

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

JENNIFER FOSTER

vs.

NO. 2023-18907

THE BOARD OF SUPERVISORS TOWAMENCIN TOWNSHIP

## COVER SHEET OF MOVING PARTY

Date of Filing November 22 2023

Moving Party THE BOARD OF SUPERVISORS TOWAMENCIN TOWNSHIP

Counsel for Moving Party JAMES J RODGERS, Esq., ID: 21635

Document Filed (Specify) PRELIMINARY OBJECTIONS TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Matter is:            (Appealable) |            (Interlocutory)

Discovery Needed: ☐ (Yes) | ☐ (No)

If applicable, Civil Case Management Order Discovery Deadline: \_\_\_\_\_

**CERTIFICATIONS** - Check **ONLY** if appropriate:

**— Counsel certify that they have conferred in a good faith effort to resolve the subject discovery dispute. (Required by Local Rule 208.2(e) on motions relating to discovery.)**

         Counsel for moving party certifies that the subject **civil motion** is **uncontested** by all parties involved in the case. (If checked, skip Rule to Show Cause section below.)

By: \_\_\_\_\_  
Counsel for Moving Party

**RULE TO SHOW CAUSE** - Check **ONE** of the Choices Listed Below:

\_\_\_\_\_ Respondent is directed to show cause why the moving party is not entitled to the relief requested by filing an **answer** in the form of a **written response** at the **Office of the Prothonotary** on or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_ Respondent is directed to show cause, in the form of a **written response**, why the attached Family Court Discovery Motion is not entitled to the relief requested. Rule Returnable and Argument the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_  
at **1:00 p.m. at 321 Swede Street, Norristown, PA.**

\_\_\_\_\_ Respondent is directed to file a **written response** in conformity with the Pennsylvania Rules of Civil Procedure.

Rule Returnable at time of trial.

By: \_\_\_\_\_  
Court Administrator

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**THE BOARD OF SUPERVISORS,  
TOWAMENCIN TOWNSHIP**

**NOTICE TO PLEAD**

**TO PLAINTIFFS:**

You are hereby notified to file a written response to the enclosed PRELIMINARY OBJECTIONS within twenty (20) days from service hereof or judgment may be entered against you.

**DILWORTH PAXSON LLP**

BY: /s/ James J. Rodgers

James J. Rodgers

**COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA -  
CIVIL DIVISION**

JENNIFER FOSTER

KOFI OSEI

MARTIN COHEN

Plaintiffs,

v.

No. 2023-18907

THE BOARD OF SUPERVISORS OF  
TOWAMENCIN TOWNSHIP

Defendant,

PENNSYLVANIA-AMERICAN WATER  
COMPANY, Intervenor Defendant

**PRELIMINARY OBJECTIONS OF DEFENDANT THE BOARD OF SUPERVISORS,  
TOWAMENCIN TOWNSHIP TO PLAINTIFFS' SECOND AMENDED COMPLAINT**

Plaintiffs Jennifer Foster and Kofi Osei ("Plaintiffs") filed this Action on August 23, 2023, naming as defendant the Board of Supervisors of Towamencin Township, and asking this Court to

provide them with relief precluding Towamencin Township (“the Township”) from performing its obligations under a contract to sell the Towamencin sanitary sewer system (the "Sewer System") to Pennsylvania American Water Company, Inc. ("PAWC"). The original complaint asserted three counts, for a Writ of Mandamus (Count I), in the alternative for a Declaratory Judgment (Count II), and for alleged past and continuing violations of the Sunshine Act (Count III). Defendant timely filed and served Preliminary Objections. Plaintiffs then filed an Amended Complaint, *inter alia*, joining a new Plaintiff, Martin Cohen. In response to Defendant’s Preliminary Objections to the Amended Complaint, Plaintiffs filed a Second Amended Complaint. Plaintiffs continue seek relief precluding Towamencin Township from consummating the sale of the Sewer System. The Second Amended Complaint also adds a claim for a Declaratory Judgment that the Common Interest Privilege Agreement between the Township and PAWC is invalid and unenforceable.

The Township now preliminarily objects to the Second Amended Complaint.

## **I. BACKGROUND.**

1. Plaintiffs allege that they have standing to bring this action as “residents, Taxpayers, ratepayers and/or Electors in Towamencin Township.” Second Am. Compl. ¶ 5.

2. The Township is governed by a Board of Supervisors, elected at large, as provided in the Second Class Township Code, 53 P.S. § 65101, *et seq.*

3. In 2016, the General Assembly enacted Act 12, which made certain amendments to the Public Utility Code (66 PA. Cons. Stat. §1329 (2016)) (Act 12 of 2016), including implementing an expedited process for consideration by the Pennsylvania Public Utility Commission (“PUC”) of applications to approve the acquisition of water and sewage treatment assets owned by municipalities (including municipal authorities) by investor owned utilities. In

doing so, the General Assembly expressed a legislative purpose to encourage such transactions, subject to the oversight of the PUC.

