

The Pennsylvania Environmental Rights Amendment: Implications for All Attorneys

The Courts' New View of the Environmental Rights Amendment

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*Any opinions expressed are my own and do not necessarily reflect the opinions of Marathon, MPLX, or MarkWest Energy Partners.

agenda



- Introduction to Article 1, Section 27
- The PEDF decision has renewed interest in the Environmental Rights Amendment
- Backdrop to PEDF
 - Robinson Township
 - PEDF in Commonwealth Court
- Supreme Court's PEDF decision
- Cases since PEDF
- Open questions

article I, section 27



- Adopted easily in 1971
- Three sentences:
 - “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment.”
 - “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come.”
 - “As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

article I, section 27 is atypical



- Montana and Rhode Island are only other states to elevate environmental rights alongside political rights in constitution.
- Hawaii, Illinois, and Massachusetts articulate and protect their citizens' environmental rights in separate articles of their charters.
- Hawaii and Illinois expressly require further legislative action to invoke environmental rights.

The backdrop to *PEDF*



- 1973: Commonwealth Court issued two significant decisions relating to Art I, Sec 27
 - ***Commonwealth v. National Gettysburg Tower, Inc.***, 302 A.2d 886 (Pa. Cmwlt. Ct. 1973)
 - Concluded that Art I, Sec 27 is “self-executing.”
 - (PA Supreme Court later divided on this point)
 - ***Payne v. Kassab***, 312 A.2d 86 (Pa. Cmwlt. Ct. 1973)
 - Announced a three-part test for determining whether a government action violates Art I, Sec 27.

The backdrop to *PEDF*



- ***Commonwealth v. National Gettysburg Tower, Inc.***, 302 A.2d 886 (Pa. Cmwlth. Ct. 1973)
 - Commonwealth challenged plan to construct 307-foot observation tower near Gettysburg battlefield.
 - Argued construction would violate people’s right to preservation of natural, scenic, historic, and esthetic values of area.
 - Concluded that Article I, Section 27 is “**self-executing.**”
 - (PA Supreme Court later divided on this point)

The backdrop to *PEDF*



- ***Payne v. Kassab***, 312 A.2d 86 (Pa. Cmwlth. Ct. 1973)
 - Action to enjoin street widening project that took ½ acre from River Common in Wilkes-Barre
 - River Commons is a public park with historical significance
 - Challengers to action argued expansion unconstitutional under Article I, Section 27
 - Commonwealth Court sided with state and local government agencies

The backdrop to *PEDF*



- ***Payne v. Kassab***, 312 A.2d 86 (Pa. Cmwlth. Ct. 1973)
 - Held:
 - “Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania.”
 - “The result of our holding is a controlled development of resources rather than no development.”

The backdrop to *PEDF*



- ***Payne v. Kassab*** test:
 1. Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
 2. Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
 3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Payne v. Kassab, 312 A.2d 86, 94 (Pa. Cmwlth. 1973)

The backdrop to *PEDF*



- Pennsylvania Supreme Court later affirmed the decisions that Commonwealth Court issued in *National Gettysburg Tower* and *Payne v. Kassab*:
 - Deeply divided in *National Gettysburg Tower* as to whether first sentence of Article I, Section 27 (“right to clean air, pure water, and to the preservation of” certain environmental values) is self-executing.
 - In *Payne v. Kassab*, did not endorse Commonwealth Court’s three-part test. But majority agreed with Commonwealth Court that public trust components of Article I, Section 27 (second and third sentences) are self-executing.

The backdrop to *pedf*



- Commonwealth Court, common pleas courts, and Environmental Hearing Board (“EHB”) applied three-part *Payne v. Kassab* test in numerous cases.
- Did so in relatively mechanical way, rarely striking down government actions under Art I, Sec 27.
- Courts and EHB “rarely distinguish[ed] between public and private resources, between values and resources, or between the public trust and the right to a decent environment.” Ken Gormley, et al., *The Pennsylvania Constitution: A Treatise on Rights and Liberties* (2004) at § 29.3.
- In many respects, Art I, Sec 27 faded into background of the legal landscape.

backdrop to *PEDF*



- ***Robinson Township v. Commonwealth***, 83 A.3d 901 (Pa. 2013)
 - Court addressed Act 13 of 2012 and concluded that several of its key provisions were unconstitutional, striking them down.
 - Plurality concluded provisions violated Art I, Sec 27.
 - Plurality criticized *Payne* test and expressed more expansive view of Art, Sec 27.
 - Plurality's position – as a plurality opinion – was not binding on the Pennsylvania Supreme Court or lower Pennsylvania tribunals.

PEDF: Commonwealth court



- Environmental organization asserted that certain Pennsylvania statutes violated public trust components of Art I, Sec 27 because:
 - Under statutes, funds Commonwealth derived from leasing state lands for oil and gas development were not reinvested into conservation and maintenance of Pennsylvania's public natural resources.
 - Funds were instead funneled into Commonwealth's general fund and used to support other public programs.

