2018 IL App (2d) 170556-U
No. 2-17-0556
Order filed June 11, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ED FIALA,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
WASCO SANITARY DISTRICT, ROBERT	)	
SKIDMORE, RAUL BRIZUELA, GARY	)	
SINDELAR, CHARLES V. MUSCARELLO,	)	No. 10-L-223
PATRICK GRIFFIN, JERRY BOOSE,	)	
KENNETH BLOOD, FOX MILL LIMITED,	)	
PARTNERSHIP, B&B ENTERPRISES,	)	
HUDSON HARRISON,	)	Honorable
	)	Mark Andrew Pheanis,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

¶ 1 *Held*: We affirmed the trial court's declaratory rulings with respect to the Sanitary District Act of 1936; we also affirmed the trial court's dismissal of plaintiff's counts for fraud and civil conspiracy; however, we reversed the trial court's dismissal of the remaining counts in which plaintiff seeks an accounting based on alleged violations of the public trust doctrine and statutorily barred conflicts of interest. Affirmed in part, reversed in part, and remanded with instructions for further proceedings.

¶ 2 In 1994, the Wasco Sanitary District (District) entered into an annexation agreement (1994 Agreement) with the Fox Mill Limited Partnership (FMLP) for the development of the

Fox Mill subdivision. The agreement called for FMLP to fund the construction of all necessary water and sewer treatment facilities. In return, the District assigned FMLP connection permits for the residential lots that were serviced by the newly constructed facilities. Accordingly, those who sought connections to the newly constructed water and sewer systems were instructed by the District to pay FMLP for the connection permits.

¶ 3 Plaintiff, Ed Fiala, is a resident of the Village of Campton Hills and a homeowner within the Fox Mill subdivision. The District provides his water and sanitary sewer services. Since 2009, he has been litigating his claims that the District's arrangement with FMLP is illegal and in violation of the public trust doctrine. Specifically, plaintiff maintains that the connection permits are the District's property, that the District is "not permitted to give away public property," and that FMLP has been unlawfully selling the connection permits for exorbitant profits. In his fifth amended complaint, plaintiff alleged that the various defendants, including FMLP, the District, and former members of the District's board of trustees, have engaged in a fraudulent scheme to deprive the District of several million dollars in fees paid by taxpayer residents for access to water and sewer services.

¶ 4 The trial court entered two orders which form the basis of this appeal. First, the court granted summary judgment in favor of the District, declaring that the District's assignment of connection permits to FMLP did not violate sections 8 or 8.1 of the Sanitary District Act of 1936 (Sanitary District Act) (70 ILCS 2805/8, 8.1 (West 1998)). Second, the court dismissed plaintiff's fifth amended complaint pursuant to sections 2-615 and 2-619(a)(9) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 2-619(a)(9) (West 2010)). Plaintiff now appeals from both rulings.

¶ 5 Although the District opposed plaintiff's claims throughout nearly all of the underlying litigation, newly elected trustees have changed course. With leave of the trial court, the District filed a brief in support of plaintiff with respect to the remaining defendants' motions to dismiss plaintiff's fifth amended complaint. The District has now filed an appellate brief in support of plaintiff, and the remaining defendants have moved to strike the District's brief as improper. We will address the propriety of the District's brief during the course of our analysis.

¶ 6 I. BACKGROUND

¶ 7 In its written order of dismissal, the trial court commented that "[t]he procedural history of this case is lengthy and convoluted." That was an understatement. For the sake of clarity, we will confine our factual recitation to the relevant agreements, pleadings, and rulings.

¶ 8 A. Agreements

¶ 9 The origin of this lawsuit traces back to the terms of the 1994 Agreement. There is no dispute that the agreement was governed by section 8 of the Sanitary District Act, which provides in relevant part:

> "Every *** sanitary district shall proceed as rapidly as is reasonably possible, by construction, purchase, lease *or otherwise*, to provide sewers and a plant or plants for the treatment and purification of its sewage ***." (Emphasis added.) 70 ILCS 2805/8 (West 1994).

¶ 10 As part of the 1994 Agreement, FMLP agreed to pay "all reasonable fees, costs and expenses required" to accomplish the annexation. This included the construction of water and wastewater treatment facilities which, upon completion, would be conveyed to the District. In return, the District agreed to treat wastewater from the development "up to a maximum" of 2,748 Population Equivalent. A Population Equivalent, or P.E., is a unit of measurement used to

determine the load on a wastewater facility. It was assumed that the sanitary sewer usage for each residential dwelling would be 350 gallons per day, meaning that each lot would require 3.5 P.E. This meant that the facilities constructed by FMLP would have the capacity to service 785 residential dwellings. (785 x 3.5 = 2747.5). To facilitate these terms, paragraph 5(j) of the 1994 Agreement provided that, upon satisfaction of its obligations, FMLP would "receive connection permits to the [water and wastewater facilities] for a maximum total of [785] single-family residential dwelling units ***." FMLP was required to "designate what portions of the SUBJECT REALTY shall receive such permits," and the District was entitled to rely on FMLP's designation. The "subject realty" was defined as the "ANNEXATION REALTY and other land currently within the DISTRICT," as described in Exhibit B to the 1994 Agreement, which consisted of a plat with a legal description. In the event that any of the connection permits were not utilized within 20 years, the District retained the option to purchase them back from FMLP.

¶ 11 The 1994 Agreement was amended in 1996, 1997, and 1999. Each of those amendments addressed FMLP's obligations pertaining to the construction of additional infrastructure to support the District's water and sewer facilities.

¶ 12 In 2001, the District and FMLP entered into the fourth amendment (2001 Amendment) to the 1994 Agreement. A recital to the 2001 Amendment stated that it had "become evident" that the wastewater facilities constructed by FMLP "may have the capacity to service more than 785 single-family residential units" or their equivalent. The 2001 Amendment provided that, if the Illinois Environmental Protection Agency (IEPA) reassessed the District's capacity and issued additional connection permits not contemplated by the 1994 Agreement, such permits would "inure to the benefit" of FMLP.

