IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – EQUITY

JENNIFER FOSTER, KOFI OSEI and MARTIN COHEN Plaintiffs, v. THE BOARD OF SUPERVISORS TOWAMENCIN TOWNSHIP, et al. Defendant.	NO: 2023-18907

MEMORANDUM IN SUPPORT OF PENNSYLVANIA-AMERICAN WATER COMPANY'S PRELIMINARY OBJECTIONS TO PLAINTIFFS' SECOND AMENDED COMPLAINT

I. INTRODUCTION

Intervenor-Defendant Pennsylvania-American Water Company ("PAWC"), by and through its counsel, hereby respectfully presents its Memorandum of Law in Support of its Preliminary Objections to Plaintiffs' Second Amended Complaint.

II. MATTER BEFORE THE COURT

The matter before the Court is PAWC's Preliminary Objections to Plaintiffs' Second Amended Complaint.

III. QUESTIONS PRESENTED

1. Should Count I of Plaintiffs' Second Amended Complaint be dismissed for legal insufficiency?

Suggested Answer: *Yes.*

2. Should Count II of Plaintiffs' Second Amended Complaint be dismissed for legal insufficiency?

Suggested Answer: *Yes.*

3. Should Count III of Plaintiffs' Second Amended Complaint be dismissed for legal insufficiency?

Suggested Answer: *Yes.*

IV. FACTUAL BACKGROUND

On August 22, 2023, Plaintiffs Jennifer Foster and Kofi Osei (collectively, "Original Plaintiffs") initiated this action by filing a Complaint against Defendant The Board of Supervisors Towamencin Township (the "Board") regarding a dispute over Towamencin Township's (the "Township") sale of the Township's sanitary sewer system ("Sewer System") to PAWC. In short, Original Plaintiffs' Complaint challenged the Asset Purchase Agreement, as amended, and an Assignment and Assumption Agreement of Asset Purchase Agreement (collectively, "APA") for the sale of the Sewer System to PAWC in violation of the Township's subsequently-enacted Home Rule Charter and the Pennsylvania Sunshine Act.

On September 12, 2023, the Board filed preliminary objections to Original Plaintiffs' Complaint. That same day, PAWC filed a Petition to Intervene in this action as an Intervenor-Defendant. On October 2, 2023, Original Plaintiffs along with newly added Plaintiff Martin Cohen (collectively, "Plaintiffs"), filed an Amended Complaint. The Amended Complaint was by and large identical to the Original Plaintiffs' Complaint with the addition of some citations to legal authority. On October 23, 2023, the Board filed preliminary objections to Plaintiffs' Amended Complaint. Shortly thereafter, on October 27, 2023, the Court granted PAWC's Petition to

Intervene as an Intervenor-Defendant, giving PAWC twenty (20) days therefrom to file preliminary objections to Plaintiffs' Amended Complaint.

On November 3, 2023, Plaintiffs filed a Second Amended Complaint.[1] In their Second Amended Complaint, Plaintiffs once again reiterate, nearly verbatim, the first three counts of the prior two complaints. Plaintiffs also added a fourth count to their Second Amended Complaint alleging that the Board violated the Sunshine Act by entering into a Common Interest Agreement with PAWC. Thereafter, the Board filed a Motion for Stay of Proceedings on November 8, 2023.

The Township entered into the APA for the sale of the Sewer System with NextEra Water Pennsylvania, LLC ("NextEra") on June 14, 2022. *See* APA, attached hereto as Exhibit "A." On December 6, 2022, nearly six months after the APA was entered into, a Government Study Commission (the "GSC") was established to determine whether the Township should adopt a home rule charter. "The GSC was clear from the beginning: its primary goal was to explore the ways in which a Home Rule Charter could stop the sewer sale." *See* Second Amended Complaint, at ¶ 49.

At some point after signing the APA, NextEra determined that it was going to seek either an assignment of its rights under the APA, or a sale of the Sewer System after closing on its purchase of the Sewer System. Pursuant to those desires, NextEra reached an agreement to assign its interests in the APA to PAWC. *See* proposed assignment, attached hereto as Exhibit "B". The Township brought the proposed assignment to public attention at the Board meeting on March 8, 2023.

