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County of Delaware, Pennsylvania, Plaintiff, v. Delaware County Regional Water Control Authority, and DELCORA Rate Stabilization Fund Trust Agreement between the Delaware County Regional Water Control Authority, as Settlor, and Univest Bank and Trust Co., as Trustee, Defendants.	**COURT OF COMMON PLEAS** **DELAWARE COUNTY** **NO. 2020-003185**

MEMORANDUM OF LAW IN SUPPORT OF THE PETITION OF DEFENDANT DELAWARE COUNTY REGIONAL WATER CONTROL AUTHORITY FOR A PRELIMINARY INJUNCTION

I. Introduction

Petitioner, the Delaware County Regional Water Control Authority ("DELCORA"), by and through its attorneys, Obermayer Rebmann Maxwell & Hippel LLP, hereby submits this memorandum of law in support of its petition for a preliminary injunction to enjoin the enforcement or application of Delaware County Ordinance No. 2020-4 (the "Ordinance" a copy

of which is attached as Exhibit A), which illegally seeks to terminate DELCORA, until such time as the Court is able to determine its legality and compliance with all applicable law.[1]

Plaintiff, the County of Delaware, Pennsylvania (the "County"), through its County Council ("Council"), has proposed the Ordinance as part of what is, in essence, a money grab: an ill-advised attempt to fill the County's coffers at the direct expense of DELCORA's customers, who are also by and large constituents of the County.[2] DELCORA – the municipal authority tasked with collecting, conveying and treating the wastewater generated by residents and business in Delaware County (as well as some in Chester County) – has agreed to sell its assets to Aqua Pennsylvania Wastewater, Inc. ("Aqua") for a total of $276.5 million. After paying off DELCORA's debt obligations and transaction-related expenses, the proceeds of that sale will be used ***entirely*** for the benefit of preventing significant rate increases for DELCORA's customers for a considerable period of time. Council's attempt to terminate DELCORA via the Ordinance is simply part of its efforts to keep that money for itself.[3]

Regardless of Council's motivation, its proposed Ordinance not only flies in the face of all applicable legal authority, but it is extremely dangerous. If Council succeeds in forcing DELCORA's termination, it would recklessly endanger the public welfare by making the provision of service to DELCORA's customers prohibited by both Pennsylvania and federal law. The law simply prohibits the transfer of DELCORA's assets to the County – and consequently, the County's provision of wastewater-related services – without the County ***first*** (a) obtaining

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[1] At the appropriate time, DELCORA will be filing its own claim against the County in this action challenging the Ordinance on the grounds that it violates state and federal law, and is void and unenforceable.

[2] Although the Ordinance has not yet been passed as of the filing of this Petition, it is scheduled for a second reading and vote on June 3, 2020, and its passage is a *fait accompli*.

[3] The County recently filed the instant action as its initial attempt to prevent the sale proceeds from benefitting its constituents by challenging a trust that will be funded as part of the transaction and dispense the necessary payments to prevent large rate increases from being imposed on DELCORA's customers.

the requisite permission from the Pennsylvania Utilities Commission (the "PUC"), (b) agreeing to comply with, and substituting itself as a party to, the existing federal Consent Decree between DELCORA, the United States Environmental Protection Agency ("EPA") and the Pennsylvania Department of Environmental Protection ("DEP"), and (c) agreeing to abide by the terms of DELCORA's National Pollutant Discharge Elimination System permit, with that permit being transferred to the County. Unless, and until, the County complies with these and other requirements, it is legally impossible for it to terminate DELCORA, assume its assets (and obligations), and continue to provide wastewater treatment services to DELCORA's customers. It would be extremely dangerous to permit the Council to enforce its Ordinance and leave these customers with no such services under ordinary circumstances, much less in the midst of a global pandemic.

Even looking past the County's failure to comply with these critical legal requirements, the termination of DELCORA and transition of its wastewater conveyance and treatment system (the "System") to the County under the extremely abbreviated timeframe set forth by the Ordinance is callously reckless and creates a logistical nightmare that would similarly imperil the wastewater conveyance services upon which the residents of Delaware County (and Chester County) rely and cause environmental harm. Notwithstanding the timeframe anticipated by the Ordinance, its enforcement and application imperils public safety and welfare by explicitly prohibiting DELCORA from operating in any meaningful sense from the time period beginning when the Ordinance passes and ending when Council, seemingly at whim, files the certificate of termination it is trying to force DELCORA to execute. It is patently dangerous to prevent DELCORA from "taking any action or expending any money in connection with any action that

is inconsistent with its termination," as the Ordinance seeks to do, while expecting wastewater conveyance and treatment to proceed uninterrupted.

Other legal authority prohibits the County from proceeding under the Municipal Authorities Act (the "MAA"), as it purports to do. Most notably, the MAA prohibits the termination of a municipal authority while it has outstanding bond debt, which DELCORA does. This bond debt cannot be eliminated by DELCORA at present, and cannot be assumed by the County due to the terms of the bonds. The MAA also mandates that (a) DELCORA "settle all claims," (b) that the County assume "all of the obligations incurred by [DELCORA]," and (c) that any conveyance of DELCORA's System to the County must be done "subject to agreements concerning the operation or disposition of the project" – ***all*** of which are impossibilities given the County's numerous public statements that it does not intend to honor the binding agreement between DELCORA and Aqua and seeks in this action to terminate the Rate Stabilization Fund Trust Agreement of which DELCORA is a party. In essence, Council's obstinacy both creates a new claim for breach that by definition cannot be settled and demonstrates a refusal to comply with the requirement to assume DELCORA's obligations before any conveyance can occur.

In short, the enforcement of the Ordinance would blatantly violate existing law and needlessly create a nightmare scenario of irreparable harm that jeopardizes wastewater conveyance and treatment services for the citizens of Delaware County and beyond. If the County wishes to terminate DELCORA, it must first comply with all applicable legal requirements ***and*** proceed in a responsible manner. Since the Ordinance fails in both of these respects, its enforcement and application must be enjoined to prevent immeasurable irreparable harm until such time as the Court is able to determine its legality and compliance with all applicable law.

II. Factual Background

A. DELCORA

DELCORA was formed in 1971 by the County pursuant to its authority under the MAA for the purpose of collecting, conveying, and treating wastewater generated by Delaware County residents and businesses. DELCORA has performed this critical function for customers in Delaware and Chester Counties for nearly five decades, carrying out its mission in a safe, effective way to prevent the contamination of streams, rivers, and the general water supply. Through its extensive infrastructure, DELCORA has worked diligently to ensure that its customers are provided quality wastewater service by meeting and, in many cases, exceeding the water discharge mandates set by the DEP and EPA. DELCORA owns and operates over 180 miles of sewer infrastructure, the vast majority of which are sanitary in nature, and serves approximately 16,000 customers equating to 197,000 Equivalent Dwelling Units.