¶ 13 In 2004, the District and FMLP entered into a "Construction and Reimbursement Agreement" pertaining to the development of two new subdivisions: Prairie Lakes and Fox Creek. The recitals stated that, under the 1994 Agreement, FMLP was "obligated to provide additional irrigation" and was "responsible for the costs of improvements" to a tract of land known as the "34 Acre Irrigation Parcel." It was anticipated that, in addition to providing "sufficient irrigation capacity to satisfy the [1994 Agreement]," the 34 Acre Irrigation Parcel would provide enough irrigation capacity to serve the Prairie Lakes and Fox Creek subdivisions. The recitals also stated that, when the 1994 Agreement was executed, the Sanitary District Act did not provide for "reimbursement" to a private funding entity who dedicated improvements to the District. However, since it was enacted in 1997, section 8.1 of the Sanitary District Act has provided as follows:

> "If one or more persons pay for building a sewer to be dedicated to the sanitary district as a public sewer, and if the sewer will, in the opinion of the board of trustees, be used for the benefit of property whose owners did not contribute to the cost of the sewer's construction, the board of trustees may provide for reimbursement of some or all of the expenses of the persons who paid for the sewer as provided in this Section. The board of trustees may, by contract, agree to reimburse the persons who paid for the sewer, in whole or in part, for a portion of their costs. The reimbursement shall be made from fees collected from owners of property who did not contribute to the cost of the sewer when it was built. The contract shall describe the property that, in the opinion of the board of trustees, may reasonably be expected to use and benefit from the sewer and shall specify the amount of proportion of the cost of the sewer that is to be incurred primarily for the benefit of that property. The contract shall provide that the sanitary district shall collect

> the fees charged to owners of property not contributing to the cost of the sewer as a condition to the connection to and use of the sewer by the respective properties of each owner. The contract may provide for the payment of a reasonable amount of interest or other charge on the amount expended in completing the sewer, with interest to be calculated from and after the date of completion of the sewer. Nothing in this Section shall be construed to require an owner of property described in a contract to connect such property to the sewer or to pay a fee if such property is not connected to the sewer. 70 ILCS 2805/8.1 (West 1998).

The Construction and Reimbursement Agreement provided that, pursuant to section 8.1, FMLP "maintain[ed] the right to seek reimbursement from the Prairie Lakes Parcel and Fox Creek Parcel for their respective portions of the cost of improvements to the 34 Acre Irrigation Parcel."[1]

¶ 14 In 2007, FMLP assigned its rights to "wastewater capacity" under the 1994 Agreement to defendant, B&B Enterprises. Plaintiff has alleged that defendants, Jerry Boose and Kenneth Blood, are the co-owners of FMLP and B&B Enterprises.

¶ 15 Finally, in 2008, the District entered into an annexation agreement (Norton Lakes Agreement) with FMLP and defendant, Hudson Harrison, for the development of a parcel known as Norton Lakes. As part of the Norton Lakes Agreement, FMLP agreed to release the District from its "reimbursement" obligations under the Construction and Reimbursement Agreement,

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[1] The term "reimbursement" has added much confusion to this already confusing case. Plaintiff uses the term to describe any and all funds that FMLP has ever received from selling connection permits. However, defendants (aside from the District) rely on the statutory meaning of the term as it is used in section 8.1 of the Sanitary District Act.

and Harrison agreed to procure an assignment of a portion of FMLP's "current wastewater and water capacity." Harrison then entered a separate agreement with B&B Enterprises, wherein Harrison agreed to pay B&B Enterprises $2,650,000 for the "amount of wastewater capacity" necessary to service the proposed 106 single-family lots within the Norton Lakes development. This amount was based on a purchase price of $25,000 per lot. Upon the satisfaction of all necessary obligations, the Norton Lakes Agreement called for Harrison to "receive" water and wastewater connection permits for 106 residential dwellings.

¶ 16 B. Procedural History

¶ 17 Plaintiff initially filed his complaint in the United States District Court for the Northern District of Illinois, but he voluntarily dismissed that case. He proceeded to file a complaint in the current matter in the Circuit Court of Kane County, but it was removed back to federal court based on plaintiff's allegation that defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO) (14 U.S.C. § 1961 *et seq.*). However, the federal court dismissed plaintiff's complaint based on a lack of standing for the RICO claims and remanded the state law claims back to the Circuit Court of Kane County.

¶ 18 Plaintiff's third amended complaint included three counts. Count I sought declaratory relief under the public trust doctrine, the Sanitary District Act of 1936, and the Public Officer Prohibited Activities Act (50 ILCS 105/3 (West 2012)). Count II alleged common-law fraud against all defendants except the District, and Count III alleged a civil conspiracy against all defendants except the District.

¶ 19 The trial court dismissed the third amended complaint pursuant to sections 2-619(a)(1) and (a)(9) of the Code, ruling that plaintiff failed to identify the public property in which he claimed an interest and thus lacked standing to bring a taxpayer lawsuit. Plaintiff appealed, and

we reversed and remanded. We held that plaintiff had standing to bring a common law action under the public trust doctrine based on his allegation that the District's "water and sewer services" were public property held for the public's benefit. We reasoned this was similar to the plaintiff's allegations in *Mueller v. City of Highland Park*, 166 Ill. App. 3d 114, 118-19 (1988), where we held that the plaintiff had standing based on his claim of an equitable interest in payments due for the city of Highland Park's "water supply and service." *Fiala v. Wasco Sanitary District*, 2014 IL App (2d) 130253-U, ¶ 17.

¶ 20 On remand, the trial court found that the broad allegations in plaintiff's third amended complaint lacked the specificity necessary to survive the defendants' motions to dismiss pursuant to section 2-615 of the Code. With regard to each of the defendants aside from Harrison, the court commented that there "could be a valid cause of action" based on (1) plaintiff's allegations pertaining to the 2001 Amendment, which provided that any connection permits not contemplated by the 1994 Agreement would "inure to the benefit" of FMLP, and (2) the alleged conflicts of interest surrounding the District trustees who approved the 2001 Amendment. However, the court found that plaintiff's allegations "[did] not put [Harrison] in any position other than having paid the fee as directed by the [District] to B&B." Accordingly, the court entered an order dismissing each of the defendants except Harrison *without prejudice* and granted plaintiff leave to file a fourth amended complaint. In a separate order, the court granted Harrison's section 2-615 motion to dismiss *with prejudice*, stating that there was "no just reason for delaying either enforcement or appeal."

¶ 21 On appeal, in *Fiala v. Harrison*, 2016 IL App (2d) 150842-U, we noted plaintiff's allegation that Harrison knowingly participated in the fraudulent scheme by paying a bribe for the approval of the 2008 Agreement regarding the development of the Norton Lakes parcel.

Plaintiff had also alleged that Harrison falsified applications to the Illinois Environmental Protection Agency. We held in relevant part:

> "Taking into account the unique and particular circumstances of this case [Citation.], we do not believe it is clear that plaintiff could prove no set of facts which would entitle him to relief against Harrison. [Citation]. We therefore conclude that the trial court abused its discretion in dismissing Harrison from the case with prejudice. On remand, the trial court is instructed to allow plaintiff an opportunity to amend his pleadings against Harrison." *Harrison*, 2016 IL App (2d) 150842-U, ¶ 23.

