

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

68 MM 2020

FRIENDS OF DANNY DEVITO, KATHY GREGORY,
B&J LAUNDRY, LLC, BLUEBERRY HILL PUBLIC GOLF COURSE &
LOUNGE, and CALEDONIA LAND COMPANY,

Petitioners,

vs.

TOM WOLF, GOVERNOR AND RACHEL LEVINE,
SECRETARY OF PA. DEPARTMENT OF HEALTH,

Respondents.

**BRIEF OF *AMICUS CURIAE* PENNSYLVANIA
ASSOCIATION OF REALTORS®**

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Date: April 3, 2020.

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Statement of Interest¹

The Pennsylvania Association of Realtors® (“PAR”) files this brief as an *Amicus Curiae* in support of the Court striking down all orders of Respondent prohibiting across-the-board operation of “Offices of Real Estate Agents and Brokers” and “Activities Related to Real Estate” due to the COVID-19 outbreak. PAR is sensitive to the public health crisis now facing Pennsylvania, but must urge the Court to alleviate the severe threat to the critical infrastructure of the Commonwealth from Respondents’ restrictions of the operations of its members as somehow not “life sustaining.”

To the contrary, the continued buying and selling of real estate is a critical part of the continued flow of life even in the midst of the present challenging state of affairs. Leaving home buyers and sellers in limbo and potentially without shelter during the COVID-19 health crisis is counterproductive to the Commonwealth’s stated goal of maintaining the health and safety of the Commonwealth’s residents.

Chartered in 1920 as the Pennsylvania Real Estate Association, PAR today is one of the largest trade associations in the Commonwealth, with a mission to advocate for its more than 35,000 professional members throughout Pennsylvania.

¹ No person other than PAR, its members or counsel have (i) paid in whole or in part for the preparation of the *amicus curiae* brief, or (ii) authored in whole or in part the *amicus curiae* brief.

PAR is a non-profit corporation committed to upholding a strict code of professional ethics for the betterment of Pennsylvania Realtors® and the public they serve. This high standard of professional conduct also enables the safe and efficient transaction of business, as well as the advancement of civil development and economic growth. Members of PAR protect the interests of their clients by promoting home-ownership, encouraging investment in real estate, and defending the right to own and use private property.

Consumers' purchase of residential real estate often represents the largest financial investment in their life experience, and the aforesaid complexities of the transaction are relatively unknown or mysterious to the average consumer. PAR members include brokers, many of whom own and/or operate ancillary businesses related to the real estate transaction, including mortgage, title and insurance companies, along with individual real estate agents and real estate appraisers. The real estate market involves many service providers that are necessary to complete a transaction.

Questions Presented

1. Whether Respondents' Shutdown of "Offices of Real Estate Agents and Brokers" and "Activities Related to Real Estate" as Non-Life Sustaining Businesses Arbitrarily Denies Life-Sustaining Services to Pennsylvanians and Contradicts Federal Guidance Allowing Such Operations.
2. Whether the Governor's Waiver Application Process is Inadequate to Guarantee Continuation of Life-Sustaining Services Because of Undue Delay and the Administration's Announcement of the Sudden Termination of Such Process, Thereby Potentially Diverting Thousands of Further Requests for Waiver to the Unified Judicial System Without the Benefit of Any Prior Administrative Review.

Summary of the Argument

The membership of the Pennsylvania Association of Realtors® offers vital, life-sustaining services to millions of Pennsylvanians. Governor Tom Wolf's administration has improperly prohibited the offering of life-sustaining real estate and related services by PAR's membership. Such denial, while ostensibly made in conjunction with the guidance from the U.S. Department of Homeland Security Cybersecurity & Infrastructure Security Agency, is in fact in contradiction of such guidance. This arbitrarily denies to millions of Pennsylvanians life-sustaining services that must be maintained even in time of public health crisis.

