IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thirty, Inc., d/b/a Best Western Premier Eden Resort & Suites, Treztark II Ltd., as owner of Sleep Inn & Suites and Mainstay Suites, Unique Inns of Lancaster d/b/a Fulton Steamboat Inn, Sleep Tight, Inc., d/b/a Inn at Leola Village, Historic Revere Tavern, Inc., d/b/a Best Western Plus Revere Inn and Suites, Dommel's Hotels d/b/a Country Inn of Lancaster, Cork Factory Hotel, LLC, Continental Inn, Inc., Hospitality Associate of Lancaster L.P., Milestone Hospitality International, LLC, t/a Lancaster Host & Conference Center, 44 Lancaster Associates, LLC d/b/a Comfort Suites, 44 Strasburg Associates, LLC d/b/a Clarion Inn at Historic Strasburg, BM Hospitality, Inc. d/b/a Holiday Inn Express Lancaster Rockvale Outlets, Horst Hotels d/b/a Hilton Garden Inn, Fairfield Inn, Country Inns & Suites and Homewood Suites	:	
v.	:	No. 805 C.D. 2013
	:	Argued: December 11, 2013
Gil Smart and Lancaster Newspapers, Inc.,	:	
Appellants	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: April 14, 2014

Gil Smart (Mr. Smart) and Lancaster Newspapers, Inc. (collectively "Newspaper") appeal from the order of the Court of Common Pleas of Lancaster County (trial court) which granted in part and denied in part the appeal of a group of seventeen Lancaster County "Hoteliers[1]" from the Final Determination of the Pennsylvania Office of Open Records (OOR).

On September 15, 1999, the Lancaster County Commissioners passed ordinances authorizing the imposition of Hotel Room Rental and Excise Taxes. Those taxes went into effect on January 1, 2000. The Hotel Room Rental Tax is 3.9% and the Excise Tax is 1.1%. The Hoteliers remit the taxes on a monthly basis on a form entitled "Combined Monthly Report of the Lancaster County Hotel Room Rental Tax and the Lancaster County Hotel Excise Tax" (Monthly Report). The Monthly Report requires the Hoteliers to furnish the following: (Line 1) total potential room nights; (Line 2) total number of occupied room nights; (Line 3) taxable receipts (total gross receipts less exempted receipts); (Line 4) room tax computation; (Line 5) excise tax computation; and (Line 6) total tax due. The tax

[1] The seventeen hotels are: Thirty, Inc. d/b/a Best Western Premier Eden Resort & Suites; Treztark II, Ltd, as owner of Sleep Inn & Suites and Mainstay Suites; Unique Inns of Lancaster, d/b/a Fulton Steamboat Inn; Sleep Tight, Inc. d/b/a Inn at Leola Village; Historic Revere Tavern, Inc. d/b/a Best Western Plus Revere Inn and Suites; Dommel's Hotels d/b/a Country Inn of Lancaster; Cork Factory Hotel, LLC; Continental Inn, Inc.; Hospitality Associate of Lancaster, L.P. and Milestone Hospitality International, LLC, t/a Lancaster Host and Conference Center; 44 Lancaster Associates, LLC d/b/a Comfort Suites; 44 Strasburg Associates, LLC d/b/a Clarion Inn at Historic Strasburg; BM Hospitality, Inc. d/b/a Holiday Inn Express Lancaster Rockvale Outlets; Horst Hotels d/b/a Hilton Garden Inn, Fairfield Inn, Country Inn & Suites, and Homewood Suites (hereinafter "Hoteliers.")

calculation is made by multiplying the taxable receipts by the applicable tax rates to arrive at the tax due. Combined Monthly Report of the Lancaster County Hotel Room Rental Tax and the Lancaster County Hotel Excise Tax at 1; Reproduced Record (R.R.) at 29a.

On February 12, 2012, the Newspaper, through Smart,[2] submitted a request under the Right-to-Know Law[3] (RTKL) to Lancaster County (County) seeking "tax records for all County hotels that paid the hotel tax/excise tax from 2007 to 2011." Open Records Request Form, February 12, 2012, at 1; R.R. at 10a. The Newspaper's request stated further "Specifically, we seek yearly totals of room rental tax remitted to the County for each hotel, for each year, and also occupancy data on a year by year basis, where that information is available." Id.