4. Many municipalities in Pennsylvania which operated their own water or sewage treatment systems have elected to explore the opportunity created by Act 12 to sell their systems on favorable economic terms to investor-owned utilities regulated by the PUC. Such sales allow municipalities to shift increasingly burdensome management responsibilities and the cost of the replacement of aging infrastructure to investor owned utilities and their broader rate bases, thus avoiding future borrowings and/or tax increases.

5. On or about May 25, 2022, the Board of Supervisors held a public meeting to decide whether to approve a sale of the Sewer System to NextEra Energy, Inc. ("NextEra"). The Board of Supervisors voted to approve such a sale of the Township System and adopted Ordinance 22-04 (the "Sewer Sale Ordinance").

6. On or about June 14, 2022, the Township entered into an Asset Purchase Agreement ("APA") with NextEra.

7. NextEra subsequently decided to withdraw from the wastewater business and sell its Pennsylvania rights and assets. NextEra never intended to abandon the APA, but instead sought an appropriate party to which it could assign its rights under the APA. NextEra found the appropriate party in PAWC and subsequently entered into negotiations with PAWC to sell its Pennsylvania rights and assets. Once PAWC and NextEra agreed to the sale of those assets, they notified the Township and proposed the approval of the assignment of the APA by NextEra to PAWC.

8. On March 8, 2023, the Board of Supervisors provided an update on the sewer sale, alerting the public to NextEra's intention to sell its Pennsylvania assets to PAWC and the need to

consider the approval of an assignment agreement (the “Assignment Agreement”), an amendment to the APA (the “Amendment to the APA”) and an amendment to the Sewer Sale Ordinance (the “Amendment to the Sewer Sale Ordinance”). After public comment, the Board authorized the Township Solicitor and Special Counsel to take all needed steps to prepare the Assignment Agreement, the Amendment to the APA and the Amendment to the Sewer Sale Ordinance, for consideration at the Board’s March 22, 2023 meeting.

9. At the Board’s meeting on March 22, 2023, the Board of Supervisors approved the Assignment Agreement and the Amendment to the APA, and adopted the Amendment to the Sewer Sale Ordinance.

10. On May 15, 2023, PAWC filed with the PUC an Application to Acquire the Towamencin Sewer System, seeking approval of the transfer of assets to PAWC and the rights of PAWC to begin to offer or furnish wastewater service, docketed at No. A-2023-3039900.

11. A slim majority of electors voting in the primary election from the Township voted to approve by referendum the Home Rule Charter (“HRC”) on May 16, 2023. The HRC, which went into effect on July 1, 2023, contains provisions upon which Plaintiffs rely as prohibiting the Township from performing its pre-existing obligations under the APA and transferring the Sewer System assets to PAWC.

## **II. PRELIMINARY OBJECTION NO. 1: THE MANDAMUS CLAIM IS INSUFFICIENT AS A MATTER OF LAW (Pa. R.C.P. 1028(a)(4)).**

Plaintiffs seek an order of mandamus to compel the Board of Supervisors to terminate the Asset Purchase Agreement with Pennsylvania American Water on the ground that the Board of Supervisors’ failure to do so violates the HRC.

### A. THE DEMURRER STANDARD

12. The Pennsylvania Rules of Civil Procedure authorize preliminary objections to a pleading for legal insufficiency – a demurrer. Pa. R.C.P. 1028(a)(4).

13. A demurrer is an assertion that a complaint or counterclaim does not set forth a cause of action or a claim on which relief can be granted. A complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but it must also formulate the issues by summarizing those facts essential to support the claim. *Lerner v. Lerner*, 954 A.2d 1229, 1235 (Pa. Super. 2008); *Alpha Tau Omega Fraternity v. University of Pennsylvania*, 464 A.2d 1349, 1352 (Pa. Super. 1983).

14. Pleadings are legally insufficient when, presuming the facts alleged and all reasonable inferences taken therefrom to be true, the allegations do not permit recovery. *See Hess v. Fox Rothschild LLP*, 925 A.2d 798, 807 (Pa. Super. 2007).

15. In ruling on preliminary objections in the nature of a demurrer, the court should consider as true “all of the well pleaded material facts set forth in [the preceding pleading] and all reasonable inferences that may be drawn from those facts.” *Bower v. Bower*, 611 A.2d 181, 182 (Pa. 1992); *see also* Pa. R.C.P. 1028(a)(4).

