

IN THE SUPREME COURT OF PENNSYLVANIA

FRIENDS OF DANNY DEVITO,	:	
KATHY GREGORY,	:	
B&J LAUNDRY, LLC	:	No. 68 MM 2020
BLUEBERRY HILL PUBLIC GOLF	:	
COURSE & LOUNGE, and	:	
CALEDONIA LAND COMPANY,	:	
Petitioners	:	SECOND SUPPLEMENTAL
	:	APPLICATION FOR RELIEF
	:	BY BLUEBERRY HILL PUBLIC GOLF
v.	:	COURSE & LOUNGE
	:	
TOM WOLF, GOVERNOR	:	
AND RACHEL LEVINE,	:	
SECRETARY OF PA.	:	
DEPARTMENT OF	:	
HEALTH,	:	
	:	
Respondents	:	

SECOND SUPPLEMENTAL APPLICATION FOR RELIEF  
BY BLUEBERRY HILL PUBLIC GOLF COURSE & LOUNGE

COMES NOW Petitioner, Blueberry Hill Public Golf Course & Lounge, by and through its attorneys, Scaringi Law, pursuant to Rule 123 of the Pennsylvania Rules of Appellate Procedure, and respectfully represent:

1. On March 24, 2020, Petitioners filed their Emergency Application for Extraordinary Relief (the Petition), challenging Governor Tom Wolf’s order of March 19, 2020 barring most businesses in Pennsylvania from accessing their physical locations (the Order).
2. On March 26, 2020, the Respondents filed their Answer.

3. On March 26, 2020, Petitioners filed an Ancillary Application for Relief requesting expedited briefing and oral arguments.
4. On March 26, 2020, Petitioners filed a Supplemental Application for Relief renewing their request for briefing.
5. On March 27, 2020, this Court granted Petitioners' request for briefing and set briefing deadlines.
6. On March 31, 2020, Petitioners filed their Brief.
7. On April 2, 2020, Petitioners Blueberry Hill Public Golf Course & Lounge and Kathy Gregory filed Supplemental Applications for Relief.
8. On April 3, 2020, Respondents filed their Brief.
9. On April 3, 2020, the City of Philadelphia filed an Application for Leave to file Amicus Brief and corresponding Brief.
10. On April 3, 2020, the Pennsylvania Association of Realtors filed an Application for Leave to File Amicus Curiae Brief and corresponding Brief.
11. On April 3, 2020, Respondents filed an Answer to Petitioners' Supplemental Applications for Relief.
12. On April 6, 2020, the City of Pittsburgh filed an Application for Leave to File Nunc Pro Tunc Amicus Brief.
13. On April 6, 2020, this Honorable Court issued an Order granting the City of Pittsburgh's Application and receiving its Brief.

14. On April 8, 2020, Petitioner Friend of Danny DeVito filed a Supplemental Application to supplement the record with an additional averment of fact.

15. Since the filing of the Petitioners' Petition on March 24, 2020, new facts have arisen that are material and relevant thereto.

16. As averred previously, on March 23, 2020, Petitioner Blueberry Hill, a golf club and course, submitted a waiver application to the Department of Community and Economic Development (DCED) seeking a waiver from the Governor's March 19, 2020 Business Closure Order (the Order) closing all Pennsylvania businesses, including golf courses, the Governor deemed to be non-life-sustaining.

17. Petitioner has still not received a response from DCED. And, if the Governor denies this waiver request, Petitioner has no right to further administrative review or judicial review, according to the Governor.

18. The Governor's Order did not provide an explanation why he closed all Pennsylvania golf courses other than by presumably placing golf courses in the "non-life-sustaining" category entitled "Other Amusement and Recreation Industries."

