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Attorneys for Defendants Township of Berkeley &  
Township Council of the Township of Berkeley

DONALD WHITEMAN,  
PATRICIA A. DOLOBACS, JUDITH A.  
ERDMAN and 282 other PETITION  
SIGNERS OF SOUTH SEASIDE  
PARK HOMEOWNERS  
& VOTERS ASSOCIATION,

Plaintiff,

v.

TOWNSHIP COUNCIL OF  
BERKELEY TOWNSHIP, TOWNSHIP  
OF BERKELEY, JOHN DOES 1-10,  
ABC CORPS. 1-10

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
OCEAN COUNTY

DOCKET NO. OCN-L-002667-20

**ANSWER TO PLAINTIFF'S  
COMPLAINT IN LIEU OF  
PREROGATIVE WRITS**

Defendants, Berkeley Township and the Township Council of Berkeley Township, whose principal place of business is located at 627 Pinewald-Keswick Road, Bayville, New Jersey, 08721, by way of answer to the Plaintiffs' Complaint in Lieu of Prerogative Writs says as follows:

**COUNT ONE – ARBITRARY, UNREASONABLE AND CAPRICIOUS**

**DENIAL OF PETITION FOR DE-ANNEXATION**

1. Admitted.
2. Admitted.
3. Admitted.

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4. These Defendants are without information sufficient to form a belief as to the allegations set forth in the fourth paragraph of the Plaintiffs' Complaint and leave the Plaintiffs to their proofs thereon.

5. These Defendants are without information sufficient to form a belief as to the allegations set forth in the fifth paragraph of the Plaintiffs' Complaint and leave the Plaintiffs to their proofs thereon.

6. Defendants admit that South Seaside Park is part of Berkeley Township and is separated from the mainland portion of the Municipality. The balance of this paragraph is denied.

7. Said petition shall speak for itself.

8. Admitted.

9. Admitted, however, Plaintiff fails to note that said acreage constitutes more than ten (10%) percent of the Township's overall property value and includes the only oceanfront beach the Township controls.

10. Admitted, however, these Defendants note that it is also subject to the ward system.

11. Admitted.

12. Admitted.

13. The provisions of N.J.S.A. 40A:7-12 shall speak for themselves.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

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19. Admitted, however, Plaintiff fails to note the international COVID-19 pandemic and State of Emergency which continues to this day.
20. Admitted, however said Resolution was also based upon Mr. Wisser's report.
21. Admitted.
22. Admitted.
23. Admitted.
24. Admitted.
25. Said Resolution of Denial shall speak for itself.
26. Admitted.
27. Denied.
28. Denied.

**Economic and Social Well-Being of Plaintiffs**

- A. This paragraph does not assert a factual statement and no response is made thereto.
- B. The record and proceedings before the Township and Planning Board shall speak for themselves.
- C. Denied.
- D. These Defendants are without information sufficient to form a belief as to the allegations set forth in this paragraph of the Plaintiffs' Complaint and leave the Plaintiffs to their proofs thereon.
- E. These Defendants make no response to this paragraph as same constitutes argument as opposed to statements of fact. These Defendants shall rely upon the record and proceedings before the Berkeley Township Planning Board with respect to such facts.

- F. Admitted, however, historically, this has not been correct and said arrangement could be changed at any time in the future by the Toms River Regional Schools. Middle School and High School children continue to attend schools in Berkeley Township.
- G. This paragraph constitutes legal argument and these Defendants make no response thereto other than to deny.
- H. Denied.
- I. Denied.
- J. Denied.
- K. Denied.
- L. Denied. Other than admitting the location of the Township's Recycling Center, the balance of this paragraph is denied.
- M. Denied.
- N. Denied.
- O. Denied.
- P. The testimony revealed that petitioners seek to disassociate themselves from the more economic and culturally diverse residents of Berkeley Township so they can associate with those only of the same economic, social and cultural class as themselves.
- Q. Denied. Defendant has invested tremendous sums of tax payer funds in South Seaside Park.

**No significant injury to the Defendant, Township of Berkeley**

- 29. Denied.

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30. Admitted, however the testimony revealed that greater than ten (10%) percent of the Township's overall tax base would be lost, forever.

31. Denied. In fact, one of the petitioner's witnesses admitted she had been told not to talk about how her taxes would go down ostensibly by the petitioners.