16. The court should not, however, accept as true argumentative allegations or expressions of opinion, *see Gaster v. Nether Providence*, 556 A.2d 947, 948-49 (Pa. Commw. 1989), nor should it accept any conclusions of law. *See Gekas v. Shapp*, 364 A.2d 691, 693 (Pa. 1976).

17. Where a complaint fails to set forth a valid cause of action, a preliminary objection in the nature of a demurrer is properly sustained. *See Lerner*, 954 A.2d at 1235; *Greenspan v. United Services Automobile Association*, 471 A.2d 856, 858 (Pa. Super. 1984).

**B. COUNT I OF THE COMPLAINT IS LEGALLY INSUFFICIENT BECAUSE IT FAILS TO ALLEGE A LEGALLY SUFFICIENT CLAIM ON THE PART OF PLAINTIFFS FOR THE RELIEF SOUGHT, I.E., AN ORDER IN MANDAMUS.**

18. 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*, 606 A.2d 951 (Pa. Commw. 1992).

19. The Supreme Court of Pennsylvania has explained 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.” *Kaufman Const. Co. v. Holcomb*, 55 A.2d 534, 537 (Pa. 1947). This holds true even if the decision rendered by an official or tribunal was wrong. *Id.*

20. Further, mandamus should not be used to direct the retraction or reversal of an action already taken. *Pennsylvania Dental Ass’n v. Commonwealth Ins. Dep’t*, 516 A.2d 647, 652 (Pa. 1986). Instead, “[m]andamus 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.’” *Id.*

21. As Plaintiffs acknowledge in their Complaint (Am. Comp. at ¶ 119), mandamus is a proper remedy only where the petitioner demonstrates (1) a clear legal right to the relief sought, (2) a corresponding duty in the respondent, and (3) absence of any other appropriate or adequate remedy. *Equitable Gas Co. v. City of Pittsburgh*, 488 A.2d 270, 271 (1985).

22. "Mandamus will not issue unless the right of the petitioner is clear and specific; it can never be invoked in a doubtful case." *Commonwealth ex rel. McLaughlin v. Erie County*, 100 A.2d 601, 604, (1953).

23. Where there is any doubt as to the petitioner's right or whether the respondent's duty exists, mandamus is neither appropriate nor available. *Leff v. N. Kaufman's, Inc.*, 20 A.2d 786, 789 (1941), *Perkasie Borough Auth. v. Hilltown Twp. Water & Sewer Auth.*, 819 A.2d 597, 603 (Pa. Commw. 2003).

24. Plaintiffs frame the sought relief as ordering the Township's compliance with the HRC. *See* Second Am. Compl. at ¶¶ 118, 123-24, 127, 138.

25. However, at its core, Plaintiffs seek relief that would undo action taken by the Township in good faith and in the exercise of legitimate jurisdiction. Put another way, Plaintiffs seek to direct the reversal of action already taken.

26. This is the exact type of relief the Supreme Court of Pennsylvania has held is inappropriate for mandamus relief.

27. The APA represents a pre-existing contractual relationship into which the Township legally entered.

28. Plaintiffs' sought relief would rely upon intervening governmental action, the adoption of the HRC, to prevent the Township from performing its obligations under the APA in violation of the Constitutions of the Commonwealth of Pennsylvania and the United States.

29. The right to this relief is doubtful at best. Accordingly, in a Pennsylvania court mandamus is neither appropriate nor available.

30. Therefore, Count I of the Plaintiffs' Second Amended Complaint fails to state a claim upon which relief can be granted and must be dismissed.

**C. BREACH OR REPUDIATION OF THE APA PREDICATED ON THE HRC WOULD VIOLATE THE CONTRACTS CLAUSES OF THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONS.**

31. The Contracts Clause of the Pennsylvania constitution states "No ... law impairing the obligation of contracts... shall be passed." Pa. Const. art. I, § 17.

32. The PA Constitution's Contract Clause mirrors its federal counterpart. The Contract Clause of the United States Constitution provides, in relevant part, that "[n]o state shall enter into any ... Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10.

33. The Contracts Clause of the Pennsylvania Constitution is generally applied in the same manner as its federal counterpart. *Workers' Comp. Judges Prof'l Ass'n v. Exec. Bd. of Commonwealth*, 39 A.3d 486, 493 (Pa. Commw. 2012), aff'd, 66 A.3d 765 (Pa. 2013).

34. A violation of the Contracts Clause is demonstrated where a change in state law would effect a substantial impairment of a contractual relationship. Thus, Contract Clause analysis requires three inquiries: (1) whether there is a contractual relationship; (2) whether a change in a law has impaired that contractual relationship; and (3) whether the impairment is substantial. *Corman v. Nat'l Collegiate Athletic Ass'n*, 74 A.3d 1149, 1170 (Pa. Commw. 2013).