¶ 22 While the appeal in *Fiala v. Harrison* was pending, the trial court took up the District's "Counterclaim and Cross Claim for Declaratory Judgment." The District alleged that, pursuant to the terms of the 1994 Agreement and its amendments, FMLP had paid for all of the necessary improvements to support the Fox Mill, Fox Creek, and Prairie Lakes subdivisions. The District further alleged that, in consideration for having these facilities constructed and conveyed at no cost to itself, it had assigned the corresponding connection permits and capacity to FMLP. The District sought declarations that: (1) its assignment of connection permits and capacity to FMLP for the Fox Mill, Fox Creek, and Prairie Lakes developments, and FMLP's subsequent sale of the permits, did not implicate the "reimbursement provisions" of section 8.1 of the Sanitary District Act; (2) these transactions were permitted under the 1994 Agreement and subsequent amendments; and (3) these transactions were "not otherwise precluded by law." In response to the District's declaratory judgment action, plaintiff filed two separate motions for partial summary judgment. The District then filed a cross-motion for summary judgment and the remaining defendants filed briefs in support of the District.

¶ 23 On March 17, 2016, after hearing arguments, the trial court denied plaintiff's motions for partial summary judgment and granted the District's cross-motion for summary judgment. As part of its order, the court declared as follows:

> "(a) Section 8.1 of the [Sanitary District Act] is not applicable to the assignment of annexation permits, and reimbursement agreements thereunder are not required for the connection permits assigned to [FMLP] pursuant to the [1994 Agreement] and its amendments;
>
> (b) [The District's] assignment of the connection permits and capacity to [FMLP] does not violate the Sanitary District Act or any other law;
>
> (c) The sale of the connection permits by [FMLP] to subsequent homeowners or builders and any profit therefrom does not violate the Sanitary District Act or any other law, nor does it implicate Section 8.1 of the [Sanitary District Act], nor are the funds derived from such sales the basis of any reimbursement agreement under the [1994 Agreements] and the amendments thereto."

¶ 24 Following our decision in *Fiala v. Harrison*, while the parties were briefing the issues raised in the District's counterclaim for declaratory judgment, plaintiff filed his fifth amended complaint, which includes eight counts. Counts I and II are for declaratory relief based on the public trust doctrine; whereas the first count relates to the District's *wastewater* facilities, the second count relates to the District's *water* facilities. Count III is for declaratory relief based on the Public Officer Prohibited Activities Act. Count IV is for declaratory relief based on a violation of section 3(d) of the Sanitary District Act (70 ILCS 2805/3(d) (West 2008)). Count V is for declaratory relief based on plaintiff's request for an accounting of all financial transactions relating to the construction of the water and wastewater facilities and the collection of fees

associated with those facilities. Counts VI, VII, and VIII are brought against each of the defendants except the District. Count VI is for common law fraud. Count VII is for civil conspiracy concerning the Norton Lakes development only. Finally, Count VIII is also for civil conspiracy, but no allegations are made concerning the Norton Lakes development.

¶ 25 According to plaintiff, Boose and Blood have perpetuated a fraudulent scheme that involves bribes, kickbacks, false and deceptive statements, and illegal transactions. Plaintiff alleges that FMLP and B&B Enterprises are owned by Boose and Blood. Defendants, Raul Brizuela, Robert Skidmore, and Gary Sindelar, are former District trustees (the trustee defendants), each of whom failed to disclose personal and business relationships with Boose and Blood. Defendant, Charles V. Muscarello, formerly acted as legal counsel to the District; plaintiff alleges that Muscarello is now a business partner with B&B Enterprises through his interests in various other entities. Finally, defendant, Patrick Griffin, is the attorney and the former vice president of B&B Enterprises.

¶ 26 The fifth amended complaint also contains the following allegations. From 1996 to the present, the District has charged residents $6,000 for sewer connections and $1,765 for water connections. Throughout that time, certain applicants have been instructed to pay connection fees directly to Boose and Blood. This arrangement was unlawful, as all such payments were public funds that should have gone directly to the District. Boose and Blood, with the assistance of Muscarello and Griffen, have paid bribes and kickbacks to the trustee defendants for the purpose of influencing them to approve the agreements and amendments in dispute. As a result, the District has aided Boose and Blood by diverting millions of dollars in connection fees that rightfully belonged to the District.

¶ 27 Aside from the District, each of the remaining defendants filed combined motions to dismiss plaintiff's fifth amended complaint pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1) (West 2016)). Although the District initially filed a joinder to these motions, it subsequently requested leave to withdraw its joinder and instead file a brief in support of plaintiff, explaining that this was the desire of the newly elected trustees. The trial court granted the District's motion.

¶ 28 On July 7, 2017, following a hearing, the trial court entered written order granting the combined motions to dismiss. With respect to the section 2-615 component, the court ruled that, despite numerous opportunities to amend his pleadings, plaintiff's complaint remained "replete with conclusions of law and fact," and thus failed to satisfy the stringent pleading requirements for fraud and civil conspiracy. With respect to the section 2-619 component, the court relied on its earlier ruling on the District's counterclaim for declaratory judgment. After restating its declarations regarding the legality of the agreements in dispute, the court stated the following:

> "By this [March 17, 2016] order this Court has held that the assignment and sale of water connection permits are likewise allowable under the [Sanitary District Act]. Consequently, there was absolutely nothing illegal or improper in the assignment of connection permits to [FMLP] for resale to subsequent owners/builders as a part of [FMLP's] agreement to construct at its own expense and risk a multimillion dollar water facility for the village. The argument that the trustees were statutorily prohibited from assigning permits to [FMLP] for resale in exchange for construction of the facility is the bedrock of Plaintiff's complaint. Without a finding that money derived from connection permits is the untouchable property of the village and its citizens, Plaintiff cannot show damages, fraud, nor conversion. Similarly, the declaratory requests have no basis.

