IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

John and Melissa McCafferty,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. N12C-07-063 MJB
	)	
Delaware Department of Transportation	)	
and John/Jane Doe(s) Employees of	)	
Delaware Department of Transportation,	)	
	)	
Defendants.	)	

Submitted: August 2, 2013
Decided: November 19, 2013

Upon Defendant DelDot's Motion for Summary Judgment, **GRANTED**.

OPINION AND ORDER

John and Melissa McCafferty, *pro se*, 109 Hilldale Court, Claymont, DE 19703.

Stacey Cohee, Deputy Attorney General, Delaware Department of Justice, Attorney for Defendants.

Brady, J.

I. INTRODUCTION

This case concerns a basketball pole, located in front of John and Melissa McCafferty's ("Plaintiffs") home, in a cul-de-sac of a development in Claymont, Delaware, that was removed by employees of the Delaware Department of Transportation ("DelDOT" or "Defendants") on March 25, 2011. The basketball pole was removed because DelDOT determined it to be in violation of 17 *Del. C*. § 525, Delaware's "Clear Zone" statute. Section 525 grants authority to DelDOT "to remove artificial obstructions . . . including . . . poles" placed within "seven feet perpendicular to the pavement edge."[1]

A. Facts[2]

Plaintiffs purchased the property located at 109 Hilldale Court, Claymont, DE 19703, in September 2005. Hilldale Court is a dead end cul-de-sac road in Radnor Green, a suburban development. The neighborhood was built in the 1950s. In front of the Plaintiffs' home was a basketball hoop that had been there for some time prior to their purchase of the property.[3]

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[1] 17 *Del. C*. § 525. Maintenance of clear zones within rights-of-way:

> (a) The Department is authorized to maintain clear zones within the rights-of-way under its jurisdiction. In maintaining these clear zones, the Department shall have the immediate authority to remove artificial obstructions placed therein, including, but not limited to, nonofficial signs, poles, mailboxes not placed in conformance with Departmental regulation, or other hazards to safe passage. In removing artificial obstructions, the Department shall attempt to determine the owner of the obstruction and provide written notice and an opportunity for the owner to recover the obstruction after its removal. The Department shall also have the immediate authority to remove or trim vegetation growing within these rights-of-way.
> (b) As used in this chapter, the term "clear zone" has the following meanings:
> . . .
> (2) For all interior streets within residential subdivisions, the term includes the total roadside border area within a right-of-way, starting at the edge of the pavement and continuing for the shorter distance of either:
> a. Seven feet perpendicular to the pavement edge, or
> b. If there is a sidewalk adjacent to the street, the sidewalk edge further from the street.

[2] Unless otherwise noted, the Facts are taken from the Background section of the Complaint. Compl., p. 3–5, Transaction ID 45221532 (July 9, 2012).

[3] A basketball pole may have been in front of the house as early as the 1950s. The pole in questions was installed by the home's previous owner sometime in the 1980s.

In August 2010, DelDOT received an anonymous complaint regarding basketball poles in Radnor Green. On September 7, 2010, Anthony Marcozzi of DelDOT's Roadside Enforcement sent a letter to Plaintiffs and 7 other residents, informing them that their basketball poles were in violation of 17 *Del. C*. § 525 and instructing them to remove the poles within fourteen days or DelDOT would be forced to remove them.[4] Plaintiffs advised DelDOT that its basketball "pole was permanent and had been in the same place for decades."[5]

State Representative Bryon H. Short wrote a letter to Secretary Carolann Wicks of DelDOT expressing his position that the basketball poles should be allowed to remain in Radnor Green.[6] Rep. Short also expressed the opinion that the basketball poles should be "grandfathered in" under Section 525 because they were in place before the statute was enacted.[7] Secretary Wicks responded via letter on November 24, 2010, thanking Rep. Short for his letter, but advising him that DelDOT believed its interpretation of 17 *Del. C*. § 525 was correct, the basketball pole was in violation of the statute, and DelDOT had the authority to remove the pole if the property owners failed to do so within the instructed time period.[8]

On December 15, 2010, Anthony Marcozzi sent another letter to Plaintiffs, referring to the September 7, 2010 letter, advising them that their basketball pole was still in the clear zone and that it must be removed within fourteen days or DelDOT would remove it.[9]

On March 25, 2011, DelDOT employees arrived at the McCafferty's residence and removed the basketball pole.

