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IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

BRUCE PETRIE and GINGER PETRIE, ANDREW G. KRASNANSKY and TINA-LOUISE KRASNANSKY, ROBERT DUANE BLASKO and ELIZABETH A. BLASKO, and ROBERT McKELLIN and CYNTHIA McKELLIN Plaintiff(s) v. LOWER SAUCON TOWNSHIP, BETHLEHEM LANDFILL COMPANY, & IESI PA BETHLEHEM LANDFILL CORPORATION Defendants and ST. LUKE'S HOSPITAL – ANDERSON CAMPUS, BETHLEHEM TOWNSHIP and DELAWARE AND LEHIGH NATIONAL HERITAGE CORRIDOR, INC., Intervenors.	:	No. C0048CV2023-6089 DECLARATORY JUDGMENT/EQUITY

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COURT OF COMMON PLEAS
CIVIL DIVISION
NORTHAMPTON COUNTY, PA

PLAINTIFFS AND INTERVENORS' PRELIMINARY OBJECTIONS TO THE PRELIMINARY OBJECTIONS TO THE AMENDED COMPLAINT FILED BY BETHLEHEM LANDFILL COMPANY

Plaintiffs, Bruce Petrie and Ginger Petrie, Andrew G. Krasnasnsky and Tina-Louise Krasnansky, Robert Duane Blasko and Elizabeth A. Blasko, and Robert McKellin and Cynthia McKellin (collectively "Plaintiffs" or "Citizens"), by and through their counsel, Gary Neil Asteak, Esquire, Intervenors, St. Luke's Hospital – Anderson Campus ("St. Luke's") and Delaware and Lehigh National Heritage Corridor, Inc. ("DLNHC"), by and through their counsel, Fitzpatrick Lentz & Bubba, P.C., and Intervenor, Bethlehem Township, by and through its counsel, Broughal and DeVito, LLP, (collectively "Objectors") hereby file these Preliminary Objections to the

Preliminary Objections to the Amended Complaint filed by Defendant, Bethlehem Landfill Company (formerly known as and incorrectly pleaded as IESI PA Bethlehem Landfill Corporation) (the "Landfill") and, in support thereof, aver as follows:

I. INTRODUCTION

1. Objectors submit these Preliminary Objections to Preliminary Objections to the Amended Complaint filed by the Landfill on or around February 23, 2024.

2. The Landfill's Preliminary Objections, which consists of 72 pages and 287 multi-averment paragraphs, challenge all aspects of the Amended Complaint, including all claims asserted therein. [1]

3. The Landfill's Preliminary Objections disregard the meritoriousness of the preliminary objections with the hope of overwhelming the Court into sustaining at least some of the objections.

4. This brazenness is evidenced by the Landfill filing preliminary objections to Count II of the Amended Complaint, which is only asserted against Lower Saucon Township (the "Township"), not the Landfill.

5. The Landfill cannot file preliminary objections against a claim that Objectors have not brought against the Landfill.

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[1] Pennsylvania Rule of Civil Procedure 1022 states that "[e]very pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation." Pa.R.C.P. No. 1022. Rule 1017(a)(4) identifies preliminary objections as a pleading. Pa.R.C.P. 1017(a)(4). The Landfill's Preliminary Objections brazenly violate the requirement that each paragraph only include one material allegation, with some paragraphs including as many as four or more material allegations. Had the Landfill complied with the Pennsylvania Rules of Civil Procedure and utilized one averment per paragraph, the Landfill's Preliminary Objections would have well-exceeded 400 paragraphs. Although the Landfill's Preliminary Objections as a whole are improper and in violation of Rule 1022, for the sake of judicial economy, Objectors have chosen not to file a preliminary objection on this basis.

6. Consequently, Objectors assert preliminary objections, pursuant to Pa.R.C.P. 1028(a)(2) and 1028(a)(5), with respect to the preliminary objections filed by the Landfill as to Count II of the Amended Complaint.

II. FACTUAL AND PROCEDURAL HISTORY

A. The Complaint and Amended Complaint

7. Plaintiffs initiated the instant case by filing a Complaint on August 14, 2023.

8. Following resolution of certain outstanding issues, as well as in the interest of judicial economy, the parties stipulate that Objectors would file an Amended Complaint on or before January 19, 2024, to which the Landfill could file an Answer or preliminary objections on or before February 23, 2024.

9. In accordance with the parties' stipulation, on January 18, 2024, Objectors filed an Amended Complaint. A copy of the Amended Complaint is attached hereto as Exhibit A (hereinafter "Am. Compl.").