[1] The filing of Plaintiffs' Second Amended Complaint rendered Plaintiffs' Amended Complaint moot, and thereby nullified the Court's previously imposed deadline for PAWC to file preliminary objections. Pennsylvania Rule of Civil Procedure 1028 provides that parties have twenty (20) days from the filing of a pleading to file preliminary objections. As such, the deadline for PAWC to file preliminary objections to Plaintiffs' Second Amended Complaint is November 24, 2023.

On March 9, 2023, the GSC published its final report in which the adoption of a home rule charter was recommended, and a copy of the proposed home rule charter was attached. In relevant part, the proposed home rule charter prohibited "the sale or long-term lease of potable water, wastewater, and stormwater systems to nongovernmental entities." *See* Proposed Home Rule Charter, attached hereto as Exhibit "C". On March 10, 2023, the proposed home rule charter and ballot question, along with the GSC's final report, were submitted to the Montgomery County Board of Elections for inclusion on the May 16, 2023 ballot.

The Board subsequently voted to adopt the APA, as amended and assigned, at the Board meeting on March 22, 2023. Accordingly, on March 23, 2023, the Township, NextEra, and PAWC entered into the APA, as amended and assigned. On May 15 and 16, 2023, the Township and PAWC filed various applications and petitions with the Pennsylvania Public Utility Commission ("PUC") seeking final approval of the sale.

Thereafter, on May 16, 2023, the Home Rule Charter referendum passed by a narrow margin. The Home Rule Charter went into effect on July 1, 2023.

At issue herein, are the first three counts of Plaintiffs' Second Amended Complaint in which Plaintiffs allege three causes of action: (1) an action in mandamus seeking the Court to direct "the Township to comply with the Home Rule Charter and terminate the [APA]"; (2) a declaratory judgment action seeking the Court to declare that the Township "cannot finalize" the sale of the Sewer System; and (3) an action alleging violations under The Sunshine Act. Counts I, II, and III of Plaintiffs' Second Amended Complaint are legally insufficient, and must be dismissed, for the reasons set forth below.

V. LEGAL ARGUMENT

a. Standard of Review

Under Pennsylvania Rule of Civil Procedure 1028(a), preliminary objections may be filed where there is "legal insufficiency of a pleading (demurrer)." Pa. R. Civ. P. 1028(a)(4). A demurrer tests the "legal insufficiency of the challenged pleadings" and will be sustained "where the pleader has clearly failed to state a claim for which relief can be granted." *Composition Roofers Local 30/30B v. Katz*, 398 Pa. Super. 564, 568, 581 A.2d 607, 609 (Pa. Super. 1990).

For purposes of reviewing preliminary objections based upon legal insufficiency, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. *McArdle v. Tronetti*, 426 Pa. Super. 607, 611, 627 A.2d 1219, 1221 (Pa. Super. 1993). The court need not accept as true, however, "conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." *Myers v. Ridge*, 712 A.2d 791, 794 (Pa. Cmwlth. 1998). A demurrer is appropriate "in cases which are so free from doubt that a trial would certainly be a fruitless exercise." *Id.*

Count One of Plaintiffs' Second Amended Complaint is legally insufficient as Plaintiffs have failed to make a claim upon which relief can be granted. Count One of Plaintiffs' Second Amended Complaint, based upon the facts as pled, seeks an improper use of Mandamus relief in clear contravention of Pennsylvania law. Count Two of Plaintiffs' Second Amended Complaint is legally insufficient as Plaintiffs are asking this Court to make improper use of the Declaratory Judgment Act. Finally, Count Three of Plaintiffs' Second Amended Complaint is legally insufficient as it is completely time-barred. Accordingly, for the reasons more fully set forth below, Counts I, II, and III of Plaintiffs' Second Amended Complaint must be dismissed.

b. <u>Legal Insufficiency of Count One: Mandamus</u>

In Count One of Plaintiffs' Second Amended Complaint, they seek an Order of Mandamus "directing the Township to comply with the Home Rule Charter and terminate the [APA][. . .]." Plaintiffs' Second Amended Complaint fails to make out a *prima facie* case for mandamus relief.