> The touchstone for the validity of the agreement between the [District] and [FMLP] is found in the original annexation agreement. Paragraph 5(j) of that document sets forth that once [FMLP] [has] fulfilled all of [its] obligations in regards to construction of the wastewater facility [it is] to receive the connection permits for that subdivision and further notes that the Districts can BUY BACK any unused permits after 20 years. Paragraph 6 of that agreement mirrors paragraph 5 in regards to water capacity as set by the EPA. Interestingly, Plaintiff notes that 'no legal challenge is being made against this agreement' thereby tacitly confirming the legality of the practice of assigning connection permits in exchange for construction or expansion of a facility. Fifth Amended Complaint, par. 37. It therefore clearly follows that if it is not illegal for a municipality and a developer to exchange the rights to connection permits for construction of water and sewer infrastructure, the practice of these contracting parties amending annexation agreements to account for additions of property, recalculations of usage and subsequent creation of additional connection permits and construction of additional infrastructure is also not prohibited, statutorily or otherwise."

¶ 29 Plaintiff timely appeals from the orders dated March 17, 2016, and July 7, 2017.

¶ 30 II. ANALYSIS

¶ 31 FMLP, B&B Enterprises, the trustee defendants, Boose, Blood, Musarello, and Griffin (collectively the B&B defendants) have joined in filing an appellees' brief, while Harrison has filed his own appellee's brief. As mentioned above, the District has filed a "Brief and Argument of Appellee," but therein argues in support of plaintiff. The B&B defendants and Harrison have filed a joint motion to strike the District's brief as improper, but their arguments are unavailing. The District has not attempted to introduce any new issues in this appeal—it has simply taken a

different position in plaintiff's appeal. Contrary to the arguments by the B&B defendants and Harrison, this does not affect our appellate jurisdiction and there is no requirement that the District file a cross-appeal. The trial court honored the newly elected trustees' request to change course in the underlying litigation and we are inclined to do the same in this appeal. The motion to strike the District's brief is therefore denied.

¶ 32 A. Declaratory Judgment

¶ 33 We begin with the trial court's order dated March 17, 2016, which resolved the District's counterclaim for declaratory judgment. Because the rulings contained in the order were based solely on the parties' legal arguments, and no factual determinations were involved, our review is *de novo*. See *Pekin Insurance Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 593 (2009).

¶ 34 Plaintiff concedes that the District lawfully assigned 785 connection permits to FMLP pursuant to the 1994 Agreement, but he nonetheless maintains that it was unlawful for FMLP to "collect the [District's] connection fees." This theory is based on plaintiff's observation that the connection permits run with the land. According to plaintiff, because the permits are attached to the corresponding lots, FMLP effectively sold the permits when it sold the lots. In his reply brief, plaintiff acknowledges that FMLP "had the right to sell their lots [under the 1994 Agreement] for whatever price they saw fit," and that this could have included a mark-up to account for FMLP's expenditures in building the necessary water and sewer facilities. Plaintiff argues, however, that FMLP had no legal authority to collect a standalone fee for access to the facilities, asserting that this authority belongs exclusively to the District. Thus, plaintiff argues that the sale of connection permits by FMLP constituted a conversion of District property.

¶ 35 We disagree with plaintiff. The essence of the 1994 Agreement was that, in consideration for having the necessary water and sewer facilities built and conveyed at no cost to

itself, the District bargained away its right to collect connection fees from property owners who sought access to those same facilities. Hence, regardless of how plaintiff has framed the issue, the question he raises is whether the relevant provisions of the Sanitary District Act authorized the exchange of consideration in the 1994 Agreement. We answer that question in the affirmative.

¶ 36 Our primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature. *Solon v. Midwest Medical Records Association Inc.*, 236 Ill. 2d 433, 440 (2010). We must construe the statutory language according to its plain and ordinary meaning, and when the language is clear and unambiguous, it must be applied as written. *Id.*

¶ 37 Section 8 of the Sanitary District Act required the District to "proceed as rapidly as is reasonably possible, by construction, purchase, lease *or otherwise*, to provide sewers and a plant or plants for the treatment and purification of its sewage ***." (Emphasis added.) 70 ILCS 2805/8 (West 1994). The parties have presented no cases examining the scope of a sanitary district's authorization under section 8, and our research has likewise revealed none. However, the B&B defendants cite *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098 (2002), for the proposition that the "or otherwise" language in section 8 "denotes the broadest possible authority" that a statute can prescribe to a municipal body.

¶ 38 In *Illinois-American Water*, the city and the plaintiff's predecessor entered into an agreement whereby the city conveyed the existing water treatment facilities and mains (water works) to the predecessor in exchange for the predecessor supplying water to the city at an agreed-upon rate. However, the city retained an option to purchase the water works upon the expiration of 10 years. The agreement remained in force for several decades until the city eventually adopted a plan to buy back the water works. In response, the plaintiff sought a

declaration that the purchase option was unenforceable. *Illinois-American Water Co.*, 332 Ill. App. 3d at 1101-02. The plaintiff argued that the city did not have the authority to include the option provision when the agreement was originally entered, because no statute expressly granted the city any such authority at that time. The appellate court rejected this argument, noting that section 3 of the controlling statute authorized the city to "take, hold and acquire property and real estate, by purchase or otherwise" for the purpose of constructing and maintaining its water works. *Id.* at 1103 (quoting Ill. Rev. Stat. 1889, ch. 24, par. 256). The appellate court held that, "[b]ased on a plain reading of this language, we conclude that the city had broad powers to acquire a water works system by purchase *or otherwise.* In our view, the language of section 3 is broad enough to include a purchase option agreement." (Emphasis in original.) *Illinois-American Water Co.*, 332 Ill. App. 3d at 1103.

¶ 39 We agree with the B&B defendants that *Illinois-American Water* is instructive here. Just as the controlling statute in *Illinois-American Water* contained language broad enough to include a purchase option agreement, the language in section 8 is broad enough to allow for the exchange of consideration in the 1994 Agreement. In fulfilling its obligations to provide the necessary sewer facilities, and for the purpose of having the facilities built and conveyed at no cost to itself, the District was authorized to bargain away its right to charge property owners for access to those same facilities. This belies plaintiff's argument that the right to collect connection fees belongs exclusively to the District.

¶ 40 However, our interpretation of the District's authority under section 8 does not mark the end of our inquiry. The record reflects that the District assigned additional connection permits to FMLP beyond the 785 permits that were originally contemplated in the 1994 Agreement. These assignments were accomplished pursuant to the 2001 Amendment, which provided that any

additional permits resulting from an IEPA reassessment of the District's capacity would "inure to the benefit" of FMLP. Plaintiff has alleged that the trustee defendants "wrongfully recalculated" the District's capacity for the purpose of assigning the additional permits to FMLP, and that the District did not receive proper consideration from FMLP for the assignment of the additional permits. We will address these allegations *infra*, when we consider the sufficiency of plaintiff's fifth amended complaint. For present purposes, it matters only that the additional permits were assigned to FMLP after section 8.1 of the Sanitary District Act was enacted in 1997. We must therefore consider the impact of section 8.1, if any, on the District's ability to assign connection permits to FMLP and FMLP's ability to sell the permits to property owners. Stated differently, we are focused narrowly on the issue of whether our legislature intended for section 8.1 to limit the scope of a sanitary district's authority under section 8.

