

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

NO. 68 MM 2020

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

vs.

TOM WOLF, GOVERNOR and RACHEL LEVINE,
SECRETARY OF PA DEPARTMENT OF HEALTH,

Respondents

**APPLICATION FOR RELIEF OF HOME BUILDERS ASSOCIATION OF
BUCKS AND MONTGOMERY COUNTIES AND HOME BUILDERS
ASSOCIATION OF CHESTER AND DELAWARE COUNTIES FOR
LEAVE TO FILE *AMICUS CURIAE* BRIEF**

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1. Applicants are the Home Builders Association of Bucks and Montgomery Counties and the Home Builders Association of Chester and Delaware Counties (collectively, the “HBA”), non-profit corporations serving as trade associations in the Commonwealth of Pennsylvania together comprised of more than 1,000 members including builders, developers and trade contractors working in the southeastern Pennsylvania region in the suburban counties outside of Philadelphia.

2. The HBA’s mission is to provide and protect the American Dream of home ownership for current and future generations and promoting, educating, and advocating the advancement of the residential construction industry while serving the community.

3. The HBA seeks permission to file an *Amicus Curiae* brief because of their interest in the subject matter of the pending matter, specifically matters arising from Respondents’ actions affecting builders and contractors and the services they provide to the citizens and residents of the Commonwealth of Pennsylvania that are “life sustaining” and critical to infrastructure.

4. The brief that the HBA seeks permission to file is attached to this application as **Exhibit A**.

WHEREFORE, Applicants, the Home Builders Associations of Bucks and Montgomery Counties and the Home Builders Association of Chester and Delaware Counties, request the Court to accept the attached brief as *Amicus Curiae*.

Respectfully submitted,

KAPLIN STEWART MELOFF REITER & STEIN, P.C.

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Dated: April 13, 2020

EXHIBIT A

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I. STATEMENT OF INTEREST

The Home Builders Association of Bucks and Montgomery Counties and the Home Builders Association of Chester and Delaware Counties (collectively, the “**HBA**”) submit this brief as *Amicus Curiae*. The HBA is a non-profit corporation serving as a trade association in the Commonwealth of Pennsylvania comprised of a total of more than 1,000 members including builders, developers and trade contractors working in the southeastern Pennsylvania region in the suburban counties beyond Philadelphia. The HBA members are the backbone of the residential construction industry in southeastern Pennsylvania. Without residential construction, especially construction for homes under contract with impending closing dates, many citizens and residents of this Commonwealth will have no home in which they can “stay at home” as required by the Governor’s executive orders. Residential construction is essential not only for the Commonwealth’s economy, but is also “life sustaining,” because it provides Commonwealth citizens and residents with shelter and a place to live.

Residential construction in the suburban and more rural counties of the Commonwealth differs greatly from residential construction in the Cities of Philadelphia and Pittsburgh (the “**Cities**”). The majority of residential construction in the Cities is vertical and/or densely packed whereas residential construction, the majority of which is construction of single-family detached and single-family

attached homes, in the suburbs and rural Pennsylvania is physically separated as required by applicable zoning set back regulations. Thus, implementation of applicable CDC and Commonwealth Health Department COVID-19 social distancing and virus-spreading prevention measures is feasible.

The HBA members immediately responded to the COVID-19 health crisis by implementing detailed workplace protocols complying with CDC and Commonwealth Health Department guidelines limiting the number of construction trades scheduled to work in or outside of new homes then under construction; maintaining social distancing; wearing mandatory protective gear; and directing that each trades person provide their own transport to and from the site. The residential construction industry is enforcing these workplace protocols as part of their regular OSHA workplace requirements and are committed to doing so while mitigating the risk of COVID-19 spread.

II. QUESTIONS PRESENTED

1. Whether the Governor's ban of all residential construction as non-life sustaining is impermissibly sweeping and arbitrary where construction of residential housing is vital to infrastructure, provides shelter and a place to live, and can be performed safely, particularly in suburban and rural areas.