Mandamus is an extraordinary writ and is a remedy used to compel performance of a ministerial act or mandatory duty. *Borough of Plum v. Tresco,* 146 Pa. Cmwlth. 639, 606 A.2d 951 (Pa. Cmwlth. 1992). Mandamus relief should issue only where the plaintiff demonstrates an immediate, specific, well-defined and complete legal right to the thing demanded, a corresponding duty in the defendant, and the absence of any other appropriate or adequate remedy. *Equitable Gas Co. v. City of Pittsburgh*, 488 A.2d 270, 271 (Pa. 1985). Mandamus "is not used to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of an action already taken." *Pa. Dental Ass'n v. Cmwlth. Ins. Dep't,* 516 A.2d 647, 652 (Pa. 1986).

The Pennsylvania Supreme Court has described the purpose of mandamus as follows:

> Mandamus is a device that is available in our system to compel a tribunal or administrative agency to act when that tribunal or agency has been "sitting on its hands." It must not be turned into a general writ of error or writ of review lest we further encourage interlocutory and piecemeal appellate review, or multiple appeals with their attendant burdens and delays.

Id. The Supreme Court of Pennsylvania has further held that it is "elementary" that mandamus cannot be used to "review or compel the undoing of action taken by such an official or tribunal in good faith and in the exercise of legitimate jurisdiction, even though, in fact, the decision rendered may have been wrong [. . .]." *Kaufman Const. Co. v. Holcomb*, 55 A.2d 534, 537 (Pa. 1947). Finally, if there is any doubt as to a plaintiff's right or the defendant's duty, mandamus is "neither appropriate nor available." *Perkasie Borough Auth. v. Hilltown Twp. Water & Sewer Auth.*, 819 A.2d 597, 603 (Pa. Cmwlth. 2003).

Herein, Plaintiffs attempt to avoid the constraints of mandamus relief by framing their request for relief in terms of ordering "compliance" with the Home Rule Charter. However, this is

an over-simplification of what the Plaintiffs are *actually* seeking. The natural effect of ordering such "compliance" as requested by Plaintiffs, would order the Board to *overturn* the decisions it made "in good faith and in the exercise of legitimate jurisdiction" to enter into the APA through *retroactive* application of the Home Rule Charter.[2] This is precisely the type of "relief" that the Supreme Court of Pennsylvania has consistently held is inappropriate for a mandamus action. Accordingly, Count One should be dismissed for failure to state a claim upon which relief can be granted.

It is important to note, *in arguendo*, that even if mandamus was an appropriate form of relief in this matter, Plaintiffs' claims would *still* fail. Plaintiffs allege that the APA is "wholly executory" and thus performance can be "excused" due to impossibility. *See* Complaint ¶¶93-96. Plaintiffs misunderstand the doctrine of impossibility of performance under Pennsylvania law. "[U]nder the doctrine of impossibility of performance applicable to the construction of contracts, if, after a contract is made, a party's performance is made impracticable *through no fault of his or her own*, the parties may waive the difficulties or terminate the agreement, ending all contractual obligations." *Davis-Haas v. Exeter Twp. Zoning Hearing Bd.*, 166 A.3d 527, 539 (Pa. Cmwlth. 2017) (*quoting In re Busik,* 759 A.2d 417, 423 (Pa. Cmwlth. 2000))(emphasis added). If a contracting party is the *cause* of the impossibility, performance will **not** be excused. *Princeton Sportswear Corp. v. H & M Assocs.,* 507 A.2d 339 (Pa. 1986) (in which performance under a lease was not excused where fire that destroyed the subject building was caused by lessor's negligence). *See also Pearson v. Tanner*, 870 F. Supp. 2d 380, 386 (E.D. Pa. 2012) (in which the Eastern District Court of Pennsylvania held, in applying Pennsylvania law, that "frustration of contractual purpose"

[2] *See Taylor v. Abernathy,* 642, 222 A.2d 863, 870 (Pa. 1966)("From this, it can be seen that the City of Sharon violated no duty to the family of Mrs. Miller by failing to enact a pension plan in compliance with the enabling act, even though, in the future, the city will be under a duty to include designated family members of retirees within its pension system.")

was not an available defense to plaintiffs whose wrongful conduct was the proximate cause of the alleged contractual "frustration."). There is no provision in the Home Rule Charter giving it, or any of its Articles, retroactive effect. Accordingly, the Home Rule Charter in and of itself does not invalidate the APA, or make performance thereunder impossible. It would be the Township's retroactive application of the Home Rule Charter that would render performance of the APA "impossible." Thus, as the Township's action in retroactively applying the Home Rule Charter would be the direct cause of the "impossibility," performance of the APA would not be excused.

