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Make the Road States, d/b/a Make the Road	:	
Pennsylvania; Julia Minotto; Tonya	:	
Wenger; Celine Elizabeth Schrier; Jesse D.	:	IN THE COURT OF COMMON PLEAS
Royer; Dean Kendall; Eric Gjertsen; and	:	OF BERKS COUNTY
Alex Crawford,	:	
	:	CIVIL ACTION – LAW
Plaintiffs,	:	
	:	
v.	:	2021-2696
	:	
Christian Leinbach, Kevin Barnhardt,	:	
Michael Rivera, the Board of	:	
Commissioners of Berks County, and Berks	:	
County,	:	
	:	
Defendants.	:	

**BRIEF IN SUPPORT OF
PRELIMINARY OBJECTIONS TO PLAINTIFFS’ COMPLAINT OF
DEFENDANTS’, CHRISTIAN LEINBACH, KEVIN BARNHARDT, MICHAEL
RIVERA, THE BOARD OF COMMISSIONERS OF BERKS COUNTY, AND BERKS
COUNTY**

Defendants, Christian Leinbach, Kevin Barnhardt, Michael Rivera, the Board of Commissioners of Berks County, and Berks County (hereinafter the “Berks Defendants”), by and through their undersigned counsel, MacMain, Connell & Leinhauser, LLC, hereby submit this Brief in Support of its Preliminary Objections to Plaintiffs’ Complaint in the nature of a Demurrer pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4).

I. INTRODUCTION

This case arises out of activities at the February 25, 2021 Berks County Board of Commissioners’ meeting regarding the Board’s vote on a resolution related to its relationship with U.S. Immigration and Customs Enforcement (“ICE”) and the operation of the Berks County Residential Center. At the February 25, 2021 public meeting, the Berks County Board of Commissioners in a split vote (2 votes in favor vs. 1 vote opposed) adopted Resolution 73.2021 which was included as Agenda Item M and which stated, “Adopt a resolution ratifying, confirming, and approving execution of a letter of support to the U.S. Immigration and Customs Enforcement for white paper proposal for the Berks County Residential Center.” Plaintiffs’ Complaint includes claims against the Berks Defendants for three separate violations of the Pennsylvania Sunshine Act for: 1) privately deliberating on an Official Action; 2) failing to provide a reasonable opportunity for public comment; and 3) failing to keep written minutes of the substance of an Official Action.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

In the instant matter, Plaintiffs, Make the Road States, d/b/a Make the Road Pennsylvania; Julia Minotto; Tonya Wenger; Celine Elizabeth Schrier; Jesse D. Royer; Dean Kendall; Eric Gjertsen; and Alex Crawford, (collectively, “Plaintiffs”) filed a Complaint in this Court on March 26, 2021 alleging violations of the Pennsylvania Sunshine Act (65 Pa.C.S. §§ 701-716) against the Berks Defendants. A true and correct copy of the Complaint is attached hereto as *Exhibit A*.

Pursuant to the allegations of the Complaint, Plaintiff Make the Road States, d/b/a Make the Road Pennsylvania is a 501(c)(3) non-profit organization, members of which reside in Berks County and regularly attend Berks County Commissioners’ meetings. *Exhibit A*, ¶ 4. Further,

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Plaintiffs Julia Minotto, Tonya Wenger, Celine Elizabeth Schrier, Jesse D. Royer, Dean Kendall, Eric Gjertsen, and Alex Crawford are all residents of Berks County who express an interest in the operation of the Berks County Residential Center (“BCRC”). *Exhibit A*, ¶¶ 5-12. Plaintiffs’ allegations concern the circumstances surrounding Berks County Commissioners Resolution 73.2021 (the “Resolution”) which was voted upon at the February 25, 2021 Commissioners’ meeting, ratifying, confirming, and approving execution of a letter of support to the U.S. Immigration and Customs Enforcement for white paper proposal for the BCRC. *See, Exhibit A.*