The Wolf administration's undue delay in processing requests for waiver from its orders shutting down all businesses except those arbitrarily designated "life sustaining" has rendered the present administrative process utterly ineffective. Further, the administration's position that it has the authority to create and destroy such administrative review process at any moment and at will, thereafter leaving tens of thousands of PAR members without any avenue of administrative or even judicial relief from the shutdown of their businesses, is contrary to the Pennsylvania Constitution and risks opening the floodgates to litigation in the Unified Judicial System.

Argument

I. Respondents' Shutdown of "Offices of Real Estate Agents and Brokers" and "Activities Related to Real Estate" as Non-Life Sustaining Businesses Arbitrarily Denies Life-Sustaining Services to Millions of Pennsylvanians and Contradicts Federal Guidance Allowing Such Operations

On March 19, 2020 Respondents Governor Tom Wolf ("Wolf") and Secretary of Health Dr. Rachel Levine ("Levine") issued an executive order that prohibited the operation of all but "life sustaining" businesses throughout the Commonwealth of Pennsylvania ("Business Shutdown Order").² Respondents recognized certain businesses as "life sustaining" but denied such recognition to others on a list promulgated by the Wolf Administration ("Approved Business List").³ The Approved Business List has been revised several times since its initial promulgation on March 19, 2020 but despite such revisions, continues to prohibit the membership of the Pennsylvania Association of Realtors® ("PAR") from providing services essential to the lifeblood of the people of Pennsylvania, significantly impairing Pennsylvanians' ability to meet the "shelter" component of the "food, clothing and shelter" triad of life necessities.

² <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order> (accessed April 3, 2020).

³ See List of Life-Sustaining Businesses (revised as of March 24, 2020): https://www.scribd.com/document/452416026/UPDATED-2-30pm-March-24-2020-Industry-Operation-Guidance#fullscreen&from_embed.

But you don't just have to take PAR's word for it. The United States government agrees.

On March 28, 2020, the U.S. Department of Homeland Security Cybersecurity & Infrastructure Security Agency ("CISA") issued an "Advisory Memorandum on the Identification of Essential Critical Infrastructure Workers During COVID-19 Response" ("CISA Advisory").⁴ The CISA Advisory expressly includes "[r]esidential and commercial real estate services, including settlement services" within the ambit of the "Essential Critical Infrastructure Workforce." *Id.*

Strangely, Respondents have stated the following about its Business Shutdown Order and any exemptions that might be granted therefrom.

In making exemption determinations, the Department of Community and Economic Development (DCED) is maintaining consistency with an advisory issued by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency.⁵

Such is clearly not the case, because as noted *supra*, the current version of the Approved Business List does not extend to numerous services offered by PAR members that the CISA Advisory has identified as critical infrastructure to Pennsylvania's ongoing wellbeing during the current health crisis. This is a critical

⁴ *See*

https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf

⁵ *See* <https://www.scribd.com/document/452553495/UPDATED-4-00pm-April-1-2020-Life-Sustaining-Business-FAQs> (last accessed 4/3/2020).

point given that CISA guidance was utilized to create the existing list of life-sustaining businesses and is being used as the basis for current waiver process administered by the Pennsylvania Department of Community and Economic Development (“DCED”). Reclassification of the operations of PAR members as life-sustaining is both justified and imperative at this time. At the time of the writing of the present brief, such has not happened, all to the significant detriment of Pennsylvanians and their life sustaining need for housing.

While the CISA Advisory classifies “[r]esidential and commercial real estate services, including settlement services” as essential, the CISA Advisory also identifies the continued labor of the following workers providing real estate-related services as essential,

- Workers responsible for the leasing of residential properties to provide individuals and families with ready access to available housing.
- Workers responsible for handling property management, maintenance and related service calls who can coordinate the response to emergency “at-home” situations requiring immediate attention, as well as facilitate the reception of deliveries, mail and other necessary services.
- Workers performing housing construction-related activities to ensure additional units can be made available to combat the nation’s existing housing supply shortage.
- Workers supporting the construction of housing, including those supporting government functions related to the building and development process, such as inspections, permitting and plan review services that can be modified to protect the public health,

but fundamentally should continue and serve the construction of housing (e.g., allow qualified private third-party inspections in case of government shutdown).