¶ 41 Plaintiff maintains that section 8.1 established the *only* method by which developers may be compensated for their expenditures in constructing sewer facilities for sanitary districts that are governed by the Sanitary District Act. In support, plaintiff cites the maxim of construction *inclusio unius est exclusio alterius*, which means that the inclusion of one thing implies the exclusion of another. *City of St. Charles v. Illinois Labor Relations Board*, 395 Ill. App. 3d 507, 509-10 (2009). In other words, "where a statute lists the thing or things to which it refers, the inference is that all omissions are exclusions, even in the absence of limiting language." *McHenry County Defenders, Inc. v. City of Harvard,* 384 Ill. App. 3d 265, 282 (2008). Applying this principle to the instant case, plaintiff argues that the sale of connection permits by FMLP constituted an unauthorized form of "reimbursement" under section 8.1.

¶ 42 The B&B defendants counter that nothing in section 8.1 suggests a limitation on the broad authority granted to sanitary districts in section 8. They maintain that section 8.1 simply

codified an *inducement for developers* to build sewer facilities—even when it is anticipated that those same facilities will later be dedicated to a sanitary district. The arguments made by the B&B defendants mirror those made by the District before the newly elected trustees decided to change course and support plaintiff. In its memorandum in support of its counterclaim for declaratory judgment, the District noted that, "[o]nce sanitary district facilities are built, it is not uncommon for them to service other properties." However, "[a]bsent guarantees of access to the systems they paid to build, developers needing sewer services would likely construct private systems to serve only their developments." With respect to section 8.1, the District cited the following statements from floor debates during the 90th General Assembly:

> "[I]f [a sanitary district] take[s] that particular system over and it becomes part of [the sanitary district's] system, then they're allowed to reimburse the developers for the cost that they had in building it. This happens quite frequently, where a private developer will build the particular *** portions of the system and then it'll become part of the sanitary district itself." 90th Ill. Gen. Assem., House Proceedings, May 31, 1997, at 226 (statements of Representative Scott).

The District relied on this statement in support of its position that, when a sanitary district collects fees from property owners who did not pay for constructing a sewer system, section 8.1 simply authorizes a portion of those funds to be used to "reimburse" the persons who did pay for the system. The District argued, however, that "[n]othing in [section 8.1] limits the ability of Sanitary Districts to arrange for financing and construction by other means."

¶ 43 We agree with the B&B defendants and find persuasive the arguments originally made by the District. Nothing in the plain language of section 8.1 suggests that the statute describes the *only* method by which developers may be compensated for the costs of constructing the

necessary sewer facilities. To the contrary, "[i]f one or more persons pay for building a sewer to be dedicated to the sanitary district as a public sewer *** the board of trustees *may* provide for reimbursement of some or all of the expenses of the persons who paid for the sewer as provided in this Section. The board of trustees *may*, by contract, agree to reimburse the persons who paid for the sewer, in whole or in part, for a portion of their costs." (Emphasis added.) 70 ILCS 2805/8.1 (West 1998). We reject plaintiff's invitation to read restrictions into this permissive language, as there is nothing in section 8.1 to indicate that a sanitary district is prohibited from bargaining away its right to charge property owners for access to its sewer systems.

¶ 44 Furthermore, we observe that the restrictive provisions in section 8.1 are not applicable unless a sanitary district contracts to "reimburse" developers using funds that are taken from sanitary district coffers. Under these circumstances, "[t]he reimbursement *shall* be made from fees collected from owners of property who did not contribute to the cost of the sewer when it was built. The contract *shall* describe the property that, in the opinion of the board of trustees, may reasonably be expected to use and benefit from the sewer and shall specify the amount of proportion of the cost of the sewer that is to be incurred primarily for the benefit of that property. The contract *shall* provide that the sanitary district *shall* collect the fees charged to owners of property not contributing to the cost of the sewer as a condition to the connection to and use of the sewer by the respective properties of each owner." (Emphasis added.) 70 ILCS 2805/8.1 (West 1998).

¶ 45 Here, there are no allegations that funds were ever taken directly from the District coffers to "reimburse" FMLP. Plaintiff makes much of the 2004 Construction and Reimbursement Agreement, under which FMLP "maintained the right to seek reimbursement" from the District pursuant to section 8.1, because it was anticipated that property owners within the Prairie Lakes

and Fox Creek subdivisions would benefit from FMLP's improvements to the 34 Acre Irrigation Parcel. However, the B&B defendants state that FMLP and its successors never *actually* sought or received any "reimbursement" directly from the District. This is consistent with the terms of the 2008 Norton Lakes Agreement, under which FMLP agreed to release the District from its obligations under the Construction and Reimbursement Agreement, and Harrison agreed to procure the amount of "wastewater and water capacity" from FMLP that was necessary to service the proposed 106 single-family lots. In this context, the District and FMLP treated the term "capacity" as being synonymous with the corresponding connection permits. The "capacity" that FMLP sold to Harrison apparently derived from the connection permits that had "inured to the benefit" of FMLP pursuant to the 2001 Amendment. If the Construction and Reimbursement Agreement had remained in place, then Harrison would have been required to purchase the permits directly from the District, and the District would have been required to "reimburse" FMLP using the procedures established in section 8.1. For reasons unknown (but likely financially motivated), FMLP elected to forego this arrangement and instead seek compensation directly from Harrison. Accordingly, the Norton Lakes Agreement called for Harrison to "receive" 106 water and wastewater connection permits upon the satisfaction of his obligations to FMLP, which included the payment of $2,650,000. Thus, FMLP procured the assignment of additional connection permits pursuant to the 2001 Amendment, and FMLP effectively sold 106 of these permits to Harrison in the form of "capacity."

¶ 46 As we explained above, plaintiff has alleged that the terms of the Norton Lakes Agreement violated the public trust doctrine, but these allegations are irrelevant for present purposes. The relevant inquiry here is whether FMLP or its successors ever received any "reimbursement" directly from the District. Because there are no allegations that this ever took

place, the restrictive provisions in section 8.1 do not apply. Therefore, the trial court correctly ruled that section 8.1 is not implicated by the District's assignment of connection permits to FMLP, nor is it implicated by the sale of connection permits by FMLP and its successors.