2. Whether the DCED's divergent grants and denials of waivers violated builders' Equal Protection rights and Pennsylvania Administrative Agency Law.

3. Whether the Governor’s elimination of the waiver process leaves builders without any administrative remedy in violation of Pennsylvania Administrative Agency Law and due process.

III. STATEMENT OF THE CASE

The HBA members primarily construct residential suburban housing in southeastern Pennsylvania pursuant to an approved subdivision and land development plan that physically separates the single family home or attached individual residential units as opposed to the vertical densely packed residential construction in the Cities.

A. Respondents’ Ban of All Residential Construction

On March 19, 2020 Respondents Governor Tom Wolf (“**Governor**”) and Secretary of Health Dr. Rachel Levine (“**Health Secretary**”) issued an executive order that prohibited the operation of all but so-called and undefined “life sustaining” businesses throughout the Commonwealth of Pennsylvania (“**Business Shutdown Order**”).¹ Although Respondents recognized certain businesses as “life sustaining,” they denied such recognition to others on a list promulgated by the Wolf

¹ <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order> (accessed April 3, 2020)

Administration (“Approved Business List”).² The Approved Business List expressly prohibits residential construction from proceeding anywhere in the Commonwealth, with only a limited exception for so-called “emergency repairs.” *Id.* The Governor and Health Secretary determined that residential construction is not “life sustaining.”

Specifically, the Governor’s FAQ restricts residential construction as follows:

Residential construction projects that have been issued a final occupancy permit may continue to completion (i.e., may complete “punch list” items discovered after the certificate of occupancy has been issued). For all other residential construction projects limited activities may continue to the extent necessary to stabilize the site, temporarily prevent weather damage, or make emergency repairs only. No new residential construction or non-emergency rehabilitation projects may be started.³

Based upon the above, a builder can only proceed to complete a residence if a final certificate of occupancy (“CO”) has been issued. A final CO is only issued *after* construction of the residential unit has been completed. Therefore, this limited exemption does not in fact permit residential construction.

Further, the Governor’s Order only permits builders to “temporarily prevent weather damage.” As everyone in the industry knows, any framing left exposed to

² See List of Life-Sustaining Businesses (revised as of April 1, 2020): <https://www.scribd.com/document/452553026/UPDATED-4-00pm-April-1-2020-Industry-Operation-Guidance>

³ <https://www.scribd.com/document/452553495/UPDATED-11-30-AM-April-9-2020-Life-Sustaining-Business-FAQs>

weather will become irreparably damaged and the work will have to be re-done at greater expense. Therefore, the only effective way to protect exposed framing is to permanently, not temporarily, complete exterior residential construction. Otherwise, the structure is prone to develop mold and potentially create health and warranty issues at a later time such that a builder with a partially completed structure is presented with a no-win situation.

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 list “identifies workers who conduct a range of operations and services that are typically essential to continue critical infrastructure viability, including ... working construction...” *Id.* The Advisory List includes “[w]orkers performing housing construction related activities to ensure additional units can be made available to combat the nation’s existing housing supply shortage.” *Id.* Thus, the CISA has advised the states to allow residential construction to continue as critical infrastructure because it supplies people with a place to live. In other words, residential construction is “life sustaining.”

⁴ See <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>

In banning all residential construction, the Governor and Health Secretary expressly disregarded the CISA Advisory and arbitrarily decided that all residential construction is not “life sustaining.”

B. Pennsylvania’s Failed and Aborted Waiver Process

From approximately March 19, 2020 to April 3, 2020, businesses were able to apply online to the Pennsylvania Department of Community and Economic Development (“DCED”) for waivers from the Business Shutdown Order. The DCED explained the waiver process as follows:

When a business completes a waiver form, a team of professionals at DCED will review each request and respond based on the guiding principle of balancing public safety while ensuring the continued delivery of critical infrastructure services and functions. Those requesting a waiver will be notified via email if their operations may re-open. Businesses applying for a waiver must remain closed until a decision is made about their application.⁵

Further, the DCED claimed that “[i]n making exemption determinations, the [DCED] is maintaining consistency with an advisory issued by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency.”⁶ Yet, as described above, while the CISA Advisory explicitly included residential

⁵ See, Governor’s prior FAQ in effect until April 3, 2020.