- Staff at government offices who perform title search, notary and recording services in support of mortgage and real estate services and transactions.⁶

As noted in its Statement of Interest, *supra*, PAR members include brokers, many of whom own and/or operate ancillary businesses related to the real estate transaction, including mortgage, title and insurance companies, along with individual real estate agents and real estate appraisers. The real estate market involves many service providers that are necessary to complete a transaction.

Even more arbitrary is the fact that although the Wolf administration has justified the Approved Business List by appealing to the Federal CISA list from March 19, 2020, updated on March 23, 2020, which doesn't include real estate (CISA update of March 28, 2020),⁷ it has not continued to adopt updates as CISA guidance has been updated. And this despite the fact that the Approved Business List was updated on April 1, 2020 to "clarify" that the "traveler accommodation" category includes hotels/motels but not short term residential rentals.⁸

⁶ See

https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf

⁷ See <https://www.scribd.com/document/452553495/UPDATED-4-00pm-April-1-2020-Life-Sustaining-Business-FAQs-Q1>

⁸ See <https://www.scribd.com/document/452553026/UPDATED-4-00pm-April-1-2020-Industry-Operation-Guidance>, p. 6.

The Wolf administration has given no reason for not adopting the updated list, and several states have moved real estate services into an approved category as a result of the CISA updates.⁹ Almost all states allow some sort of real estate services, with the California guidelines serving as a model that Pennsylvania could use as a working base to develop guidelines appropriate to our state.

PAR is committed to working with the Wolf administration to develop a comprehensive safety and risk-mitigation strategy for moving the industry forward in a manner that protects the community and those involved in providing and receiving real estate services. PAR's goal is to minimize in-person services wherever possible and implement appropriate sanitation and social distancing practices where such in-person services are necessary.

There are also continuity-of-government concerns that are critical to the Commonwealth's fiscal health as a body politic. As the Commonwealth struggles to maintain a continued life-sustaining existence following the extraordinary measures that have been taken, the housing and financial services industries provide critical economic stimulus for Pennsylvania. The real estate industry attributes \$129.4 billion to the state's economy or 16.4% of the gross state product

⁹ *See* <https://www.car.org/en/aboutus/mediacenter/news/essentialservice?src=redalert>; <https://www.nysar.com/covid-19-resources/nysar-updates/esd-deems-specific-activities-essential/>

annually. The realty transfer tax contributed \$534 million in revenue to the state's 2018-19 budget, plus hundreds of millions of dollars to local governments and school districts. Prior to the COVID-19 crisis, the realty transfer tax revenue was \$36.1 million in February, \$9.5 million above estimated revenue, bringing the fiscal-year total to \$366.5 million, which is \$14.5 million, or 4.1 percent, more than anticipated.

With interest rates at or near all-time lows, the volume of mortgage refinancing has increased sharply, allowing families to reduce monthly payments and providing billions of dollars of additional disposable income to families in need. In addition, many families in recent months have taken advantage of the low rates to purchase a home. All of these activities are critical to helping the state's economy recover from the COVID-19 pandemic and, most significantly to help Pennsylvania families weather the current economic storm.

PAR's desire is to work with the Wolf administration to develop revised guidelines to be able to provide housing opportunities for Pennsylvanians while operating in a responsible and ethical manner. However, as long as Respondents maintain the Business Shutdown Order in contravention of express guidance from the federal government, which the administration itself purports to follow, such cannot occur. This arbitrary manner of governance must be rectified forthwith to

allow PAR members to assist Pennsylvanians in securing the “shelter” prong of the “food, clothing and shelter” triad of necessities so critical to the people of our state.