¶ 47 In sum, section 8 of the Sanitary District Act authorized the District to bargain away its right to charge property owners for access to the facilities that were constructed by FMLP. The enactment of section 8.1 in 1997 did nothing to limit the scope of the District's authorization under section 8. Therefore, there was no requirement that any of the agreements—formed before or after 1997—include "reimbursement" provisions pursuant to section 8.1. For these reasons, we affirm the trial court's declaratory rulings in its order dated March 17, 2016.

¶ 48 B. Motion to Dismiss

¶ 49 We must now consider the trial court's order on July 7, 2017, which dismissed plaintiff's fifth amended complaint with prejudice pursuant to sections 2-615 and 2-619(a)(9) of the Code (735 ILCS 5/2-615, 5/2-619(a)(9) (West 2010)). A section 2-615 motion tests the legal sufficiency of a complaint. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Rather than raising affirmative defenses, a section 2-615 motion disputes whether the pleadings contain sufficient facts which, if proven, could entitle the plaintiff to relief. *Grundhoefer v. Sorin*, 2014 IL App (1st) 131276, ¶ 10. Unlike a section 2-615 motion, a section 2-619(a)(9) motion admits the sufficiency of the complaint, but asserts an "affirmative matter" that defeats the claim. *Bjork*, 2013 IL 114044, ¶ 21. The purpose of a section 2-619(a)(9) motion "is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003). Our standard of review is *de novo* under either section of the Code. *Glasgow v. Associated Banc-Corp*, 2012 IL App (2d) 111303, ¶ 11.

¶ 50 At the outset, we observe that the bulk of the trial court's written order was dedicated to reciting this case's lengthy procedural history and relating the court's earlier declaratory rulings to plaintiff's allegations of fraud and civil conspiracy contained in Counts VI-VIII. However, there was little mention of plaintiff's declaratory requests in Counts I-V, which sought an accounting based on alleged violations of the public trust doctrine and conflicts of interest. The court reasoned that, because the District's assignment of connection permits to FMLP was not statutorily prohibited, "the declaratory requests have no basis." Respectfully, plaintiff's declaratory requests are deserving of more consideration. Just because the District was authorized to bargain away its right to collect connection fees does not mean the District had *carte blanche* to form agreements in violation of the public trust doctrine, or to disregard potential conflicts of interest among the trustees. With this in mind, we turn to the allegations in plaintiff's fifth amended complaint.

¶ 51 Counts I and II are for alleged violations of the public trust doctrine involving the District's water facilities and wastewater facilities, respectively. The public trust doctrine provides that certain types of public property are held in trust by the State for the benefit of the public. *Wade v. Kramer*, 121 Ill. App. 3d 377, 379 (1984). "[T]o state a cause of action under the public trust doctrine, facts must be alleged indicating that: certain property is held by a governmental body for a given public use; the governmental body has taken action that would cause or permit the property to be used for a purpose inconsistent with its originally intended public use; and such action is arbitrary or unreasonable, ***." *Paschen v. Village of Winnetka*, 73 Ill. App. 3d 1023, 1028 (1979).

¶ 52 Disregarding plaintiff's allegations that sections 8 and 8.1 of the Sanitary District Act prohibited FMLP from selling the connection permits for standalone fees, and construing his

remaining allegations in the light most favorable to him (see *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006)), plaintiff has stated valid causes of action under the public trust doctrine. He has alleged that the District held certain property by way of its water and wastewater connection permits and its water and wastewater capacity. He has alleged that, by assigning its connection permits to FMLP and recalculating its capacity for the purposes of maximizing FMLP's profit, the District used its property for purposes inconsistent with its originally intended use. Finally, plaintiff has alleged that, by failing to require adequate consideration in return, the District's assignment of connection permits to FMLP was arbitrary and unreasonable.

¶ 53 At the crux of plaintiff's lawsuit is his theory that it was "illegal" for FMLP and its successors to collect connection fees from property owners within the District. Although we have rejected this theory, it remains that plaintiff has raised some valid concerns. For instance, plaintiff points to a memorandum in the record that was drafted by Muscarello, the District's former legal counsel, in 1999. Muscarello advised the District's acting trustees that, even though FMLP paid for the construction of the necessary water and sewer facilities, the 1994 Agreement did not provide for the assignment of any more than 785 connection permits. Muscarello cautioned the trustees that, if they were to "give away" additional permits, they could be "sued by some interested party somewhere along the line." Undeterred, the trustees entered into the 2001 Amendment, which provided that any additional permits resulting from an IEPA reassessment of the District's capacity would "inure to the benefit" of FMLP. Thus, rather than allowing the District keep the additional permits, sell them to property owners, and retain the connection fees for the benefit of District taxpayers, the trustees simply assigned the additional permits to FMLP, and they allegedly did so without requiring any additional consideration. The B&B defendants argue that, because this decision did not conflict with the relevant provisions of

the Sanitary District Act, it automatically passes muster under the public trust doctrine. We disagree. Assuming the additional permits resulted from a proper IEPA reassessment, it has not been established that they were assigned to FMLP in a manner consistent with their originally intended use, nor has there has been an adjudication on the merits as to whether the 2001 Amendment was arbitrary and unreasonable.

¶ 54 Plaintiff also notes that there has been nothing to establish whether FMLP ever designated any connection permits to portions of the "subject realty" as described in Exhibit B to the 1994 Agreement. In this context, plaintiff's observation that the permits run with the land is well taken. The District is entitled to rely on FMLP's designations for the purpose of keeping track of the permits, and it could potentially exercise its option to purchase any unused permits back from FMLP after 20 years. While it is unclear precisely how many permits the District has assigned to FMLP, plaintiff asserts that FMLP and its successors have thus far sold more than 1000. Plaintiff acknowledges in his brief that 785 permits were assigned and sold during the development of the Fox Mill subdivision, but there is no indication that the remaining permits were ever designated in accordance with the 1994 Agreement. The parties have not yet addressed the extent of FMLP's designation requirement and we do not endeavor to do the same for the purposes of this appeal. In any event, plaintiff correctly asserts that the permits needed to be designated to the "subject realty" with *some* degree of specificity. As a result, FMLP ran the risk that the permits would be designated property that never sold; the permits were not chips to be cashed at the window of FMLP's choosing.