⁶ See, <https://www.scribd.com/document/452553495/UPDATED-4-00pm-April-1-2020-Life-Sustaining-Business-FAQs> (last accessed 4/9/2020).

construction as critical infrastructure, the Governor refused to exempt it from the Business Shutdown Order.

In particular, the DCED granted waivers to some residential construction companies while denying waiver requests to other similarly situated residential builders. There was no rhyme or reason to the DCED's denials and grants of waivers.⁷ After only a few weeks, the DCED eliminated the waiver process by April 3, 2020. It has not permitted any applications for waiver to be submitted since then. Thus, the HBA members have no administrative remedy to apply for a waiver from the Governor's Business Shutdown Order.

C. **Most States Exempt Residential Construction from Closure**

The National Association of Home Builders (“NAHB”) regularly updates a map of the country on its website, showing the states that have issued business

⁷ At a recent April 10, 2020 press conference, Governor Wolf acknowledged that the DCED's decisions on waivers were inconsistent. Specifically, after noting that a team of people at the DCED made the decisions on waivers, he stated:

In some cases we agreed, in some cases we disagreed. Did we make calls that some people may question? Yeah, probably.

<https://www.pennlive.com/coronavirus/2020/04/gov-tom-wolf-provides-latest-details-on-coronavirus-in-pa-live-updates.html>

closure orders and whether those orders have exempted residential construction.⁸ Notably, the vast majority of states issuing closure orders have exempted residential construction. *Id.* The states that have banned residential construction, Washington, Michigan, Vermont, New York, and Pennsylvania, are in the decided minority. *Id.*

On April 8, 2020, the New Jersey Governor signed an Executive Order requiring the closure of all non-essential construction projects by April 10, 2020. The New Jersey Order was careful to permit certain residential construction as “essential construction projects,” including:

Residential projects that are exclusively designated as affordable housing. ...

Projects already underway involving individual single-family homes, or an individual apartment unit where an individual already resides, with a construction crew of 5 or fewer individuals. This includes additions to single-family homes such as solar panels.

Projects already underway involving a residential unit for which a tenant or buyer has already entered into a legally binding agreement to occupy the unit by a certain date, and construction is necessary to ensure the unit’s availability by that date [emphasis added]. ...

Any work on a non-essential construction project that is required to physically secure the site of the project, ensure the structural integrity of any buildings on the site, abate any hazards that would exist on the site if the construction

⁸ https://www.nahb.org/Advocacy/Industry-Issues/Emergency-Preparedness-and-Response/Coronavirus-Preparedness/Stay-on-the-Jobsite?_ga=2.65171310.1947417399.1586470357-478914282.1586358339

were to remain in its current condition, remediate a site, or otherwise ensure that the site and any buildings therein are appropriately protected and safe during the suspension of the project.

Any emergency repairs necessary to ensure the health and safety of residents.⁹

While the New Jersey Governor should have also exempted residential construction occurring in suburban and rural areas, at least the New Jersey Governor declined to sign the sweeping unduly restrictive Order that the Pennsylvania Governor signed. Instead, the New Jersey Governor signed an Order that permitted residential construction to continue in certain circumstances and recognized that the industry would take certain precautions, such as limiting work crews, so as to be able to safely proceed with vital construction.