10. In their Amended Complaint, Objectors allege that certain real property, which consists of seven (7) parcels, is located in Lower Saucon Township, Northampton County, and is owned by the Landfill (the "Property"). Am. Compl. ¶¶ 19-20.

11. In the Amended Complaint, Objectors claim that the majority of the Property is encumbered by a pair of substantively identical Scenic and Conservation Easements (collectively the "Conservation Easements"), which are recorded and serve to preserve approximately 208 acres of the Property for scenic and conservation purposes and which specifically preclude landfill activities. Am. Compl. ¶¶ 21-22.

12. Moreover, Objectors allege that approximately eight (8) acres of the Property along the Southern boundary are also subject to a 100' Woodlands Protection Easement, which was

incorporated into the Conservation Easements and is intended to preserve undisturbed woodlands except for the limited purposes of culling dead trees and promoting healthy tree growth. Am. Compl. ¶ 23.

13. Objectors also aver that the City of Bethlehem owned the Property at the time the Conservation Easement and Woodland Easement were established in 1994. Am. Compl. ¶ 26.

14. The Conservation Easements and Woodland Easement were established by the City of Bethlehem for the purposes of protecting the land subject to the easements and for ensuring that relevant portions of the Property would serve as a buffer to the landfill activities in perpetuity. Am. Compl. ¶ 28.

15. In the Amended Complaint, Objectors allege that on December 21, 2022, the Township adopted Ordinance No. 2022-02 (i) amending the Lower Saucon Township Zoning Ordinance, (ii) rezoning the Property from the Rural Agricultural (RA) zoning designation to the Light Industrial (LI) zoning designation, and (iii) adding landfills and waste disposal facilities as uses permitted by Conditional Use. Am. Compl. ¶¶ 17-18.

16. Objectors further claim that, following litigation which invalidated Ordinance No. 2022-02, on August 30, 2023, the Township passed the Ordinance No. 2023-05 (the "Ordinance"), which (i) rezoned the Property from the Rural Agricultural (RA) zoning designation to Light Industrial (LI), (ii) reclassified landfills and waste disposal facilities from uses permitted by conditional use to uses permitted by-right, and (iii) ensured that the Landfill would be able to expand landfill activities on the Property without oversight or planning considerations. Am. Compl. ¶¶ 42-45.

17. Objectors allege that, on August 30, 2023, the Township voted to remove the Conservation Easements and Woodland Easement from the Property without seeking approval from the Orphans' Court. Am. Compl. ¶ 46.

18. Objectors aver that, since the release of the Conservation Easements and Woodland Easements, the Landfill filed an application with the Township for approval of its "Phase V Preliminary Land Development & Lot Consolidation Plan" (the "Land Development Plan"), which proposes the construction of solid waste facilities within the areas protected by the Conservation Easements and Woodland Easement. Am. Compl. ¶¶ 48-49.

19. Objectors assert that, on December 6, 2023, the Township voted to grant conditional approval to the Land Development Plan, and on December 29, 2023, the Township and Landfill filed a notice of the release of the Conservation Easements and Woodland Easement. Am. Compl. ¶¶ 50-51.

20. Objectors assert that, as a result of the release of the Conservation Easements and proposed expansion of landfill activities, the Citizens will be adversely affected as, *inter alia*: the proximity of residents to the landfill will subject them to pollutants; preexisting scenic views and the use of outdoor recreation will be removed; stormwater runoff will increase; leachate will pollute groundwater; the Lehigh River will be polluted; and adverse health consequences caused by noxious fumes, leachate, and other dangerous byproducts of landfill activities will be suffered. Am. Compl. ¶ 54.

21. Moreover, Objectors allege that St. Luke's will be irrevocably damaged by the release of the Conservation Easements and proposed landfill activities as, *inter alia*: there will be an increase in the presence of large birds, which will pose a substantial risk to emergency personnel and critically injured individuals being transported to the Anderson Campus by helicopter;

decaying organic matter and the accumulation of trash is unsightly and carries the potential for odor and noxious fumes and a further potential to pollute the Lehigh River and remove preexisting scenic views; and, St. Luke's maintains a strategic partnership with the DLNHC to preserve the Delaware & Lehigh National Heritage Corridor and engage residents in surrounding communities, including Lower Saucon Township, to use nature trails affected by the proposed landfill expansion. Am. Compl. ¶ 61.

