

3. Respondent, through counsel, recently became aware of an Order issued by this Court on October 21, 2024, in a different Right to Know Law appeal, *Picker v. Pennsylvania Liquor Control Board*, No. 553 C.D. 2024.

4. In the October 21, 2024 Order, the Court, in a *per curium* order, granted the petitioner's request to strike an improper supplement to the record without leave of court. *See* October 21, 2024 Order, attached and incorporated hereto as Ex. A.

5. The Order stated, "Section 1303 of the Right-to-Know Law, Act of February 14, 2008, P.L. 6, 65 P.S. § 67.1303, provides that the record on appeal before a Chapter 13 court 'shall consist[] of the request, the agency's response, the appeal filed under [S]ection 1101, the hearing transcript, if any, and the final written determination.'" Based on the foregoing, the Court granted the petitioner's application to strike, concluding that the Pennsylvania Liquor Control Board's brief included as exhibits documents that were not "before the Office of Open Records."

6. In the instant matter, the reproduced record similarly contains documents that were not before the OOR. R.123-125a. Petitioner did not seek leave of this Court to include documents in the reproduced record that were not before the OOR and Petitioner's briefs rely on those documents. Petitioner's opening brief at 33-34; reply brief at 6.

7. In particular, Petitioner’s reproduced record improperly includes a Declaration of Jonathan Fascitelli, chief executive officer for CBL Real Estate LLC d/b/a 76DevCo (“76DevCo Declaration”), dated April 23, 2024. R.123a-125a.

8. Respondent objected to the inclusion of the 76DevCo declaration in her Reply Brief, stating: “Petitioner has improperly sought to supplement the record on this appeal with a declaration of a third party that was not submitted to the OOR. The OOR record shows that no third parties sought to participate as a direct interest participant. *See* R.003b–004b, 008b–009b. Yet, when SEPTA filed its Opening Brief to this Court in April 2024, it submitted into the record on appeal a third party declaration from 76DevCo that had not been presented to the OOR.” Respondent’s August 30, 2024 Brief at 18 (citing *McKelvey v. Pa. Dep’t of Health*, 255 A.3d 385, 404 (Pa. 2021)).

9. In *McKelvey*, the Supreme Court rejected the Department of Health’s request to supplement the record on appeal from an OOR decision, explaining “[w]e note that the Department received numerous opportunities to submit evidence and argument before the OOR, and chose not to take advantage of those opportunities.” *Id.*

10. Like the agencies in *McKelvey* and *Picker*, Petitioner had a full and fair opportunity to litigate this matter before the OOR, including the opportunity to submit documents related to any alleged third-party interests. SEPTA instead chose

to improperly insert a post-OOR declaration into the reproduced record and its briefing without seeking or obtaining leave of Court.

11. Even if Petitioner had requested leave of Court it must still demonstrate why additional evidence—which could have been provided to the OOR—is necessary; otherwise, the agency is attempting to gain a “proverbial second bite of the apple.” See *Pennsylvania Tpk. Comm'n v. Murphy*, 25 A.3d 1294, 1297–98 (Pa. Cmwlth. 2011) (denial of state agency’s application to supplement the record pursuant to Pa.R.A.P. 123 with additional declarations not introduced at the OOR).

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that this Honorable Court grant her application for relief and enter an order in the form attached hereto.

Date: November 5, 2024

/s/Paula Knudsen Burke

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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.

Dated: November 5, 2024

/s/Paula Knudsen Burke

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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Dated: November 5, 2024

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Benjamin R. Picker,	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Liquor Control Board	:	
(Office of Open Records),	:	
Respondent	:	No. 553 C.D. 2024

PER CURIAM

ORDER

NOW, October 21, 2024, upon review of Benjamin R. Picker’s (Petitioner) August 20, 2024 “Application to Strike [the Pennsylvania Liquor Control Board’s (Respondent)] Improper Supplementation of the Record Without Leave of Court” (Application), to which no answer has been filed, the Application is GRANTED.

Section 1303 of the Right-to-Know Law, Act of February 14, 2008, P.L. 6, 65 P.S. §67.1303, provides that the record on appeal before a Chapter 13 court “shall consist[] of the request, the agency’s response, the appeal filed under [S]ection 1101, the hearing transcript, if any, and the final written determination.” *Id.*

A review of the record confirms that the exhibits attached to Respondent’s appellate brief were not before the Office of Open Records. Accordingly, pages 50 through 93 (Exhibits B through H) of Respondent’s brief are STRICKEN, and any reference thereto in the appellate brief shall be disregarded by the Court.

Petitioner may file four copies of a reply brief, and serve one copy on Respondent, pursuant to this Court’s August 23, 2024 Order.

The Prothonotary shall attach a copy of this Order to all electronic and paper copies of the briefs.

Certified from the Record
OCT 21 2024
And Order Exit