D. Residential Construction's COVID-19 Protocol

The NAHB quickly responded to the health crisis by publishing a comprehensive Coronavirus Preparedness and Response Plan for the industry to implement to protect workers from contracting and spreading the disease in the community.¹⁰ This detailed protocol includes educating workers regarding what COVID-19 is and how to prevent exposure. *Id.* Employees work staggered shifts,

⁹ <https://njsme.org/wp-content/uploads/2020/04/EO-122.pdf>

¹⁰ <http://nahbnow.com/2020/03/workers-on-home-building-sites-should-strictly-adhere-to-coronavirus-precautions>

with no more than one trade or five workers at a time, and workers keep at least six feet apart from each other. *Id.* All safety discussions occur daily and via telephone where possible. *Id.* Workers must wear protective equipment, in addition to what they already wear to prevent falls and head injuries, including masks and gloves. *Id.* Workers are directed to arrange their own transport to and from the job. *Id.* Workers are not permitted to return to the job if they become ill and cannot return to work until they are symptom free for the required fourteen days. *Id.* In sum, the NAHB has applied the guidelines promulgated by the CDC so that construction can proceed safely and without risk of spreading the coronavirus. The construction industry as a whole has a history of complying with OSHA job safety regulations and therefore its workers are primed to comply with the CDC guidelines to be able to resume work.

Likewise, the HBA members have implemented the NAHB protocol to protect workers from contracting and/or spreading the disease in the community. Suburban and rural residential construction can successfully be accomplished while rigorously adhering to the NAHB Coronavirus Preparedness Plan.

E. PennDOT’s COVID-19 Guidance to Restart Construction Projects

PennDOT issued “COVID-19 Guidance Restarting Construction Projects” on March 30, 2020 (“**PennDOT’s Guidance**”).¹¹ Like the NAHB’s Coronavirus

¹¹ <http://www.paconstructors.org/wp-content/uploads/2020/03/Guidance-for-Restarting-Construction-Projects-Final-v1.6-3-30-20.pdf>

Preparedness and Response Plan, PennDOT's Guidance sets forth detailed procedures for all persons working on a construction project to follow to mitigate the spread of the virus. For instance, the PennDOT Guidance calls for persons to practice social distancing; wear protective gear; clean worksites; and persons with symptoms not to come to work until they are symptom free. PennDOT Guidance pp. 10-11.

The PennDOT Guidance notes:

Do not host large group meetings. CDC recommends avoiding gatherings of 10+ people; and when meeting, keep a minimum 6-foot distance between people. Perform meetings online, via conference call, or outdoors (while maintaining 6-foot distance between people), whenever possible.

PennDOT Guidance at p. 9. In sum, like the NAHB protocol, the PennDOT Guidance applies the CDC recommendations to a construction project.

The PennDOT Guidance contains a matrix that characterizes the risk of certain construction activities as "low" or "moderate" for mitigating the spread of the virus. PennDOT Guidance p. 15. Notably, PennDOT characterizes the risk of clearing and grubbing; erosion and sediment control installation and removal; rock and rip rap placement; and electrical work as "low." *Id.* at pp. 15-16. The risk of spreading the virus for excavation and inspection of foundations is characterized as "low" or "moderate". *Id.* p. 18. Comparable activities for residential construction should carry similar low to moderate risk of spreading the virus.

While PennDOT’s Guidance contemplates that construction will commence in three phases, construction is scheduled to re-start in the first phase. *See* PennDOT Guidance p. 2. Phase I will “[r]estart projects that can meet social distancing for all operations while implementing and evaluating best practices.” *Id.* p. 2. Phase 2 and 3 will restart as follows:

Phase 2: Restart additional projects where some activities may make it difficult to achieve social distancing, but plans will have been developed and implemented to address those operations. For example, carpenters inside a confined building space may find it difficult to achieve social distancing.

The Department/PA Turnpike and Contractor management staff would discuss alternative solutions to make social distancing possible or rearrange construction schedules so at-risk activities can be completed in compliance with social distancing.

Phase 3: Restart all remaining projects.

These projects may be projects not started because of impacts associated with utilities, railroads, etc. Project would not start until those issues were addressed and would not impact the project schedule.

PennDOT Guidance p. 2. The PennDOT Guidance remains in effect until Governor Wolf’s “in place COVID-19 mitigation measures are rescinded.” *Id.* p.

14.

