

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

FRIENDS OF DANNY DEVITO, *et al.*,

Petitioners

v.

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

Respondents

No. 68 MM 2020

**GOVERNOR TOM WOLF AND SECRETARY OF HEALTH RACHEL
LEVINE’S ANSWER TO PETITIONERS’ SUPPLEMENTAL
APPLICATIONS FOR RELIEF**

Governor Tom Wolf and Secretary of Health Rachel Levine respectfully submit this answer in opposition to Petitioners’ two Supplemental Applications for Review filed on April 2, 2020. Those two applications are filed out-of-time, present no new facts, and actually support the reasonableness of the Governor’s Order.

Since filing their brief with this Court, Petitioners (collectively “the Entities”) submitted two supplemental applications asking the Court to consider additional facts that they neglected to raise in either their Emergency Application or their brief. Specifically, the Entities ask this Court to consider: (a) the fact that three other states allow golf courses to remain open during the pandemic; and (b) a memorandum from the Federal Cybersecurity and Infrastructure Security Agency (CISA) suggesting that real estate services should be considered essential.

Contrary to the Entities’ averments, these are not “new facts” that have arisen since they filed their brief with this Court on March 31, 2020. The CISA Memorandum was released on March 28, 2020. Indeed, counsel for the Entities emailed Commonwealth Officials’ counsel on Sunday March 29, 2020 to call attention to the CISA Memorandum. Additionally, news articles the Entities cite with respect reporting that New York and Ohio are permitting golf courses to remain open are dated March 27, 2020 and March 30, 2020, respectively. Thus, the Entities’ had the opportunity—and indeed the obligation—to raise these arguments in their initial brief to this Court. *See* Pa.R.A.P. 2111 and 2119. As they failed to do so, these arguments are waived. *See Seebold v. Prison Health Services, Inc.*, 57 A.3d 1232, 1248 n.23 (Pa. 2012) (finding waiver where appellant failed to raise argument in opening brief). The Entities have repeatedly attempted to convert the Pa.R.A.P 123 application process into a mechanism for raising arguments in series, regardless of rule or deadline. This is improper.

To the extent this Court is nonetheless inclined to consider these arguments well past the point that they should have been properly presented, they carry no weight whatsoever.

With respect to golf courses, the Governor and Secretary of Health, guided by their experts, must be permitted broad discretion in determining whether golf courses represent an unacceptable risk of COVID-19 spread. While focusing exclusively

upon three states with lenient golf course policies, the Entities fail to mention the 12 states—Illinois, Maine Massachusetts, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, Vermont, Washington and Wisconsin—which join Pennsylvania in closing all courses.¹ Each day, more and more courses are closed as States realize the dangers present in these recreational businesses. *Id.* Further, citing to New York’s lax golf course policies is perplexing, given that New York is currently the epicenter of the COVID-19 epidemic.

With respect to real estate businesses, the fact that one such business—the Brokers Realty Group Limited—was granted a waiver does not prove that the Governor’s Order is somehow invalid. Quite the opposite. It demonstrates that the waiver system works.

As demonstrated by the Entities’ own exhibit, the Brokers Realty Group Limited was granted a waiver to operate its place of business under limited circumstances to minimize the risk of infection. Suppl. appl. at 4. This, of course, does not mean that all real estate agents must now be allowed to operate. The waiver process examines applicants based upon the unique facts described within their application and the risk/benefit analysis in letting that business reopen a physical location. For this reason, the waiver approval letter attached to the Entities’

¹ Golf and COVID-19: Latest news on course operations, Golf Advisor, <https://www.golfadvisor.com/covid-19> (last visited 4/2/20).

Supplemental Application does not make any declarations about the essential nature of real estate businesses generally or the safety of opening numerous new physical locations broadly. Rather, that approval letter is limited to the specific applicant's business "to the extent described in [its] application" and only for "the physical location identified in [its] application." Gregory Suppl. app. ex A.

Additionally, the Brokers Realty Group Limited submitted "virtual and telework operations" details with its application, explaining how the company would minimize the risk of community infections. The Entities ignore all of this language in their attempt to paint the entirety of the real estate practice with a single broad brush. It is precisely for that reason why the waiver process must be performed on an individualized basis.

Further, the Entities mischaracterize the CISA guidelines. Those guidelines expressly state as follows:

This list is advisory in nature. It is not, nor should it be considered, a federal directive or standard. Additionally, this advisory list is not intended to be the exclusive list of critical infrastructure sectors, workers, and functions that should continue during the COVID-19 response across all jurisdictions. Individual jurisdictions should add or subtract essential workforce categories based on their own requirements and discretion.

(emphasis in original).²

Finally, with respect to the waiver process, the Brokers Realty Group Limited filed an application and, after an individualized assessment based upon the facts contained within its application, the Governor and Secretary of Health granted a waiver allowing limited operations at a physical location. This demonstrates that the waiver process works and the Governor's Order is narrowly tailored to confront the global pandemic.

The two April 2, 2020 Supplemental Applications for Relief should be denied.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

KELI NEARY
Executive Deputy Attorney General
Civil Law Division

By: */s/ J. Bart DeLone*

J. BART DeLONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section
Pa. Bar # 42540

² Guidance on the Essential Critical Infrastructure Workforce, CISA Website, <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce> (last visited 4/2/20).

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 712-3818
FAX: (717) 772-4526

DATE: April 3, 2020

CERTIFICATE OF COUNSEL

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/ J. Bart DeLone

J. BART DeLONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section

CERTIFICATE OF SERVICE

I, J. Bart DeLone, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing answer, via electronic service, on the following:

Marc A. Scaringi, Esq.
Brian C. Caffrey, Esq.
Scarinigi Law

/s/ J. Bart DeLone

J. BART DeLONE
Chief Deputy Attorney General

DATE: April 3, 2020