For a similar reason, Plaintiffs' allegation that the parties contracted for a change in law is without merit. Plaintiffs allege that Section 14.01(b)(ii) of the APA "expressly contemplate[s]" the "current situation" "by clear and unambiguous terms." *See* Second Amended Complaint, at ¶128. However, Plaintiffs have misleadingly left an incredibly important qualifying clause off of their quotation of said section. Section 14.01(b)(ii) of the APA, provides, *in the entirety of the relevant part*:

> This Agreement may, by notice given in the manner provided by this Agreement, be terminated and abandoned at any time before completion of the Closing:
>
> [. . .]
>
> (b) By any of the Seller or the Buyer if:
>
> [. . .]
>
> (ii) any Governmental Authority shall have issued an order, decree or ruling or taken any other action, in each case permanently restraining, enjoining or otherwise prohibiting the material transactions contemplated by this Agreement and such order, decree, ruling or other action will have become final and non-appealable, **provided however, that the Party seeking termination pursuant to this clause (b) of Section 14.01 is not in breach in any material respect of any of its representations, warranties, covenants or agreements contained in this Agreement[.]**

See Exhibit "A" at §14.01 (emphasis added). The Township could only avail itself of this provision if it was not in breach of any of its material warranties under the APA. However, under Section

4.02 of the APA, the Township warrants that it has "the power and authority to enter into this Agreement and do all acts and things and execute and deliver all other documents as are required hereunder to be done, observed or performed by it in accordance with the terms hereof." Plaintiffs' argument that the Home Rule Charter prevents the Township from completing its obligations under the APA, would put the Township in breach under §4.02. Thus, the APA does not "contemplate" the Township being able to legislate itself out of its contractual obligations, as it expressly prohibits a party from taking advantage of its own breach.

It is interesting that Plaintiffs make the argument that §14.01(b)(ii) is "evidence" that the parties contemplated the ability to get out of the APA without a breach, when a similar, but opposite, argument exists under the Home Rule Charter. Section 701.1 of the Home Rule Charter provides:

> Except as provided in this Charter, the Township shall continue to own, possess, and control all rights and property of every kind and nature, owned, possessed or controlled by it when this Charter takes effect, and **shall be subject to all its debts, obligations, liabilities, and duties.**

See Exhibit "C", at §701.1 (emphasis added). Nothing in Article VI of the Home Rule Charter, relating to the Sewer System, suggests that contractual obligations and duties held by the Township at the time the Home Rule Charter went into effect were to be nullified. *See generally*, Exhibit "C" at Art. VI. Accordingly, because the APA was clearly in effect at the time the Home Rule Charter went into effect, the Township remained subject to its obligations and duties thereunder. For the foregoing reasons, Count One of Plaintiffs' Second Amended Complaint fails to state a claim upon which relief could be granted and must be dismissed.

c. Legal Insufficiency of Count Two: Declaratory Judgment

In Count Two of the Second Amended Complaint, Plaintiffs make a claim for declaratory relief under The Declaratory Judgment Act ("DJA"). *See* 42 Pa. C.S. §7531 *et seq*. The DJA provides, in relevant part:

> Courts of record, within their respective jurisdictions, shall have power to **declare rights, status, and other legal relations** whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

42 Pa. C.S. §7532 (emphasis added). Specifically, the prayer for relief in Count Two of Plaintiffs' Second Amended Complaint states:

> Wherefore, the Plaintiffs respectfully request that this Honorable Court enter an order that the Township of Towamencin cannot finalize this Transaction and may not execute the necessary documents to complete the transfer of the sewer system assets.

See Second Amended Complaint, at Count Two "Wherefore" clause, pg. 35. Plaintiffs do not seek for this Court to determine the *rights* of the parties under the Home Rule Charter or the APA — Plaintiffs are seeking for this Court to order the Board *to act.* In actuality, Plaintiffs are seeking for this Court to enjoin the Township from complying with its contractual duties. Count Two of Plaintiffs' Second Amended Complaint attempts to turn a Declaratory Judgment action into an action for a permanent injunction. The two actions are notably distinct. Indeed,"[a] declaratory judgment, unlike an injunction, does not order a party to act." *Eagleview Corp. Ctr. Ass'n v. Citadel Fed. Credit Union*, 150 A.3d 1024, 1029-30 (Pa. Cmwlth. 2016).