B. DELCORA's Relationship with the Philadelphia Water Department and Factors That Bore On Its Decision to Sell to Aqua.

Since the 1970s, DELCORA has had a contractual relationship with the Philadelphia Water Department ("PWD") that was necessitated when three of DELCORA's water treatment plants were taken out of service. When that occurred, DELCORA contracted with PWD to allow for some of DELCORA's wastewater flow to be treated at one of PWD's facilities. The contractual arrangement between DELCORA and PWD has been in place ever since through multiple contracts, and currently runs through the year 2028 pursuant to a 15 year contract that was agreed to by the parties in 2013 (the "2013 Contract").

Under the terms of the 2013 Contract, DELCORA is responsible for its share of PWD's 25-year capital investment plan, which was needed to implement PWD's Long Term Control Plan. At the time that contract was made, the costs to be incurred by DELCORA during the life of that

plan were estimated to be $178 million. Before agreeing to terms in 2013, DELCORA performed due diligence to determine how much it would cost to perform the capital improvements needed to disconnect from PWD and no longer contract with it. Those costs were estimated to be $350-$400 million. The cost-effective decision to remain with PWD was determined to be in the best interests of DELCORA and its customers, resulting in the 2013 Contract.

This changed, however, in December 2017, when PWD informed DELCORA that its share of costs pursuant to the capital investment plan would sky-rocket to at least $605 million. Naturally, this caused DELCORA to reconsider its continuing relationship with PWD. DELCORA determined that, in order to disconnect from PWD in 2028 (at the end of the 2013 Contract), an investment of $450 million would be needed for capital improvements that would take eight years to complete. DELCORA also performed an analysis of its projected capital costs through 2042 and determined that, if it remained with PWD, these costs collectively would be approximately $1.2 billion.[4]

DELCORA was thus faced with two possible outcomes, each of which would raise rates for its customers in drastic fashion. Even though the decision to disconnect from PWD was the better choice for its customers, it would still cause them to incur significant rate increases for DELCORA to be able to afford to make the necessary capital improvements in order to do so.

C. The Proposed Transaction Between DELCORA and Aqua.

Faced with the prospects of significantly increasing capital costs and, consequently, rates, DELCORA entered into discussions with Aqua for the purchase of DELCORA's System in the summer of 2019. Aqua is a large provider of water/wastewater utility service in Delaware and Chester Counties, making it a logical partner for DELCORA. After a period of negotiation,

[4] Attached as Exhibit B is a breakdown of these projected capital costs through 2042.

DELCORA and Aqua entered into an Asset Purchase Agreement (the “APA”) on September 17, 2019. The purchase price agreed-upon was $276.5 million.

The proposed transaction is uniquely structured to protect DELCORA’s customers. After paying down DELCORA’s obligations – which DELCORA would otherwise not be able to satisfy – and transaction-related expenses, the entirety of the remaining proceeds paid by Aqua will be placed into an independently managed, irrevocable trust that exists solely to provide rate assistance and relief to DELCORA’s customers (the “Trust”). If this Trust did not exist, DELCORA’s customers would see significant rate increases comparable to what they might face absent any transaction with Aqua – again, due to the significant capital costs that are necessary in order to separate from PWD’s system. Instead, the Trust will serve to cap all rate increases for customers at 3% per year, with dispensations made to Aqua to pay for any further increases they otherwise would have faced.

Although direct payments to DELCORA’s customers in the amount of those dispensations were considered, the Trust was ultimately set up to avoid the costly logistical problem that would be faced in mailing monthly checks for small amounts to each of DELCORA’s customers. The administrative costs involved in this task alone would have significantly diminished the amount of money available for rate stabilization. Payments made directly to Aqua will minimize these costs, providing the maximum rate benefit to customers.

D. Council’s Attempt to Prevent the Transaction Proceeds from Being Used for the Benefit of DELCORA’s Customers.

The then duly elected Council amended DELCORA’s articles of incorporation on December 18, 2019. The amendment allowed DELCORA to do exactly what is contemplated by the transaction with Aqua: the creation of a trust for the benefit of DELCORA’s customers. As a result, DELCORA created the Trust on December 27, 2019.

After a new term of Council began on January 6, 2020, the newly sworn in members came to the decision to undermine the proposed transaction between DELCORA and Aqua. While DELCORA does not know for sure why this is the case, all indications are that Council does not want to see the proceeds of the transaction placed in trust for the benefit of its DELCORA's customers, and instead wants to keep the money for itself and not for the operation, maintenance and improvement of the Authority and the services it provides. Council's filing of the instant action, which seeks to undo the creation of the Trust and prevent it from being funded with the transaction proceeds, and its attempt to intervene in the current Public Utility Commission proceeding challenging the Aqua transaction confirm this to be the case.[5]

E. <u>Council's Illegal Attempt to Terminate DELCORA.</u>

Seemingly not content to simply raid the proceeds of the transaction, on May 19, 2020, Council publicly announced Ordinance 2020-4 (the "Ordinance"), which seeks to terminate DELCORA entirely. The Ordinance had its statutorily required first reading on May 20, 2020. It encountered no objection of any kind from the County Council members, and in fact their comments clearly indicated an intent to pass said Ordinance 2020-04 on June 3, 2020. Its unanimous passage is a foregone conclusion. The Ordinance, however, is patently illegal on its face and would cause severe and irreparable harm to DELCORA, DELCORA's customers and, the County itself.

The Ordinance provides for the following:

- That DELCORA be terminated immediately, even though this is inconsistent with the remainder of the Ordinance (*see* Ordinance, § 1);

[5] DELCORA will be filing preliminary objections to the County's baseless Complaint in this action because it misrepresents the terms of the trust and fails to state any claim pertaining to it.

- That DELCORA "immediately terminate and cease any activity that is not consistent with the County's directives contained [in the Ordinance] and as required to effectuate its termination" (*see* Ordinance, § 2.01);
- That DELCORA "effectuate the transfer of all of its assets, funds and other property, including, as applicable, any regulatory permits, to the County, and the assumption of all of its liabilities by the County" (*see* Ordinance, § 2.02);
- That DELCORA "shall satisfy any outstanding debts and obligations of the Authority and settle all other claims which may be outstanding against it" (*see* Ordinance, § 2.03);
- That DELCORA do everything required by the Ordinance and deliver a certificate of termination by June 18, 2020 (*see* Ordinance, § 2.04);
- That DELCORA "is prohibited from taking any action or expending any money in connection with any action that is inconsistent with its termination" (*see* Ordinance, § 3); and
- That the County is "authorized" to possibly satisfy "any outstanding debts and obligations of the Authority (whether by assumption of such debts and obligations by the County or through the incurrence by the County in accordance with applicable law of indebtedness, the proceeds of which shall be used to satisfy such debts and obligations)" (*see* Ordinance, § 8);

As detailed herein, the enforcement of these provisions (and indeed the entirety of the Ordinance) would violate both federal and Pennsylvania law, and would cause significant irreparable harm.