35. There is no doubt here that a contract exists between the Township and PAWC.

36. Further, there is no doubt that Plaintiffs invoke a change in the law, *i.e.*, the adoption of the HRC and its purported prohibition on the consummation of the asset sale to prevent the performance of the contract.

37. Nor can there be any doubt that the impairment of contractual rights that Plaintiffs seek is not only substantial, but total.

38. In interpreting the federal Contracts Clause the United States Supreme Court has stated that, “[w]ith like uniformity [SCOTUS] has regarded [the Contracts Clause] as reaching every form in which the legislative power of a State is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the State exercising delegated legislative authority’.” *Delaware Cnty. Prison Emps. Indep. Union v. Delaware Cnty.*, 671 A.2d 1202, 1205 (Pa. Commw. 1996) (citing *Ross v. Oregon*, 227 U.S. 150 at 162–163 (1913)).

39. Any law which enlarges, abridges, or in any manner changes the intention of parties as evidenced by their contract, imposing conditions not expressed therein or dispensing with

performance of those which are a part of it, “impairs obligation of contract” regardless of whether the law affects the validity, construction, duration, or enforcement of the contract. *Delaware Cnty. Prison Emps. Indep. Union v. Delaware Cnty.*, 671 A.2d 1202, 1205 (Pa. Commw. 1996) (citing *Beaver County Building and Loan Association v. Winowich*, 323 Pa. 483 (1936)).

40. Total destruction of contractual expectations is not necessary, but unquestionably sufficient, for a finding of substantial impairment. *Energy Reserves Group, Inc. v. Kansas Power and Light Company*, 459 U.S. 400, 410 (1983) (citing *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26–27 (1977)).

41. The constitutional prohibition against impairment of contracts applies to the state or its subdivisions as obligor. *Walsh v. Sch. Dist. of Philadelphia*, 343 Pa. 178, 178 (1941).

42. If the state regulation constitutes a substantial impairment, to survive a challenge under the Contracts Clause, the State, in justification, must have a significant and legitimate public purpose behind the regulation, for example, if there the intent behind the governmental action was to remedy a broad and general social or economic problem. *EmergyCare, Inc. v. Millcreek Twp.*, 68 A.3d 1, 4–5 (Pa. Commw. 2013). There is no such allegation here.

43. Moreover, it would be impossible to make such a showing given the legislative declaration of policy embodied in Act 12 favoring the acquisition of public sewer systems by investor-owned utilities.

44. In any event, this Court is not the proper forum for addressing any claim that the adoption of the HRC provision purporting to preclude the sale of the Township’s Sewer System (notwithstanding the existence of a binding APA) represents a governmental action intended to remedy a broad and general social or economic problem to protect the public interest. Instead, any determination regarding the public interest involved in PAWC’s acquisition of the Sewer System

must be made by the PUC as part of its consideration of PAWC's application to acquire the Sewer System and to offer or furnish wastewater service at Docket No. A-2023-3039900. *See Reading & Sw. St. Ry. Co. v. Pennsylvania Pub. Util. Comm'n*, 77 A.2d 102, 104 (Pa. Super. 1950) ("The Public Utility Commission has no jurisdiction to adjudicate purely private rights and its duty is to determine the public interest.") (emphasis added); *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 674-75 (Pa. Super. 1978) ("Initial jurisdiction in matters concerning the relationship between public utilities and the public is in the PUC not in the courts.") (internal citations omitted).

45. The Contracts Clause prohibition on the impairment of contracts is particularly applicable where a government entity uses its lawmaking powers to avoid its own contracts, as opposed to interfering with the contracts of third parties for a separate public purpose.

46. A municipality acting in its corporate capacity (as a party to a commercial contract) is subject to the same duties and liabilities as any private corporation and it may not violate the obligations of a contract entered into by it in its capacity as a private corporation because it deems it to be for the benefit of its citizens to do so. *Cumru Twp. Auth. v. Snekul, Inc.*, 618 A.2d 1080, 1084 (Pa. Commw. 1992) (citing *Philadelphia v. Fidelity Philadelphia Trust Co.*, 56 A.2d 99, 102-03 (Pa. 1947)).

47. The APA, APA Amendment, and Assignment Agreement, all of which predated the adoption of the HRC, establish an existing contractual relationship between PAWC and the Township.

48. An absolute prohibition on performing the transfer of the assets in the APA would be total impairment, let alone "substantial." The HRC flatly prohibits the sale of the municipal wastewater system, thus destroying the entire purpose of the contract at issue.

49. Whether or not the public interest is being served by the APA will be determined by the PUC, whose approval is still required to complete the purchase. This weighing of the public interest is statutorily delegated to the PUC and has been affirmed numerous times.

50. Accordingly, any exception to the “substantial impairment” prong concerning an exercise of state police power securing the public interest is a matter for determination solely by the PUC, rather than by Plaintiff, or the court in this present action.