Phase I of the PennDOT Guidance is already underway. In fact, the day after the PennDOT Guidance was published, on March 31, 2020, PennDOT announced that it would restart sixty-one construction projects that it had delayed on March 17, 2020 as a result of the Governor's Business Shutdown Order.¹² Acting PennDOT Secretary Yassmin Gramian stated:

A safe and reliable transportation network is always of the utmost importance, but it becomes even more crucial in times of crisis. We need to ensure that work continues on these critical projects, and we are taking the proper precautions to help ensure the safety of both our employees and our partners in the industry.

Id. According to PennDOT, the restarted work includes landslide repairs, bridge, tunnel and drainage repairs, and work needed to eliminate roadway restrictions that allegedly could impede the ability for the movement of life-sustaining goods and services. *Id.* Thus, PennDOT has been permitted to re-start construction projects notwithstanding the Governor's Business Shutdown Order.

F. Homeowners are Stuck as a result of the Governor's Ban

As a result of the Governor's March 19 Business Shutdown Order, HBA builders were compelled to stop work on constructing homes that were under contract with individual customers. HBA builders applied for various waivers,

¹² <https://local21news.com/news/local/penn-dot-restarts-critical-highway-and-bridge-projects>; <https://triblive.com/local/regional/penn-dot-to-re-start-work-on-emergency-highway-bridge-projects>

explaining that they had entered into contracts with homeowners who had made plans in reliance on the settlement dates in their contracts. While some waivers were granted, others were not. By April 3, 2020, the Governor rescinded all waivers. Many, many homeowners have been harmed as a direct consequence. They include families who need the home to care for their elderly parents; who are expecting the birth of children; who sold or are scheduled to sell their prior homes imminently; who are living in cramp quarters or renting expensive, small apartments with short-term leases due to expire; and who have locked in a rate of interest that will expire if they do not close by their contracted settlement date. All of them have been living in quarantine in makeshift living arrangements, waiting for weeks on end for the construction of their new house to be completed. Some of them are concerned that their unfinished houses are exposed to the elements. The above are just some examples of the lives that had been disrupted because the construction of their homes was stopped. In the eyes of the homeowners – who are making the biggest purchase of their lives and longing for the house that they had planned to move into – there is no question that residential construction is “life sustaining.”

In signing the broad-brushed Business Closure Order, the Governor failed to recognize that residential construction is “life sustaining” and critical to Pennsylvania infrastructure, as the federal government and the vast majority of states have all recognized. Residential construction can and should be permitted to

proceed, particularly in suburban and rural areas of the Commonwealth, while adhering to safe COVID-19 workplace practices. Indeed, PennDOT has been permitted to re-start construction projects, based on adherence to CDC guidelines for the workplace. The HBA builders should also be permitted to re-start their interrupted construction projects for their customers based on their commitment to adhere to the same CDC guidelines as PennDOT has adopted.

IV. SUMMARY OF THE ARGUMENT

This Court received *amicus* briefs from the City of Philadelphia and the City of Pittsburgh. Both Cities described the emergencies each is potentially facing to meet the needs of their dense and large populations. The Court must also be mindful that suburban and rural areas located throughout this Commonwealth are not as densely populated as their urban counterparts are and that residential construction can therefore proceed in the suburban and rural counties in a safe and precautionary way. Urban residential construction typically occurs either in confined vertical pockets of space or in densely compacted areas. Builders in the suburban and rural counties are primarily building residential housing in larger land areas and the buildings are more spread out as a result and proceed unit by unit.

Moreover, residential builders promptly implemented the CDC safety guidelines to reduce the risk of exposure to the coronavirus disease at construction sites. In reviewing the Governor's broadly sweeping Business Closure Order, the

Court must recognize that residential construction is indeed, “life sustaining,” as well as vital to the Commonwealth’s infrastructure and economy. As discussed above, the federal government and the majority of states that have issued business closure orders have exempted residential construction as a result. By implementing the CDC guidelines at the work sites, the HBA’s member builders and contractors can and should be permitted to resume residential construction so as to permit this vital sector of the economy to continue to operate. Simply put, an exception can and should be made to the Governor’s stringent Business Closure Order for residential construction that can resume safely and with measures in place to prevent exposure to the coronavirus in suburban and rural areas. Considering that PennDOT has been granted permission to restart its construction projects -- based on adherence to the same basic guidelines – there is no reason not to permit residential construction to re-start as well.