19. The term "life-sustaining" does not appear in any statute or regulation cited by the Governor in support of his Order, or otherwise; so Petitioner is left to

wonder what life-sustaining and non-life-sustaining mean and why the Governor determined golf clubs to be non-life-sustaining.<sup>1</sup>

20. Petitioner believes and therefore avers that other golf clubs have applied for a waiver from the Order and have been denied. However, the waiver denials do not explain the reason for the denial or what things the golf clubs can do to be considered a life-sustaining business in the mind of the Governor.

21. Thus, to date, Petitioner has had to guess at why it has been deemed non-life-sustaining by the Governor.

22. On April 8, 2020, Petitioner indirectly received an answer when the Governor, during a press conference, explained why he considers fishing to be life-sustaining but golfing to be non-life-sustaining:

The Fish & Boat Commission made the decision to open trout season, I think, early. And the idea was that that's something people can do ***individually. Unlike golf, where you have to go and pick up your cards and maybe actually congregate with other people.*** [Fishing] is something you can do, like hiking, you can do outside and be on your own.

And one of the concerns I think I have, and I think we all need to have, is for the mental well-being of Pennsylvanians as we go through this. Staying at home is the best possible thing. Staying away from other people is what we need to do to keep this virus from spreading... And going out in the middle of a stream and trout fishing by yourself is something that could really be

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<sup>1</sup> The Governor's definition of "life-sustaining," which is, "businesses that are not critical to sustaining life in a pandemic," is circular. See <https://www.governor.pa.gov/newsroom/gov-wolf-secretary-levine-provide-updated-guidance-stress-need-for-compliance-as-cases-rise/>

good for your mental health and not contribute one bit to the spread of this virus.”<sup>2</sup>

23. Thus, Petitioner concludes that the Governor has closed its operations, as well as all golf clubs across Pennsylvania, and refuses to open their operations because the Governor believes:<sup>3</sup>

- a. golfing is not or cannot be done on an individual basis;<sup>4</sup>
- b. COVID-19 may be spread via golfer’s score cards;
- c. golfers may congregate at the golf club.

24. Petitioner has already informed the Governor via its previous filings in the within case of the various steps it can take to prevent the spread of COVID-19, should it be permitted to reopen, some of which are restated below:

- a. Petitioner is prepared to assign one patron to one golf cart and to sanitize the golf cart after each use;

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<sup>2</sup> <https://www.pennlive.com/sports/2020/04/is-trout-fishing-a-more-socially-distanced-sport-than-golf-no-but-tom-wolf-probably-has-other-concerns-about-golfers.html>

<sup>3</sup> The Governor also maintains that fishing is good for one’s mental health and implies that golfing is not. Although the undersigned counsel has had the occasion to agree with the Governor that golfing can be harmful to one’s mental health, he also maintains there are as many frustrated fishermen who didn’t get a bite as there are golfers who missed that putt. In any event, the Governor’s goal of fostering mental health by allowing fishing is equally achievable by allowing golf. A walk outdoors, on a golf course by oneself or a few yards away from a golfing associate fosters good mental health and would “not contribute one bit to the spread of this virus.”

<sup>4</sup> However, the undersigned counsel represents he prefers to golf by himself or with his son and not in groups.

b. Petitioner is prepared to instruct golfers (whether walking or riding in separate carts) to remain apart from other golfers at all times while engaging in golf;

c. Petitioner is prepared to follow the United States Golf Association (USGA) recommendations for safe golf in the face of COVID-19, including removing of rakes from sand traps and other recommendations published by the USGA as follows:

<https://www.usga.org/content/usga/home-page/rules-hub/rulesarticles/covid-19-rules-and-handicapping-faqs.html>

25. Petitioner respectfully represents that the Governor's concern about "score cards" is addressed by the fact that many golfers keep score on apps on their personal smart devices. Also, many golfers are happy to simply play golf and exercise without keeping score. Golfers who wish to keep score can easily do so on their own piece of paper (each hole at Petitioner's course is already equipped with a sign showing "par" for the hole). Furthermore, Petitioner can simply eliminate the use of paper score cards in order to alleviate the Governor's concerns.