32. This paragraph constitutes a legal argument and these Defendants make no response thereto. These Defendants will rely upon the record below.

33. This paragraph constitutes a legal argument and these Defendants make no response thereto. These Defendants will rely upon the record below.

34. Denied. The testimony revealed that de-annexation would result in the permanent loss of more than ten (10%) percent of the Township's tax base.

35. Denied. The testimony revealed that de-annexation would result in the permanent loss of more than ten (10%) percent of the Township's tax base. In addition, as a matter of law, an increase in tax ratables in the future already belongs to the tax payers of Berkeley Township.

36. Denied. The testimony revealed that de-annexation would result in the permanent loss of more than ten (10%) percent of the Township's tax base.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

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**WHEREFORE**, the Defendants, Berkeley Township and the Township Council of Berkeley Township demand judgment against the Plaintiffs as follows:

- a) Dismissing the Plaintiff's Complaint in its entirety with prejudice.
- b) Cost of suit.
- c) Attorney's fees.
- d) Such other relief as this Court deems equitable and just.

**COUNT TWO – DUE PROCESS VIOLATIONS**

1. These Defendants repeat and incorporate herein each and every answer of the preceding counts as if set forth more fully herein at length.

2. Denied. The Berkeley Township Planning Board, in reviewing a petition for De-Annexation acts in a legislative and advisory role to the Township of Berkeley, and not in a quasi-judicial fashion. The petition presented is not an application for development under the New Jersey Municipal Land Use Law. As the statute is silent on the process to be used, the Planning Board went out of its' way to allow hearings which provided for fundamental due process safeguards including allowing residents to present their case in chief, cross examination of witnesses, relaxed rules of evidence and halting other applications so the petitioners could be heard.

3. Denied. This paragraph constitutes a statement of law and the various witnesses are not qualified to opine with respect to same. Nevertheless, the Planning Board acted appropriately under the statute in exercising it's legislative and advisory functions.

4. A. Denied. The process utilized was necessary to coordinate the testimony of witnesses since there is no procedure under the statute as to how such proceedings should be conducted. As noted through the

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testimony, same was necessary to correct false statements made by petitioners.

- B. Denied. The sign was on a neighbor's property and it is absolutely appropriate for public officials to encourage public participation in a public legislative hearing. Again, this was not a land use application under the New Jersey Municipal Land Use Law, nor was it a quasi-judicial function of the Planning Board.
- C. Denied. Recognizing that there is no statutory procedure established for the conduct of such a hearing, Plaintiffs attempted to create an adversarial, quasi-judicial proceeding instead of a legislative and planning function of the Planning Board.
- D. Denied. Said decision is not the "same case" and was heard under a different statute. Petitioners attempt to boot strap allegations from forty (40) years prior, without presenting all of the testimony and exhibits from that proceeding, would have been patently unfair.
- E. Denied.
- F. Denied.
- G. Denied. There is no statutory timeframe, or even a requirement, for the adoption of a resolution by the Planning Board under N.J.S.A. 40A:7-12. Pursuant to N.J.S.A. 40A:7-12, the decision of the governing body on whether to grant or deny de-annexation, must be made within thirty (30) days after receipt of the report from the Planning Board. This, the governing body did on September 21, 2020. As noted, the Board acted in an advisory and legislative function in its' capacity as the Planning

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Board for the Municipality and not a quasi-judicial one. Plaintiffs also ignore the fact that the average age of the Berkeley Township Planning Board Members is in their 70's and the months which transpired between the initial vote and the final adoption included a worldwide pandemic.

- H. Denied. It is the petitioners who controlled the nature and scope of their request. With ten (10%) percent of the Township's tax base at stake, forever, the Planning Board wished to ensure that petitioner's request was thoroughly and carefully considered. The Township understands why petitioners would not want the Board to conduct such a comprehensive review, but it is neither arbitrary or capricious for the Board to do so. Notably, Plaintiffs fail to disclose their own expenditures in trying to become part of Seaside Park.
- I. Denied. It would be inappropriate, and a waste of tax payer's resources, for the Township to ask Township employees or staff to spend hours reviewing transcripts which have nothing to do with their limited testimony. It was most appropriate for the Board to have its' consultants provide the relevant testimony to the witnesses so they would be prepared to respond.
- J. Denied. Throughout the proceedings, Plaintiffs' Counsel attempted to create an adversarial proceeding when no such proceeding is contemplated under the statute.