At first blush, Council's attempt to terminate DELCORA appears to be another step in its plot to take control over the proceeds from the sale of DELCORA's assets to Aqua. However, numerous public statements by members of Council and its solicitor have made it clear that its

intention is not just to raid the proceeds that would otherwise go into the Trust, but to undo the transaction with Aqua entirely. *See* Council's press releases regarding the filing of this action and the Ordinance, which are attached as Exhibits C and D[6]; *see also* comments from County Solicitor William Martin in May 25, 2020 Delaware County Daily Times article (attached as Exhibit E) confirming Council's intent to avoid the Aqua transaction and its baseless belief that the APA is unenforceable. Such an outcome would not just be imprudent and in violation of the MAA itself – it is dangerous. As noted above, separation of DELCORA's System from PWD's will take approximately eight years, and that process needs to stay on course in order for it to occur by the end of DELCORA's current contract with PWD. *See* Affidavit of Robert Willert (the "Willert Affidavit"), attached as Exhibit F, ¶¶ 17-21. Any delays will leave DELCORA <u>both</u> without PWD's system and without its own infrastructure to treat the flow it would have to handle once separated from PWD.

As set forth herein, the Ordinance makes clear that Council simply has not thought any of this through, nor has it thought through the serious, immediate consequences and legal violations that will occur if the Ordinance is enforced or applied. Its enforcement and application must be enjoined to avoid this disastrous outcome until the Court is able to determine its legality and compliance with all applicable law.

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[6] In the press release regarding the filing of the instant action to try and block the trust from being funded, Council stated of the transaction that "this deal stunk and the fix was in," that it is "seeking to block a shady entity that was created solely to protect patronage jobs," that it is "moving forward on our promise to Delaware County by reversing this egregious deal," and that it believed that "[t]he sale of DELCORA was never necessary." *See* Exhibit C.

Similarly, in the press release announcing the Ordinance, Council stated that it is "taking another step to reverse an overtly political and backhanded deal" and that it "vowed to reverse [the transaction]," and that this action is "another step forward in accomplishing that." *See* Exhibit D.

III. Statement of Question Involved

(1) Should enforcement and application of the Ordinance be enjoined because it flagrantly violates state and federal law, will cause irreparable harm, and because DELCORA satisfies all other legal requirements for the issuance of an injunction to preserve the status quo?

Suggested Answer: Yes.

IV. Argument

A. Legal Standard for Issuance of Preliminary Injunction.

"To obtain a preliminary injunction, a litigant must show: (1) it is needed to prevent irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, an injunction will not substantially harm other interested parties in the proceedings; (3) the injunction will restore the parties to their status as it existed prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the injunction will not adversely affect the public interest." *Marcellus Shale Coal. v. Dep't of Envtl. Prot. of Pa.*, 185 A.3d 985, 986, n. 4 (Pa. 2018).

As set forth below, because DELCORA's instant petition satisfies each of these elements, it is entitled to a preliminary injunction enjoining enforcement of the Ordinance.

B. The Ordinance Is Illegal and Fails on the Merits Because Its Enforcement Would Violate Multiple Federal and State Laws.

1. By Law, DELCORA Cannot Convey Its Wastewater Management System To The County Until The County Obtains A Certificate Of Public Convenience From The Pennsylvania Utilities Commission.

At its most basic level, the Ordinance cannot be enforced because it is illegal for the County to receive DELCORA's assets until it has received regulatory approval from the PUC in

the form of a certificate of public convenience. Under the Public Utility Code, this is a ***mandatory*** prerequisite for a municipal corporation to receive assets by which it would provide public utility service to customers beyond its corporate limits – precisely what the County would need to do here in order to receive DELCORA's assets and provide uninterrupted service to ***all*** of DELCORA's customers. 66 Pa. C.S. § 1102(a)(5). The County has not done so, and an injunction should issue for this reason alone.

DELCORA serves many customers in Delaware County, but it also serves approximately 245 customers in Chester County. Even though these customers are extra-territorial to Delaware County, by law DELCORA may serve them without regulation by the PUC due to its status as a municipal authority. *See* 66 Pa. C.S. § 102 (municipal authority not included as "municipal corporation").

However, under the Public Utility Code, this changes when the County seeks to obtain DELCORA's assets, which mainly consist of its System. The County is not a municipal authority, but a "municipal corporation" pursuant to 66 Pa. C.S. § 102. The Code explicitly mandates that it is only lawful for a municipal corporation to "acquire, construct, or begin to operate, any plant, equipment, or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits" upon approval by the PUC, "evidenced by its certificate of public convenience ***first had and obtained***." 66 Pa. C.S. § 1102(a)(5) (emphasis added). Since the County has not even considered obtaining, let alone even sought, a certificate of public convenience, it cannot acquire DELCORA's System, which necessarily provides public utility service beyond the Delaware County corporate limits.

This exact situation has been explicitly addressed by the PUC itself. In a proceeding before the PUC involving the City of Lebanon's application for a certificate of public

convenience, the PUC ruled on a virtually identical situation: a municipality seeking to acquire the assets of its municipal authority, some of which were to be used to furnish public utility service beyond the City's corporate limits. *See Application of the City of Lebanon*, Docket No. A-220010 (Pa. P.U.C. April 6, 2006).[7] The City of Lebanon argued that it had the right to do so under the MAA without seeking PUC approval. The PUC rejected this position, holding that "it is clear on the face of Section 1102(a)(5) that the City must obtain a Certificate of Public Convenience ***prior to*** acquiring the physical assets and facilities of the water system by which it intends to provide extraterritorial service." *Id.* (emphasis added).

Enforcement or application of the Ordinance would violate these requirements and, indeed, the explicit language of 66 Pa. C.S. § 1102(a)(5). The County simply cannot force DELCORA to comply with the Ordinance when it would violate the clear mandate of the Public Utility Code and the PUC.

Since transferring DELCORA's assets to the County is a necessary prerequisite to DELCORA's termination, the Ordinance – the sole purpose of which is to effectuate DELCORA's termination – fails on its face. The enforcement of its terms would fly in the face of clearly applicable Pennsylvania law, and should be enjoined as a result.

2. Council Cannot Enforce The Ordinance Until The County Complies With The Requisite Environmental Statutes, Regulations And Obligations, And It Has Not Even Considered Doing So.

Similarly, but separately, the County cannot compel DELCORA to convey its assets unless and until it complies with all federal and state environmental requirements to allow it to operate the System. These requirements are critical for the safe operation of DELCORA's System, and Council has not given any indication that it has even considered the significant environmental ramifications of its desire to rush to terminate DELCORA.

[7] A copy of this decision is attached as Exhibit G.

a. It Would Violate Federal And State Law For DELCORA To Convey Its Wastewater Management System To The County Unless The County Has Substituted Itself For DELCORA As A Party To The Consent Decree Between DELCORA, The EPA And The DEP, And The Requirements Of The Consent Decree Are Otherwise Satisfied.

