks of the "danger zone." Harm is not irreparable if it is easily avoided, nor is it imminent where, like the danger Plaintiff alleges from the

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<sup>17</sup> Under Delaware law, taxpayer standing is "reserved for a narrow set of claims involving challenges either to expenditure of public funds or use of public lands." *Reeder v. Wagner*, 974 A.2d 858, \*2 (Del. 2009) (TABLE) (quoting *O'Neill v. Town of Middletown*, 2006 WL 205071, at \*19 (Del. Ch. Jan. 18, 2006)).

<sup>18</sup> See, e.g. *Alpha Builders, Inc. v. Sullivan*, 2004 WL 5383570, at \*5 (Del. Ch. Nov. 5, 2004) ("Mere apprehension of uncertain damage or insufficient remedy will not support a finding of irreparable harm."); *Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 208 (Del. Ch. 2002) ("To demonstrate irreparable harm, . . . [t]he alleged injury must be imminent and genuine, as opposed to speculative."); *Weldin Farms, Inc. v. Glassman*, 414 A.2d 500, 505 (Del. 1980) (referencing "the sound equitable doctrine that an injunction will not issue by reason of mere apprehension of uncertain speculative damage at an indefinite time in the future").

<sup>19</sup> See *H.F. Ahmanson & Co. v. Great W. Fin. Corp.*, 1997 WL 305824, at \*9 (Del. Ch. June 3, 1997) (denying injunctive relief where "the harm that plaintiffs profess to be concerned about is essentially theoretical, speculative, and at most, *de minimis*, but is in no realistic sense irreparable"); *Cook v. Oberly*, 459 A.2d 535, 540 (Del. Ch. 1983) ("Temporary restraining orders and preliminary injunctions . . . will not be granted unless irreparable injury is to be suffered by the party seeking relief if a remedy is not granted.").

Planned Roadway, it is months from arising.<sup>20</sup> In other words, the Plaintiff has failed in his attempt to demonstrate that absent a restraining order, he faces imminent irreparable harm.<sup>21</sup> Therefore, the Plaintiff's motions for expedition and a temporary restraining order are DENIED. The stay of this action remains in place.

Because the Plaintiff has not shown irreparable harm, I need not address the Defendants' defenses, including equitable jurisdiction and standing. Nothing in this Letter Opinion prevents any party from raising those issues as appropriate once the stay is lifted. To the extent the foregoing requires an Order to take effect, IT IS SO ORDERED.

Sincerely,

*/s/ Sam Glasscock III*

Sam Glasscock III

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<sup>20</sup> Counsel for the DNREC stated at oral argument that it will take several months to complete the Planned Roadway.

<sup>21</sup> See *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2010 WL 1223782, at \*4 (Del. Ch. Mar. 24, 2010) (“[I]f a Court may remedy an injury by an award of damages or the later shaping of equitable relief, a showing of irreparable injury has not been made.”).