51. The HRC’s prohibition of the sale of assets under the APA satisfies all three prongs of a violation of the Commerce Clause of the Pennsylvania Constitution and the United States Constitution and therefore cannot be enforced.

52. Case law has drawn a “governmental” versus “proprietary” distinction using a three-part test: (1) whether the activity in which the unit is engaged is one that it is statutorily required by law to perform; (2), whether the activity is one that may be conducted by a private actor, and (3), whether the activity is used as a means of raising revenue. *Program Admin. Services v. Dauphin Cty. Gen. Auth.*, 874 A.2d 722, 726 (Pa. Commw. 2005), *aff’d* on other grounds, 928 A.2d 1013 (Pa. 2007) (citing *Boyle v. Mun. Auth. Westmoreland Cnty.*, 796 A.2d 389 (Pa. Commw. 2002), *appeal den.*, 812 A.2d 1231 (2002) (authority providing water and wastewater services is engaged in proprietary activity.)

53. Provision of wastewater service is not a statutory duty of the Township.

54. Wastewater service is regularly provided to the public by private, regulated utilities such as PAWC.

55. The provision of wastewater service has generated revenue for municipalities, including the Township, which do not customarily provide those services without charge.

56. Sewage treatment services provided by public entities have been recognized as a proprietary function. *MacCalman v. County of Bucks*, 191 A.2d 265 (1963).

57. Because the Board of Supervisors acted in a proprietary capacity in entering into the APA, APA Amendment, and Assignment Agreement, those actions remain binding despite the subsequent adoption of the HRC.

58. There is no exception to the application of the Contracts Clause to preclude the impairment of a contract simply because it is executory, *i.e.*, not fully performed.

59. Consummation of the APA is subject to the approval of the PUC in the proceeding referenced in paragraph 10 above, and will require a determination by the PUC that the proposed transaction is in the public interest. Plaintiffs are free to oppose the approval of the application in the PUC proceedings. This opportunity demonstrates the availability to Plaintiffs of an alternate remedy that precludes relief in mandamus.

60. Plaintiffs fail to allege that if the requested relief is denied they will suffer injury that is specific and different from any alleged harm to the public at large. “A public duty can be enforced only ...by a private citizen who has a specific and independent legal right or interest in himself different from that of the public at large or who has suffered an injury special and peculiar to himself.” *Wm. Penn Parking, Inc. v. City of Pittsburgh*, 346 A.3d 269 (Pa. 1975, *quoting Dombrowski v. Philadelphia*, 245 A.2d 238, 245 (Pa. 1968).

61. Therefore, Count I of Plaintiffs’ Second Amended Complaint fails to state a claim upon which relief can be granted and must be dismissed.

**III. PRELIMINARY OBJECTION NO. 2: THE DECLARATORY JUDGMENT CLAIM WITH REGARD TO THE ASSET SALE IS INSUFFICIENT AS A MATTER OF LAW (Pa. R.C.P. 1028(A)(4)).**

62. As an alternative ground for relief, Plaintiffs request an order framed as a “declaratory judgment” directing the Township not to execute the asset transfer documents. *See* Second Am. Compl. at ¶¶ 146-172.

63. Such an order would in effect be an injunction, which is not appropriate as a declaratory judgment.

64. The Declaratory Judgments Act empowers courts to “declare rights, status, and other legal relations.” 42 Pa. C.S. § 7532.

65. The relief Plaintiffs seek is for the Court to “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 Am. Compl. at p. 35.

66. Plaintiffs are not asking the Court to declare the rights, status, and other legal relations of parties, as is allowed under the Declaratory Judgments Act.

67. Instead, Plaintiffs ask the Court to enjoin the Township from complying with its contractual duties under the APA.

68. Pennsylvania caselaw recognizes the distinction between declaratory relief and injunctive relief.

69. “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 (Pa. Commw. 2016) (emphasis added).

70. Plaintiffs are not parties to the contracts at issue, and otherwise lack an individual interest that is specific and different from any alleged harm to the public at large.

71. In their Second Amended Complaint, Plaintiffs cite the recent decision of the Commonwealth Court in *Cicero v. Pennsylvania Pub. Util. Comm'n*, 300 A.3d 1106 (Pa. Commw. 2023) as if it provided precedential support for their ability to obtain mandamus or declaratory relief. It does not.

72. In *Cicero* a panel of the Commonwealth Court vacated a decision of the PUC approving the acquisition of a municipal sewer system by an investor owned utility, based on a conclusion that the PUC applied an incorrect legal standard in evaluating the evidence concerning whether the acquisition at issue there would serve the public interest. *Id.* at 1118-20. Several applications for review have been filed with the Supreme Court of Pennsylvania.