DELCORA cannot legally be made to comply with the Ordinance because it is party to a federal consent decree with the EPA and the DEP (the "Consent Decree," attached as Exhibit H), which prevents DELCORA from taking the actions Council is attempting to improperly force. Council has not thought through its proposed action, as it ***must*** take action to substitute itself as a party to the consent decree before DELCORA can transfer its System to the County.

The Consent Decree is the result of legal action taken by the EPA and DEP in the United States District Court for the Eastern District of Pennsylvania in 2015. *See U.S. and DEP v. DELCORA*, 2:15-cv-04652-TJS (E.D.Pa. 2015). In that action, the EPA and DEP alleged that DELCORA, like many other authorities throughout the country, was in violation of a number of federal and Pennsylvania statutes and regulations caused by wastewater overflow that discharged untreated sewage into creeks and rivers, including (a) the federal Clean Water Act, 33 U.S.C. §§ 1251-1387, (b) Pennsylvania's Clean Streams Law, 35 Pa.S.A. §§ 691.201, 691.202, and 695.401, and (c) the terms and conditions of DELCORA's National Pollutant Discharge Elimination System ("NPDES") permits issued to DELCORA by the DEP. In order to resolve those claims, DELCORA entered into the Consent Decree, which requires that it take certain measures to prevent the continuing occurrence of this discharge. These measures include operating in full compliance with DELCORA's own approved Long Term Control Plan and a vast number of technical requirements in order to address long-term sewer overflow remediation, as well as assurance of its financial capability to do so. *See generally* Exhibit H (Consent Decree). Failure to comply with the Consent Decree not only would put DELCORA out of

compliance and constitute violations of federal and state law, but it would have significant adverse ramifications for the environment due to continued sewage overflow.[8]

The County does not have the ability to step into DELCORA's shoes and comply with the Consent Decree from a practical, day-to-day operational standpoint, and it cannot simply do so from a legal perspective as well. Specifically, Section 5 of the Consent Decree provides that:

- At least 30 days' written notice must be provided to both the EPA and DEP before DELCORA can transfer its wastewater conveyance and treatment System;
- DELCORA is ***prohibited*** from transferring its System unless "the transferee has the financial and technical ability to assume [the obligations and liabilities of the Consent Decree];"
- DELCORA is ***prohibited*** from transferring its System without the consent of the EPA and DEP and their agreement to release DELCORA from the Consent Decree; and
- DELCORA is ***prohibited*** from transferring its System without a joint request from the transferee, the EPA and DEP, and without approval of the District Court.

See Consent Decree, § 5.

The County has not done anything to attempt to meet these requirements or even demonstrate any awareness that they exist. No notice has been provided to any party involved with the Federal Consent Decree. More importantly, the County has not shown that it has the "financial and technical ability" needed to assume DELCORA's obligations and liabilities under the Consent Decree. In fact, by deploying its "shoot first and ask questions later" approach, the County has fundamentally demonstrated that it has no idea what it is doing, calling into question whether it will ever have the financial and technical abilities to assume these obligations. There

[8] Moreover, the Consent Decree provides that the failure to comply with its terms carries harsh penalties, including significant fines that accrue daily. *See* Consent Decree, ¶¶ 49-65.

is no indication in the public record or otherwise that the County has the necessary technical ability to operate DELCORA's System. Moreover, the County's actions in trying to torpedo the transaction with Aqua and/or raid the Trust involved in that transaction indicate that it does not have the necessary financial ability, and likely will not for the foreseeable future.

The terms of Consent Decree conclusively demonstrate that the County cannot simply pass the Ordinance, assume DELCORA's assets, and terminate it. It is not that simple, and the County has given no indication that it appreciates the complexity and nuances involved the environmental regulation and remediation that is a critical component of the operation of DELCORA's System. The enforcement of the Ordinance must be enjoined until Council not only appreciates this, but also affirmatively demonstrates that the County is in compliance with the terms of the Consent Order and will remain so going forward.

b. The County Cannot Legally Assume DELCORA's System Unless And Until DELCORA's NPDES Permit Is Transferred To The County.

Additionally, DELCORA is legally prohibited from transferring ownership of its assets to the County unless and until its NPDES permit is transferred to the County. The DEP must consent to the permit transfer, and there is no indication here that DEP has even been approached about the County's shotgun-style plan to terminate DELCORA and take over the System, let alone its plan to continue to comply with the terms of the NPDES permit.

The purpose of an NPDES permit issued by the DEP is to ensure compliance with applicable laws and regulations regarding the discharge of pollutants into bodies of water. The permit is essentially a license for a facility to discharge a specified amount of a pollutant into a receiving water body under certain set conditions.

DELCORA's NPDES permit (attached as Exhibit I) was issued in 2013 and expired in 2018. It provides that, if a renewal application is submitted, but not approved, its terms are automatically continued until the DEP acts on the renewal application. *See* NPDES permit, p. 1. DELCORA timely complied with the DEP's requirements to submit an application for renewal of the permit. This application has not yet been acted upon by the DEP.

The permit contains strict conditions about its transfer, with penalties if they are not followed. First, the permit may be transferred by way of modification, or if it is revoked and reissued. *See* NPDES permit, § III(B)(1). At present, however, transfer by this method is impossible, as the permit has expired and is under review for renewal.

Alternately, the permit may be transferred upon providing notice to, and receiving consent from, the DEP. *See id*, § III(B)(2). Not only has this process not been undertaken, but there is no indication that the County will be able to satisfy a critical element of it: that the County, as the new permittee, "is in compliance with existing DEP issued permits, regulations, orders and schedules of compliance, or has demonstrated that any noncompliance with the existing permits has been resolved by an appropriate compliance action or by the terms and conditions of the permit (including compliance schedules set forth in the permit), consistent with 25 Pa. Code 92a.51 (relating to schedules of compliance) and other appropriate Department regulations. (25 Pa. Code 92a.71)." *See id*, § III(B)(2)(d).

As is the running theme of the County's short-sighted action, it has given no indication that, upon receiving DELCORA's assets, it will be in compliance with anything required of it. Instead, the County wants to rush to terminate DELCORA, receive its assets, and then later figure out if it can comply with the strict environmental requirements necessary to receive an NPDES permit and operate the System. Simply put, the County will be without authority to run

DELCORA's System if it is permitted to enforce or apply the Ordinance and force its transfer without dealing with this critical issue (among the others detailed herein).

Before undertaking to terminate DELCORA and assume its assets, the County must either receive DELCORA's NPDES permit via transfer or, more likely, be issued a new permit after submitting an application to the DEP. *See id*, § III(B)(3). This Court should not even consider permitting the County to enforce the Ordinance until it has done so and received clear approval from the DEP to operate pursuant to an NPDES permit.

3. Council Cannot Enforce The Ordinance Because It Violates The Municipal Authorities Act (the "MAA").

The County also cannot terminate DELCORA because it has not complied with the MAA. DELCORA was created by the County under the MAA's authority. Consequently, DELCORA can ***only*** be terminated and convey any property to the County after strict compliance with the MAA's provisions as well.