22. Additionally, Objectors assert that the release of the Conservation Easements will damage DLNHC as it will, *inter alia*, frustrate the mission of the DLNHC, which is to preserve, interpret and leverage the nationally significant history and current scenic, and will remove or substantially inhibit the use of D&L Trail for its original purpose as well as its use for scenic views and outdoor recreation. Am. Compl. ¶¶ 66-68.

23. Finally, Objectors aver that, as a municipality with a shared border with the Township, which partially runs along the median line of the Lehigh River, Bethlehem Township will be negatively affected by the release of the Conservation Easements and landfill expansion as, *inter alia*: decaying organic matter carries the potential for odor and noxious fumes and will pollute the Lehigh River adjacent to Township properties and the scenic views from Township properties and the views of Township residents; the accumulation of trash is unsightly and will be visible from Township property and the property of Township residents; and, the D&L trail is used by Township residents and will be negatively affected as outlined above. Am. Compl. ¶¶ 70-71.

24. As a result, Objectors assert four claims in their Amended Complaint: 1) Declaratory Judgment against the Landfill (Count I); 2) **Declaratory Judgment against the Township (Count II)**; 3) Equitable Relief against the Landfill and Township (Count III); and 4) Injunction against the Landfill (Count IV).

25. In Count I (Declaratory Relief), filed against the Landfill, Objectors request, *inter alia*, the Court enter an Order deeming that Objectors are third-party beneficiaries of the Conservation Easements, and the Conservation Easements prohibit the expansion of landfill activities. Am. Compl. ¶¶ 72-81.

26. In Count II of the Amended Complaint (Declaratory Judgment), brought ***only*** against the Township, Objectors request that the Court, *inter alia*, deem that Objectors are third-party beneficiaries to the Conservation Easements and that the Township is subject to the Donated or Dedicated Property Act, 53 P.S. §3381, *et seq.* (the "DDPA"). Am. Compl. ¶¶ 82-95.

27. Objectors further request in Count II that, as a result of the applicability of the DDPA to the Township and its release of the Conservation Easements, the Court deem (1) the Township's termination of the Conservation Easements was *void ab initio* as the termination lacked approval of the Orphans' Court, (2) the Township was without authorization to rezone the Property, (3) the Township lacked the authority to grant approval of the Land Development Plan without approval of the Orphans' Court, and (4) the Land Development Plan are in violation of the DDPA. Am. Compl. ¶¶ 82-95.

28. In Count III (Equitable Relief), which was filed against both the Township and the Landfill, Objectors request that the Court, *inter alia*, enter an order requiring the Township to rescind the Ordinance, reestablish the Conservation Easements and enjoin the Landfill from expanding its landfill activities on the relevant portions of the Property. Am. Compl. ¶¶ 96-103.

29. Finally, in Count IV (Injunction), filed against the Landfill, Objectors request, *inter alia*, that the Court enjoin the Landfill from expanding landfill activities to the relevant portions of the Property. Am. Compl. ¶¶ 104-111.

B. Landfill's Preliminary Objections

30. In response to the Amended Complaint, on February 23, 2024, the Landfill filed Preliminary Objections and a Brief in Support thereof to the Amended Complaint. A copy of the Preliminary Objections to the Amended Complaint is attached hereto as Exhibit B.

31. In its Preliminary Objections, the Landfill raised objections to **all** aspects of the Amended Complaint pursuant to Pa.R.C.P. 1028(a)(1), 1028(a)(2), 1028(a)(3), 1028(a)(4), 1028(a)(5), 1028(a)(6) and 1028(a)(7) (but not 1028(a)(8)). See Exhibit B.

32. Moreover, the Landfill brought preliminary objections as to **all four** claims in the Amended Complaint, including Count II (Declaratory Judgment), which was **only** filed against the Township, not the Landfill. See Exhibit B.

33. Despite the fact that Objectors never brought Count II (Declaratory Judgment) against the Landfill, the Landfill nevertheless asserts Preliminary Objections pursuant to Pa.R.C.P. 1028(a)(2), 1028(a)(3), 1028(a)(4) and 1028(a)(5) against Count II.

34. The Landfill has no basis to object to claims that were not brought against it.

35. Therefore, the Landfill's Preliminary Objections as to Count II of the Amended Complaint are improper and should be stricken with prejudice pursuant, to Pa.R.C.P. 1028(a)(2) and 1028(a)(5), as the Landfill has no grounds to challenge a claim which was not brought against it.