On March 16, 2012, the County denied the Newspaper's request because the records contained "confidential and proprietary information" pursuant to Section 708(b)(11) of the RTKL, 65 P.S. §67.708(b)(11) and "personal financial information" pursuant to Section 708(b)(6)(A) of the RTKL, 65 P.S. §67. 708(b)(6)(A).

The Newspaper appealed to the OOR pursuant to Section 1101(a) of the RTKL[4], 65 P.S. §67.1101(a).

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[2] Smart was the Associate Editor for the Sunday News Edition.

[3] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-.3104.

[4] Section 1101(a) of RTKL, 65 P.S. §67.1101(a), provides in pertinent part:

> (a) Authorization –
>
> (1) If a written request for access to a record is denied…the requester may file an appeal with [OOR] …within 15 business days of the mailing date of the agency's response.

On April 3, 2012, Hoteliers asserted a direct interest in the appeal and requested the right to participate pursuant to Section 1101(c) of the RTKL[5], 65 P.S. §67.1101(c), which was granted by the OOR the same day. The Hoteliers submitted Affidavits of seventeen local hotel owners in support of their position that the information contained on the Monthly Forms was confidential proprietary information and constituted a trade secret.

On April 27, 2012, the OOR issued a Final Determination which granted the Newspaper's appeal in part and denied it in part and required the County "to release the information identifying the lodging facility, the total amount of the Hotel Tax (Line 4) and the total amount of the Excise Tax (Line 5). The County may redact the occupancy data (Line 2) as confidential proprietary information." OOR Final Determination, April 27, 2012, at 7; R.R. at 159a.

The Hoteliers filed a Petition for Review with the trial court. In Paragraph 15 of their Petition for Review from the OOR's Final Determination the Hoteliers argued that they had standing:

> Petitioners [Hoteliers] have standing to file this instant appeal because they were granted the right to participate

[5] Section 1101(c) of the RTKL, 65 P.S. §67.1101(c), provides in pertinent part:

> (c) Direct Interest –
>
> (1) A person other than the agency or requester with a direct interest in the record subject to an appeal under this section may, within 15 days following receipt of actual knowledge of the appeal but no later than the date the appeals officer issues an order, file a written request to provide information or to appear before the appeals officer or to file information in support of the requester's or agency's position.

> in the OOR and are interested parties in this matter as it is their confidential and proprietary trade secrets [that] will be disclosed should the County be required to comply with the decision of the OOR.

In its Answer, the Newspaper generally "denied as a conclusion of law" that the Hoteliers had standing to appeal the OOR's Determination to the common pleas court. The Newspaper did not file a motion to quash the Hoteliers' appeal or otherwise raise the issue of the Hoteliers' standing until after the hearing in its post-trial brief.

At the hearing, the Hoteliers presented the testimony of two witnesses with experience in hotel management: Drew Anthon (Mr. Anthon), the owner of the Eden Resort and Suites Hotel, and Joseph McInerney (Mr. McInerney), President and CEO of the American Hotel and Lodging Association. The Hoteliers also called Jan Freitag (Mr. Freitag) of Smith Travel Research and Lancaster County Treasurer, Craig Ebersole (Mr. Ebersole). The Newspaper called Mr. Smart as its only witness.

Mr. Anthon explained that the information contained on Lines 2 through 6 of the Monthly Report was considered confidential information in the hotel industry. Specifically, Line 2 of the Monthly Report required hotels to disclose the total number of occupied room nights which was information the hotels kept confidential because its disclosure would enable competitors to know how another hotel was performing. Hearing Transcript, September 27, 2012, (H.T.) at 9; R.R. at 96a. Line 3 required hotels to declare gross receipts. That part of the Monthly Report had two subparts, gross receipts and tax exempt receipts and a "taxable receipts" line. The gross receipts of a hotel were kept strictly

confidential. The amount of receipts exempted from tax was another confidential figure because it might be used by competitors to adjust rates to attract that market share. H.T. at 9-12; R.R. at 96a-97a. The difference calculated when tax exempt receipts were deducted from gross receipts was another number that was kept secret by hotels and treated as confidential. H.T. at 11; R.R. at 96a. From the information collected in Line 3, an estimated metric of hotel performance may be calculated. That metric was "revenue per available room" or "RevPAR" which is a measure of performance that, if known to competitors, might allow them to understand the financial performance of the hotel. H.T. at 12-13; R.R. at 97a. Mr. Anthon described RevPAR as the "gold standard in the hotel industry to understand the performance of a hotel." H.T. at 13; R.R. at 97a.