The proper framing of an action under the DJA is to ask the Court to declare the rights of the Plaintiffs, Township, and PAWC under the Home Rule Charter and the APA. Indeed, Pennsylvania courts have long held that a declaratory judgment action is the appropriate procedure for the interpretation of the applicability, validity, and constitutionality of a regulation. *Nat'l Solid*

Wastes Mgmt. Ass'n v. Casey, 580 A.2d 893, 898 (Pa. Cmwlth. 1990). Plaintiffs' failure to request appropriate relief under the DJA raises more questions than it answers. Indeed, PAWC suspects that Plaintiffs have avoided using the DJA for its intended purpose due to the constitutional implications that application of the Home Rule Charter poses.

Plaintiffs' insistence that the Home Rule Charter precludes or prevents or invalidates the APA necessarily implicates the Contracts Clauses of the United States and Pennsylvania Constitutions. The Pennsylvania Constitution's prohibition against *ex post facto* laws provides as follows:

> § 17. Ex post facto laws; impairment of contracts.
>
> No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.

Pennsylvania Constitution Article 1, § 17.

The Supreme Court of Pennsylvania has explained that the Contracts Clause protects "contracts freely arrived at by the parties to them from subsequent legislative impairment or abridgment." *First Nat'l Bank of Pa. v. Flanagan*, 515 Pa. 263, 528 A.2d 134, 137 (Pa. 1987). The Supreme Court of Pennsylvania has explained:

> Any law which enlarges, abridges, or in any manner changes the intention of the parties as evidenced by their contract, imposing conditions not expressed therein or dispensing with the performance of those which are a part of it, impairs its obligation, whether the law affects the validity, construction, duration, or enforcement of the contract.
>
> The amount of impairment of the substantive obligation of a contract is immaterial. Any deviation from its terms, however slight, falls within the meaning of the constitution.
>
> [. . .]
>
> A later law cannot abridge rights under a prior contract. The only substantive laws in effect when the parties enter into a contract are implicitly incorporated into it.

Id. at 137-38 (internal citations omitted). "Any change in procedure which does not supply an alternative remedy, equally adequate and efficacious, in place of that which existed when the contract was made, is violative of the constitutional prohibition." *Beaver Cty. Bldg. & Loan Ass'n v. Winowich*, 187 A. 481, 486 (Pa. 1936).

The Home Rule Charter, by Plaintiffs' own admission was not even included on the ballot until May 16, 2023 — nearly one year after the APA had been entered into. *See* Second Amended Complaint at ¶90. Furthermore, the vote was not certified until June 5, 2023. *Id.* The Home Rule Charter did not go into effect until July 1, 2023. *Id.* at ¶92. There is no provision in the Home Rule Charter giving it, or any of its Articles, retroactive effect. Thus, there is no basis within the Home Rule Charter to apply it *ex post facto* to the APA. However, even if such a provision *did* exist, the APA would be entitled to Constitutional protection because the Home Rule Charter impairs the substantive obligations of those agreements.

To the extent that Plaintiffs would argue that Article VI of the Home Rule Charter was an "exercise of its police powers," an analysis thereunder necessarily involves determining whether the law or regulation causing the contractual impairment remedies a general social problem. *S. Union Twp. v. Dep't of Envtl. Prot.*, 839 A.2d 1179, 1188 (Pa. Cmwlth. 2003). By Plaintiffs' own admission, the purpose of the Home Rule Charter was to "explore the ways in which a Home Rule Charter could stop the sewer sale." *See* Second Amended Complaint, at ¶75. The Home Rule Charter was not an exercise of the Township's police powers to remedy a "social problem" — it was a clear attempt to manufacture a way to excuse the Township from its contractual obligations under the APA. Furthermore, to the extent that Plaintiffs attempt to argue that "stop[ping] the sewer sale" remedied the "social problem" of whether privatizing the Sewer System was in the best interests of the public, that is a determination that is within the sole discretion of the PUC. In