26. Petitioner has already addressed the Governor's concerns about congregation by adopting social distancing and one person per cart rules, and take-out dining only at Petitioner's restaurant, should it be permitted to reopen. The Governor has permitted all restaurants in Pennsylvania to employ take-out dining;

Petitioner wishes to be treated like all other restaurants in Pennsylvania pertaining to dining. Furthermore, golfing if done in groups is not done in a group of more than four, whereas the governments' various rules or policies against groups is either at ten or more. News reports from PA's April 8, 2020 trout season-opening show fishermen shoulder to shoulder.<sup>5</sup> Petitioner can do a much better job of accommodating social distancing than as represented in the fishing pictures as follows:

- a. Golfers (even when in a group of 4) are spread apart on the fairway simply by the way golf is played;
- b. At the tee and green when golfers are nearer one another, the golf game is in no way impeded if the golfers stay several yards apart;
- c. No common touching of objects is required to play golf;
- d. Each golfer uses their own clubs and ball;
- e. Under USGA recommended accommodations sand-rakes will not be used because sand traps will be "free-lift" areas;
- f. Similarly, the "flags" on the green will not have to be touched because under the accommodations they will be left in place at all times;
- g. No other objects are required to be touched to play golf;

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<sup>5</sup> <https://www.pennlive.com/coronavirus/2020/04/anglers-cast-snag-into-pa-fish-and-boat-commission-hopes-for-social-distancing-in-at-least-one-spot.html>

h. Petitioner will limit payment to credit cards; Petitioner owns credit card devices that do not require common touching of the credit cards.

27. Petitioner respectfully represents that the Order to close all Pennsylvania golf courses is unreasonable considering the ease with which COVID-19 prevention and mitigation protocol can be incorporated by Pennsylvania golf clubs.

28. Pennsylvania is in the minority of states with its order completely closing golf courses for play. Neighboring states Ohio, New York and West Virginia permit golfing provided COVID-19 protocol are put in place, with West Virginia deeming golf to be essential for exercise.<sup>6</sup> (However, Maryland and New Jersey have closed all golf courses in their states).<sup>7</sup>

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<sup>6</sup> However, on April 9, 2020, New York State issued a document entitled, “GUIDANCE ON EXECUTIVE ORDER 202.6 GUIDANCE FOR DETERMINING WHETHER A BUSINESS ENTERPRISE IS SUBJECT TO A WORKFORCE REDUCTION UNDER RECENT EXECUTIVE ORDERS.” This document now states, “golf courses are not essential.” Thus, some are interpreting this means that golf courses must now close after being permitted to remain open since the beginning of the issuance of the business closure and stay-at-home orders. However, the New York Metropolitan Golfing Association issued a statement on April 9, 2020 stating, “Nothing in today’s guidance supports the conclusion that golf, as a pure recreational activity, played in accordance with the CDC’s social distancing guidelines and other health safeguards, is prohibited or that private golf courses must lock their gates to members simply carrying their own bags or walking for exercise.” See <https://nypost.com/2020/04/09/no-more-golfing-in-new-york-during-coronavirus-pandemic/>

<sup>7</sup> <https://thegolfnewsnet.com/golfnewsnetteam/2020/04/07/are-golf-courses-open-where-you-live-golf-course-openings-and-closures-by-all-50-states-118742/>



29. The golf industry is significant to Pennsylvania’s economy. A report indicates that when the total economic impact of Pennsylvania’s golf-related activities is considered, the golf industry generated \$4.8 billion of direct, indirect and induced economic output, and nearly 56,000 jobs with \$1.4 billion of wage income in 2014 in Pennsylvania. Further, according to that report, “the continued health and growth of the golf industry has a direct bearing on future jobs, commerce, economic development, and tax revenues for a large number of Pennsylvania’s communities and industries.”<sup>8</sup>

