Breathing New Life into Pennsylvania’s Environmental Rights Amendment

By James W. Pfeifer and John W. Carroll

On Dec. 19, 2013, the Pennsylvania Supreme Court issued a controversial decision in *Robinson Township v. Commonwealth of Pennsylvania* addressing the injunction entered by the Commonwealth Court enjoining the enforcement of a number of the provisions of a 2012 act that limited local land use regulation of oil and gas activities (Act 13). Act 13 set forth the first major overhaul to Pennsylvania’s Oil and Gas Act in more than 30 years. The Supreme Court issued an opinion that was part plurality, part majority, affirming the Commonwealth Court’s decision and enjoining the enforcement of a number of the provisions of the act.

The majority decision confirmed that a wide range of individuals have standing to assert a claim challenging the enforcement of Act 13 and remanded a number of issues to the Commonwealth Court for further consideration. The decision’s most compelling impact, however, is the plurality’s ruling that the challenged provisions limiting local land use regulation were unconstitutional based on an analysis of Article I, Section 27, of Pennsylvania’s Constitution.

Article 1, Section 27, was added to Pennsylvania’s Constitution in 1971 as the Environmental Rights Amendment. It provides:

*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.

The plurality concluded that several provisions of Act 13 were unconstitutional, based in large part on the finding that the provisions failed to consider the localized impact oil and gas operations might have on communities. In dissent, Justice Thomas G. Saylor warned that the plurality’s application of Section 27 “completely redefine[s] the role of municipalities relative to the sovereign.” Dissenting Slip Opinion at 8. Time will tell if Robinson Township’s plurality decision will have such an impact or serve as a one-time invalidation of Act 13.

The Environmental Rights Amendment Expanded

Chief Justice Ronald D. Castille’s opinion analyzes Article 1, Section 27, beginning with an analysis of existing interpretations of the amendment. The court notes its dissatisfaction with the case law developed to date for the protection of Section 27 rights, noting that “it would appear that the jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways.” Slip Opinion at 71.

Until Robinson Township, the accepted test for evaluating a claim under Section 27 was set forth in Payne v. Kasub. 312 A.2d 86 (Pa. Commw. Ct. 1973). The plurality rejected this test (except in narrow circumstances), The Payne court held that to determine whether relief is proper under Section 27, a court must balance the following factors:

(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
The most compelling impact is the ruling that the Act 13 provisions limiting local land use regulation were unconstitutional.

Time will tell if the decision will have a lasting impact or serve as a one-time invalidation of Act 13.

clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?”

Id. The plurality rejected the Payne test on the basis that it was “non-textual” and “inappropriate to determine matters outside the narrowest category of cases, i.e., those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests.” Slip Opinion at 101-02.

The plurality did not fully define the constitutional test to replace the overruled Payne test. However, it set out to establish the framework on which future Section 27 claims will be decided. It began by noting that the three clauses of Section 27 establish two basic rights: The first clause “requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.” Id. at 74. The second and third clauses establish that the commonwealth is to serve as a trustee of Pennsylvania’s commonly owned public natural resources for the benefit of its citizens. Id. at 81-82.

With respect to its trustee obligations, the commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution or depletion of public natural resources, whether such degradation, diminution or depletion would occur through direct state action or indirectly, e.g., because of the state’s failure to restrain the actions of private parties. Id. at 84. The plurality provided an expansive definition of “public natural resources” stating that “[a]t present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” Id. at 80.

On this basis the plurality declared that a Section 27 claim may proceed on two different theories — either that the government has infringed upon citizens’ rights or the government has failed in its trustee obligations. Id. at 72. Section 27 protects against a wide range of actions, the court held, providing protection against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the long term. Id. at 88. Importantly, the court noted that there is no impediment to citi-
The court noted there is no impediment to citizen suits to enforce the state’s Environmental Rights Amendment.

After defining the framework in which Section 27 claims were to be considered, the plurality proceeded to evaluate the Act 13 provisions at issue. Specifically, it considered the provisions set forth at 58 Pa.C.S. §§ 3303, 3304 and 3215(b)(4). Section 3303 pre-empted existing local ordinances relating to oil and gas operations. Section 3304 precluded local ordinances from prohibiting certain natural gas development activities and required that they allow oil and gas operations in the manner set forth in the statute. Section 3215(b) created minimum setback requirements with respect to water resources, but subsection (b)(4) provided for mandatory waivers of setback requirements upon the submission of a plan identifying the additional measures to be taken to protect the resources.

The plurality noted that in general the claims at issue implicate the commonwealth’s duty as trustee of public natural resources and that the resources at issue are “surface and ground water, ambient air, and aspects of the natural environment in which the public has an interest.” Id. at 114, 117. The plurality then proceeded from a controversial premise, stating that “[b]y any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.” Id. at 118.

The plurality struck down § 3303’s pre-emption of local ordinances as unconstitutional. The court found that citizens who purchased homes in areas zoned residential had a reasonable expectation regarding the manner in which that environment would be maintained into the future and that Act 13 would fundamentally disrupt such expectations. Id. at 121. It ruled that “Act 13 thus commands municipalities to ignore their obligations under Article 1, Section 27, and further directs municipalities to take affirmative actions to undo existing protections of the environment in their localities. The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment.” Id. at 122.

The plurality proceeded to strike down § 3304’s mandated zoning provisions on similar grounds. It noted that a zoning regime permitting industrial uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally protected aspects of the public environment and of a certain quality of life. Id. at 124. The court again found that the provision disrupted the citizens’ expectations regarding their local environment. Id. at 125. The court held that the General Assembly did not comply with Section 27’s constitutional command because it did not exercise the police power to foster sustainable development in a manner that respects the reserved rights of the people to a clean, healthy and esthetically pleasing environment. Id. at 128, citing Schuylkill Trust Co. v. Schuylkill Mining Co., 57 A.2d 833 (Pa. 1948).

Finally, the plurality struck down § 3215 (b)(4)’s provision granting waivers of setback requirements as a matter of right.
The court said a claim may proceed on two theories: that the government has infringed upon citizens’ rights or that it has failed in its trustee obligations.

It found the provision violated Section 27 because it did not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver of the setbacks. Slip Opinion at 131. As such, it failed to provide effective protections for the waters of the commonwealth. Id. at 132. The court held that the provision “fosters decisions regarding the environment and habitability that are non-responsive to local concerns” and fails “to account for local conditions.” Id. at 133.

**Conclusion**

On Jan. 2, 2014, the commonwealth filed an application for reconsideration with the Supreme Court, challenging the finding of unconstitutionality based in large part on the alleged paucity of a factual record. Regardless of the outcome of that application, the question may remain whether future courts will continue to apply the *Payne* test when reviewing actions of the executive branch or develop a new test based on *Robinson Township’s* broader framework. Is the Legislature going to be held to the same standard as the executive branch when questions of constitutionality are raised? Should it? Now that Article 1, Section 27, has been dusted off by the court and is no longer considered merely aspirational, where will this new interpretation lead? Stay tuned. ⚖️

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