Plaintiffs allege that during the meeting, the Commissioners did not provide a description of the contents of the letter of support or the white paper proposal concerning the BCRC or provide copies of the documents themselves, and thereafter that there is no public information about the contents of the letter of support or white paper proposal. *See, Exhibit A*, ¶¶ 40, 41, 65. Plaintiffs also allege, without any basis or information to support their claim, that the Commissioners privately deliberated about the Resolution prior to their vote at the February 25, 2021 Commissioners’ meeting. *Exhibit A*, ¶ 50. Plaintiffs further allege that despite addressing the Resolution in public Commissioners’ meeting which offered the opportunity for public comment, that the Commissioners failed to provide a *reasonable* opportunity for public comment at the meeting because the public was not provided with sufficient information regarding the Resolution. *Exhibit A*, ¶¶ 35, 42, 81, 82. Plaintiffs final allegation is that the Commissioners failed to record and maintain sufficient minutes regarding their vote on the Resolution, arguing that the minutes which do exist lack sufficient “substance” with regard to the official action. *Exhibit A*, ¶¶ 90-92.

Plaintiffs contend, *inter alia*, that the Berks Defendants therefore violated the Pennsylvania Sunshine Act by conducting private deliberations on an official action, failing to

provide a reasonable opportunity for public comment, and by failing to keep sufficient written minutes of the substance of an official action. *Exhibit A*, ¶¶ 19-95. However, upon review of the Sunshine Act and the averments made in support of Counts I, II, and III of Plaintiffs' Complaint, it is clear that the claims are legally insufficient, fail to state a claim for a violation of the Pennsylvania Sunshine Act against the Berks Defendants, and should properly be demurred.

III. QUESTION PRESENTED

- 1. Whether Counts I, II, and III of Plaintiffs' Complaint Should be Demurred Pursuant to Pa.R.Civ.P. 1028(a)(4) Where Plaintiffs' Claims are Legally Insufficient Pursuant to the Pennsylvania Sunshine Act?**

Suggested Answer: Yes.

IV. LEGAL ARGUMENT

- A. Preliminary Objection in the Nature of a Demurrer to Counts I, II, and III of Plaintiffs' Complaint Pursuant to Pa.R.Civ.P. 1028(a)(4)**

The Pennsylvania Rules of Civil Procedure provide that preliminary objections may be filed for legal insufficiency of a pleading. *See*, Pa.R.Civ.P. 1028(a)(4). "A preliminary objection in the nature of a demurrer is properly granted where the contested pleading is legally insufficient." *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 883 (Pa.Super. 2000) (*citing*, Pa.R.Civ.P. 1028(a)(4) and stating "[t]he question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.").

Further, preliminary objections in the nature of a demurrer require the Court to resolve issues solely on the pleadings, no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. *Weiley v. Albert Einstein Medical Center*, 51 A.3d 202, 208 (Pa.Super. 2012).

To this end, in considering preliminary objections in the nature of a demurrer, the Court must accept as true all well-pleaded material allegations and any reasonable inferences arising

therefrom; however, a court “need not accept as true ‘conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion,’” *Donegal Mut. Ins. Co. v. Stroker*, 15 Pa. D. & C. 5th, 245, 247 (C.P. 2010), *quoting, Myers v. Ridge*, 712 A.2d 791, 794 (Pa.Cmwlth. 1998).

Berks County is an agency within the meaning of the Sunshine Act. The Pennsylvania Sunshine Act provides that the “right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking [*sic*] of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society.” 65 Pa.C.S. § 702(a).

i. Berks Defendants’ Preliminary Objection to Count I

The Sunshine Act further states that “official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered).” 65 Pa.C.S. § 704. The Sunshine Act defines official action as: “(1) recommendations made by an agency pursuant to statute, ordinance or executive order; (2) the establishment of policy by an agency; (3) the decisions on agency business made by an agency; or (4) the vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.” *Id.* Further, as an exception to open meetings, agencies are permitted to “hold an executive session under section 708,” in certain specific circumstances such as to “consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed”; or “to review and discuss agency business

which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations of possible or certain violations of the law and quasi-judicial deliberations.” 65 Pa.C.S. §§ 707, 708(a)(4), 708(a)(5).