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K. Partially admitted and partially denied. The Township cannot compromise public safety, and certain information relating to the police function cannot be disclosed to the public.

L. Denied. The transcripts of the proceeding shall speak for themselves.

5. Denied.

6. Denied.

**WHEREFORE**, the Defendants, Berkeley Township and the Township Council of Berkeley Township demand judgment against the Plaintiffs as follows:

- a) Dismissing the Plaintiff's Complaint in its entirety with prejudice.
- b) Cost of suit.
- c) Attorney's fees.
- d) Such other relief as this Court deems equitable and just.

**AFIRMATIVE DEFENSES**

1. Plaintiff's Complaint fails to state a cause of action upon which relief can be granted.
2. Plaintiff's Complaint is barred by the applicable statute of limitations.
3. Plaintiff's Complaint is barred and limited by the terms and conditions of the New Jersey Tort Claims Act and all provisions set forth therein.
4. Plaintiff's Complaint is barred for failure to comply with the provisions of the New Jersey Tort Claims Act.
5. Plaintiff's Complaint is barred by the doctrine of waiver.
6. Any allegations of negligence against these Defendants is reduced by the comparative negligence of the Plaintiff.

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7. Plaintiff's Complaint is barred as a result of the Plaintiff's failure to exhaust administrative remedies.

8. Plaintiff's Complaint is barred by the doctrine of laches.

9. Plaintiff's Complaint is barred by public policy.

10. Plaintiff's Complaint is barred by the doctrine of unclean hands.

11. The applicability of the provisions of N.J.S.A. 59:2-1 and N.J.S.A. 59:2-2, as to the immunities available to the public entity and/or public employee are asserted.

12. The applicability of the provisions of N.J.S.A. 59:2-3 and N.J.S.A. 59:3-2, as to the absence of liability from the exercise of judgment or discretion are asserted.

13. The applicability of the provisions of N.J.S.A. 59:2-4, N.J.S.A. 59:3-3 and N.J.S.A. 59:3-4, as to the non-liability for any injury caused by adopting or failing to adopt a law or by failing to enforce a law are asserted.

14. The applicability of the provisions of N.J.S.A. 59:3-5 as to the non-liability of a public employee for an injury caused by its adoption or failure to adopt any law or by its failure to enforce any law are asserted.

15. The applicability of the provisions of N.J.S.A. 59:2-5 and N.J.S.A. 59:3-6 as to the non-liability for issuance or failure to issue any permit, license, certificate, approval, order or similar authorization are asserted.

16. The applicability of the provisions of N.J.S.A. 59:2-6 and N.J.S.A. 59:3-7 as to the non-liability for injury caused by the failure to inspect for the adequacy of same are asserted.

17. The applicability of the provisions of N.J.S.A. 59:2-7 and N.J.S.A. 59:3-11 concerning recreational facilities are asserted.

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18. The applicability of the provisions of N.J.S.A. 59:4-2 and N.J.S.A. 59:4-3 as to the condition of property, including, but not limited to, issues of actual or constructive notice and condition of its public property are asserted.

19. The applicability of the provisions of N.J.S.A. 59:4-4 and N.J.S.A. 59:4-5 are asserted.

20. The applicability of the provisions of N.J.S.A. 59:4-6 as to the liability for an injury caused by the plan or design of public property, either as to original construction or improvement thereto are asserted.

21. The applicability of the provisions of N.J.S.A. 59:4-7 as to the effect of weather conditions on the use of streets and highways are asserted.

22. The applicability of the provisions of N.J.S.A. 59:4-8 and N.J.S.A. 59:4-9 as to the condition of any unimproved public property, including but not limited to, tidelands and submerged lands are asserted.

23. The applicability of the provisions of N.J.S.A. 59:5-4 as to the failure to provide police protection service are asserted.

24. The applicability of the provisions of N.J.S.A. 59:8-3 through N.J.S.A. 59:8-7 regarding failure to provide adequate notice of claim are asserted.

25. The applicability of the provisions of N.J.S.A. 59:8-8 through N.J.S.A. 59:8-11 regarding failure to timely file notice of claim are asserted.