III. PRELIMINARY OBJECTION, PURSUANT TO Pa.R.C.P. 1028(a)(2), IN THE NATURE OF A MOTION TO STRIKE THE LANDFILL'S PRELIMINARY OBJECTIONS TO THE AMENDED COMPLAINT FOR FAILURE TO CONFORM TO LAW OR RULE OF COURT AS COUNT II OF THE AMENDED COMPLAINT WAS NOT ASSERTED AGAINST THE LANDFILL.

36. Pennsylvania Rule of Civil Procedure 1028(a)(2) provides for the striking of a preliminary objection or part of a preliminary objection as a result of a failure of a preliminary

objection to conform to law or rule of court or inclusion of scandalous or impertinent matter. Pa.R.C.P. 1028(a)(2).[2]

37. Rule 2229, relating to Permissive Joinder, states in part:

> (b) A plaintiff may join as defendants persons against whom the plaintiff asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action.

Pa.R.C.P. 2229(b).

38. Consequently, Rule 2229(b) permits the joinder by a plaintiff of multiple defendants on several theories of relief. Del Boring Tire Serv., Inc. v. Barr Mach., Inc., 426 A.2d 1143, 1146 (Pa. Super. 1981).

39. "The joinder of additional parties under Rule 2229 does not affect either the substantive or procedural rights the parties would have in separate actions. This is made clear by Rule 2231(c) & (d) . . ." Id.

40. Rule 2231, titled "Effect of Joinder. Practice in General," states in part:

> (c) The trial of an action in which parties have joined or have been joined under Rules 2228 and 2229 shall be conducted as if independent actions between such parties had been consolidated for trial.
>
> (d) Except as otherwise provided by these rules, the joinder of parties in any action shall not affect the procedural rights which each party would have if suing or sued separately, and the verdicts and judgments entered therein shall be joint, several or separate according to the nature of the right or liability therein determined.

Pa.R.C.P. 2231(c)-(d).

41. The Landfill and Township are permissibly joined as joint defendants in the pending litigation as the claims against each arise out of the same occurrence and share a common

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[2] Rule 1017 specifically enumerates what constitutes a pleading, which includes preliminary objections. Pa.R.C.P. 1017(a)(4). Therefore, preliminary objections to preliminary objections is permissible.

question of law or fact; therefore, Pa.R.C.P. 2229(b) governs.

42. Although the Landfill and Township are joint defendants, in accordance with Rule 2231(c) and 2231(d), they maintain their legal autonomy. See Del Boring Tire Service, Inc. v. Barr Mach., Inc. 426 A.2d 1143 (Pa. Super. 1981) (holding that the dismissal of one defendant and the filing of a third-party complaint against the dismissed defendant did not implicate *res judicata* as the two actions in the complaint were procedurally separate).

43. As the Landfill and the Township have legal autonomy, they must proceed independently as if a separate case was brought against each. See Pa.R.C.P. 2231(c)-(d).

44. For example, even if the Landfill successfully filed a demurrer against a claim asserted against both the Landfill and the Township, the demurrer would only be successful as to the Landfill; the claim would still survive as to the Township.

45. Moreover, although the Amended Complaint includes both the Landfill and the Township, had Objectors chosen to file two separate complaints, as is their right, the Landfill would have no ability to file preliminary objections to a pleading it was not a party to. See Pa.R.C.P. 2231(c)-(d).

46. As a result, the Landfill cannot file preliminary objections to claims that are not asserted against it.

47. Because Count II of the Amended Complaint is solely brought against the Township, the Landfill has violated Rules 2229(b) and 2231(c)-(d), in addition to well-established caselaw, by filing preliminary objections to Count II. See Pa.R.C.P. 2229(b), 2231(c)-(d).

48. Consequently, the Court must sustain Objectors' preliminary objection, pursuant to Pa.R.C.P. 1028(a)(2), and strike with prejudice the Landfill's preliminary objections with respect

to Count II of the Amended Complaint for failure to conform to law or rule of court.[3]

WHEREFORE, Plaintiffs, Bruce Petrie and Ginger Petrie, Andrew G. Krasnasnsky and Tina-Louise Krasnansky, Robert Duane Blasko and Elizabeth A. Blasko, and Robert McKellin and Cynthia McKellin, and Intervenors, St. Luke's Hospital – Anderson Campus, Delaware and Lehigh National Heritage Corridor, Inc. and Bethlehem Township, hereby request this Honorable Court sustain their preliminary objection, pursuant to Pa.R.C.P. 1028(a)(2), and strike with prejudice Defendant, Bethlehem Landfill Company's Preliminary Objections to the Amended Complaint with respect to any objections asserted against Count II.