determining whether or not to grant a Certificate of Public Convenience ("CPC"), the PUC must determine "**that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.**" 66 Pa. C.S. §1103(a)(emphasis added). Furthermore, "the decision to issue a CPC 'falls squarely within the [Commission's] area of expertise and is best left to the [C]ommission's discretion.'" *Cicero v. Pa. Pub. Util. Comm'n*, 2023 Pa. Commw. LEXIS 120, at *23 (Pa. Cmwlth. July 31, 2023)(*citing Elite Indus., Inc. v. Pa. Pub. Util. Comm'n,* 574 Pa. 476, 832 A.2d 428, 432 (Pa. 2003)). Accordingly, even if Plaintiffs had properly framed Count Two as a declaratory judgment action, it would, *at best*, raise a question that requires determination by the PUC.

As such, Plaintiffs' claim for declaratory relief is an improper request for relief under the DJA and, as a result, Count Two of Plaintiffs' Second Amended Complaint must be dismissed. Alternatively, this Court should stay these proceedings[3] until the PUC, under its primary jurisdiction[4] under the Pennsylvania Public Utility Code (*see* 66 Pa. C.S. § 1102), makes its determinations on whether the transaction is in the public interest and a CPC should be issued.

d. Legal Insufficiency of Count Three: Sunshine Act Violations

Plaintiffs' arguments regarding violations of the Sunshine Act (the "Act") are two-fold: (1) the "closed" meetings of the Sewer Committee violated Section 704 of the Act, and (2) the inclusion of the proposed assignment at the March 8, 2023 meeting violated Section 712.1 of the Act. Both arguments are equally unavailing.

[3] A Motion to Stay the instant proceedings was filed by the Board on November 8, 2023. A hearing on same has been scheduled for December 8, 2023 before the Honorable Judge Smyth.

[4] *See DiSanto v. Dauphin Consolidated Water Supply Company*, 436 A.2d 197, 202 (Pa. Super. 1981); *Vertis Group v. Pa. PUC,* 840 A.2d 390, 395 (Pa. Cmwlth. 2003); *Elkin v. Bell Telephone Company*, 420 A.2d 371, 376 (Pa. 1980); *Feingold v. Bell of Pennsylvania,* 383 A.2d 791, 801 (Pa. 1977); *County of Erie v. Verizon North, Inc.,* 879 A.2d 357, 364 (Pa. Cmwlth. 2005).

1. Plaintiffs' Claims Regarding the "Sewer Committee" Must Fail.

Plaintiffs allege that the Sewer Committee failed to comply with Section 704 of the Act which requires any official actions and deliberations taken "by a quorum of the members of an agency shall take place at a meeting open to the public [. . .]." Plaintiffs allege that because the Sewer Committee was "so incredibly influential regarding the decision to monetize the sewer assets, the interview and bid process, and the eventual persuasive recommendation to the full Board of Supervisors," that any meetings of the Sewer Committee must have been made open to the public. *See* Second Amended Complaint, at ¶¶ 49, 55-56.

From a procedural standpoint, Section 713 of the Sunshine Act provides, in relevant part, that:

> A legal challenge under this chapter shall be filed within 30 days from the date of a meeting which is open, or within 30 days from the discovery of any action that occurred at a meeting which was not open at which this chapter was violated, provided that, in the case of a meeting which was not open, no legal challenge may be commenced more than one year from the date of said meeting.

65 Pa. C.S. § 713.

Because Plaintiffs allege that the meetings were not open, Plaintiffs were required to bring any legal challenges to the Sewer Committee's meetings and/or actions taken during those meetings within 30 days of discovery of said meetings and/or actions. Additionally, no legal challenge to a closed meeting can be commenced more than one year from the date of said meeting.

By Plaintiffs' own admission, "numerous" Right-to-Know requests were submitted to the Township to ascertain information about the Sewer Committee. *See* Second Amended Complaint, at ¶57. On February 1, 2022, Plaintiff Osei made a Right-to-Know request to the Township seeking, in relevant part, "[m]inutes and attendance list from Sewer Committee with PFM on 3 September 2020[.]" *See* Exhibit A to Second Amended Complaint, at p. 72. Thus, Plaintiffs knew as early as February 1, 2022, that the Sewer Committee was conducting closed meetings and any

legal challenge thereto had to be filed no later than March 3, 2022. Moreover, the Sewer Committee meeting referenced in the February 1, 2022 request occurred on September 3, 2020. The Complaint herein was filed on August 22, 2023, nearly *three* years later—well in excess of the one year limitation provided by Section 713.