The Ordinance comes nowhere close to doing so. It does not even address the MAA's clear mandate that DELCORA cannot be terminated or convey any projects or property while its bonds are still outstanding, or the fact that the bonds cannot be assumed by the County by their terms. In addition, the Ordinance ignores the fact that all "claims" against DELCORA must be settled. In fact, the Ordinance and this action seeking to invalidate the Trust have created additional claims that will be at issue for years, all of which stand in the way of DELCORA's termination. Relatedly, Council has made it clear that, despite the MAA's clear mandate that the County assume all of DELCORA's obligations and take any project subject to all agreements concerning its operation or disposition, it has no intention of honoring DELCORA's contractual obligations to sell its assets to Aqua and place the sale proceeds in trust for the benefit of its

customers. Council cannot comply with the MAA when it has already stated its express intent to breach those agreements.

As discussed in more detail below, these material failings to comply with the MAA's terms preclude the enforcement and application of the Ordinance in any form or fashion.

a. Overview of Relevant Provisions of the MAA.

The termination of a municipal authority under the MAA is governed by 53 Pa. C.S. § 5619 and 53 Pa. C.S. § 5622. 53 Pa. C.S. § 5619 sets out specific requirements that must be satisfied before a municipal authority is able to transfer its projects and/or property to its creating municipality. 53 Pa. C.S. § 5622 governs the circumstances under which a municipality may pass an ordinance, such as the Ordinance at issue here, in order to involuntarily terminate an authority.

Pennsylvania courts have consistently required that, when a municipality seeks to terminate a municipal authority that it created pursuant to 53 Pa. C.S. § 5622, it must first ensure that the provisions of 53 Pa. C.S. § 5619 are satisfied, specifically those provisions relating to outstanding bond obligations. *See County of Mifflin v. Mifflin County Airport Authority,* 437 A.2d 781 (Pa. Commw. Ct. 1981) (holding that power of municipality to force transfer of project of authority is subject to requirements of 53 Pa. C.S. § 5619); *Forward Township Sanitary Sewage Auth. v. Township of Forward,* 654 A.2d 170, 175 (Pa. Commw. Ct. 1995) (acknowledging that impediments of 53 Pa. C.S. § 5619 limit authority's ability to transfer property); *Township of Forks v. Forks Twp. Mun. Sewer Auth.*, 759 A.2d 47, 54 (Pa. Commw. Ct. 2000) ("Sections 18A and 14 of the Act, when read together in conjunction with *Forward* and *Mifflin*, control this matter and lead to the inescapable conclusion that for the purpose of dissolving an authority, a municipality has the power to unilaterally direct its authority to transfer

authority property without the consent of the authority provided, however, that no impediment exists at the time of conveyance in the form of a trust indenture of a bond issue or other indebtedness and the authority is not foisting its debts upon the municipality without its consent.”).[9]

Here, the requirements of 53 Pa. C.S. § 5619 cannot be satisfied, and as a result Council has no authority under the MAA to force DELCORA to transfer its assets or the System to the County. In addition, even if it did, Council's Ordinance still fails to comply with 53 Pa. C.S. § 5622. The Ordinance thus wholly fails to comply with the MAA's requirements regarding the termination of a municipal authority and is unenforceable.

b. The County Cannot Compel DELCORA to Comply with the Ordinance Because DELCORA Has Outstanding Bonds that Cannot be Satisfied or Assumed, Making The Satisfaction of the Requirements of 53 Pa. C.S. § 5619 An Impossibility.

With respect to the termination of an authority, the MAA states:

> When an authority has ***finally*** paid and discharged all bonds, with interest due, which have been secured by a pledge of any of the revenues or receipts of a project, the authority may, subject to agreements concerning the operation or disposition of the project, convey the project to the municipality creating the authority or, if the project is a public school project, to the school district to which the project is leased.

53 Pa. C.S. § 5619(a) (emphasis added). A similar provision exists with respect to the "property" of an authority. 53 Pa. C.S. § 5619(b).

In interpreting these statutory provisions, Pennsylvania courts have made clear that the projects and/or property of an authority cannot be transferred to a creating municipality under any circumstances if the authority has outstanding bonds. In *Mifflin*, for example, the Commonwealth Court analyzed a situation, much like the instant one, where Mifflin County

[9] Sections 18A and 14, as discussed in case law, refer to the MAA's predecessor statute that contained essentially identical provisions and requirements as those set forth in 53 Pa. C.S. §§ 5622 and 5619, respectively. *See, e.g., Application of City of Lebanon*, *supra*, p. 13.

passed an ordinance seeking to compel its airport authority to transfer its property to the county. 437 A.2d 781. In an action for mandamus, the Commonwealth Court found that Mifflin County lacked the ability to force the authority to make such a transfer because (a) the authority had outstanding bonds and (b) the terms of those bonds contained anti-takeover covenants that prevented the transfer of the property while the bonds remained outstanding and the assumption of the outstanding bond obligations. Specifically, the Court held that "Section 14 of the Act and the trust indentures for the outstanding bonds make doubtful the County's right to the transfer of the Airport property in the circumstances of this case." *County of Mifflin,* 437 A.2d at 783.

This is the exact same situation DELCORA is in here. DELCORA has five outstanding bond issuances. *See* Indentures and Funding Agreement, attached as Exhibit J. These bonds are all governed by the terms of DELCORA's original 2001 Indenture (attached as Exhibit K). The bonds are not redeemable until at least 2025, with some redeemable later.[10] While the terms of the 2001 Indenture provide for defeasance, this can only occur with cash on hand, and DELCORA simply does not have enough liquid assets to do so.[11] *See* Exhibit L (Pileggi Affidavit), ⁋⁋ 9-15.

The County has not demonstrated that it has even considered, much less has a plan to address, the outstanding bonds and/or their defeasance. Without defeasance, there is no way for the bonds to be finally "paid and discharged," making it impossible for the County to order DELCORA to transfer its assets. *Compare Twp. of Forks v. Forks Twp. Mun. Sewer Auth.*, 759 A.2d 47, 53 (Pa. Commw. Ct. 2000) ("There is also authority in this Indenture to redeem the

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[10] DELCORA's outstanding bonds include: (1) 2007 Sewer Revenue Bonds, which are not redeemable until 2025; (2) 2009 PennVest Bonds, which are not redeemable until 2029; (3) 2015 Sewer Revenue Bonds, which are not redeemable in full until at least 2025; (4) 2016 Sewer Revenue Bonds, which are not redeemable in full until at least 2026; and (5) 2017 Sewer Revenue Bond, which are not redeemable in full until at least 2027. *See also* Affidavit of John Pileggi (the "Pileggi Affidavit"), attached as Exhibit L, ⁋⁋ 3-8.

[11] Even if it were a possibility, defeasance under the timeline set by the Ordinance is simply not possible.