In their Complaint, Plaintiffs concede that the official action taken by the Commissioners in voting on Resolution 73.2021 was conducted at an open meeting on February 25, 2021. *See generally, Exhibit A.* Plaintiffs therefore allege in Count I that the Berks Defendants only violation of 65 Pa.C.S. § 704 of the Sunshine Act is the private deliberation on an Official Action. *See, Exhibit A* at ¶ 73. Pursuant to the Sunshine Act, the Berks Defendants are only precluded from deliberation on an official action when a quorum with two of the three board members exists. 65 Pa.C.S. § 704. Plaintiffs acknowledge that the Berks County Commissioners’ vote was not unanimous, but rather was split 2-1 with regard to Agenda Item M (Resolution 73.2021), and which resulted in adopting the resolution to ratify, confirm, and approve execution of a letter of support to the U.S. Immigration and Customs Enforcement for white paper proposal for the Berks County Residential Center. *See, Exhibit A* at ¶ 36. Plaintiffs have failed to plead any facts beyond their unwarranted and unsubstantiated conclusions in support of the contentions that “there necessarily had to be some previous communication among Defendant Commissioners about the letter of support, white paper proposal, and BCRC” and “on information and belief, Defendant Commissioners privately deliberated about the Resolution prior to their vote.” *See, Exhibit A* at ¶¶ 48, 50.

Plaintiffs’ blind assertions of a secret meeting at which the Commissioners could communicate, and plan are actually counter to the factual results, namely that the Board members vote was neither unanimous, deliberated in a group setting, nor rehearsed prior to the

vote during an open public meeting. In failing to provide any well-pleaded material allegations regarding a secret meeting for the purpose of deliberating Resolution 73.2021, and only providing the Court with unwarranted inferences from facts, argumentative allegations, or expressions of opinion, the Plaintiffs have failed to appropriately plead the necessary elements of their claim against the Berks Defendants. *Donegal Mut. Ins. Co. v. Stroker*, 15 Pa. D. & C. 5th, 245, 247 (C.P. 210); *See also, Myers v. Ridge*, 712 A.2d 791, 794 (Pa. Cmwlt. 1998).

Alternatively, Plaintiffs concede that the Berks Defendants and their representatives have made it known that the Berks Defendants were precluded by the federal government from releasing the letter of support contemplated by Resolution 73.2021 or discussing the confidential information contained therein or in the white paper proposal and directed all individuals who inquired following the February 25, 2021 Commissioners meeting to inquire with ICE regarding the white paper proposal. *See, Exhibit A* at ¶¶55, 57-64. Even if the Berks Defendants had engaged in any deliberations on an Official Action at which a quorum of the Board of Supervisors was present, such deliberations would have been an appropriate executive session exception to open meeting deliberation, and thus Plaintiffs' Count I is not viable. 65 Pa.C.S. §§ 707, 708.

In failing to adequately support their unsubstantiated allegations with fact, and because on the face of the Complaint Plaintiffs have conceded that they are aware of the Berks Defendants' position that the subject matter in the white paper proposal and the letter response are to be kept confidential on orders of ICE and the federal government, Count I is legally insufficient to state a claim and must therefore be demurred.

ii. Berks Defendants' Preliminary Objection to Count II

The Sunshine Act requires that the board or council of a political subdivision “shall provide a reasonable opportunity at each advertised regular meeting... for residents of the political subdivision... to comment on matters of concern, official action or deliberation which are or may be before the board or council prior to taking official action.” 65 Pa.C.S. § 710.1(a). Further, “[i]f a board of council of a political subdivision or an authority created by a political subdivision has complied with the provisions of subsection (a), the judicial relief under section 713 (relating to business transacted at unauthorized meeting void) shall not be available on a specific action solely on the basis of lack of comment on that action.” 65 Pa.C.S. § 710.1(b).