Even if the Court were to give Plaintiffs the benefit of the doubt that there were other Sewer Committee meetings after the September 3, 2020 meeting, it is implausible that any such meetings occurred within the relevant one year limitation. As the instant Complaint was filed on August 22, 2023, any meetings would have had to occur no earlier than August 22, 2022 for a legal challenge to meet the time limitations of Section 713. By Plaintiffs' own admission, the purpose of the Sewer Committee was to examine whether it was in "the Township's best interest, or not, to monetize the sanitary sewer system." *See* Second Amended Complaint at ¶47. Furthermore, Plaintiffs' objections to the Sewer Committee meetings are based wholly on the allegation that the meetings constituted deliberations regarding the sale of the sewer system. *Id.* at ¶ 49. As the APA was ratified on May 25, 2022, the logical conclusion is that any Sewer Committee meetings "deliberating" the sale of the sewer system must have occurred *before* the actual sale. Thus, the very, very latest a Sewer Committee meeting covered by Plaintiffs' allegations could have possibly occurred was on May 25, 2022. Therefore, any challenges thereto must have been brought by May 25, 2023—nearly three months *prior* to when Plaintiffs' filed the initial complaint. Accordingly, giving Plaintiffs every benefit of the doubt and favorable inference that could possibly be given to their averments, the legal challenges to the Sewer Committee meetings under the Act are time-barred under Section 713 and must be dismissed.

Further still, Plaintiffs' arguments regarding the Sewer Committee meetings are *substantively* without merit. The Commonwealth Court of Pennsylvania has repeatedly held "that

official action taken at a later, open meeting cures a prior violation of the Sunshine Act." *Ass'n of Cmty. Orgs. for Reform v. SEPTA*, 789 A.2d 811, 813 (Pa. Cmwlth. 2002)(internal citations omitted). That position has been endorsed by the Supreme Court of Pennsylvania. *See Smith v. Twp. of Richmond*, 82 A.3d 407, 417, n10 (Pa. 2013)("[I]t is the prevailing law of this Commonwealth that the Sunshine Act does not authorize courts to invalidate official action taken at a subsequent public meeting that conforms to the Act's requirements, based on an earlier, improper closed-door meeting."). Plaintiffs admit that the APA was approved at a publicly held meeting on May 25, 2022. *See* Second Amended Complaint, ¶¶40-41. At no point do Plaintiffs contend that the May 25, 2022 meeting violated the Act. Accordingly, the alleged violations of the Sewer Committee regarding the closed meeting "deliberations" were cured by the public meeting on May 25, 2022.

As such, Plaintiffs claims regarding the Sewer Committee's violations of the Act are without merit and must be dismissed.

2. Plaintiffs' Claims Regarding the March 8, 2023 Meeting are Time-Barred

The second part of Plaintiffs' arguments regarding violations of the Act relate to the March 8, 2023 meeting in which the Board proposed the assignment to the public. Specifically, Plaintiffs allege that the Board failed to include the proposed assignment on the meeting's agenda in violation of Section 712.1 of the Act.

Plaintiffs' allegations regarding the March 8, 2023 meeting revolve around the Board's failure to include the proposal of the assignment on the agenda within 24 hours of the meeting in violation of Section 712.1(c). Plaintiffs further contend that the Board did not satisfy the exceptions provided in subsections (b) and (c) of Section 712.1, which permit adding emergency items to the agenda so long as they are (1) brought to the agency's attention less than 24 hours

before the meeting and (2) are *de minimis* in nature. However, subsection (e) of Section 712.1 provides that the agency must announce the reason for the change at the public meeting. Plaintiffs allege that the Board violated the Act by failing to include the assignment proposal on the agenda and failing to explain the reason for the change.