With regard to Lines 4 and 5, Hotel Tax and Excise Tax, (which the OOR held were not confidential), Mr. Anthon explained that "if you know that the tax paid is X dollars and that tax paid is equal to 5 percent, I divide the five into the dollars and you immediately have a result of understanding what the room revenue is." H.T. at 12-13; R.R. at 97a. Then, "once I have the room revenue as a number, then I immediately know … the … RevPAR of the hotel, by taking the number of available rooms, which is public knowledge, into the room revenue to develop the number of RevPAR." H.T. at 13; R.R. at 97a. "So by having the tax only…I can achieve the two most significant proprietary and confidential information and data just from having the amount of tax paid." Id.

Mr. McInerney explained that a hotel's revenue, average rate and average daily rate (ADR) were confidential information which might be used by competitors to divert business. RevPAR, ADR and room revenue were the benchmarks of a hotel's performance.

Mr. Freitag also testified to the importance of ADR and RevPAR, why those figures were confidential, and the harm that could come if any individual hotel's RevPAR and ADR were made available to competitors.

Mr. Ebersole testified that the County Treasurer's Office treated the information contained in the Monthly Reports as confidential and proprietary information and that he followed the legal guidance issued by his predecessor's solicitor with regard to maintaining the confidentiality of the information contained on the Monthly Reports.

The Newspaper reiterated its opposition to the Hoteliers' standing in its post-hearing briefs.

The trial court reversed in part the decision of the OOR. The trial court concluded that the Newspaper waived the issue of standing "since this was not properly raised at the first opportunity." Common Pleas Court Decision, April 17, 2013, at 4.

With regard to the merits, the trial court upheld the confidentiality of Line 2 (total number of occupied room nights). However, it found that the OOR erred in determining that the tax information on Lines 5 and 6 of the Monthly Report was not confidential and proprietary information. The trial court concluded that by knowing the name of the hotel, one can easily determine the number of rooms because that information is public knowledge. By knowing the tax paid by the hotel, one can compute revenue (tax paid divided by .05 equals revenue). Then RevPAR may be easily calculated. The trial court found that based on the testimony of the Hoteliers' witnesses, and the submissions made to the OOR, the

confidentiality of the information was very important. The trial court agreed with the OOR that the names of the taxpaying businesses, alone, were not confidential.

On appeal,[6] the Newspaper raises three issues: (1) whether the Hoteliers lacked standing to appeal the Final Determination of the OOR to the trial court and whether the trial court erred when it found the Newspaper waived the standing issue; (2) whether the trial court erred when it determined that the information of Lines 5 and 6 (Hotel Tax and Excise Tax) was confidential and proprietary; and (3) whether the trial court ignored substantial and credible evidence that the Hoteliers failed to make any effort to protect the Hotel Tax and Excise Tax information contained in county records prior to the instant RTKL request?

I.

First, the Newspaper argues that the Hoteliers lacked standing to seek review of the Final Determination of the OOR to the trial court and the trial court erred when it held that the Newspaper waived the standing issue.

Did the Newspaper Waive its Objection to
The Hoteliers' Standing to Seek Review of the
Decision of the OOR by the Trial Court?

The issues of standing to sue and standing to appeal are not jurisdictional under Pennsylvania law. 20 Pennsylvania Appellate Practice §

[6] Our review of a trial court's decision in an RTKL case is limited to determining whether findings of fact are supported by competent evidence or whether the trial court committed an error of law or abuse of discretion in reaching its decision. Allegheny County Dep't. of Administrative Services v. Parsons, 61 A.3d 336, 342 (Pa.Cmwlth.), appeal denied, __ Pa.__, 72 A.3d 604 (2013).