II. The Governor’s Waiver Application Process is Inadequate to Guarantee Continuation of Life Sustaining Services Because of Undue Delay and the Administration’s Announcement of the Sudden Termination of Such Process, Thereby Potentially Diverting Thousands of Further Requests for Waiver to the Unified Judicial System Without the Benefit of Any Prior Administrative Review

Respondents’ current handling of the administrative process it has created to consider alterations to the Approved Business List is wholly inadequate to handle requests from PAR members for relief from the Business Shutdown Order in a timely manner. Further, Respondents have announced that as of the close of business on the very day of the preparation of this brief, it will no longer accept requests for waivers of the Business Shutdown Order as to any business. Any PAR member not having already requested a waiver will be denied rights of review.

A. The Current Administrative Review Process for Applications for Waiver is Hopelessly Bugged Down, Not Permitting Prompt Disposition of Requests, and Continues to Threaten the Provision of Life Sustaining Services by *Amicus Curiae*’s Members

On March 20, 2020 PAR submitted a request for waiver of the effect of the Business Shutdown Order on behalf of its membership. PAR’s members number approximately 35,000. Respondents, having received PAR’s request for waiver a full 14 days ago, still have not issued a written decision on such request—either granting or denying—thereby keeping the services of PAR’s members in support

of the critical infrastructure in a hopeless state of limbo to the detriment of millions of Pennsylvanians. Daily outreach by PAR to the Governor's office has resulted in no communications whatsoever. Further, there is no end in sight to the business shutdown.

Respondents have demonstrated an inability to act in a timely fashion on requests for relief from the Business Shutdown Order—which itself was suddenly imposed with no prior notice on March 19, 2020. Moreover, as referenced in Petitioners' filings, a waiver has apparently been granted to at least one company providing real estate services, the decision having been made by Respondents that such office's services were critical to ongoing life in Pennsylvania. However, there is no distinction apparent on the face of the record, nor otherwise expressed to PAR, why such relief was uniquely granted to such business, thereby demonstrating the arbitrary and ineffective nature of the waiver application process and the immediate need for PAR's membership to be freed to resume services just as such waiver-receiving office has been allowed to do. A waiver having been granted to one real estate company, the burden is on Respondents to justify a denial to others.

B. Respondents’ Sudden Announcement to End the Waiver Review Process Is Contrary to Pennsylvania Jurisprudence and Would Work Extreme Hardship Both on PAR’s Membership and On the Judiciary

Respondents have announced that they will, as of 5:00 p.m. on April 3, 2020, refuse to consider any new requests for waiver from the Business Shutdown Order. This would include new requests from PAR’s membership. Even beyond this, Respondents have asserted in this case that it is “not the law” that a closed business must have an opportunity for judicial review from the effect of the Business Shutdown Order.

Amicus Curiae wonders whence such legal stance derives. It certainly does not come from a plain reading of the Pennsylvania Constitution which states,

§ 9. Right of appeal

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

Pa. Const. art. V, § 9.¹⁰

Under the Pennsylvania Constitution, an appeal will lie from the Governor’s denial of an individual waiver request to the Department of Community and Economic Development. Such is clearly the determination of an ‘administrative

¹⁰ See also Pa. Const. art. I, § 11 (courts to be “open” for remedy of injury).

agency” within the meaning of the Pennsylvania Constitution. Respondents’ rejection of any right of appeal—even judicial review at all—is deeply troubling, for it suggests that the Governor and his administration are a law unto themselves, able by whatever power they invoke to deny relief from orders with no right of a private party to appeal to the courts. And this in turn adds further burden to PAR’s membership in any attempt to seek independent judicial review of the Business Shutdown Order. Respondents will challenge the very right of PAR members to seek judicial relief from the Business Shutdown Order as a threshold matter.

Denial of any avenue for administrative review will open the floodgates to litigation of such claims in the Unified Judicial System. Literally tens of thousands of applications for relief have been filed as of April 1, 2020, and without an ongoing administrative review process (dilatory and flawed as it may be), such claims would necessarily be filed in the Unified Judicial System.