PEDF: commonwealth court



- Commonwealth Court re-affirmed *Payne v. Kassab* test and its pre-*Robinson Township* mode of analyzing Article I, Section 27 challenges.
- Rejected challenge at hand, concluding that General Assembly has wide discretion to decide which public purposes Commonwealth's funds from oil and gas leasing should serve.
- “The only constraint we see on the use of monies derived from the sale or leasing of public natural resources under Article I, Section 27 is the general requirement that the monies be used ‘for the benefit of all the people.’”
 - *PEDF v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth 2015)

PEDF: supreme court



- Majority opinion
- Dismantles *Payne v. Kassab* test:
 - Test is “unrelated to the text of Section 27 and the trust principles animating it” and “strips the constitutional provision of its meaning.”
 - “[T]he proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”

PEDF: supreme court



- Pronounced that, under first sentence of Art I, Sec 27, government may not “unreasonably impair” right to clean air, pure water, and the like.
- Illuminated some of Commonwealth’s duties under “public trust” components of Art I, Sec 27:
 - Private trust principles inform meaning of public trust components.
 - “[T]he Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties.”
 - “[T]he Commonwealth must act affirmatively via legislative action to protect the environment.”

PEDF: supreme court



- Concluded proceeds derived from public natural resources are part of “**trust corpus.**”
- Proceeds must be reinvested in **conservation and maintenance** of public natural resources, not other public programs.
- If statutes divert oil & gas sale proceeds into other public programs, they are unconstitutional.

Changing Landscape



- What effect is the new interest in the Environmental Rights Amendment having on litigation?
 - Common to see Art I., Sec. 27 arguments raised by Pennsylvania environmental groups in response to actions by Department of Environmental Protection
 - Also raised at municipal level to challenge actions of local governments

PERMIT RENEWAL



- ***Friends of Lackawanna v. Pa.*** (EHB Dkt. No. 2015-063-L, Nov. 8, 2017)
 - Keystone Landfill received last permit renewal in 2005 and sought to renew 10-year permit
 - PaDEP approved permit for an additional 10 years with no new operational conditions, after reviewing the facility’s compliance history (which was positive)
 - Neighborhood environmental group formed to oppose the expansion of the Keystone Landfill challenged the renewal, raising concerns about (1) contamination in the groundwater and odors; (2) PaDEP’s compliance history review was inadequate; and (3) by renewing permit, PaDEP failed in its responsibilities under Act 1, Section 27
 - EHB considered whether PaDEP lawfully executed its duties under Art. I, Sec. 27 (see pg. 34)
 - Unclear to EHB what standards PaDEP applies when considering a permit renewal, so EHB decided it was OK for PaDEP to consider all concerns raised by FOL.

PERMIT RENEWAL



- ***Friends of Lackawanna*** cont.
 - **“Article I, Section 27 applies to the Department’s decision to renew a municipal waste landfill permit. The Department may not take such an action in derogation of its constitutional responsibilities.” (pg. 37)**
 - **(1)** “We held in *CCJ* that the proper approach in evaluating the Department’s decision under the first part of Article I, Section 27 is, first, for the Board to ensure that the Department considered the environmental effects of its actions.” (pgs. 38-39)
 - **(2)** “We must then decide whether the Department correctly determined that any degradation, diminution, depletion, or deterioration of the environment that is likely to result from the approved activity is reasonable or unreasonable.” (pg. 39)

- **Required a groundwater assessment permit condition under Art I, Sec 27 because PaDEP failed to act on leachate found in certain monitoring well (MW-15).**
 - “Article I, Section 27 requires effective oversight by the Department over a solid waste disposal facility accepting up to 7,500 tons of waste per day in such close proximity to densely populated areas.” (pg. 61)
 - “The lack of effective oversight will almost certainly lead to an impingement of the neighbors’ constitutionally assured rights.” (pg. 62)
 - “Except for the groundwater degradation associated with MW-15, FOL did not meet its burden of proving by a preponderance of the evidence that the Department acted unreasonably or not in accordance with the law, including Article I, Section 27, in renewing Keystone’s operating permit without conditions.” (pg. 72)

Art. 1, Sec. 27 and Local Ordinances



- *UGI Utilities, Inc. v. City of Reading*, No. 499 M.D. 2015 (Pa. Cmwlth. Nov. 21, 2017)
 - UGI challenged city ordinance governing location of gas meters in historic districts.
 - City argued, in part, that ordinance implicated historic resources protection provision of Art. I, Sec. 27.

Art. 1, Sec. 27 and Local Ordinances



- *UGI Utilities, Inc. v. City of Reading*, No. 499 M.D. 2015 (Pa. Cmwlth. Nov. 21, 2017)
 - Court found ordinance preempted by PUC Code provision governing safe location of meters
 - Art. I, Sec. 27 “does not immunize local regulation from preemption”
 - Exception: “where the state statute or regulation on which the preemption is based so completely removes environmental protections that it violates the state’s duties under that constitutional provision.”
 - *Citing* plurality opinion from *Robinson Township*

open questions following *PEDF*



- Is any state agency empowered by Art 1, Sec 27 to take environmentally-protective actions not otherwise authorized by statute?

- Is first sentence of Art I, Sec 27, self-executing?
 - (conferring upon individuals “right to clean air, pure water, and the preservation of certain environmental values, is What is (i) “clean air,” (ii) “pure water,” (iii) “natural values of the environment,” (iv) “scenic values of the environment,” (v) “historic values of the environment,” (vi) “esthetic values of the environment,” and (vii) “preservation” of the values of the environment?)

- When does a law “unreasonably impair” right to clean air, pure water, and preservation of certain environmental values?

open questions following *PEDF*



- How do property rights and environmental rights interplay?
- To what extent, if any, does “Pennsylvania’s public natural resources,” include private property rights?
- Are local governments trustees of public natural resources?
- As trustees under Art I, Sec 27, will courts give government agencies the same level of deference given to private trustees?

Thank you PBI!