73. The *Cicero* decision was based on a factual record developed before the PUC, which is necessarily different from the factual record the PUC will evaluate in ruling on PAWC's application in this matter.

74. Further, the *Cicero* court recognized that "the decision to issue a [Certificate of Public Convenience] falls squarely within the [PUC's] areas of expertise and is best left to the [PUC's] discretion." *Id.* at 1118 (internal quotations omitted) (emphasis added).

75. In issuing Act 12, the Pennsylvania General Assembly expressed a legislative purpose to encourage the acquisition of water and sewage treatment assets owned by municipalities to investor owned utilities, subject to the oversight of the PUC.

76. The PUC, not this Court, has primary jurisdiction to determine whether the acquisition of the Sewer System by PAWC is in the best interests of the public, including Plaintiffs.

77. Therefore, Count II of Plaintiffs' Second Amended Complaint fails to state a claim upon which relief could be granted and must be dismissed.

**IV. PRELIMINARY OBJECTION NO. 3: PLAINTIFFS LACK STANDING OR CAPACITY TO MAINTAIN THEIR MANDAMUS AND DECLARATORY JUDGMENT CLAIMS (Pa. R.C.P. 1028(a)(5)).**

78. Plaintiffs fail to allege that they have suffered, or will suffer, injury if the requested relief is denied that is specific and different from any alleged harm to the public at large.

79. Absent such a particular, individual injury, Plaintiffs lack standing or, stated differently, lack the capacity to bring these claims.

80. “[An] action brought under the DJA ‘must allege an interest by the party seeking relief which is direct, substantial and present, ...and must demonstrate the existence of an actual controversy related to the invasion or threatened invasion of one’s legal rights.’” *Bowen v. Mt. Joy Twp.*, 644 A.2d 818, 821 (Pa. Commw. 1994).

81. Plaintiff must assert a substantial interest in the outcome of a dispute “which surpasses the common interest of all citizens in seeking obedience to the law. *Id.* (quoting *Empire Coal Mining Def., Inc. v. Dept. of Env'tl. Resources*, 623 A.2d 897, 899 (Pa. Commw. 1993), appeal denied, 629 A.2d 1384 (1993).

82. Plaintiffs have failed to assert any interest surpassing the common interest of all citizens.

83. Therefore, Counts I, II and IV of Plaintiffs’ Second Amended Complaint must be dismissed.

**V. PRELIMINARY OBJECTION NO. 4: PLAINTIFFS’ SUNSHINE ACT CLAIM IS INSUFFICIENT AS A MATTER OF LAW**

84. In Count III, Plaintiffs allege a claim for violations of the Sunshine Act. *See* Second Am. Compl. at ¶¶ 173-224.

85. Plaintiffs allege that: (1) the Board's consideration at the March 8, 2023 meeting violated Section 712.1 of the Sunshine Act; and (2) the meetings of the Sewer Committee violated Section 704 of the Sunshine Act.

86. For the foregoing reasons, both claims fail.

**A. PLAINTIFFS' CLAIMS REGARDING THE MARCH 8, 2023 MEETING WERE NOT TIMELY RAISED AND ANY ALLEGED VIOLATION WAS CURED**

87. Plaintiffs allege that the Board failed to include the proposed assignment of the APA on the agenda of the March 8, 2023 meeting in violation of Section 712.1(c) of the Sunshine Act.

88. Plaintiffs seek an order striking the Supervisors' votes on March 8, 2023 and March 22, 2023, thus invalidating the Amendment to the APA and voiding the Amendment to the Sewer Sale Ordinance which is Ordinance No. 23-03.

89. At the outset of the March 8, 2023 meeting, which Plaintiffs admit was public, the Board approved an amendment to the meeting agenda to include a Sewer Sale Update.

90. At the conclusion of the update, the Board authorized the Township Solicitor and Special Counsel to take all necessary steps to prepare the Assignment Agreement, the Amendment to the APA, and the Amendment to the Sewer Sale Ordinance to be considered at the Board's March 22, 2023 meeting.

91. At the March 22, 2023 meeting of the Board, as to which no notice issue has been raised and was fully open to the public, the Board approved the Assignment Agreement, the Amendment to the APA, and the Amendment to the Sewer Sale Ordinance.

92. The Second Amended Complaint does not allege that any Sunshine Act violation occurred at the March 22, 2023 meeting.

93. The Commonwealth Court has repeatedly held “that official action taken at a later, open meeting cures a prior violation of the Sunshine Act.” *See e.g., Ass’n of Cmty. Orgs. for Reform v. SEPTA*, 789 A.2d 811, 813 (Pa. Commw. 2002) (internal citations omitted), *see also Smith v. Twp. of Richmond*, 82 A.3d 407, 417, n.10 (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.”).