IV. PRELIMINARY OBJECTION, PURSUANT TO Pa.R.C.P. 1028(a)(5), IN THE NATURE OF A MOTION TO STRIKE THE LANDFILL'S PRELIMINARY OBJECTIONS TO THE AMENDED COMPLAINT DUE TO THE LANDFILL'S LACK OF STANDING SINCE OBJECTORS DID NOT ASSERT COUNT II OF THE AMENDED COMPLAINT AGAINST THE LANDFILL.

49. Pennsylvania Rule of Civil Procedure 1028(a)(5) provides for the filing of a preliminary objection on the basis of a lack of capacity to sue.

50. Courts have interpreted the phrase "lack of capacity to sue" as the ability to raise a preliminary objection on the basis of a lack of standing.[4] C.G. v. J.H., 172 A.3d 43, 53-54 (Pa. Super. 2017), aff'd, 193 A.3d 891 (Pa. 2018).

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[3] Rule 1028 provides for leave to amend a pleading following the filing of preliminary objections. Pa.R.C.P. 1028. However, it is well established that the filing of "an amendment is properly refused where it appears to be a reasonable possibility that the amendment will be futile.". See Stempler v. Frankford Tr. Co., 529 A.2d 521, 524 (Pa. Super. 1987). The Landfill cannot change the fact that Objectors have not asserted Count II against the Landfill; therefore, an amendment would be futile. The Court must strike the Landfill's preliminary objections as to Count II with prejudice.

[4] Although issues of standing asserted through preliminary objections often raise issues of fact, a preliminary objection pursuant to Pa.R.C.P. 1028(a)(5) can sometimes turn on a pure question of law. C.G. v. J.H., 172 A.3d at 54. In this case, it is undisputed that Objectors have not asserted Count II against the Landfill, only the Township. Therefore, no issues of fact exist.

51. "In Pennsylvania, a party to litigation must establish as a threshold matter that it has standing to bring an action." Chester Upland Sch. Dist. v. Rossi, 275 A.3d 1117, 1124 (Pa. Commw. 2022).

52. To establish standing, "the party must have a substantial, direct, and immediate interest in the outcome of the litigation." Phantom Fireworks Showrooms, LLC v. Wolf, 198 A.3d 1205, 1215 (Pa. Commw. 2018).

53. The Landfill cannot establish standing to bring preliminary objections against Count II of the Amended Complaint.

54. Objectors did not assert Count II against the Landfill.

55. Moreover, the crux of the requested relief in Count II is that the Court deem the Township is subject to the DDPA, 53 P.S. §3381, *et seq.* (the "DDPA"), which in turn would invalidate the Township's termination of the Conservation Easements as the termination lacked Orphan's Court approval. Am. Compl. ¶¶ 82-95.

56. Count II raises a narrow question as to the appropriateness of the procedure by which the Township terminated the Conservation Easements and Woodland Easement and ultimately requests that the merits of the termination of the same be heard by the Orphans' Court.

57. The interest of the Landfill as to whether the Township used the appropriate procedure pursuant to the DDPA is no greater than that of the general public.

58. The Landfill lacks a substantial, direct and immediate interest in the outcome of Count II as Count II was not brought against the Landfill.

59. Additionally and importantly, given that the Landfill is not a political subdivision, the DDPA does not apply to the Landfill; therefore, the requested relief falls outside the interest of the Landfill. See 53 P.S. § 3384.

60. Because the Landfill cannot establish even one let alone all three requirements for standing, the Landfill lacks standing to bring preliminary objections against Count II. See Phantom Fireworks Showrooms, LLC, 198 A.3d at 1215.

61. As a result, the Court must sustain the Objectors' preliminary objection, pursuant to Pa.R.C.P. 1028(a)(5), and strike the Landfill's preliminary objections with respect to Count II of the Amended Complaint.

WHEREFORE, Plaintiffs, Bruce Petrie and Ginger Petrie, Andrew G. Krasnasnsky and Tina-Louise Krasnansky, Robert Duane Blasko and Elizabeth A. Blasko, and Robert McKellin and Cynthia McKellin, and Intervenors, St. Luke's Hospital – Anderson Campus, Delaware and Lehigh National Heritage Corridor, Inc. and Bethlehem Township, hereby request this Honorable Court sustain their preliminary objection, pursuant to Pa.R.C.P. 1028(a)(5), and strike with prejudice Defendant, Bethlehem Landfill Company's Preliminary Objections to the Amended Complaint with respect to any objections asserted against Count II.

FITZPATRICK LENTZ & BUBBA, P.C.

Date: March 12, 2024

By: _____

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