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[4]Compl. Ex. AML [hereinafter "Anthony Marcozzi Letter"].
[5] Compl. at p. 4, 9(b).
[6]Compl. Ex. BSL [hereinafter "Bryon Short Letter"].
[7]*Id*.
[8]Compl., Ex. CWL.
[9]Def. Mot. to Dismiss, Ex. D [hereinafter "December notice"].

B. Procedural History

Plaintiffs commenced this action on July 9, 2012, against DelDOT and unidentified employees of DelDOT alleging that DelDOT wrongfully removed their basketball pole. Plaintiffs' complaint originally included a total of 68 counts, including violations of their 1st, 4th, 5th, and 7th Amendments, as well as claims for damages to their property.

At a hearing on November 29, 2012, the Court dismissed most counts in the Complaint and asked for supplemental briefing on the following remaining claims and issues: Retroactive Enforcement and Constitutionality of 17 *Del. C.* § 525; Selective Enforcement of 17 *Del. C.* § 525; and sovereign immunity of DelDOT and its employees.[10]

On June 25, 2013, the Court wrote to the parties informing them that it was converting DelDOT's Motion to Dismiss into one for Summary Judgment pursuant to Superior Court Rule 12(b),[11] in order to consider matters outside the pleadings.[12] The Court allowed the parties to submit any additional material relevant to the issues under consideration. The Court received a supplemental pleading from Plaintiffs on July 17, 2013, a letter from DelDOT with an affidavit of Debra Lawhead attached on July 23, 2013, and a response to DelDOT's letter from Plaintiffs on August 2, 2013.

[10]Nov. 29, 2012 Hearing Tr., 39: 6–21 [hereinafter "the Hearing"].

[11]Super. Ct. Civ. R. 12(b)

> . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[12]June 25, 2013 Letter from Court, Transaction ID 52998496.

C. Parties' Contentions

Sovereign Immunity

DelDOT contends that Article 1 Section 9 of the Delaware State Constitution provides for sovereign immunity for tort actions brought against the State and against employees of the State in their official capacities.[13] DelDOT contends that "[s]overeign immunity is an absolute bar to liability claims against the State of Delaware unless it is waived by the General Assembly."[14]

Plaintiffs contend that DelDOT may not claim sovereign immunity because Section 525 and its application violate Plaintiffs' constitutional rights and because DelDOT was negligent in its actions. Plaintiffs contend that they were deprived of life, liberty or property without a meaningful opportunity to be heard.[15]

Retroactive Enforcement

DelDOT contends that because the purpose of Section 525 is public safety and not punishment, Plaintiffs cannot properly assert a claim of retroactive enforcement.[16] DelDOT argues that "retroactive application of statutes without specific language demonstrating legislative intent to do so is not prohibited where substantive rights are not affected."[17] DelDOT contends that Plaintiffs' substantive rights have not been affected because their basketball pole

[13] *See Aleem v. Taylor*, 2003 WL 1851704, *2 (Del. Ct. Com. Pl. Mar. 27, 2003).
[14] *Turnbull v. Fink*, 668 A.2d 1370, 1374 (Del. 1995) (citing *Wilmington Housing Auth. v. Williamson*, 228 A.2d 182, 786 (Del. 1967).
[15] *Fuentes v. Shevin*, 407 U.S. 67 (1972).
[16] Supplemental Pleadings for Defs' Mot. to Dismiss at 3 (Jan. 17, 2013).
[17] *Id.* (citing *In re Just*, 2012 WL 5964375, *1 (Del. Super. Ct. Nov. 21, 2012)) (finding that a "statute will not be given retroactive application if it affects substantive rights" absent legislative intent to the contrary).

was returned to them and because DelDOT assumed control of the right-of-way under 17 *Del. C.* § 131,[18] and therefore Plaintiffs did not have a right to maintain the pole there.

Plaintiffs contend that there are issues of material fact regarding the retroactive enforcement of Section 525. Plaintiffs argue that the statute is silent on retroactive enforcement and that Rep. Byron Short's letter to DelDOT was binding upon DelDOT as to legislative intent.