Bonds prematurely and there are sufficient liquid assets owned by the Authority which permit the Authority to pay off the Bonds and debts prior to conveying the Project and thereby avoid the impediments of the *Mifflin* bonds.").[12]

Moreover, the 2001 Indenture and all of DELCORA's bond issuances contain covenants that would be violated if the Ordinance is enforced. These restrictions prevent the County from simply assuming DELCORA's bond obligations. Among others, these covenants state that:

- DELCORA shall ***at all times operate, or cause to be operated the system*** (*see* 2001 Indenture, § 6.04);
- DELCORA may not mortgage, pledge, encumber ***or otherwise dispose of*** any part of the system (*see* 2001 Indenture, § 6.13) (emphasis added);
- DELCORA shall ***maintain its existence*** throughout the term of the bonds (*see* 2001 Indenture, § 6.22); and
- DELCORA shall not do or permit anything to be done, or omit or refrain from doing anything where such action or inaction would be a ground for declaring a forfeiture or termination of the Indentures (*see* 2001 Indenture, § 6.23).[13]

These provisions are similar to the anti-takeover provisions in *Mifflin* that Pennsylvania courts have recognized as clear impediments to the satisfaction of 53 Pa. C.S. § 5619 and termination of a municipal authority. *See Forks*, 759 A.2d at 53 (citing "anti-takeover covenants" in *Mifflin* that prevented county's assumption of bond obligations).[14] In fact, *Mifflin* emphasized substantially

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[12] The definition of "bonds" under the MAA is expansive and includes any obligations secured by DELCORA's revenue receipts. *See Forward Twp. Sanitary Sewage Auth.*, 654 A.2d at 175 n.6; *see also Mifflin*, 437 A.2d 783 (clarifying that 53 Pa. C.S. § 5619 was implicated because authority had revenue bonds).

[13] Similar provisions exist in the Funding Agreement governing the 2009 PennVest Bonds. *See* Funding Agreement at Exhibit J, pp. 22-23 (Covenants D18, D22, D23).

[14] In addition, and as addressed below, *Mifflin* addressed the fact that a municipality cannot assume debt obligations of a municipal authority merely by passing an ordinance, and must instead comply with the

identical "otherwise dispose of" language in its discussion of the "anti-takeover" provisions that precluded the assumption of bond obligations and termination of the authority at issue in that case. 437 A.2d at 783.

The County cannot compel DELCORA to comply with the Ordinance until its bonds are "finally paid and discharged," which they are not, and will not be for some time – particularly where the Ordinance itself fails to address the bonds. Similarly, the County cannot simply assume DELCORA's bond obligations. The Ordinance will thus result in a blatant breach of the terms of the bonds that is impermissible by law.[15] As a result, 53 Pa. C.S. § 5619 presents an insurmountable barrier to County's acquisition of DELCORA's project/property.

c. The County is Without Authority to Compel DELCORA to Comply with the Ordinance Because It Is Impossible for DELCORA to Do So While Also Settling All Outstanding Claims Against It, As Required by the MAA.

In addition to the statutory provisions discussed above, the MAA mandates that before it conveys its property to a municipality, an authority must have "settled all other outstanding claims against it." 53 Pa. C.S. § 5619(b). The plain language of this provision presents a requirement that is a literal impossibility for DELCORA as a direct result of the Ordinance itself.

As detailed above, forcing DELCORA to comply with the Ordinance will cause it to incur claims that cannot be "settled" and thus stand directly in the way of fulfilling the requirements set forth by the MAA. Most notably, if DELCORA does not comply with the Consent Decree, it will be subject to considerable claims in the form of fines that will accrue daily. DELCORA will also be in violation if it is made to transfer its NPDES permit without complying with its requirements. If forced to comply with the Ordinance, DELCORA would

Local Government Unit Debt Act – something the County has not done in this case.

[15] By their terms, any breach of the bond indentures would cause an additional 6% in interest to accrue. *See* 2001 Indenture, § 10.01(g).

also be subject to claims from its bondholders, who have legal rights that cannot be infringed upon simply because the County wants to recklessly act without any regard for terms of those bonds.

In addition, and perhaps most significantly, it is patently apparent that Council's actions are being undertaken with the express intention of attempting to breach the contractual obligations DELCORA has to Aqua and the Trust. The APA between Aqua and DELCORA is a binding, legally enforceable agreement, and Council's actions will undoubtedly result in its breach (if they have not already). This is also the case for the agreements related to the Trust, which the transaction will fund. It is thus implausible to conceive that DELCORA can simply turn over its property to the County free and clear of any claims, as required by the MAA.

DELCORA cannot comply with both the Ordinance and the requirements of 53 Pa. C.S. § 5619(b), as its compliance with the former makes compliance with the latter impossible. DELCORA cannot violate the enforceable rights of its bondholders and leave them "high and dry," or, more likely, expose DELCORA to yet more County-created claims against it. Enforcement and application of the Ordinance should be enjoined as a result.

d. The County Has Already Made Clear That It Will Not Comply With Its Obligations Under the MAA to Assume DELCORA's Obligations.

Compliance with the MAA is also not possible here because the County has already made it clear that it has no intention of assuming and/or honoring all of DELCORA's obligations (and it is unclear if it can even legally do so).

DELCORA does not have enough liquid funds to satisfy all of its outstanding liabilities and obligations. In addition to its bonds (which the County cannot assume), DELCORA currently has 19,965,482 in other outstanding liabilities, as well as $12,960,901 in other long

term debt. *See* Exhibit L (Pileggi Affidavit), ⁋ 16. However, DELCORA does not have enough liquidity to satisfy its debt. At present, it has $112,128,093.39 in its accounts. *See id.*, ⁋ 11. However, this amount does not tell the whole story, as (a) $19,522,291.67 constitutes debt service funds, (b) $7,833,742.73 is operating cash, which is set aside and used for its ongoing operations, and (c) $84,772,058.99 is held in reserves and is designated for specific purposes, including for renewal and replacement, rate stabilization, reserves for its Long Term Control Plan, and construction. *See id.*, ⁋⁋ 9, 13, 14. Thus, in a best-case scenario, DELCORA does not have enough cash to cover its obligations. This does not even account for additional obligations DELCORA will incur in the forms of fines under the Consent Decree (and potentially otherwise) if made to comply with the Ordinance.

Under these circumstances, 53 Pa. C.S. § 5622 is clear: the County can only pass an ordinance requiring DELCORA to convey its System "upon the assumption by the municipality of all the obligations incurred by the authorities with respect to that project." 53 Pa. C.S. § 5622(a). There is absolutely no indication from the Ordinance that the County can or will comply with this requirement. Not only is there no showing in the Ordinance that the County has the means to incur DELCORA's outstanding financial obligations, but it is clear from Council's public statements and actions that it intends to disregard DELCORA's existing obligations with respect to the transaction between it and Aqua – perhaps the single most significant "obligation" of the authority. *See supra* p. 10, fn. 6.

Even if Council were to contradict its own statements and claim that it has no intention of abdicating DELCORA's contractual obligations to Aqua, the mere fact that the County filed the instant action in the first place is *prima facie* evidence that it has no intention of upholding

perhaps the single most significant obligation inherent to that transaction – the creation and funding of the Trust for the benefit of DELCORA's customers.