Lastly, the procedures that the Governor implemented to address individual applicants’ requests for waivers were a dismal failure precisely because the process did not comport with basic administrative procedures of providing applicants with notice, an opportunity to be heard, and a written decision based upon substantial evidence. The Governor was compelled to shut down the ad hoc waiver procedures because of the sheer number of the applications and the inconsistency in the decisions that were made. The Courts must address the inequities caused by the

Governor's overly broad ban on residential construction and the lack of an adequate administrative procedure to protect the HBA members' rights.

V. ARGUMENT

A. The Governor's Order is Impermissibly Overbroad

A law is overbroad if it impermissibly sweeps into its proscriptions conduct that is legitimate as well as conduct that may properly be regulated. *United States v. Robel*, 389 U.S. 258 (1967). A law will be declared invalid to the extent it reaches too far, but otherwise left intact. *Hinton v. Devine*, 633 F. Supp. 1023, 1030-31 (E.D. Pa. 1986).

Where a law infringes on constitutional rights, the law must be tailored to vindicate the government's articulated interest with as little burdening of the constitutional right as possible. *Hinton*, 633 F. Supp. at 1030.

The Supreme Court has reiterated a fundamental rule in this regard time and again: "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405, 421 (1963), ... In summary, any law that touches protected rights must be narrowly drawn to define and punish or regulate specific conduct found to constitute a clear and present danger to a substantial government interest.

Id. at 1031 (citing *inter alia* *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966)) (underline added).

HBA members are committed to protecting their workers and the community by implementing the CDC guidelines for safely constructing tract housing in suburban and rural areas. The federal government and the vast majority of states recognize that residential construction is vital to the nation's infrastructure. The CISA expressly found essential: "Workers performing housing construction-related activities to ensure additional units can be made available to combat the nation's existing housing supply shortage." The Governor has disregarded the "life sustaining" need to continue residential construction and the fact that it can proceed safely in compliance with CDC guidelines.

The Governor has failed to recognize that construction of residential housing in suburban and rural areas can be accomplished safely without the risk of spreading the disease. By permitting PennDOT to re-start construction -- including engaging in activities common to residential construction, such as clearing, grubbing, erosion and sediment control, excavation and foundation work, all of which are deemed as low to moderate risk of spreading the disease -- the Governor's Administration has conceded that construction activity can proceed safely, with the proper measures in place. By failing to make an exception for residential construction, as a safe and life sustaining business activity in non-urban environments, the Governor's Order is impermissible.

B. The DCED's Waiver Process and Decisions on Waivers were Flawed

HBA members were not provided with the right to a hearing, which is the basic due process protection provided to all persons before a Commonwealth agency can take away a person's right to conduct business in the Commonwealth. The General Assembly has declared that: "No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard." 2 Pa.C.S. §504.

Moreover, government licenses to engage in a business or occupation create an entitlement to partake of a profitable activity, and therefore are property rights. *Thus, some form of due process is required when an administrative agency revokes one's right to transact business in the Commonwealth* [emphasis added].

Philadelphia Entertainment and Dev. Partners, L.P. v. Pennsylvania Gaming Control Bd., 34 A.3d 261, 276 (Pa. Commw. Ct. 2011) (citations and quotations omitted).

Additionally, when the Courts assess the reasonableness of administrative agency rulemaking, they apply an arbitrary and capricious standard. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An agency "must examine the relevant data and articulate a satisfactory explanation for its action including rational connection between the facts found and the choice made." *Id. Accord City of Philadelphia v. Sessions*, 280 F. Supp.3d 579, 620-21 (E.D. Pa.

2017). An agency must give adequate reasons for its decisions. *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016).