30. As has been presented and argued in the prior pleadings and Petitioners’ Brief, the Governor claims he has the power to close all Pennsylvania businesses, including golf courses, pursuant to his police power. Further, this Court has cited the Supreme Court of the United States for the police powers test:

To justify the State in thus interposing its authority in behalf of the public, it must appear, -- first, that the interests of the public . . . require such interference; and, second, that the means are ***reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.***

*Lawton v. Steele*, 152 U.S. 133, 137 (1894) as cited by *Nat'l Wood Preservers v. Commonwealth Dep't of Env'tl. Res.*, 489 Pa. 221, 234 (1980) (emphasis added).

31. Assuming for the sake of argument that the Governor has the power through any of three statutes he has cited, which Petitioner denies, to close

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<sup>8</sup> <http://wearegolf.org/wp-content/uploads/2019/01/Pennsylvania-Golf-State-Report-2014.pdf>

Petitioner's business, such closure still must be reasonably necessary in order to attain the goal of preventing the spread of COVID-19 and it must not be unduly burdensome to the businesses. See *Nat'l Wood Preservers v. Commonwealth Dep't of Envtl. Res.*

32. The Order is not reasonably necessary considering golf courses can and will put into place COVID-19 prevention and mitigation protocol, including eliminating paper score cards and prohibiting congregating.

33. Further the Order completely closing all golf courses is unduly oppressive. It eliminates any possibility of golf clubs generating any revenues at all, while they are still saddled with debts, expenses and other payment obligations, as Petitioner outlined in his first supplemental application.

34. Lastly, although the public has an interest in containing the spread of COVID-19, the public also has an interest in the right to engage in recreation, including golf; the public also has an interest in the operation of an industry that generates nearly five billion in revenues a year to the Pennsylvania economy, generates substantial tax revenues to the government, and provides over fifty thousand jobs for Pennsylvanians.

35. Also, as has been previously argued in this case, governmental decisions cannot be "arbitrary, capricious and prejudicial to the public interest." See *Flynn-Scarcella v. Pocono Mt. Sch. Dist.*, 745 A.2d 117, 118 (Pa. Commw. Ct.

2000). According to *Flynn-Scarcella*, when a decision is based on random or convenient selection or choice rather than on reason or nature, then that decision is defined as arbitrary. The Governor's decision to deem the recreational sport of fishing as life-sustaining and the recreational sport of golfing as non-life-sustaining is arbitrary. It is even more arbitrary considering all the COVID-19 prevention and mitigation steps that can be easily employed by golf courses across Pennsylvania.

36. Petitioner requests that this Honorable Court order the Governor to revise his Order and move all golf courses from the non-life-sustaining to life-sustaining lists.

37. Petitioner makes this request on behalf of itself and all golf courses in Pennsylvania.

WHEREFORE, Petitioner respectfully requests that this Court order and decree that the Governor transfer Petitioner and all golf course businesses from the non-life-sustaining list to the life-sustaining list and that the Governor may include a proviso imposing reasonable restrictions on golf course operations designed to combat the spread of the viral illness COVID-19 that are the same or substantially similar to those imposed upon golf clubs in Ohio or as recommended by the United States Golf Association.

Respectfully submitted,

/s/ Marc A. Scaringi  
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Date: April 10, 2020

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DEPARTMENT OF :  
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CERTIFICATE OF SERVICE

I, Deborah A. Black, Paralegal for Scaringi Law, do hereby certify that I served a true and correct copy of the *Second Supplemental for Relief by Blueberry Hill Public Golf Course and Lounge*, in the above-captioned action, upon the following via PACfile System, to:

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Date: April 10, 2020

/s/ Deborah A. Black

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**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Petitioners' Counsel

Signature: /s/ Marc A. Scaringi

Name: Marc A. Scaringi, Esquire

Attorney No. (if applicable): 88346

Date: April 10, 2020