These deficiencies violate 53 Pa. C.S. § 5619(a) as well. This section mandates that any project transferred by DELCORA to the County is done so "subject to agreements concerning the operation or disposition of the project." By expressing an intent to violate the APA and agreements concerning the trust, Council has already made it clear that it will not comply with this requirement – yet another example of the Ordinance not complying with the express terms of the MAA.

DELCORA also has a large number of contracts that would need to be assigned to the County if DELCORA were to be terminated. Much like the Consent Decree and NPDES permit, 44 of these contracts require counterparty consent. In order for the County to obtain a certificate of convenience with the PUC, the PUC must also approve the assignment of many of these contracts. The Ordinance is completely silent as to how the County intends for assignment of these contracts to be effectuated.

4. Council Cannot Enforce The Ordinance And Assume DELCORA's Obligations Without Violating The Local Government Unit Debt Act.

Even if the County could somehow comply with the MAA and assume all of DELCORA's bond obligations, debt and other liabilities, it ***still*** has given no indication that it has complied, or will be able to comply, with the Local Government Unit Debt Act, 53 Pa. Cons. Stat. §§ 8001-8271 (the "Debt Act").

The Debt Act sets forth certain statutorily proscribed requirements before a local government unit (such as the County) can incur debt. These requirements include, but are not limited to, "the enactment of an ordinance authorizing the bonds or notes following a publication of the proposed ordinance; compliance with limits on the amount of debt a governmental unit

may incur; the submission of a debt statement; an accepted proposal for the purchase of bonds or notes; and the enactment of an ordinance or resolution awarding the bonds." *Forward Township*, 654 A.2d at 175 (*citing* 53 P.S. §§ 6780-3, 6780-52, 6780-160, 6780-161, 6780-351 through 6780-360). In situations where a municipality seeks to terminate an authority pursuant to 53 Pa. C.S. § 5622, Pennsylvania courts have been clear that "the Local Government Unit Debt Act does not give the County a clear right, if any at all, to assume the debt obligations of the Authority simply by enacting an ordinance, as the County sought to do in this case." *Mifflin*, 437 A.2d at 783.

Much like *Mifflin*, the County seeks to act in violation of the Debt Act here. It seeks to act through the Ordinance without any indication that it has complied, or will comply, with the requirements of the Debt Act. The only things that are clear in this case are (1) the County will be have to assume debt if it wishes to terminate DELCORA, (2) the County has not planned at all for the incurrence of this debt, and (3) the County has not given any consideration whatsoever to the Debt Act's requirements, with which it must comply.

In addition, the Ordinance is silent as to the primary reason for the transaction in the first place: that DELCORA, if it does not sell to Aqua, will be incurring significant obligations in the future. These obligations are not speculative. The amounts DELCORA will have to spend are significant under any scenario if it does not proceed with the Aqua transaction, whether it remains with or separates from PWD. Council has given no indication as to how it will assume these substantial obligations, much less how it will do so in compliance with the Debt Act.

The County's enforcement and application of the Ordinance will be in clear violation of the Debt Act. It simply cannot compel DELCORA to transfer its assets and obligations under those circumstances.

C. An Injunction Is Needed Because Enforcement Of The Ordinance Would Cause Irreparable Harm.

1. The Statutory Violations That Would Result From The Ordinance's Enforcement Constitute *Per Se* Irreparable Harm.

As discussed above, enforcement of the Ordinance would immediately result in multiple violations of state and federal statutes. These violations constitute *per se* irreparable harm, warranting an injunction. *See Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa. Commw. Ct. 2016) ("the violation of an express statutory provision constitutes *per se* irreparable harm"); *Wolk v. Sch. Dist. of Lower Merion*, 2020 Pa. Commw. LEXIS 209, at *30 (Commw. Ct. Mar. 2, 2020) ("For purposes of injunctive relief, statutory violations constitute irreparable harm *per se*."); *Pa. Pub. Util. Com. v. Israel*, 52 A.2d 317, 322 (Pa. 1947) ("When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.").

This alone ends the inquiry as to this element of the injunction test.

2. The Ordinance Would Needlessly Create Service Interruption For Some Or All Of DELCORA's Customers and Significant Harm to the Environment.

In addition to the flagrant statutory violations it would cause, if the County is permitted to enforce the Ordinance, it would needlessly cause immediate, irreparable harm. DELCORA's compliance with any portion of the Ordinance would (a) cause some or all of DELCORA's customers to be without wastewater conveyance and treatment services, creating a public health disaster during a global pandemic, and (b) create severe harm to the environment. *See* Exhibit F (Willert Affidavit), ¶¶ 22-30. An injunction is urgently needed to prevent this from occurring.

Pennsylvania law is clear that the loss of sewage disposal services "is a harm that cannot be compensated with monetary damages." *Cosner v. United Penn Bank*, 517 A.2d 1337, 1341 (Pa. Super. 1986); *see also Strasburg Assocs. v. W. Bradford Twp.*, 24 Pa. D. & C.3d 465, 473 (C.P. Chester 1981) (holding that preventing treatment of sewage would have caused irreparable harm when it would have caused pollution of stream and where "the disposal of solid waste generated in all of Chester County would have been seriously impeded and adversely affected, giving rise to an immediate hazard of unknown proportion.").

This is precisely the situation DELCORA is faced with here. Enforcement of the Ordinance would force DELCORA to transfer its System to the County, which (as addressed above) is legally prohibited from operating it without (a) obtaining PUC approval, (b) substituting itself as a party to the Consent Decree, and (c) transferring DELCORA's NPDES permit. It is not possible for DELCORA to take any action dictated by the Ordinance without (a) jeopardizing the services that it provides to its customers in Delaware and Chester Counties and (b) creating significant risk of harm to the environment. There is no reason why these customers and the public at large should suffer this irreparable harm.

Even overlooking the countless legal obstacles that would prevent the County from operating DELCORA's System, the self-contradictory language of the Ordinance needlessly creates additional impediments that will result in an interruption of wastewater service and, thus, irreparable harm. Most notably, the Ordinance will terminate DELCORA, leaving its customers without an operator of the System. In addition, Ordinance is unnecessarily restrictive in how DELCORA can expend its funds before termination, preventing DELCORA from "taking any action or expending any money in connection with any action that is inconsistent with its termination." *See* Ordinance, § 3. DELCORA cannot continue to operate if subject to this

restriction. It will not be able to pay its employees, its vendors, or otherwise expend the funds needed for the day-to-day operation of its System. This creates irreparable harm. *See* Exhibit F (Willert Affidavit), ¶¶ 32-39.

Even if the County was able to force DELCORA to transfer the System to it, Council has made no showing that it has any idea how to operate it. *See id.*, ¶ 31. In fact, public comments made by the County Solicitor have conceded that Council simply has not thought through how it will assume the significant responsibility of operating the System. *See, e.g.,* Exhibit E ("[The County Solicitor] said it is unknown yet where the authority's operations would fall within the county departmental system – whether it would be its own department or come under the auspices of another department").