As reported by the Associated Press,

[Pennsylvania] received more than 34,000 waiver requests through Wednesday. The Department of Community and Economic Development has approved about 5,600 requests and denied over 8,600, agency spokeswoman Casey Smith said Thursday.¹¹

¹¹ Michael Rubinkam and Mark Scolforo, Deadline Looms for Pennsylvania Virus-Shutdown Waivers, *U.S. News & World Report*, <https://www.usnews.com/news/best-states/pennsylvania/articles/2020-04-02/state-sets-deadline-for-exemptions-from-wolf-shutdown-order> (last accessed April 3, 2020).

The sheer number of applications for waiver has undoubtedly overwhelmed the executive. In fact, Respondents' apparent inability to handle such an enormous quantity of requests is probably the very reason why the Governor has summarily decided to end the process as of 5:00 p.m. on April 3.¹² Respondents are virtually assuring that the legal uncertainty that they themselves have created will now burden the judiciary in the first instance, a branch of government that neither created the present legal quagmire nor frankly has the inherent expertise to adjudicate such claims for relief in the first instance. Some avenue of administrative relief must thus continue.

The Wolf Administration's sudden about-face—an exact 180° turn from what it had been proclaiming to Pennsylvania's quickly-dwindling economy mere days ago when it lauded the availability of the waiver process and encouraged businesses to make application thereunder—is stunning. Without any administrative review procedure at all, aggrieved parties will have no option but to resort to judicial action, presumably in the Commonwealth Court or this Court, and thereby potentially flood the judiciary with claims for which there is no established statutory or clear regulatory basis for review.

¹² “The Wolf administration announced a deadline of 5 p.m. Friday for waiver applications, prompting an outcry from small-business advocates who said the deadline was premature and would create additional hardship for struggling employers.” *Id.*

Respondents developed the Approved Business List without the benefit of public hearings and without any opportunity for public comment. They now would, by the asserted absence of right of judicial review, mandate that all of PAR's members in the Commonwealth live under the unreasonable yoke of the Business Shutdown Order, with any alteration thereto only to be made in Respondents' sole and unreviewable discretion.

Respondents have specifically argued to this Court that the existence of the waiver process solves any constitutional infirmity inherent in the no-notice, no-hearing Business Shutdown Order. See Ans. to Emer. Appl. for Ex. Relief, p. 24 (“Insofar as *any* form of pre- or post-deprivation “review” of the implementation of the Governor’s order can possibly be deemed constitutionally required (a point not conceded), the existing waiver process is adequate.”).

To recap: the Wolf administration has now indefinitely closed all business operations not exempted by the Approved Business List. The contents of the Approved Business List were created without any public input, without prior notice and without state statutory or regulatory mechanism for administrative challenge apart from a process which suddenly created *ex nihilo* and which will now suddenly go away. The administration has claimed that its actions are beyond appeal or judicial review. And the administration has guaranteed no response time to any request for waiver from the Business Shutdown Order already submitted.

As of the end of business on April 3, 2020, the administration will ignore any new requests for relief made *by any entity for any reason whatsoever*.

Respondents' position is inherently unsound and arbitrary. It finds no parallel in any other area of Pennsylvania law. Sweeping executive authority has been asserted with not a glimmer of legal clarity. This is unconstitutional for, as noted elsewhere, liberty finds no refuge in a jurisprudence of doubt.¹³

¹³ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992).

Conclusion

WHEREFORE, *Amicus Curiae* Pennsylvania Association of Realtors® supports Petitioners' request that the Court order the Governor to categorize all real estate services as life-essential.

Respectfully submitted,

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Certification of Compliance

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

/s/ Aaron D. Martin

April 3, 2020

Name

Date

Certificate of Word Count

I certify that this Brief is less than 7,000 maximum word count set forth in Pa. R.A.P. 2544. Based on the word count feature of Microsoft Word, the foregoing brief consists of 3,900 words.

/s/ Aaron D. Martin

Certificate of Service

I hereby certify that on this **3rd** day of **April, 2020**, the foregoing document was served upon the persons in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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