501:16 (2013-14 ed). Therefore, failure to raise a lack of standing to appeal issue in a motion to quash or dismiss may result in the waiver of the issue.[7]

The Newspaper acknowledges that an objection to a person's standing to appeal is "waivable" but it contends that its objection to the Hoteliers' lack of standing was not waived under these circumstances. It maintains that there is an "exception" to this general rule whenever a statute designates who may sue or appeal. The Newspaper argues that in such a case, standing is "so intertwined with subject matter jurisdiction" that it becomes a jurisdictional.

Specifically, the Newspaper argues that the RTKL is a statutory cause of action in which the General Assembly has specifically designated that only "the requester or … local agency" may appeal a decision of the OOR to the trial court. Section 1302(a) of the RTKL, 65 P.S. §67.1302(a).[8] Therefore, the issue of

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[7] In re: Condemnation of Urban Dev. Auth. of Pittsburgh, 590 Pa. 431, 437 n.6, 913 A.2d 178, 181 n.6 (2006) ("the courts of this Commonwealth view the issue of standing as nonjurisdictional and waivable."); Beers v. Unemployment Compensation Bd. of Review, 534 Pa. 605, 608–11 n.6, 633 A.2d 1158, 1160–61 n.6 (1993) ("Whether a party has standing to maintain an action is not a jurisdictional question"); South of South Street Neighborhood Association v. Philadelphia Zoning Board of Adjustment, 54 A.3d 115 (Pa. Cmwlth. 2012) (challenge to standing of association is not jurisdictional); Panzone v. Fayette County Zoning Hearing Bd., 944 A.2d 817 (Pa. Cmwlth. 2008) (landowner did not challenge zoning hearing board's standing to appeal trial court's order; issue of board's standing was waived); Johnstown Tribune Publ'g Co. v. Ross, 871 A.2d 324, 327 n.4 (Pa. Cmwlth. 2005) (standing is not an issue of subject matter jurisdiction and is waived if not properly preserved before the trial court); Bullock v. County of Lycoming, 859 A.2d 518, 523 (Pa. Cmwlth. 2004) ("[T]he issue of standing is not jurisdictional and failure to raise it in preliminary objections waives the issue in future proceedings."); Society Created to Reduce Urban Blight v. Zoning Board of Adjustment, 682 A.2d 1 (Pa. Cmwlth. 1996) (standing is not jurisdictional).

[8] That section provides:

1302. Local Agencies.

(Footnote continued on next page…)

standing was "interwoven with that of subject matter jurisdiction" such that standing to appeal the decision of the OOR was a "jurisdictional prerequisite" which the Newspaper was free to raise "at any time." In support of its position, the Newspaper relies on the following cases: Grom v. Burgoon, 672 A.2d 823, 824–825 (Pa. Super. 1996) (where a statute creates a cause of action and designates who may sue, the issue of standing is interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite to an action); Hill v. Divecchio, 625 A.2d 642, 645 (Pa. Super. 1993) (stating that when "a statute creating a cause of action [designates] who may sue, then standing becomes a jurisdictional prerequisite to an action"); and In re Duran, 769 A.2d 497 (Pa. Super. 2001) (in a "statutory cause of action" where the legislature has designated who may bring an action thereunder, lack of standing need not necessarily be raised at the responsive pleading stage).

The Newspaper asserts that because the Hoteliers were neither "the requester" nor "the agency" they had no "standing to appeal" the OOR's Decision. Consequently, the trial court lacked "subject matter jurisdiction" to consider the Hoteliers' petition for review of the OOR's Final Decision. The Newspaper argues

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(continued…)

> (a) General Rule. – Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b) or of the date of the request for access is deemed denied, a requester or local agency may file a petition for review or other document as required by rule of court with the court of common pleas for the county where the local agency is located. The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision.

that since its challenge to Hoteliers' standing involves subject matter jurisdiction, it was not "waivable."

Our Supreme Court has "specifically renounce[d]" the very argument advanced by the Newspaper. In In re Nomination Petition of deYoung, 588 Pa. 194, 201, 903 A.2d 1164, 1168 (2006), our Supreme Court specifically abrogated this Court's holding in Beverly Healthcare–Murrysville v. Department of Public Welfare, 828 A.2d 491 (Pa. Cmwlth. 2003), that subject matter jurisdiction is intertwined with standing where a statute designates who may sue.