First and foremost, Plaintiffs admit and do not dispute that the March 8, 2023 meeting was a properly advertised public meeting. *See* Second Amended Complaint, at ¶200. Under the express terms of Section 713, "a legal challenge [under the Act] **shall be filed within 30 days from the date of a meeting which is open** [. . .]." 65 Pa. C.S. §713 (emphasis added). There is no further qualification regarding challenges to open meetings. Challenges must be made within thirty days of the meeting, full stop. Accordingly, Plaintiffs were required to bring challenges to the March 8, 2023 meeting by April 7, 2023, making the instant Complaint overdue by *over four months.*

Plaintiffs' attempts to apply the discovery qualification for closed meetings to public meetings are disingenuous and must fail. However, even if this Court were to apply the discovery exception to public meetings, which is contrary to Section 713, Plaintiffs' claims are still time-barred. Once again by Plaintiffs' own admission, they knew *at the time of the meeting* that the Board was allegedly in violation of the Act because the purported violation occurred *at the meeting*. *See* Second Amended Complaint, at ¶82. Indeed, the minutes from the March 8, 2023 meeting show that both Plaintiffs were in attendance at the meeting and made public comment. *See* Exhibit B to Second Amended Complaint, p. 5 (p. 63/311). *See also Carr v. Horsham Twp.,* 2017 Pa. Commw. Unpub. LEXIS 488, *5 (in which Commonwealth Court held that objectors knew of the alleged violation at the time it occurred because they were present at the meeting). Accordingly, pursuant to this theory, Plaintiffs discovered the alleged violations on March 8, 2023 meaning any legal challenges thereto were required to be made by April 7, 2023.

Even if one were to take Plaintiffs' argument at face value and presume that Plaintiffs did not know there was a violation at the time of the meeting, Plaintiffs' actions post-meeting clearly indicate knowledge well in advance of filing the initial complaint. Namely, by Plaintiffs' own admission, the Township's partial response to Plaintiff Foster's Right-to-Know request on May 8, 2023, "revealed" that the Township knew of the assignment of the APA more than 24 hours in advance of the March 8, 2023 meeting. *See* Second Amended Complaint at ¶101. Accordingly, under this theory, Plaintiffs were required to bring the instant Complaint no later than June 7, 2023.

Additionally, Plaintiffs' contention that the discovery qualification can occur on some sort of rolling basis is contrary to Pennsylvania law. In interpreting the discovery qualification, the Commonwealth Court has held the following: "[T]his section provides that where a meeting is not open to the public, legal challenges under The Sunshine Act must be brought within thirty days of the complainants discovery of the occurrence of ***an*** impropriety at that meeting which is actionable under the Act." *Lawrence County v. Brenner*, 582 A.2d 79, 82 (Pa. Cmwlth. 1990)(emphasis added). Thus, the standard is the discovery of a single impropriety actionable under the Act — not *all* potential improprieties or the universe of improprieties. Accordingly, regardless of whether this Court were to apply Section 713 as written, or accept Plaintiffs' arguments that the discovery exception applies to public meetings, the claims are still time-barred.

Once again, Plaintiffs' challenge to the vote and approval of the assignment is substantively without merit. Even if this Court were to accept Plaintiffs' contention that the March 8, 2023 meeting violated the Act, Plaintiffs have made no such contention regarding the March 22, 2023 meeting at which the vote actually occurred. It is the law in this Commonwealth "that official action taken at a later, open meeting cures a prior violation of the Sunshine Act." *Ass'n of Cmty. Orgs. for Reform v. SEPTA*, 789 A.2d 811, 813 (Pa. Cmwlth. 2002)(internal citations omitted).

Accordingly, any perceived violations of the Act were ultimately cured by the proper official action taken at the March 22, 2023 meeting.

For the above reasons, Plaintiffs' claims regarding the Act are without merit and must be dismissed.

VI. CONCLUSION

For the foregoing reasons, Pennsylvania-American Water Company respectfully requests that this Honorable Court sustain its Preliminary Objections, thereby dismissing Counts I, II, and III of Plaintiffs' Second Amended Complaint pursuant to Pa. R. C. P. 1028(a)(4).

WHEREFORE, Pennsylvania American Water Company respectfully requests this Court enter an Order granting these Preliminary Objections and dismissing Counts I, II, and III of Plaintiffs' Second Amended Complaint.

Respectfully submitted,

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