Selective Enforcement

DelDOT contends that they received a complaint regarding Plaintiffs' basketball pole and seven other basketball poles in the area and that they canvassed the area and determined all eight poles cited in the complaint to be located in the state's right-of-way in violation of Section 525. DelDOT sent notice to all eight property owners giving them all an opportunity to remove the poles themselves without any further action from DelDOT. The Plaintiffs did not remove their pole, so DelDOT removed it. DelDOT contends that Plaintiffs have not demonstrated that DelDOT's actions "shock the conscience" of the Court, which is necessary to succeed on a claim of selective enforcement.[19]

Plaintiffs contend that the fact that DelDOT did not remove other similar basketball poles in the area demonstrates that DelDOT selectively enforced Section 525 against Plaintiffs and seven other property owners in the area. Plaintiffs contend that this shocks the conscience of the Court.

II. Standard of Review

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[18] 17 *Del. C.* § 131. General jurisdiction: (a) All the public roads, causeways, highways and bridges in this State which have been or may hereafter be constructed, acquired or accepted by the Department of Transportation shall be under the absolute care, management and control of the Department.

[19] *Sisk v. Sussex County*, 2012 WL 1970879, *6 (D. Del. June 1, 2012) (citing *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 286 (3d Cir. 2004)).

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[20]

III. Discussion

A. Sovereign Immunity

The immunity from civil liability of the State, its agencies, and its employees, acting in their official capacities, is a "fundamental premise of our systems of law and government."[21] "[T]he doctrine of sovereign immunity provides that the State may not be sued without its consent."[22] This immunity is only limited or waived by an act of the General Assembly.[23] To overcome the State's immunity from liability: "(1) the State must waive immunity; and (2) the [State Tort Claims Act (STCA)] must not otherwise bar the action."[24] The State, through the General Assembly, may waive immunity by either (1) procuring insurance coverage under 18 *Del. C.* § 6511 for claims cited in the complaint or (2) by statute which expressly waives immunity.[25]

1. Waiver of Immunity

In Delaware, it is well-settled that where the State has "no insurance coverage for the risks presented," the State has "not independently waived sovereign immunity under 18 *Del. C.* § 6511."[26]

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[20]Super. Ct. Civ. R. 56(c).
[21]*J.L. v. Barnes*, 33 A.3d 902, 913 (Del. Super. Ct. 2011) (citing U.S. CONST. amend. XI) ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").
[22]*Doe v. Cates*, 499 A.2d 1175, 1176 (Del. 1985).
[23]*Id.*; *see also* Del. CONST. art. 1 § 9 ("Suits may be brought against the State, according to such regulations as shall be made by law.").
[24]*Barnes*, 33 A.3d at 913 (citing *Doe*, 499 A.2d at 1176-77).
[25]*Doe*, 499 A.3d at 1176.
[26]*Furman v. Del. Dept. of Transp.*, 30 A.3d 771, 773 (Del. 2011) (citation omitted); *Doe v. Cates*, 499 A.2d 1175, 1181 (Del. 1985) (citation omitted).

Debra Lawhead is the Insurance Coverage Administrator of the State of Delaware.[27] Ms. Lawhead administers insurance coverage in all instances in which the State has waived sovereign immunity under the State Insurance Coverage Program.[28] Ms. Lawhead has personal knowledge of the policies established by the Insurance Determination Committee, and, after reviewing Plaintiffs' Complaint, Ms. Lawhead has concluded that the State of Delaware and its agency (DelDOT) "has not purchased any insurance nor has [it] established any self insurance program through the Insurance Determination Committee that would be applicable in the circumstances and events alleged in the Complaint against the State of Delaware, its agency and division ([DelDOT]) in the above captioned matter."[29]

Furthermore, Ms. Lawhead's affidavit states that the General Assembly has not obtained any insurance or "enacted any legislation pertaining to or allowing any possible liability of the State resulting from the facts as alleged in [the] Complaint."[30] Finally, Ms. Lawhead's affidavit states "None of the commercial insurance secured for the State during any fiscal year provided for coverage for the type of injury asserted in the complaint in the above captioned matter."[31]

Because sovereign immunity is so firmly rooted in both the common law and the Delaware Constitution, a waiver of sovereign immunity must be a clear and specific act of the General Assembly.[32] Sections 131, 149 and 525 under Title 17, which are implicated here, contain no provisions where the State has waived its immunity. Accordingly, there has been no clear and specific act of the General Assembly waiving sovereign immunity in this case.