In Beverly Healthcare, Beverly Healthcare (Beverly), an operator of a nursing home, appealed from a final order of the Department of Public Welfare (DPW) that dismissed Beverly's appeal from the Westmorland County Assistance Office's (CAO) denial of an application for medical assistance filed by Beverly on behalf of one of its patients. One issue before this Court was whether Beverly had standing to appeal the CAO's denial of nursing home care benefits to a patient and whether the DPW improperly raised the issue of standing *sua sponte*.

This Court, relying on Pennsylvania Superior Court precedent, stated:

> [w]here, as here, a statute creates a cause of action and designates who may bring an action or appeal a decision, the issue of standing is interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite to an action or an appeal. Grom v. Burgoon, 672 A.2d 823, 824–825 (Pa. Super. 1996); Hill v. Divecchio, 625 A.2d 642, 645 (Pa. Super. 1993).

Beverly Healthcare, 828 A.2d at 496.

Noting that Section 423(a) of the Public Welfare Code[9] and the DPW's regulations at 55 Pa.Code §275.2 permit only the resident, resident's guardian or representative to appeal to the DPW from any decision of a county assistance office, this Court concluded that standing was jurisdictional in those circumstances and could be raised *sua sponte*.[10]

In Nomination of deYoung, our High Court actually admonished this Court for its Beverly Healthcare decision noting that "[t]his Court has never adopted the reasoning regarding standing intertwined with subject matter jurisdiction espoused in Beverly Healthcare–Murrysville and we specifically renounce it here." Nomination of deYoung, 588 Pa. at 201, 903 A.2d at 1168. The Supreme Court concluded that this Court erred when it raised and addressed the issue of standing on its own accord. The Supreme Court explained, "[s]ubject matter jurisdiction concerns the competency of the court to determine controversies of the general class to which the case presented for its consideration belongs ..... 'Whether a party has standing to maintain an action is not a jurisdictional question.'" Nomination of deYoung, 588 Pa. at 201, 903 A.2d at 1168 (quoting Beers v. Unemployment Comp. Bd. of Review, 534 Pa. 605, 633 A.2d 1158 (1993)) (emphasis in the original).

Applying Nomination of deYoung to this controversy, the RTKL confers a right to file a statutory appeal from a final decision of the OOR relating to a decision of a local agency to the common pleas court. Clearly then, the

[9] Act of June 13, 1967, P.L. 31, *as amended*, 62 P.S. §423(a).

[10]The decision also impliedly concluded that an objection to standing could not be waived in those circumstances because standing was intertwined with jurisdiction.

common pleas court was vested with subject matter jurisdiction to hear and decide the Hoteliers' statutory appeal.

Contrary to the argument of the Newspaper, even though the RTKL designates who may appeal a decision of the OOR, whether the Hoteliers had standing to appeal was not jurisdictional. Unlike an objection to jurisdiction which may be raised at any time, an objection to standing may be waived if not timely raised.[11]

Did the Newspaper Waive its
Objection to the Hoteliers' Standing?

The Hoteliers contend that the Newspaper waived its objection to standing. They contend that prior to filing its post-hearing brief, the Newspaper had several opportunities to raise the issue of the Hoteliers' standing to appeal to the trial court from the final decision of the OOR. The Newspaper attended a pre-trial status conference but did not mention a challenge to the Hoteliers' standing.

This Court must agree that the Newspaper waived its objection to the Hoteliers' standing.

In Pittsburgh Trust for Cultural Resources v. Zoning Board of Adjustment of City of Pittsburgh, 604 A.2d 298 (Pa. Cmwlth. 1992), owners of a

[11] This Court notes that despite the Supreme Court's admonition in Nomination of deYoung, some courts continue to intertwine subject matter jurisdiction with standing. See e.g. In re G.D., 61 A.3d 1031 (Pa. Super. 2013); R.M. v. J.S., 20 A.3d 496 (Pa. Super. 2011). See also, 2 Standard Pennsylvania Practice 2d § 6:46 (stating "where a statute creates a cause of action and designates who may bring an action, the issue of standing is interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite to an action.").

building (Owners) located in a historic district in downtown Pittsburgh applied for a special exception to build an arcade. The Pittsburgh Zoning Board of Adjustment (Board) granted the special exception. Afterwards, the Pittsburgh Trust for Cultural Resources (Trust) and the Penn-Liberty Association (Association) appealed the Board's decision. Owners petitioned to intervene. On February 27, 1990, the City of Pittsburgh (City) also petitioned to intervene. On March 1, 1990, the Owners filed a motion to quash the appeal filed by the Trust and the Association for lack of standing. A hearing was held on the motion to quash and the merits of the appeal on March 20, 1990. On May 22, 1990, the Owners filed a motion to quash the City's intervention on the grounds that the City lacked standing to appeal to the common pleas court due to its failure to file a timely notice of appeal.