Plaintiffs contend that the Berks Defendants failed to provide a reasonable opportunity for public comment prior to taking Official Action at the February 25, 2021 public meeting. *See, Exhibit A* at ¶¶ 77-85. Plaintiffs, however, admit that the Berks Defendants provided opportunity for public comment, at the February 25, 2021 meeting at which a vote was conducted on Resolution 73.2021. *See, Exhibit A* at ¶¶ 42, 81. Plaintiffs also acknowledge that the vote in question was included in the Commissioners’ Meeting Agenda as Item M, which stated: “Adopt a resolution ratifying, confirming, and approving execution of a letter of support to the U.S. Immigration and Customs Enforcement for white paper proposal for the Berks County Residential Center.” *See, Exhibit A* at ¶ 36. Plaintiffs also acknowledge that “BCRC has been the focus of public interest locally, statewide, and nationally.” *See, Exhibit A* at ¶ 28.

In pleading that: (1) BCRC was a focus of public interest; (2) a resolution regarding a letter of support to ICE regarding the BCRC was on the February 25, 2021 Commissioners’ Meeting agenda; and (3) the public was afforded an opportunity to comment at the public

meeting, all of which satisfy the Berks Defendants' obligations under the Sunshine Act, Plaintiffs have pled the very facts which defeat their Count II claims.

Further, where, as here, the Berks Defendants complied with subsection 65 Pa.C.S. § 710.1(a), Plaintiffs are precluded from the judicial relief nullifying the Board of Commissioners acts which they seek pursuant to 65 Pa. C.S. § 713. 65 Pa.C.S. § 710.1(b). Based on Plaintiffs' failure to plead sufficient facts alleging a violation of 65 Pa.C.S. § 710.1(a), Plaintiffs' Count II is legally insufficient to state a claim and must therefore be demurred.

iii. Berks Defendants' Preliminary Objection to Count III

Plaintiffs contend that the Berks Defendants have failed to keep written minutes of the substance of an Official Action with regard to the vote on Resolution 73.2021, and in so doing violated the Sunshine Act. *See, Exhibit A* at ¶¶ 86-95. Plaintiffs, however, concede that the Berks Defendants kept minutes from the February 25, 2021 meeting, and that the minutes refer to the resolution as "ratifying, confirming, and approving execution of a letter of support to the U.S. Immigration and Customs Enforcement for white paper proposal for the Berks County Residential Center." *See, Exhibit A* at ¶ 90.

The Sunshine Act requires that written minutes be kept of all open meetings of agencies, to include in pertinent part, "the substance of all official actions and a record by individual member of the roll call votes taken." 65 Pa.C.S. § 706(3). The Sunshine Act defines "Official Action" as "(1) recommendations made by an agency pursuant to statute, ordinance or executive order; (2) the establishment of policy by an agency; (3) the decisions on agency business made by an agency; or (4) the vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order." 65 Pa.C.S. § 703. The substance of the Official Action was the act of voting on the resolution, which Plaintiffs acknowledge is included in the meeting

minutes. *See, Exhibit A* at ¶ 90. The Berks Defendants thus made available to the public in the relevant meeting minutes the substance of their Official Action but did not provide a detailed listing of all of the letter's or white paper's contents. Contrary to what Plaintiffs' pleadings would lead the Court to believe, The Sunshine Act does not require that the minutes contain as attachments copies of all of the documents referenced by the Official Actions taken, which is the actual grievance raised by Plaintiffs.

The Berks Defendants complied with the requirements of maintaining minutes regarding the substance of their Official Action, and based on Plaintiffs' failure to plead sufficient facts alleging a violation of 65 Pa.C.S. § 706(3), Plaintiffs' Count III is legally insufficient to state a claim and must therefore be demurred.

V. CONCLUSION

Based on the foregoing reasons, Defendants, Christian Leinbach, Kevin Barnhardt, Michael Rivera, the Board of Commissioners of Berks County, and Berks County, respectfully request that this Honorable Court sustain its Preliminary Objection to Counts I, II, and III of Plaintiffs' Complaint and dismiss Counts I, II, and III of the Complaint as to the Berks Defendants and to grant such other relief as this Court deems appropriate.

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Date: April 20, 2021

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