¶ 55 On remand, the parties will need to address these and any other issues that may arise during the course of discovery. We caution that nothing herein should be construed as a determination on the merits. Rather, the foregoing observations serve only to demonstrate that

plaintiff has alleged facts which, if proved, could entitle him to relief (see *Grundhoefer*, 2014 IL App (1st) 131276, ¶ 10), even though the allegations are unrelated to the relevant provisions of the Sanitary District Act. We therefore reverse the trial court's dismissal of Counts I and II.

¶ 56 Moving forward, Counts III and IV allege statutorily barred conflicts of interest under the Public Officers Prohibited Activities Act and the Sanitary District Act. To wit, section 3 of the Public Officers Prohibited Activities Act provides in relevant part:

> "No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote." 50 ILCS 105/3(a) (West 2008).

Similarly, section 3(d) of the Sanitary District Act provides as follows:

> "No trustee or employee of such sanitary district shall be directly or indirectly interested in any contract, work or business of the district, or the sale of any article, the expense, price or consideration of which is paid by such district; nor in the purchase of any real estate or property belonging to the district, or which shall be sold for taxes or assessments, or by virtue of legal process at the suit of such district." 70 ILCS 2805/3(d) (West 2008).

¶ 57 We agree with the B&B defendants that these statutory provisions do not apply to Muscarello. Although he was formerly retained as the District's attorney, he was never a public officer or an employee of the District.

¶ 58 However, plaintiff has sufficiently alleged that the trustee defendants violated the statutory provisions by approving the District's agreements with FMLP without disclosing their

indirect interests in those same agreements. Plaintiff has alleged that: (1) Brizuela is married to Blood's daughter, who has an ownership interest in FMLP and B&B Enterprises; (2) Skidmore's wife was formerly an employee of B&B Enterprises; and (3) Sindelar was, himself, formerly employed by B&B Enterprises. According to plaintiff, FMLP and its successors have received a financial windfall through the sale of connection permits, and a portion of that windfall was indirectly passed to the trustee defendants by virtue of their familial and professional relationships with FMLP.

¶ 59 The B&B defendants rely on *People v. Simpkins*, 45 Ill. App. 3d 202 (1977), for their argument that none of the trustee defendants' alleged relationships qualify as violations of the statutes in question. In *Simpkins*, the defendant was indicted for violating section 3 of the Corrupt Practices Act, which provided that "[n]o person holding any office *** may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote." *Id.* at 204 (quoting Ill. Rev. Stat. 1975, ch. 102, par. 3. The indictment alleged that the defendant, the mayor of Hurst, was in violation of the statute because his wife was being paid from the city's treasury under the terms of her contract of employment as the clerk of the city's water department. *Simpkins*, 45 Ill. App. 3d at 204-05. The appellate court affirmed the trial courts' dismissal of the indictment, holding that the wife's employment was not the type of direct or indirect interest contemplated by the statute. "We interpret 'indirect interest' to refer to the interest of the official, such as ownership of stock or a beneficial interest in a trust, not the individual interest of another to whom the official is related. The language is intended to prevent imaginative schemes by which an official might veil his interest from public view." *Id.* at 208-09.

¶ 60 Contrary to the argument of the B&B defendants, *Simpkins* does not stand for the broad proposition that a public official need never disclose a spouse's interest. The *Simpkins* court said nothing to detract from "the general rule that the wife's interest is not necessarily the husband's interest, *provided the contract is not a mere subterfuge for his own pecuniary interest*." (Emphasis added.) *Id.* at 208. Here, there has been nothing to establish whether the District's agreements with FMLP were merely subterfuge for the trustee defendants' own pecuniary interests. Furthermore, we note that Plaintiff has not alleged the type of innocuous conflict that was considered in *Simpkins*, but has instead alleged the type of "imaginative scheme" that the *Simpkins* court described being as the focus of the conflict of interest statutes. See *Simpkins*, 45 Ill. App. 3d at 209.

¶ 61 We additionally note that the articulated purpose of the official misconduct and conflict of interest statutes is to keep the loyalties of public officials to their public trust undivided and to compel them to act in a lawful manner while acting in their official capacities. *Wright v. City of Danville*, 174 Ill. 2d 391, 404 (1996). "Obviously, the mere fact that a governmental body may be interested in acquiring property in which a public official has a personal interest does not, by itself, invoke the sanctions of the statute. However, if the interest of the governmental body intensifies to the extent that serious negotiations and discussions regarding the property ensue and that public official has an opportunity to influence the negotiations in any way, the statute is violated." *People v. Savaiano*, 66 Ill. 2d 7, 15 (1976).

¶ 62 Here, the statutes in question are not invoked by the mere fact that the District was interested in acquiring property—the water and wastewater facilities—in which the trustee defendants allegedly had indirect interests. However, because plaintiff has not yet had an opportunity to conduct discovery, there is no way of knowing whether the trustee defendants

were indirectly interested to the extent that they influenced the serious negotiations between the District and FMLP. See *Savaiano*, 66 Ill. 2d 7, 15 (1976). For all of these reasons, we reverse the trial court's dismissal of Counts III and IV.

¶ 63 Count V seeks an accounting of all financial transactions relating to the construction of the water and wastewater facilities and the collection of fees associated with those facilities. To state a cause of action for an accounting, the complaint must establish that there is no adequate remedy at law and one of the following: (1) a breach of a fiduciary relationship between the parties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which are of a complex nature. *Landers v. Fronczek,* 177 Ill.App.3d 240, 245 (1988). Here, with respect to Counts I-IV, plaintiff has sufficiently alleged that he lacks an adequate remedy at law and a need for discovery. We therefore reverse the trial court's ruling with respect to Count V.

¶ 64 Although we agree with plaintiff that his allegations are sufficient with respect to Counts I-V, we affirm the trial court's ruling with respect to Counts VI-VIII.

¶ 65 Count VI is for common-law fraud. To state a cause of action for common-law fraud, the pleadings must satisfy the following elements: (1) a false statement of material fact was made; (2) the defendant knew the statement was false; (3) the defendant intended that the statement induce the plaintiff to act; (4) the plaintiff relied upon the truth of the statement; and (5) the plaintiff suffered damages from his reliance on the statement. *Aasonn, LLC v. Delaney*, 2011 IL App (2d) 101125, ¶ 28. "A complaint for common-law fraud 'must allege, with specificity and particularity, facts from which fraud is the necessary or probable inference, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made.' " *Id* (quoting *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496-97 (1996)).