26. The applicability of the provisions of N.J.S.A. 59:9-1 through N.J.S.A. 59:9-7 concerning conditions of suit and judgment are asserted.

27. At all times mentioned in the Complaint any and all actions or omissions of the defendant relating in any way to plaintiff's alleged damages involved decisions of the

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defendants within an area of non-actionable governmental discretion. By virtue of the said discretion, defendants are not liable to any party herein.

28. At all times defendants acted in good faith and accordingly are immune from any liability to the plaintiff.

29. At all times pertinent to the allegations contained within plaintiff's complaint, these defendants acted reasonably and properly in the execution of their duties.

30. These defendants are entitled to qualified immunity.

31. These defendants are entitled to absolute immunity.

32. The municipal defendants and all defendants acting in their official capacity are immune from punitive damages under the Civil Rights Act, 42 U.S.C. § 1983 and the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et. seq.

33. The cause of action alleged by the plaintiff is not cognizable under the Civil Rights Act, 42 U.S.C. § 1983 and 1985 or the New Jersey Civil Rights Act.

34. Plaintiff fails to state a *Monell* claim.

35. Defendants did not deny Plaintiffs their due process under the 14<sup>th</sup> amendment.

36. Defendants hereby reserve the right to interpose such other defenses and objections as continuing discovery may disclose.

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**DESIGNATION OF TRIAL COUNSEL**

(According to Rule 4:25-4)

Gregory P. McGuckin, Esquire, is hereby designated as trial counsel on behalf of the Defendants Township of Berkeley and the Township Council of the Township of Berkeley in this matter.

**DASTI, MURPHY, MCGUCKIN, ULAKY,  
KOUTSOURIS & CONNORS**  
Attorneys for Defendants Township of Berkeley  
& the Township Council of the Township  
of Berkeley

DATED: January 11, 2021

BY:

  
GREGORY P. MCGUCKIN, ESQ.

**CERTIFICATION**

(According to Rule 4:5-1 and Rule 1:38-7(b).)

I hereby certify that, pursuant to Rule 4:5-1, this matter is not the subject of any other action pending in any Court, or of any pending arbitration proceeding, nor is there any such action or proceeding contemplated. I further certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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Attorneys for Defendants Township of Berkeley  
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of Berkeley

DATED: January 11, 2021

BY:

  
GREGORY P. MCGUCKIN, ESQ.

## Civil Case Information Statement

Case Details: OCEAN | Civil Part Docket# L-002667-20

**Case Caption:** PW WHITEMAN DONALD VS TWP.

COUNCIL OF BERKELEY TWP

**Case Initiation Date:** 11/10/2020

**Attorney Name:** GREGORY P MC GUCKIN

**Firm Name:** DASTI MURPHY MC GUCKIN ULAKY ET AL

**Address:** 620 WEST LACEY ROAD P.O. BOX 1057

FORKED RIVER NJ 08731

**Phone:** 6099711010

**Name of Party:** DEFENDANT : TOWNSHIP OF BERKELEY

**Name of Defendant's Primary Insurance Company**

(if known): None

**Case Type:** ACTIONS IN LIEU OF PREROGATIVE WRITS

**Document Type:** Answer

**Jury Demand:** NONE

**Is this a professional malpractice case?** NO

**Related cases pending:** NO

**If yes, list docket numbers:**

**Do you anticipate adding any parties (arising out of same transaction or occurrence)?** NO

**Are sexual abuse claims alleged by: JUDITH A ERDMAN?** NO

**Are sexual abuse claims alleged by: PATRICIA A DOLOBACS?** NO

**Are sexual abuse claims alleged by: DONALD WHITEMAN?** NO

**Are sexual abuse claims alleged by: 282 OTHER PET. SIGNERS-SSPHVA?** NO

### THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

**Do parties have a current, past, or recurrent relationship?** NO

**If yes, is that relationship:**

**Does the statute governing this case provide for payment of fees by the losing party?** NO

**Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:**

**Do you or your client need any disability accommodations?** NO

**If yes, please identify the requested accommodation:**

**Will an interpreter be needed?** NO

**If yes, for what language:**

**Please check off each applicable category: Putative Class Action?** NO **Title 59?** NO **Consumer Fraud?** NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

01/11/2021  
Dated

/s/ GREGORY P MC GUCKIN  
Signed