The common pleas court denied the motion. On appeal, this Court concurred with the common pleas court in its finding that although the City failed to intervene within the required 30–day appeal period, Owners essentially waived their right to object by allowing three months to elapse before they objected:

> Specifically, owners failed to object to the City's participation in a conciliation conference on February 20, 1990, and also filed a supplemental brief on May 1, 1990 regarding the issue of standing, in which they referred to the City as intervenor/appellant without raising any objections. The foregoing, coupled with the fact that owners allowed virtually a three-month period to elapse between the date of the City's notice to intervene, February 27, 1990, and the date when they filed their motion to quash said intervention, May 22, 1990, constitute substantial evidence supporting Common Pleas' decision to deny owners' motion to quash the City's intervention.

Pittsburgh Trust, 604 A.2d at 304-305. See also Housing Auth. of the City of Pittsburgh v. Van Osdol, 40 A.3d 209, 214 (Pa. Cmwlth. 2012) (because the Association participated in the proceeding before the ZBA, without objection from Dung Phat, this Court concluded that the Association had standing and proceeded to discuss the merits of the issues raised by the Association).

In the present controversy, the Hoteliers filed a Petition for Review of the decision of the OOR to the common pleas court on May 24, 2012. On July 9, 2012, the Newspaper requested a Special Management status conference pursuant to Lancaster County Local Rule 212.2B, because there were "preliminary issues including how the matter [was] to proceed."[12] On July 23, 2012, the Newspaper requested a Status Conference pursuant to Lancaster County Local Rule 212.2B.E, which was scheduled for August 29, 2012. Although the Status Conference was a place and time to raise pre-trial motions and issues, the Newspaper did not challenge standing, or file a motion to quash or its equivalent. Instead, the hearing proceeded forward and, at every turn, the Newspaper actually appeared to acquiesce to the Hoteliers' standing.

At the hearing on the Hoteliers' Petition for Review on September 27, 2012, the Newspaper neither mentioned standing nor objected to the Hoteliers' presentation of its evidence. The Newspaper made substantive arguments in support of its position, and challenged the evidence and arguments of the Hoteliers.

[12] Praecipe for Special Management Conference, July 9, 2012, at 1. This document was in the Certified Record.

The Newspaper filed a Post-Trial Brief on November 19, 2012, in which it raised for the first time since its general denial, the issue of the Hoteliers' standing to appeal the final decision of the OOR. That was six months after the Hoteliers filed their Petition for Review. In that six-month span of time, judicial resources were expended at a status conference and a full-day hearing. Five witnesses appeared at the hearing and testified. Undoubtedly, the Hoteliers incurred legal fees preparing for and presenting their case against disclosure of the Monthly Reports.

Because the Newspaper failed to object to the Hoteliers' standing at the earliest opportunity and, in fact, appeared at all times to affirmatively concede the Hoteliers' standing, it waived this objection.[13]

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[13] The Newspaper's standing argument is dubious in any event in light of the due process concerns that have arisen under (albeit divergent) caselaw interpreting the new RTKL. See E. Stroudsburg Univ. Found. v. Office of Open Records, 995 A.2d 496 (Pa. Cmwlth. 2010) (*en banc*) (non-party with a "direct interest" in the case could appeal, even though such a right was not provided for within the RTKL, as a result of "due process safeguards."). See also Pennsylvania State Educ. of Ass'n ex rel. Wilson v. Dep't of Community and Econ. Dev., 616 Pa. 491, 50 A.3d 1263 (2012) (discussing privacy interests of third parties at stake and the concern that individuals are notified prior to their personal information being disseminated); Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc., 13 A.3d 1025, 1034 (Pa. Cmwlth. 2011) (granting intervention in appellate proceedings following a directly interested party's participation in an OOR adjudication because RTKL does not provide a third party with a direct interest a right to appeal the OOR's final determination "as that right is conferred only upon 'a request [o]r or the agency.').