At first, the Governor provided an appeal process whereby businesses could apply for a waiver from the Business Closure Order. The DCED's "team of professionals" was supposed to "review each request and respond based on the guiding principle of balancing public safety while ensuring the continued delivery of critical infrastructure services and functions." However, because the scope of the Governor's Business Closure Order was overly broad, the DCED quickly became overwhelmed with requests for waivers. Further, the DCED made widely divergent decisions due to the lack of a defined administrative procedure and applicable defined objective criteria, allowing some builders to proceed, while denying the same right to others. The result was that builders were treated differently from similarly situated applicants in violation of their rights to Equal Protection. Collectively, the DCED's decisions appeared to have no rhyme or reason to them.

Moreover, the DCED issued only boilerplate responses to the applications. These responses did not articulate the rationale for the decisions, including the HBA members' and the homeowners' individual circumstances. Due to the generic nature of the DCED's responses to the HBA members' applications, the members who were granted waivers encountered difficulty enforcing the waivers with local officials, and the members who were denied waivers had no idea why their waivers were

denied. In sum, the Governor's Business Closure Order was so impermissibly broad that the requests for waiver quickly inundated the waiver process and the DCED could not keep up with or endeavor to be consistent in the waivers that it did grant and the waivers that it denied.

The DCED's administrative review process by any estimation was a dismal failure caused primarily by the overly broad scope of the Governor's Business Closure Order and the lack of any defined administrative rules or procedure. The HBA's members were not provided with a proper and effective administrative procedure by which to apply for exemption from the stringent Business Closure Order, forcing them now to have to file lawsuits in the Courts, incurring potentially greater expense and delay in being permitted to resume business. In short, the waiver process failed to provide adequate due process.

C. The Governor's Elimination of the Waiver Process Violates Administrative Agency Law and Due Process

An administrative agency's departure from prior practice is arbitrary and capricious if the change in policy constitutes an "unexplained inconsistency." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. An agency must give adequate reasons for its decisions including changing its procedures. *Id.*

In shutting down the appeal process with the DCED, without any explanation, Respondents further violated the HBA members' rights to appeal the Governor's

Business Shutdown Order or to seek judicial review of any administrative denial of HBA members' rights to operate. As it stands now, the HBA members have no administrative remedy to appeal that Order and are compelled therefore to seek remedies directly in the Courts. Resort to the Courts is costly, time consuming, and potentially will result in *ad hoc* decisions regarding exemptions.

The DCED should be compelled to issue regulations that permit residential construction to proceed where safety measures are implemented and issue decisions on waivers consistent with those regulations. For the Governor to take away the HBA members' rights to operate, the Commonwealth must be required at a minimum to provide a written basis for denial based upon substantial evidence after providing HBA members with an opportunity to be heard. The HBA members must also be provided the right to appeal any Commonwealth Agency's decision denying waivers in accordance with fundamental due process and Pennsylvania's Administrative Agency Law.

VI. CONCLUSION

Amicus Curiae Home Builders Association of Bucks and Montgomery Counties and Home Builders Association of Chester and Delaware Counties support Petitioners' request and further respectfully request that this Esteemed Court order the Governor to permit residential construction to proceed as a life-sustaining

business that is vital to Pennsylvania's infrastructure and economy and can and will be implemented safely in accordance with CDC guidelines.

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/ Marc B. Kaplin Esquire

Marc B. Kaplin, Esquire

Dated: April 13, 2020

CERTIFICATE OF WORD COUNT

I certify that this Brief is less than 7,000 maximum word count set forth in Pa. R.A.P. 531. Based on the word count feature of Microsoft Word, the foregoing brief consists of 4,662 words not including the Table of Contents and Table of Authorities.

/s/ Marc B. Kaplin

Marc B. Kaplin, Esquire

Dated: April 13, 2020

IN THE SUPREME COURT OF PENNSYLVANIA

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

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April 2020, that a true and correct copy of Petitioners' Application for Relief of Home Builders Association of Bucks and Montgomery Counties and the Home Builders Association of Chester and Delaware and Counties for Leave to File Amicus Curiae Brief was served upon the following via PACFile System:

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