94. Here, the Board’s approval of the Assignment Agreement, and the Amendment to the APA at the March 22, 2023 open meeting, had the effect of curing any violation that may have occurred in connection with the actions taken by the Board on March 8, 2023.

95. The Sunshine Act provides that “a legal challenge under The Sunshine Act 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.A. § 713.

96. Accordingly, Plaintiffs’ challenges to the Board’s actions at the March 8 and March 22 meetings are untimely.

97. Plaintiffs seek to avoid this result by emphasizing the language that permits a challenge “within 30 days from the discovery of any action that occurred ....” However, this “discovery” window expressly applies only where the action being challenged was taken “at a meeting which was not open.” *Id.* (emphasis added).

98. As Plaintiffs admit, the March 8, 2023 meeting was open.

99. Plaintiffs had 30 days from March 8, 2023 to bring a challenge under the Sunshine Act. Accordingly, Plaintiffs were required to bring a legal challenge to actions taken at the March 8, 2023 meeting by April 7, 2023.

100. The original Complaint was filed on August 21, 2023, more than four months after the statutorily imposed deadline for any challenge to actions taken at the May 8, 2023 meeting.

**B. PLAINTIFFS' CLAIMS REGARDING THE "SEWER COMMITTEE" ARE TIME-BARRED AND ANY ALLEGED VIOLATION WAS CURED**

101. Plaintiffs allege that the Sewer Committee failed to comply with Section 704 of the Sunshine Act, which requires any official actions and deliberations by a quorum of the members of an agency take place at a meeting open to the public.

102. As stated *supra*, official action taken at a later, open meeting cures a prior violation of the Sunshine Act. *See, e.g., Ass'n of Cmty. Orgs. for Reform*, 739 A.2d 811.

103. Plaintiffs admit that the APA was approved at a publicly held meeting of the Board on May 25, 2022. *See* Second Am. Compl. at ¶¶ 40-41.

104. Plaintiffs' challenges to the actions of the Sewer Committee are also untimely under the Sunshine Act.

105. Plaintiffs do not allege that the May 25, 2022 meeting violated the Sunshine Act.

106. Accordingly, any alleged Sunshine Act violations resulting from the Sewer Committee's "closed meetings" were subsequently cured by the public meeting on May 25, 2022.

107. 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. 65 Pa. C.S.A. § 713.

108. Plaintiffs admit they made numerous Right-to-Know requests regarding information about the Sewer Committee. *See* Second Am. Compl. at ¶¶ 57-58.

109. On February 1, 2022, Plaintiff Osei made a Right-to-Know Request to the Township seeking the minutes and attendance list from the Sewer Committee meeting on September 3, 2020. *See* Ex. A. to Second Am. Compl. at p. 62.

110. Thus, Plaintiffs knew not later than February 1, 2022 that the Sewer Committee was conducting closed meetings.

111. Therefore, any legal challenge to the Sewer Committee was required to have been filed by March 3, 2022.

112. The original Complaint was filed on August 21, 2023, more than one year after the statutorily imposed deadline.

113. Moreover, the Plaintiffs have not requested specific relief from any action of the Sewer Committee.

114. Plaintiffs desperately claim that violations of the Sunshine Act will be identified during the discovery process. *See* Second Am. Compl. at ¶ 221.

115. This glaring admission that the Sunshine Act claims were brought in an attempt to fish for information highlights Plaintiffs' inability to timely state a claim.

116. Therefore, Count III of Plaintiffs' Second Amended Complaint must be dismissed.

**VI. PRELIMINARY OBJECTION NO. 5: THE DECLARATORY JUDGMENT CLAIM WITH REGARD TO THE COMMON INTEREST PRIVILEGE AGREEMENT IS INSUFFICIENT AS A MATTER OF LAW (Pa. R.C.P. 1028(A)(4)).**

117. As an alternative ground for relief, Plaintiffs request an order framed as a "declaratory judgment" invalidating the Township's Common Interest and Privilege Agreement with PAWC. *See* Second Am. Compl. at ¶¶ 225-249.

118. The Declaratory Judgments Act empowers courts to “declare rights, status, and other legal relations.” 42 Pa. C.S. § 7532.

119. The relief Plaintiffs seek is for the Court to “enter an order declaring that Township and [PAWC] do not meet the standards necessary to substantiate a Common Interest Agreement, that the Township is in violation of the Sunshine Act by entering into this Common Interest Agreement, and declaring the Agreement be stricken and held invalid.” *See* Second Am. Compl. at p. 47.

120. Plaintiffs are not asking the Court to declare the rights, status, and other legal relations of parties, as is allowed under the Declaratory Judgments Act.

121. The Township legally entered into the Common Interest Agreement, which prohibits the Township from sharing privileged communications it had with PAWC.