The constitutional right to due process is fully applicable in proceedings before administrative tribunals. Lawson v. Pennsylvania Dep't of Public Welfare, 744 A.2d 804 (Pa. Cmwlth. 2000). Section 752 of the Administrative Agency Law, 2 Pa. C.S. § 752, grants standing to appeal to persons aggrieved (and not just parties) to a local agency action. Pa. Dep't of Aging v. Lindberg, 503 Pa. 423, 469 A.2d 1012 (1983). That section states in pertinent part: "Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom." However, Section 1309 of the RTKL, 65 P.S. §67.1309, states that the provisions of 2 Pa.C.S., relating to administrative law and

(Footnote continued on next page…)

II.

Turning to the substantive merits of the matter, the Newspaper argues that the common pleas court erred when it determined that the information contained on Lines 4 and 5 of the Monthly Report (Hotel Tax and Excise Tax), was confidential.

The RTKL starts with the presumption that "a record in the possession of …a local agency" is "a public record." Section 305 of the RTKL, 65 P.S. §67.305. Exceptions are provided and include "[a] record that constitutes or reveals a trade secret or confidential proprietary information" which is "exempt from access under this act [.]" Section 708(b)(11) of the RTKL, 65 P.S. §67.708(b)(11).

The RTKL defines the terms "trade secret" and "confidential proprietary information" as:

> **"Trade Secret**." Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to, and not

(continued…)

procedure, shall not apply to the RTKL. A closer review of this Section may reveal yet another due process deficiency in the RTKL. Without the right to appeal to the OOR, a "non-party" intervener, whose interests are directly affected by the OOR's decision, would be left with no recourse. See Keystone Raceway Corp. v. State Harness Racing Comm'n, 405 Pa. 1, 5, 173 A.2d 97, 99 (1961) ("Regardless of the admirable purpose for which these [administrative] agencies are usually established, it is a matter of frequent complaint and common knowledge that the agencies at times act arbitrarily, or capriciously, and unintentionally ignore or violate rights which are ordained or guaranteed by the Federal or State Constitution, or established by law. For these reasons it is imperative that a checkrein be kept upon them").

> being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
>
> **"Confidential proprietary information**." Commercial or financial information received by an agency:
>
> (1) which is privileged or confidential; and
>
> (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information

Section 102 of the RTKL, 65 P.S. §67.102.

As this Court recently explained in Commonwealth Department of Public Welfare v. Eiseman, __ A.3d __ (Pa. Cmwlth, Nos. 1935 C.D.2012, 1949 C.D.2012, 1950 C.D.2012, filed on February 19, 2014), "[t]o qualify as 'confidential proprietary information,' the information must meet both components of the two-part test."

a. Confidential Information

In considering whether the requested information is "confidential," this Court must consider the efforts the parties undertook to maintain its secrecy. Eiseman.

Here, the record reflects the Hoteliers, Smith Travel Research and the County Treasurer hold the information on the Monthly Reports in confidence and do not share it with others outside the individual entity. Again, as set forth in more detail above, Mr. Anthon explained that gross receipts of a hotel, number of

occupied room nights, and receipts exempted are kept "strictly confidential" by hoteliers. RevPAR is the "gold standard" in the industry to understand the performance of a hotel. Anthon explained how RevPAR can be calculated from the information submitted on the Monthly Form. There is no other source to discover RevPAR for hotels because the information used to compute it is kept confidential from others outside of the hotel's own operations.

Mr. Freitag testified that Smith Travel Research has confidentiality agreements in place with those hotels which provide their information. He explained that hotels do not share that information with each other about their total revenue and that there is no source for such information available for a hotel to purchase this data about its competitors.

Mr. Ebersole testified that his office treats the information on the Monthly Reports confidential and proprietary information and that he followed the advice of his predecessor's solicitor with regard to the confidentiality of the information contained on the Monthly Reports.

In addition, each Hotel submitted an Affidavit in which it affirmatively represented, under penalty of perjury, that the information provided on the Monthly Report is not made available to the public, is generally neither known to nor readily ascertainable by proper means by other persons.