¶ 66 We begin by addressing plaintiff's allegation that "[t]he corrupt trustees, at the request of and with the assistance of Muscarello, Griffin, Boose, and Blood, submitted false financial disclosures with Kane County in that they failed to disclose personal and financial relationships with the B&B Defendants and others." This allegation concerns the trustee defendants' respective statements of economic interest, filed in accordance with the Illinois Governmental Ethics Act (5 ILCS 420/1-101, *et seq*. (West 2008)). However, the Illinois Governmental Ethics Act provides for sanctions that are criminal in nature, and nothing therein creates a private right of action for the willful filing of a false statement of economic interests. *Crudup v. Sims*, 292 Ill. App. 3d 1075, 1079 (1997); 5 ILCS 420/4A-107 (West 2008) ("Any person required to file a statement of economic interests under this Article who willfully files a false or incomplete statement shall be guilty of a Class A misdemeanor."). Thus, plaintiff's allegation that the plaintiffs willfully filed false statements of economic interests cannot serve as a basis for his cause of action for common-law fraud.

¶ 67 Aside from his allegations of "false financial disclosures," plaintiff makes the following specific allegations of fraudulent conduct. Each of the defendants (aside from the District) knew that the District's assignment of connection permits to FMLP was illegal but made false statements to the contrary. Boose and Blood paid bribes and kickbacks to the "corrupt trustees" (the trustee defendants) for the purpose of influencing their decisions to approve the illegal agreements. The B&B defendants also "concealed their wrongful conduct by the use of intimidation," in that citizens who dared question the validity of the agreements were threatened with lawsuits. And each of the defendants (aside from the District) made "continuous and repeated deceptive omissions" by failing to submit "proper public records of financial transactions" relating to the connection fees.

¶ 68 These allegations are obviously undermined by our holding that the agreements in question did not violate the relevant provisions of the Sanitary District Act. To the extent that they are unrelated to the Sanitary District Act, plaintiff's allegations are not made with the requisite "specificity and particularity." See *Connick*, 174 Ill. 2d at 496-97. As plaintiff has been given several opportunities to amend his complaint, the trial court was within its discretion to dismiss Count VI for common-law fraud. See *Schiller v. Mitchell*, 357 Ill. App. 3d 435, 452-53 (2005).

¶ 69 We also affirm the trial court's ruling with respect to Counts VII and VIII for civil conspiracy. "The elements of civil conspiracy are: (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 150067, ¶ 62. Although we have rejected plaintiff's theory that the agreements in question violated the relevant provisions of the Sanitary District Act, this does not foreclose the possibility that the various defendants could have nonetheless conspired to carry out a violation of the public trust doctrine. However, to the extent that plaintiff's allegations are considered in the context of the public trust doctrine, they are lacking in one crucial respect.

¶ 70 Our supreme court has emphasized that the critical component of a civil conspiracy is the existence of a tortious or unlawful act, rather than the agreement itself.

> "While the agreement is a necessary and important element of a cause of action for civil conspiracy, it does not assume the same importance as in a criminal action. An agreement to commit a wrongful act is not a tort, even if it might be a crime. [Citation.] A cause of action for civil conspiracy exists only if one of the parties to the agreement

> commits some act in furtherance of the agreement, which is itself a tort. [Citations]. Thus, the gist of a conspiracy claim is not the agreement itself, but the tortious acts performed in furtherance of the agreement." *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 62-63 (1994).

¶ 71 Here, plaintiff alleges that the defendants aside from the District "met and devised [plans] to wrongfully and illegally deprive [plaintiff], [the District], and the public of their money and property for the personal financial gain of each of them." As set forth above, with respect to the public trust doctrine, plaintiff has also alleged that the District wrongfully: (1) assigned its connection permits to FMLP; (2) recalculated its capacity for the purposes of maximizing FMLP's profit; and (3) used its property for purposes inconsistent with its originally intended use. See *supra*, ¶ 52. However, plaintiff's allegations of tortious acts relate to his faulty theory that the defendants carried out a common-law fraud when they knowingly made false statements that the agreements in question were in compliance with the Sanitary District Act, and then took unlawful actions to conceal their fraudulent arrangement. Because there was no violation of the Sanitary District Act, plaintiff cannot sustain his allegations that the defendants committed overt tortious acts in furtherance of accomplishing an unlawful purpose. Additionally, regarding his allegations under the public trust doctrine, plaintiff has failed to allege that the defendants committed overt tortious acts in furtherance of accomplishing a lawful purpose by unlawful means. Therefore, Counts VII and VIII were properly dismissed pursuant to section 2-619(a)(9) of the Code.

¶ 72 Before we conclude, we note that defendants (aside from the District) have argued that, because plaintiff is attacking the validity of two annexation agreements (the 1994 Agreement and the Norton Lakes Agreement), he can only obtain his requested relief through a *quo warranto*

proceeding. See *People ex rel. Village of Northbrook v. City of Highland Park*, 35 Ill. App. 3d 435, 439 (1976) ("It has been held repeatedly that the exclusive method of attacking the validity of an annexation is by *quo warranto* proceedings."). Plaintiff does not address this issue in his reply brief, but in his response to the combined motions to dismiss, he argued that there is no need for a *quo warranto* action, because "no legal challenge is being made against the 1994 Agreement," and he is merely seeking a finding that the Norton Lakes Agreement is void due to the conflicts of interest among the trustees defendants. See *In re Annexation to City of Prospect Heights*, 111 Ill. App. 3d 541, 543 (1982) (observing that a *quo warranto* action is not required when an annexation is void from its inception). However, plaintiff went on to argue that "[e]ven if the [Norton Lakes Agreement] survives, it makes no difference: It is the stolen money which [plaintiff] is ultimately seeking under the public trust doctrine." Along those same lines, plaintiff maintained that his lawsuit was "based primarily upon the premise that [the B&B defendants] stole over $12 million from the public coffers, by the use of fraud and deception, and in violation of the law." These latter statements indicate that, notwithstanding his conflict of interest arguments, plaintiff is indeed attacking the validity of the annexation agreements.

¶ 73 The *quo warranto* issue is a microcosm of the difficulties that have plagued this case for the better part of the past decade. The defendants waited nearly seven years to raise it, and plaintiff responded with a puzzling legal argument. In his response to the combined motions to dismiss, plaintiff requested leave to amend his complaint to add a *quo warranto* action in the event that the *trial court* deemed it necessary. On remand, if *plaintiff* determines that a *quo warranto* action is necessary in light of this disposition, then the trial court shall have discretion in determining whether to allow an amended pleading for that purpose.

¶ 74 III. CONCLUSION

¶ 75 For the reasons stated, the trial court's rulings are affirmed in part, reversed in part, and remanded with instructions for further proceedings.

¶ 76 Affirmed in part, reversed in part, and remanded with instructions.