122. Plaintiffs are not parties to the Agreement at issue.

123. Plaintiffs are not parties to the contracts at issue, and otherwise lack an individual interest that is specific and different from any alleged harm to the public at large.

124. Plaintiffs seek an invalidation of the Common Interest Agreement, a contract to which Plaintiffs are not a party, solely to enjoin the Township from fulfilling its duties owed under the Common Interest Agreement.

125. Further, any alleged violation of the Sunshine Act was cured.

126. The Township approved the Common Interest Agreement in an open meeting on November 8, 2023.

127. Assuming, *arguendo*, that the Township violated the Sunshine Act when it entered into the Common Interest Agreement, such violation was cured when the Township took official action at a later, open meeting. *Ass’n of Cmty. Orgs. for Reform*, 789 A.2d at 813.

128. Plaintiffs must demonstrate “the existence of an actual controversy related to the invasion or threatened invasion of one’s legal rights.” *Bowen*, 644 A.2d at 821.

129. Plaintiffs fail to demonstrate any such controversy related to the Common Interest Agreement.

130. Plaintiffs do not seek any documents protected under the Common Interest Agreement.

131. Nor has the Common Interest Agreement prevented Plaintiffs from the litigation of the instant matter.

132. Instead, Plaintiffs continue to waste taxpayer and court resources by bringing a clearly insufficient claim.

133. Therefore, Count IV of Plaintiffs’ Second Amended Complaint must be dismissed.

**VII. PRELIMINARY OBJECTION NO. 6: THE SECOND AMENDED COMPLAINT CONTAINS SCANDALOUS OR IMPERTINENT MATTERS WHICH MUST BE STRICKEN (Pa. R.C.P. 1028(A)(2)).**

134. The Second Amended complaint contains scandalous and/or impertinent matter, which should be stricken under Rule 1028(a)(2).

135. To be scandalous or impertinent, an allegation must be immaterial and inappropriate to the cause of action. *Biros v. U Lock Inc.*, 255 A.3d 489, 497 (Pa. Super. 2021).

136. The Second Amended Complaint contains multiple allegations of bad faith and bad behavior by the Township which are immaterial and inappropriate to the causes of action.

137. For example, Plaintiffs’ characterization of the Sewer Sale as “an illegal sale of public assets” is not only false, but completely immaterial and inappropriate to any cause of action. *See* Second Am. Compl. at ¶ 110.

138. The Second Amended Complaint contains language depicting the Township as having acted in bad faith, such as alleging that the Township was “operating under the cover of darkness” while utilizing a “cloak and dagger approach” and seeking to be rewarded for its “underhandedness.” *See id.* at ¶¶ 188-89, 198. Such language is scandalous in that its inclusion is meant to inflame tensions between the parties instead of advancing any legitimate cause of action against the Township.

139. Allowing such scandalous and impertinent allegations to stand in the Second Amended Complaint will obfuscate the real purpose of this litigation through immaterial and unsupported allegations of bad faith and bad behavior.

140. This Court cannot countenance such pleading.

141. Therefore, Counts III and IV of Plaintiffs’ Second Amended Complaint must be stricken.

## VIII. CONCLUSION

For the reasons set forth herein, the Court should dismiss the Complaint with prejudice. For all of the foregoing reasons, the Board of Supervisors respectfully request that this Court enter an Order (i) sustaining its Preliminary Objections, (ii) dismissing the Plaintiffs’ claims with prejudice, and (iii) granting Defendant such other and further relief as is just, proper and equitable.

DILWORTH PAXSON LLP

Date: November 22, 2023

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James J. Rodgers, Esq.  
*Attorney for Defendant*

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**COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA -  
CIVIL DIVISION**

JENNIFER FOSTER  
KOFI OSEI  
MARTIN COHEN

Plaintiffs,

v.

No. 2023-18907

THE BOARD OF SUPERVISORS OF  
TOWAMENCIN TOWNSHIP

Defendant.

**PRELIMINARY OBJECTIONS OF DEFENDANT THE BOARD OF SUPERVISORS,  
TOWAMENCIN TOWNSHIP TO PLAINTIFFS' AMENDED COMPLAINT**

**AND NOW**, this \_\_\_\_\_ day of \_\_\_\_\_, 2023, upon consideration of Defendant The Board of Superiors of Towamencin Township's Preliminary Objections to Plaintiffs' Amended Complaint, any responses thereto, and any oral argument thereupon, it is **ORDERED** that the objections are **SUSTAINED**. Plaintiffs' Amended Complaint is **DISMISSED WITH PREJUDICE**.

**BY THE COURT:**

\_\_\_\_\_  
**J.**

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I caused a true and correct copy of the foregoing Preliminary Objections to be served on the following via the Court's ECF system:

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Date: November 22, 2023

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