Accepting all of the above evidence as credible, this Court concludes that the trial court properly determined that the Hoteliers successfully established that the information on the Monthly Report fell within the definition of confidential information.

b. Substantial Harm to Competitive Position

Next, in determining whether disclosure of confidential information will cause "substantial harm to the competitive position" of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released. Eiseman. The word "substantial" appears in the statute to characterize the degree of injury needed to apply this exception. Eiseman.

Here, the Hoteliers presented credible evidence that the information on the Monthly Reports, if disclosed, may be used by competitors to adjust rates to attract and increase market share. Mr. Anthon explained that there is a competitive disadvantage to disclosing the information on the Monthly Reports. Competitors will understand the business of a hotel and adjust or make business decisions which may attract market share to them. He explained how that information might be used by bulk buyers of hotel rooms to depress room rates. Mr. McInerney also testified that the information on the Monthly Reports may be used to lower rates and take business away from the hotel in question. He likened it to giving a "loaded gun" to the competition.[14]

[14] The Newspaper also contends that the information should not be deemed to be confidential because the Hoteliers failed to make any effort (such as "alerting" the County that the Monthly Reports contained confidential proprietary information) to protect the hotel tax and excise tax information contained in the county records prior to the Newspaper's RTKL request. Such measures were unnecessary, however. All tax returns submitted to the Commonwealth, including sales tax returns and information provided by taxpayers who pay taxes that are governed by Section 514 of the Local Tax Enabling Act, Act of December 31, 1965, P.L. 1257, added by Act of July 2, 2008, P.L. 197, 53 P.S. § 6924.514, *as amended*, are protected against disclosure by statute ("information gained by a tax officer or any employee or agent of a tax officer or of the tax collection committee as a result of any declarations, returns, investigations, hearings or verifications shall be confidential."). See also Section 731 of the Fiscal Code, Act of April 9, 1929, P.L. 343, added by the Act of June 6, 1939, P.L. 261, 72 P.S. § 731, *as amended*,
(Footnote continued on next page…)

Based on this credible testimony proffered by the Hoteliers this Court concludes that the trial court properly determined that disclosure of the financial information contained on the Monthly Reports would enable competitors to access privileged information to the substantial detriment of the individual hotels.[15]

The order of the common pleas court is affirmed.

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BERNARD L. McGINLEY, Judge

(continued…)

("Any information gained by any administrative department, board, or commission, as a result of any returns, investigations, hearings or verifications required or authorized under the statutes of the Commonwealth imposing taxes or bonus for State purposes, or providing for the collection of the same, shall be confidential."). Again, Mr. Ebersole testified that the Treasurer's Office treats information contained on those Monthly Reports as confidential.

[15] The Court agrees with the trial court that it is a stretch to conclude that the requested information, namely the amount of tax paid, is in and of itself a trade secret as it is not a formula, drawing, pattern, compilation, customer list, program, device, method, technique or process.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thirty, Inc., d/b/a Best Western Premier Eden Resort & Suites, Treztark II Ltd., as owner of Sleep Inn & Suites and Mainstay Suites, Unique Inns of Lancaster d/b/a Fulton Steamboat Inn, Sleep Tight, Inc., d/b/a Inn at Leola Village, Historic Revere Tavern, Inc., d/b/a Best Western Plus Revere Inn and Suites, Dommel's Hotels d/b/a Country Inn of Lancaster, Cork Factory Hotel, LLC, Continental Inn, Inc., Hospitality Associate of Lancaster L.P., Milestone Hospitality International, LLC, t/a Lancaster Host & Conference Center, 44 Lancaster Associates, LLC d/b/a Comfort Suites, 44 Strasburg Associates, LLC d/b/a Clarion Inn at Historic Strasburg, BM Hospitality, Inc. d/b/a Holiday Inn Express Lancaster Rockvale Outlets, Horst Hotels d/b/a Hilton Garden Inn, Fairfield Inn, Country Inns & Suites and Homewood Suites	:	
v.	:	No. 805 C.D. 2013
Gil Smart and Lancaster Newspapers, Inc.,	:	
Appellants	:	

O R D E R

AND NOW, this 14th day of April, 2014, the Order of the Court of Common Pleas of Lancaster County in the above-captioned matter is hereby AFFIRMED.

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BERNARD L. McGINLEY, Judge