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[27]Debra Lawhead Affidavit.
[28]*Id.*
[29]*Id.* Because the Court has converted the present Motion to Dismiss into one for Summary Judgment, the Court may rely upon the affidavit of Debra Lawhead supplied by DelDOT. Accordingly, this permits the Court to address the issue, as discussed above, regarding whether the State's insurance coverage (or lack thereof) constitutes a waiver of immunity.
[30]*Id.*
[31]*Id*
[32]*Turnbull*, 668 A.2d at 1376–77.

In Plaintiffs' letter in response to Debra Lawhead's Affidavit, Plaintiffs contend that sovereign immunity and insurance coverage are issues of material fact. A careful reading of the cases cited to by Plaintiffs, however, does not support this position. In *McNutt v. Fisher*,[33] this Court did not determine that an issue of material fact precluded summary judgment; rather, the Court, for unstated reasons, chose to not rule on defendant's summary judgment motion.[34] Instead, the Court allowed the case to go to the jury, subject to post-trial consideration of the legal arguments raised in defendant's motion.[35] One reason, perhaps, for the Court's decision in that case to forgo ruling on the defendant's motion for summary judgment was that trial was set to commence within two weeks.[36] Irrespective of the Court's basis of choosing to not rule on the motion for summary judgment, *McNutt* does not stand the position for which Plaintiffs cite—namely, that sovereign immunity and insurance coverage are issues of material fact that preclude summary judgment. Similarly, the other case cited by Plaintiffs, *Simmons v. Del. Tech.*,[37] is also distinguishable. While the Court in *Simmons* did deny the defendant's motion for summary judgment, it reached this holding by concluding that determination of immunity under the State Tort Claims Act was not ripe without consideration of the plaintiff's then-unresolved motion to compel regarding Del. Tech.'s rules and procedures.[38]

What both of these cases do have in common is that the Court in both cases found that the defendants had waived sovereign immunity through the purchase of insurance.[39] In this case, according the Affidavit of Debra Lawhead, there has been no purchase of insurance, and there is no information in the record contrary to that assertion.

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[33] 2006 WL 1148681 (Del. Super. Ct. Jan. 9, 2006).
[34] *Id*. at *1.
[35] *Id.* at *7.
[36] *Id*. at *1 (indicating the plaintiff filed her response in opposition of summary judgment on November 15, 2004 and the trial commenced on November 29, 2004).
[37] 2012 WL 1980409 (Del. Super. Ct. May 17, 2012).
[38] *Id*. at *3–*4.
[39] *Id*. at *3; *McNutt*, 2006 WL 1148681 at *4.

2. State Tort Claims Act

To overcome sovereign immunity, (1) the State must waive immunity AND (2) the STCA must not otherwise bar the action.[40] So while, Plaintiffs correctly argue that consideration under the STCA may not be ripe until some discovery is conducted, there must be a waiver of liability first before the Court considers the STCA. Because there has been no waiver, which the Court finds is established by Debra Lawhead's uncontested Affidavit, the Court need not consider the STCA.

Constitutional Implications

The Court agrees with DelDOT's contention that Plaintiffs' pleadings do not amount to constitutional violations. While the Court is sympathetic with Plaintiffs' position and their frustration, they have not demonstrated that the State has infringed upon a protected right. The State has a right-of-way, under Section 525, to the property in question, and under that section is "authorized to maintain clear zones within the rights-of-way under its jurisdiction."[41] Plaintiffs were provided with notice of the violation over six months before the pole was removed. The Court finds that the September and December letters provided ample notice to Plaintiffs of the violation and DelDOT's intended course of action if the violation was not corrected. The Court also finds that Plaintiffs had sufficient opportunity to be heard before their pole was removed. Plaintiffs' first notice of the violation, Anthony Marcozzi's letter, provided the Plaintiffs with a phone number to contact Mr. Marcozzi if they had any questions regarding the matter.[42]

The Supreme Court of the United States has held that "some form of hearing is required before an individual is . . . deprived of a property interest."[43] The Court in *Mathews* created a

[40]*Barnes*, 33 A.3d at 913 (citing *Doe*, 499 A.2d at 1176–77).
[41]17 *Del. C*. § 525(a).
[42]Anthony Marcozzi Letter.
[43]*Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

balancing test to determine what process is due to an individual before they are deprived of a property interest, which includes consideration of:

> (1) the private interest that will be affected by the official action;
> (2) the risk of erroneous deprivation of such interest through the procedures used;
> (3) the probable value of additional or substitute procedural requirements; and
> (4)the government's interest including the fiscal and administrative burdens of additional procedures.[44]

In considering the *Mathews* balancing test, this Court finds that the current enforcement procedure of Section 525 does not violate due process. Regarding the first *Mathews* factor, the private interest that will be affected by the official action, though the Court sympathizes with Plaintiffs' position,[45] the private interest in the case *sub judice* is a small one—i.e., Plaintiffs' ability to keep a basketball pole in place. Notice went to the property owners, who have taken steps to address the proposed action by the State. Clearly, the opportunity to challenge the removal, or establishing it was not within a protected zone or on the notified party's property, existed. The steps taken do not allow for significant risk of erroneous deprivation. There is no showing nor can the Court conceive of any additional or substitute procedures that would assure a better process. Finally, considering the fourth *Mathews* factor, the State's interest is important. DelDOT has a strong interest in maintaining safe and clear rights-of-way within the State. It would be highly burdensome, both fiscally and administratively, if DelDOT were required to provide additional procedures in the enforcement of Section 525.

DelDOT sends out agents to determine if the complained-of obstructions violate Section 525, and has processes in place to notify citizens of its intent to act with regard to their property. Further, such action clearly provides the citizen with an opportunity to be heard, and in this case,

[44] *Id*. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970)).
[45] Having played and coached basketball, the Court acknowledges the loss Plaintiffs must feel.

the Plaintiffs not only responded to DelDOT but also had their State Representative do so. Plaintiffs were not entitled to a full, trial-type hearing.[46] Although the Court acknowledges that Plaintiffs' did not escape this matter with no damage to their property, when balancing the Plaintiffs' property interest against the other factors, it is clear that the due process received by Plaintiffs was sufficient.

B. Retroactive Enforcement

The retroactive applicability of a statute is a question of law.[47] While Plaintiffs contend that issues of material fact are present regarding the retroactive enforcement of Section 525, the Court must decide this issue as a matter of law.

The United States Constitution precludes Congress or any State from enacting a law that "imposes a punishment for an act which was not punishable at the time it was committed; or imposed additional punishment to that then prescribed."[48] The general rule in Delaware is that "in the absence of language demonstrating the legislature's intent to the contrary, a statute will not be given retroactive application if it affects substantive rights."[49] If a statute is not punitive in nature, its retroactive application does not implicate the *ex post facto* clause.[50]

While the Court does sympathize with the Plaintiffs' position, the Clear Zone Statute does not affect substantive rights. Pursuant to Section 131, DelDOT is charged with the "absolute care, management and control" of all public roads and rights-of-way.[51] Because the Plaintiffs' basketball pole was in DelDOT's right-of-way and DelDOT was expressly authorized to remove obstructions from its rights-of-way, there is no effect on Plaintiffs' substantive rights.

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[46] *Slawik v. State*, 480 A.2d 636, 645 (Del. 1984) (citing *Cafeteria Workers v. McElroy,* 367 U.S. 886, 894 (1961)) ("[I]t is established that the Due Process Clause does not require a trial-type hearing in every conceivable instance of governmental impairment of private rights.").
[47] *Wolhar*, 686 A.2d at 172.
[48] *Distefano v. Watson*, 566 A.2d 1, 5 (Del. 1989) (citations omitted).
[49] *Wolhar*, 686 A.2d at 172 (citations omitted).
[50] *In re Just*, 2012 WL 5964375 at *1 (citing *Hassett v. State*, 12 A.3d 1154 (Del. 2011)).
[51] 17 *Del. C*. § 131(a), (e), (g).

Though the statute does not expressly state it has retroactive enforceability, it is very unlikely the legislature intended DelDOT to have authority to remove obstructions from its rights-of-ways only if the obstructions came about *after* the statute was enacted.[52] Additionally, a continued presence constitutes a present hazard and violation.[53]

It is apparent to the Court that the purpose of the Clear Zone Statute is public safety and the maintenance of clear rights-of-way, and that it is not punitive in nature.[54] Because the purpose is public safety and not punishment, Plaintiffs cannot maintain a claim of retroactive enforcement. Accordingly, this claim must be dismissed.