Thus, Council's attempt to terminate DELCORA by way of the Ordinance will necessarily cause wastewater service interruption – a clear example of irreparable harm.

D. Greater Injury Would Result From Refusing An Injunction Than Granting One Because An Injunction Would Preserve the Status Quo.[16]

As addressed above, the enforcement of the Ordinance will cause significant irreparable harm. In contrast, if the Ordinance is enjoined, no harm will be suffered ***by anyone*** precisely because an injunction will preserve the status quo – that is, DELCORA will continue to provide its customers with uninterrupted, safe wastewater conveyance and treatment service and continue to honor all its obligations under all its current contracts and agreements, including but not limited to duties under the APA (and thereby will not be forced to immediately breach those agreements).

Council's action in passing the Ordinance begs the question of why it is in such a hurry to terminate DELCORA. The proposed transaction between DELCORA and Aqua is presently

[16] DELCORA addresses two elements of the preliminary injunction test here because they are essentially the same.

before the PUC for approval. That proceeding will take some time, and certainly will not conclude within the two-week period in the Ordinance. The transaction was agreed upon after a robust process that entailed scores of public meetings held to discuss DELCORA's future. Most recently, DELCORA held a series of 20 public meetings in late 2019 with employees, municipal officials and the Delaware County Council, and two public meetings with customers. The process was thoughtful, meticulous and transparent. *See* Exhibit F (Willert Affidavit), ¶¶ 4-5.

In contrast, Council has proposed ramming the Ordinance through in two and a half weeks in the midst of a pandemic, when the public cannot attend meetings in person and must watch via Zoom as their elected representatives attempt to divert money that has been specifically allocated for the purpose of reducing their utility costs.[17] One can only wonder why this is happening now via such a rushed, undemocratic process with absolutely no explanation.

Moreover, enforcement of the Ordinance will put DELCORA in immediate breach of its obligations and duties to its wastewater customers and all other parties to its existing contracts and agreements – obligations to the PUC, DEP, EPA Aqua, and DELCORA's bondholders. The injunction sought by DELCORA is critical to ensure that DELCORA continues to honor these obligations and duties.

An injunction is thus necessary to preserve the status quo. No harm will be suffered if enforcement of the Ordinance is enjoined and the status quo is preserved, whereas immeasurable harm will be needlessly created if it is not.

[17] Indeed, at the May 20, 2020 Zoom meeting of Council where the Ordinance was given its first reading, after reading the questions relating to the maintenance and operation of the System should it come under County control, members of Council refused to answer whether they had any plan or even idea about how it would operate. Their silence spoke volumes about their lack of preparation or forethought regarding such a massive undertaking.

E. The Requested Injunction Is Reasonably Suited To Abate The Offending Activity.

The offending activity in this case is the enforcement of the Ordinance, and the injunction sought by DELCORA seeks to enjoin just that. Thus, DELCORA satisfies this element of the preliminary injunction test because it seeks to enjoin the precise activity that is in violation of state and federal law, and which would cause irreparable harm.

F. The Injunction Sought By DELCORA Will Not Adversely Affect The Public Interest And, In Fact, Its Issuance Is In The Public Interest.

Issuance of the injunction is in the public interest. As a threshold matter, it is most certainly not in the public interest for Council to take the sort of action proposed by the Ordinance in the middle of the COVID-19 crisis. An injunction will ensure that all of DELCORA's customers will receive uninterrupted service, whereas enforcement of the Ordinance will needlessly cause some or all of them to experience a service interruption. This is particularly the case given the abbreviated timeframe for termination that the Ordinance seeks to impose upon DELCORA. It is impossible for DELCORA to do everything the Ordinance purports to require within a two-week period, all the while not expending funds for any purpose other than is termination, while still maintaining service to its customers.[18]

In addition, Pennsylvania case law is clear that the Ordinance's strict restrictions on DELCORA's ability to spend money are not in the public interest. This is especially the case when DELCORA has outstanding bonds and owes duties to bondholders. The Ordinance's attempt to implement restrictions on DELCORA being able to defend itself stands in direct contradiction of those duties and violates the rights of DELCORA's bondholders, and thus is not

[18] Although this is not limited to a consideration of DELCORA's bonds, the harshness of the Ordinance's two-week time period would ring particularly true even if DELCORA had the ability to "pay and discharge" those bonds. *See Forks*, 759 A.2d at 56 ("there is no evidence in the record that the Resolution's allocation of a five-week deadline . . . to the Authority for redeeming the Bonds will be sufficient.").

in the public interest. *See* 2001 Indenture, § 6.17 ("The Authority shall at all times, to the fullest extent permitted by law, defend, preserve, and protect the pledge of the Revenues and other funds pledged hereunder and all rights of the Bondholders hereunder . . . . The Authority shall not enter into any contract or take any action by which the rights of the Trustee or the Bondholders may be impaired."); *see also Forks*, 759 A.2d at 55-56 ("The Authority correctly contends, however, that the rights of the bondholders are violated by Resolution No. 980205-8 which expressly prohibits the Authority from challenging the Resolutions which affect their rights. The Authority is bound by the Indenture and, under the Indenture, the Authority must take all necessary actions to protect the interests of the bondholders. It would be against public policy to permit a municipality to create an apparently autonomous Authority to sell bonds protected by an indenture containing covenants which rely solely on the credit and good faith of the issuing authority and then have the municipality, as a nonparty to the bond obligations, capable of prohibiting the bond issuing authority from exercising its discretion to enforce a covenant compelling the taking of legal action which the authority deems necessary to protect the interests of the bondholders. Such a license to legally muzzle and handcuff the bond issuing authority here could jeopardize the credit of all authorities created for the purpose of issuing bonds by destroying potential bond buyer's preference for bonds sold by Pennsylvania municipal authorities."). Restricting DELCORA's ability to spend money would create irreparable harm and is not in the public's interest in this regard. *See* Affidavit of Robert Willert, ¶¶ 40-41.

Finally, as noted at the outset, the Ordinance is against the public interest because it is unquestionably part of Council's plot to undercut the proposed transaction between DELCORA and Aqua, which stands to benefit the thousands of DELCORA's customers who would avoid

the significant rate increases that they would otherwise see if the transaction does not close (or if it closes and the Trust is not funded with the transaction proceeds).

In sum, there is no scenario where the enforcement of the Ordinance results in an outcome that is in the public's interest. Council's attempt at forcing DELCORA's termination is ill-conceived, poorly executed, and will benefit nobody. It should be enjoined from doing so via enforcement of the Ordinance.

V. Conclusion

For all of the reasons set forth above, DELCORA respectfully requests that the Court enjoin the enforcement and application of Delaware County Ordinance No. 2020-4 until such time as the Court is able to determine its legality and compliance with all applicable law.

Respectfully submitted,

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