Plaintiffs' contention that Rep. Short's letter is somehow binding on DelDOT is unsupported by Rep. Short's statements in the letter itself. Rep. Short makes the following statements regarding this dispute: that Section 525 is "*arguably applicable to the facts*;" that he is "*not certain*" if the facts satisfy Section 525; that "the type of road in question is not entirely clear to me;" "it is equally unclear whether Section 525 applies;" Rep. Short requests DelDOT to "provide insight" and "legal support" for its position.[55] Rep. Short does offer his opinion on both the intent of Section 525 and that Plaintiffs basketball hoop may somehow have been

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[52]This is further supported by the provision that DelDOT "shall also have the immediate authority to remove or trim vegetation growing within these rights-of-way." 17 *Del. C*. § 525(a). It is even more unlikely that the General Assembly intended that DelDOT was only authorized to trim or remove vegetation that was planted *after* this was enacted.

[53]This Court explained in *Ayres v. Jacobs & Crumplar, P.A* that "[a] continuing violation 'is occasioned by continual unlawful acts, not by continual ill effects from the original violation.' In other words, there must be a present violation of which to complain." *Ayres v. Jacobs & Crumplar, P.A*. 1996 WL 769331, at *6 (Del. Super. Ct. Dec. 31, 1996) (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)). *See also Del Chapel Associates v. State*, 2001 WL 914073, at *7 (Del. Super. Ct. Jul. 31, 2001) ("[T]he defendant would continue to be guilty of a continuing violation until the defendant proved not only that it complied with the [Newark City] Code but also [until] it set up a reinspection with the City.")

[54]H.B. 234, 139th Gen. Assem., 2nd Reg. Sess. (Del. 1998) (enacted):

> . . . BE IT RESOLVED by the House of Representatives of the 139th General Assembly of the State of Delaware that the obligation to maintain safe clear zones in the rights-of-way should be affirmed; that appropriate restrictions against non-official uses of these rights-of-way should be provided . . . .

[55]Byron Short Letter, p. 1.

"grandfathered" in.[56] The Court does not find this letter to be binding upon DelDOT. Rep. Short's letter clearly states that it represents his opinions or beliefs and that the purpose of his letter was the amicable resolution of the dispute.[57]

The express language of the statute clearly states that DelDOT has "immediate authority to remove artificial obstructions" including poles within seven feet of the pavement edge in "all interior streets within residential subdivisions."[58] The Court cannot disregard this plain language granting such specific authority to DelDOT.

C. Selective Enforcement

Plaintiffs' claim of selective enforcement of Section 525 against them is based upon the fact that there were (or are) other, similar basketball poles in the area that were not removed by DelDOT. The issue of selective enforcement of zoning laws was reached by the Delaware District Court in *Sisk*.[59] To survive on a claim of selective enforcement, Plaintiff must demonstrate that DelDOT's enforcement of Section 525 "shocks the conscience" of the Court.[60]

Though the Court would rather have seen this matter resolved differently, its conscience is not shocked. The intrusion was minimal (relative to the standards for "shocking the conscience"), and the mandate and purpose of the statute is clear and persuasive. Unfortunately, for Plaintiff and the seven other basketball enthusiasts in their neighborhood, the Clear Zone Statute, as a practical matter, is enforced upon notice to, or by, those with the responsibility to keep the affected areas clear. DelDOT may not know, or find, each and every violation in every one of its rights-of-way. That does not mean, however, that DelDOT cannot enforce Section 525

[56] *Id*. at 2.
[57] Bryon Short Letter at 1 ("I write to you to set forth the basis upon which I believe that the Delaware Department of Transportation ("DelDOT") can amicably resolve this matter.").
[58] 17 *Del. C*. § 525(a), (b)(2)(a).
[59] *Sisk*, 2012 WL 1970879
[60] *Id.* at*6 (citing *Eichenlaub*, 385 F.3d at 286).

in response to complaints of obstructions, determine if the obstruction is a violation, notify the owner and, if the owner fails to remove the obstruction, remove it. Accordingly, Plaintiff cannot maintain a claim of selective enforcement against DelDOT, and that claim must be dismissed.

IV. CONCLUSION

For the reasons set forth above, Defendant DelDOT's Motion to Dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge