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Citations:

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Cyril A. Fox Jr., *Environmental Protection - A Constitutional Limitation on the Land Use Control Powers of Pennsylvania Municipalities*, 36 U. PITT. L. REV. 255 (1974).

ALWD 7th ed.

Cyril A. Fox Jr., *Environmental Protection - A Constitutional Limitation on the Land Use Control Powers of Pennsylvania Municipalities*, 36 U. Pitt. L. Rev. 255 (1974).

APA 7th ed.

Fox, C. (1974). *Environmental protection a constitutional limitation on the land use control powers of pennsylvania municipalities*. *University of Pittsburgh Law Review*, 36(2), 255-284.

Chicago 17th ed.

Cyril A. Fox Jr., "Environmental Protection - A Constitutional Limitation on the Land Use Control Powers of Pennsylvania Municipalities," *University of Pittsburgh Law Review* 36, no. 2 (Winter 1974): 255-284

McGill Guide 9th ed.

Cyril A. Fox Jr., "Environmental Protection - A Constitutional Limitation on the Land Use Control Powers of Pennsylvania Municipalities" (1974) 36:2 U Pitt L Rev 255.

AGLC 4th ed.

Cyril A. Fox Jr., "Environmental Protection - A Constitutional Limitation on the Land Use Control Powers of Pennsylvania Municipalities" (1974) 36(2) *University of Pittsburgh Law Review* 255

MLA 9th ed.

Fox, Cyril A. Jr. "Environmental Protection - A Constitutional Limitation on the Land Use Control Powers of Pennsylvania Municipalities." *University of Pittsburgh Law Review*, vol. 36, no. 2, Winter 1974, pp. 255-284. HeinOnline.

OSCOLA 4th ed.

Cyril A. Fox Jr., "Environmental Protection - A Constitutional Limitation on the Land Use Control Powers of Pennsylvania Municipalities" (1974) 36 U Pitt L Rev 255

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# ENVIRONMENTAL PROTECTION—A CONSTITUTIONAL LIMITATION ON THE LAND USE CONTROL POWERS OF PENNSYLVANIA MUNICIPALITIES

Cyril A. Fox, Jr.\*

*In 1971 an Environmental Protection Amendment was added to the Pennsylvania Constitution. Professor Fox analyzes the few cases in which this amendment has been applied and interpreted. A number of interesting questions concerning how this amendment will affect land use controls by municipalities are discussed along with the author's suggestions as to the manner in which the amendment may be most positively integrated into our system of land use regulation. —The Editors*

Across the nation there is a growing demand for greater consideration of environmental and ecological factors in land use regulation. Historically, governmental efforts to regulate the development and use of land so as to preserve its natural beauty and other aesthetic values were considered to be beyond the scope of the police power, primarily because of the inability, or perceived inability of courts to arrive at mutually acceptable standards of "beauty" for all persons involved.<sup>1</sup>

Since the 1960's, society and the courts have become more aware of, and more tolerant towards, the public need to preserve environmental and other amenities for present and future generations.<sup>2</sup> The early problems with environmentally oriented regulation are being resolved through broader legislative and constitutional enactments and a more sophisticated understanding of the essential interrelationships between various separate parcels of land.<sup>3</sup> The advent of the National Environ-

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1. In one of the famous Pennsylvania "exclusionary zoning" cases, *National Land and Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965), Easttown Township tried to defend its requirement of four and five acre zoning lots, in part, as serving to preserve the "rural character" of the area, the "setting" of older homes and "historic sites," as well creating green belts within the municipality. The court rejected these purposes as not being within the legitimate uses of the police power. The establishment of green belts, said the court, could have been accomplished through the exercise of eminent domain or the use of cluster zoning. The preservation of the "setting" of older homes and similar objectives, however, were not appropriate public goals and had to be left to private means.

2. See Large, *This Land Is Whose Land? Changing Concepts of Land As Property*, 1973 WIS. L. REV. 1039; Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971).

3. See Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973) for a review of the present judicial attitude toward regulations based primarily upon aesthetic considerations. The author finds that 14 states either have approved regulation of this type or indicated that it would be approved in a proper case; 23 states have held it to be invalid

mental Policy Act (NEPA)<sup>4</sup> and its requirement of "Environmental Impact Statements"<sup>5</sup> for most federal or federally funded projects has served to provide a mechanism by which environmental regulations and environmental judgments can be reviewed by administrative agencies and the courts. A number of states have adopted constitutional amendments or enacted state-wide legislation creating governmental duties to consider environmental factors in land use control.

On May 18, 1971, Pennsylvania voters approved an amendment to Article 1 of the Constitution of the Commonwealth of Pennsylvania, adding Section 27, the "Natural Resources and Public Estate Amendment:"

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all of the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.<sup>6</sup>

The full impact of the Environmental Protection Amendment on municipal land use regulation is not yet clear. However, in the light of the few cases in which it has been interpreted and the judicial attitude of courts in other jurisdictions, it appears likely that municipalities will have to give much greater consideration to the specific values set forth in this amendment in formulating land use control strategies and in executing those strategies through the adoption of appropriate regulations and the approval of public and private land developments. This Article will explore some of the questions raised by the amendment and suggest some of the answers which may be forthcoming.

The Municipalities Planning Code (MPC) of 1968,<sup>7</sup> which authorizes all municipalities of the Commonwealth except cities of the first and second class to regulate the development of land, does not contain any explicit requirement that municipalities consider environmental and

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absent evidence that the regulation also serves some other, more familiar public interest; and in 14 states, no cases directly addressing the issue could be found. See also *County of Fayette v. Holman*, 11 Pa. Cmwlth. 357, 315 A.2d 335 (1973) (police power to promote "general welfare" may allow the prohibition of mobile homes in certain residential areas under appropriate circumstances); and see Comment, *The Aesthetic Factor in Zoning*, 11 DUQ. L. REV. 214 (1972).

4. 42 U.S.C. §§ 4321 *et seq.* (1971).

5. 42 U.S.C. § 4332(2)(c)(1971).

6. PA. CONST. art. I, § 27.

7. PA. STAT. ANN. tit. 53, §§ 10101 *et seq.* (1972).

other values set forth in the Environmental Protection Amendment in formulating zoning, official map, sub-division, land development and planned residential development ordinances. However, the legislative purpose of the MPC<sup>8</sup> indicates that the legislature intended that it be interpreted broadly enough to allow municipalities

to provide for the general welfare by guiding and protecting *amenity*, convenience, future government, economics, practical, and social and cultural facilities, development and growth, as well as *the improvement of governmental processes and functions . . . and to permit municipalities . . . to minimize such problems as may presently exist of which may be foreseen.*<sup>9</sup>

Only in Section 605 of the MPC, is there any express recognition of the propriety of considering any of the factors enumerated in the constitutional amendment in the adoption of land use regulations. This section, which authorizes the creation of zoning district classifications, permits exceptions from the requirement that regulations be uniform for each class of use or structure within a zoning district.<sup>10</sup> Special regulations are permitted in any district for uses or structures "at or near . . . places having unique historical or patriotic interest or value" and "other places having a special character or use affected by their surroundings."<sup>11</sup> The MPC is otherwise silent on the duty of municipalities to consider environmental and other characteristics of particular parcels of land or of particular uses in the adoption, amendment and enforcement of land use regulations.

If such a duty exists, it must be found within the Environmental Protection Amendment. Certainly, the amendment itself creates a framework within which courts logically may conclude that municipalities must consciously consider those enumerated environmental values—clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic values of the environment—in the preparation of regulations and in the granting of building, use and other related permits. As will be developed hereafter failure to consider these values in connection with the granting of any permit may provide grounds for challenging the permit: first before the municipality's zoning hearing board; and subsequently, before the courts of common pleas and Commonwealth Court.

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8. PA. STAT. ANN. tit. 53, § 10105 (1972).

9. *Id.*

10. PA. STAT. ANN. tit. 53, § 10605 (1972).

11. *Id.*

The first question to be answered, however, is whether the Environmental Protection Amendment should be given any effect in the absence of specific implementing legislation by the General Assembly. Unless the amendment has some force of law independent of specific legislation, it can not operate to control the action of municipalities and other governmental agencies until appropriate legislation has been adopted. The Commonwealth Court has said on three separate occasions that the amendment was self-executing and required no further legislative implementation.<sup>12</sup> While the judges of the Commonwealth Court were not unanimous in the first two cases, with President Judge Bowman and Judge Mencer expressing contrary views, that court's most recently reported decision on point was a unanimous one.

The result of the first case interpreting the amendment to reach the Supreme Court of Pennsylvania, *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,<sup>13</sup> does not provide any definitive answer to this specific question. In that case, Justices O'Brien and Pomeroy indicated that the amendment was not self-executing;<sup>14</sup> Justices Roberts, Manderino<sup>15</sup> and Nix<sup>16</sup> expressed no opinion with respect to this aspect of the case; and Chief Justice Jones and Justice Eagen were of the view that the amendment was self-executing.<sup>17</sup>

The Commonwealth, through the Governor and the Attorney General, had sought to enjoin the construction of a 307 foot observation tower near the Gettysburg National Park and Gettysburg National Military Cemetery. There were no land use regulations in Cumberland Township, the site of the proposed tower, governing its erection. Indeed,

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12. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Cmwlth. 231, 302 A.2d 886, *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973); *Payne v. Kassab*, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), *exceptions to decree nisi dismissed*, \_\_\_\_ Pa. Cmwlth. \_\_\_\_, 323 A.2d 407 (1974); *Bucks County Bd. of Commrs. v. Commonwealth Public Utility Comm'n*, 11 Pa. Cmwlth. 487, 313 A.2d 185 (1973).

13. 454 Pa. 193, 311 A.2d 588 (1973). For an interesting discussion of the background of this case, see Roe, *The Second Battle of Gettysburg: Conflict of Public and Private Interests in Land-Use Policies*, 2 ENVIRONMENTAL AFFAIRS 16 (1972). For an indication of the tenacity of the Commonwealth after the Supreme Court decision in the instant case, see *Commonwealth of Pennsylvania v. Morton*, 381 F. Supp. 293 (D.C. D.C. 1974), where the federal district court, while denying substantive relief requested, in the form of injunction or mandamus, did remand to the Secretary of Interior for consideration of the necessity of an environmental impact statement under NEPA for that Department's granting of a right-of-way over federal land to the Tower.

14. *Id.*

15. *Id.* at 206, 311 A.2d at 595 (concurring opinion).

16. *Id.* at 206, 311 A.2d at 595 (Justice Nix concurred in the result without an opinion.).

17. *Id.* at 208, 311 A.2d at 596 (dissenting opinion).

it appears that there were no zoning ordinances at all in Adams County, where Cumberland Township is located. The case provides an example of the classic conflict between two sets of constitutional rights: those of owners of private property to use and develop their land as they see fit under rights protected by Article I, Sections 1 and 10 of the Pennsylvania Constitution; and those of the public, as provided in the Environmental Protection Amendment. The Commonwealth contended that the amendment reserved rights in the people of the Commonwealth which could be protected and asserted through their government. Based upon this theory, the Commonwealth set out to prove that construction of the tower would result in "a denial of the people's rights to the preservation of the natural scenic historic and aesthetic values of the Gettysburg Battlefield . . . ."<sup>18</sup> To establish this denial, the Commonwealth presented a number of highly respected experts in architecture, history, and religion to give evidence concerning the aesthetic value of the Gettysburg Battlefield. Defendants countered with the testimony of the designer of the tower, a County Commissioner of Adams County and an expert in environmental education. The trial court, which made extensive findings of fact based upon a lengthy record, concluded that the Commonwealth had failed to prove by clear and convincing evidence that the tower would prove detrimental to the existing environment of the Gettysburg Battlefield, particularly in view of the large amount of commercial activity presently surrounding the Battlefield.<sup>19</sup>

Upon appeal, the Commonwealth Court unanimously supported the result, affirming the chancellor's conclusion that the Commonwealth had failed to meet the heavy burden of proving that the tower would have a detrimental effect upon the environment. The court specifically approved imposing upon the Commonwealth the burden of proving its case by clear and convincing evidence of "irreparable harm."<sup>20</sup>

A majority of that court stated that the Environmental Protection Amendment was self-executing, and that the Governor and Attorney General could assert the public rights secured by its provisions:

We find no more reason to hold Section 27 needs legislative definition than that the peoples' freedom of religion and speech should wait upon the pleasure of the General Assembly. Further, uniquely among the section of Article 1 section 27

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18. 8 Pa. Cmwlt. Ct. at 235, 302 A.2d at 888.

19. 8 Pa. Cmwlt. Ct. at 241-42, 303 A.2d at 891.

20. 8 Pa. Cmwlt. Ct. at 247, 302 A.2d at 894.

confers upon the Commonwealth a definite status and imposes upon it an affirmative duty. The State is made trustee of the rights of the people in the enumerated values of the environment and of natural resources, and it is directed to conserve and maintain those values and resources. Section 27 is, we conceive, more than a declaration of rights not to be denied by the government; it establishes rights to be protected by the government. Indeed, the nature of those rights suggest the different role of government. Whereas restrictions of speech, press and practice of religion, invasions of the security of persons and their property and the imposition of arbitrary punishment, for examples, are activities that governments historically undertook, the despoilation of the environment is an act to be expected, in our private ownership society, from private persons. *Therefore, government must act in the peoples' interest* and government as trustee is no stranger to Pennsylvania. [citations omitted.]

Finally, the standard of Section 27 seems to us not to require legislative definition however desirable such might be. Courts which have attacked with gusto such indistinct concepts as due process, equal protection, unreasonable search and seizure, and cruel and unusual punishment, will surely not hesitate before such comparatively certain measures as clean air, pure water, and natural, scenic, historic and esthetic values. The most uncertain of these esthetic values has been the subject of instant judicial recognition in the fields of planning and zoning.<sup>21</sup>

President Judge Bowman, in a concurring opinion, agreed with the result reached by the majority, but found it unnecessary to consider the question of whether the amendment is self-executing.<sup>22</sup> He did attempt to draw a distinction between the rights of free speech, freedom of the press, and freedom from unwarranted governmental intrusion in the private affairs, clearly self-executing rights of citizens, and the potential effect of Section 27 as an interference with the freedom of citizens to exploit their property rights.

Judge Mencer, also concurring in the result reached by the majority, strongly dissented with respect to the question of whether Section 27 was self-executing.<sup>23</sup> Since most of his arguments were also raised at court level, they need not be further discussed here.

The Supreme Court of Pennsylvania again affirmed the conclusion of the chancellor. Justice O'Brien wrote an opinion for himself and Justice Pomeroy in which he found that the Environmental Protection Amendment was not self-executing, but required further legislative implementation. Although conceding that no other section of Article I had

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21. 8 Pa. Cmwlth. Ct. at 243-44, 302 A.2d at 892.

22. 8 Pa. Cmwlth. Ct. at 249-50, 302 A.2d at 895.

23. 8 Pa. Cmwlth. Ct. at 250-54, 302 A.2d at 895-97.

been held not to be self-executing, Justice O'Brien stated that no other section purports to enlarge rather than restrict the powers of government. "It must be recognized, however, that up until now, aesthetic or historical considerations, by themselves, have not been considered sufficient to constitute a basis for the Commonwealth's exercise of its policy power."<sup>24</sup> The Environmental Protection Amendment does not indicate which of the three branches of government should act as trustee of the public natural resources, nor how the public trust should be enforced. Resolution of these questions, according to Justice O'Brien, requires further legislative implementation.

Moreover, Justice O'Brien stated that the meaning of the words "clean air," "pure water," and "the natural, scenic, historic and aesthetic values of the environment" as used in the amendment are not clear to him. Their meaning should depend upon technical definitions, which come through legislative action. Any other result could lead to an abuse of the Commonwealth's powers under the amendment, allowing the executive branch to single out for special treatment or harassment land owners who would have no prior warning that certain activities would violate the Pennsylvania Constitution. This could lead to violations of the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution. In order to avoid such violations, the provision should not be regarded as self-executing, but as requiring further legislative definition.

Justice O'Brien also referred to constitutional amendments proposed or adopted in four other states having the same general purpose as Section 27.<sup>25</sup> The language of each of these provisions explicitly contemplates further legislative action to implement the state's policy of environmental protection.<sup>26</sup> His opinion concludes:

To summarize, we believe that, the provisions of Section 27 of Article I of the Constitution merely states, [sic] the general principle of law that the Commonwealth is trustee of Pennsylvania's public natural resources with the power

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24. 454 Pa. at 200-01, 311 A.2d at 592.

25. 454 Pa. at 203-205 n.7-10, 311 A.2d at 594 n.5-8. MASS. CONST. amend. 99; ILL. CONST. art. 11, § 2; N.Y. CONST. art. 14, § 4; VA. CONST. art. 10, § 7. See also Tobin, *Some Observations on the Use of State Constitutions to Protect the Environment*, 3 ENV. AFFAIRS 473, app. I 486 (1974). Mr. Tobin lists 11 states with "environmental bills of rights" in their constitutions: Florida, Illinois, Massachusetts, Michigan, Montana, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island and Virginia. To the list should be added Hawaii, HAW. CONST. art. 8, § 5.

26. It should be noted that the Pennsylvania Environmental Protection Amendment contains no authorization or direction to the General Assembly of Pennsylvania.

to protect the 'natural scenic, historic, and esthetic values' of its environment. If the amendment was self-executing, action taken under it would pose serious problems of constitutionality, under both the equal protection clause and the due process clause of the 14th Amendment. Accordingly, before the environmental protection amendment can be made effective, supplemental legislation will be required to define the values which the amendment seeks to protect and to establish procedure by which the use of private property can be fairly regulated to protect those values.<sup>27</sup>

Justice Roberts, with whom Justice Manderino joined, concurred only with the result reached by the Commonwealth Court and by Justice O'Brien. Although he did not discuss the question of whether Section 27 was self-executing, Justice Roberts did state that the Commonwealth "possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27" even before the adoption of the environmental protection amendment.<sup>28</sup> The Commonwealth, however, in the instant case, had "failed to establish its entitlement to the equitable relief it seeks, either on common law or constitutional (prior or subsequent to Section 27) theories."<sup>29</sup> Justice Nix concurred in the result reached by the preceding four justices.

Chief Justice Jones, joined by Justice Eagen, vigorously dissented from the opinion of Justice O'Brien, both on the question of the self-executing nature of the Environmental Protection Amendment and as to the merits of the Commonwealth's case.

Chief Justice Jones read Section 27 quite differently from his colleagues. Both the placement of the amendment in the Pennsylvania Constitution and its internal language indicate that it is self-executing. Inclusion of the amendment in Article I, "confers certain enumerated rights upon the people of the Commonwealth and imposes upon the executive branch a fiduciary obligation to protect and enforce those rights."<sup>30</sup> As part of the Declaration of Rights designed to assure that "the general, great and essential principles of liberty and free government may be recognized and unalterably established,"<sup>31</sup> the amendment is intended to "install the common law public trust doctrine *as a constitutional right to environmental protection* susceptible to enforce-

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27. 454 Pa. at 205, 311 A.2d at 594-95.

28. 454 Pa. at 206, 311 A.2d at 595.

29. 454 Pa. at 207, 311 A.2d at 596.

30. 454 Pa. at 209, 311 A.2d at 596.

31. PA. CONST. art. I, Preamble.

ment by an action in equity.”<sup>32</sup> Moreover, the language of the amendment itself is complete in its terms. It is not addressed to the General Assembly.<sup>33</sup> This difference in language from the constitutional provisions of the other states relied upon by Justice O’Brien serves to highlight the fact that the Pennsylvania provision is self-executing while the others are not. Simply because the amendment may be susceptible of judicial interpretation should not require that it “remain an *ineffectual constitutional platitude* until such time as the legislature acts.”<sup>34</sup>

Chief Justice Jones also disagreed with the conclusions of the chancellor, the Commonwealth Court, and the other members of the Supreme Court that the Commonwealth had not presented compelling evidence of irreparable harm, i.e., that the tower would “desecrate the natural, scenic, aesthetic and historic values of the Gettysburg environment.”<sup>35</sup> Thus, Chief Justice Jones and Justice Eagen would have reversed the lower courts’ decisions and enjoined construction of the tower.

As a result of this case, it cannot be said with any degree of certainty whether the Environmental Protection Amendment is wholly self-executing. *Gettysburg Tower* was concerned only with the question of whether the amendment granted certain powers to the Commonwealth, and particularly to the executive branch, to initiate action against private property owners for the purpose of protecting the “public trust.” It is not authority for the proposition that the Environmental Protection Amendment does not limit the power of the Commonwealth and its municipalities to authorize the development of private property in a manner which will cause serious degradation of the environment or serious loss to the public of those values enumerated in the first sentence of the Amendment.

It may be that the General Assembly should act to designate the executive officer or officers who would act as the “public trustee” for purposes of instituting actions to protect the trust *res*. It may also be appropriate for the General Assembly to define such terms as “clean air,” “pure water,” and “the natural, scenic, historic and aesthetic values of the environment.” However, it should not be necessary for the

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32. 454 Pa. at 209, 311 A.2d at 596.

33. Compare PA. CONST. art. VIII, § 2, which authorizes the General Assembly to exempt from taxation certain specified classes of property and institutions.

34. 454 Pa. at 210, 311 A.2d at 597.

35. 454 Pa. at 211, 311 A.2d at 597.

General Assembly to act before the provision can operate as an effective limitation upon existing governmental power. Any other conclusion would make the amendment "an ineffectual constitutional platitude."<sup>36</sup>

The Environmental Protection Amendment is capable of being divided into two parts.<sup>37</sup> The first sentence — "The people have a right to clean air, pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment" — at least affirms, if it does not create, positive rights of constitutional dignity in the citizens of the Commonwealth. These rights should need no more legislative definition than those of freedom of speech, freedom of religion or freedom of the press. Certainly the matter of defining "clean air" or "pure water" or "historic" or "esthetic" values of the environment should be no more difficult than determining what is meant by "speech" or "religion." The definitions of these latter terms has caused no end of difficulty for both the Pennsylvania and federal courts. However, no one would suggest that those rights require legislative definition or implementation before they could be claimed by the citizens of the Commonwealth or of the United States. Difficulties of judicial interpretation cannot justify judicial abrogation of constitutional policy.

Even Justice O'Brien's sweeping summary of his position<sup>38</sup> is not inconsistent with the view that the first sentence of the amendment is a self-executing limitation on the powers of government. His statement was made with reference to the argument that the amendment granted to the Governor and Attorney General power to act affirmatively for the people of the Commonwealth as trustee of the public trust. The opinion should be read as saying only that the power to bring actions against private citizens for violation of these constitutional rights requires further legislative definition, not as holding that these rights must remain in limbo until such time as the General Assembly chooses to act. Indeed Justice O'Brien recognized this when he said:

True, the first sentence of § 27 . . . can be read as limiting the right of government

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36. 454 Pa. at 210, 311 A.2d at 597. For an analysis of the concept of "self-executing" constitutional provisions in the context of the *Gettysburg Tower* case, see Comment, *An Analysis of Pennsylvania's New Environmental Rights Amendment and the Gettysburg Tower Case*, 78 DICK. L. REV. 331, 333-46 (1974), where the author concludes that the amendment should be wholly self-executing.

37. See Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of H.B. 958*, 4 PA. BAR ASS'N Q. 421 (1970).

38. See note 22 *supra*.

to interfere with the people's right to 'clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment.' As such, the first part of § 27, if read alone could be read to be self-executing.<sup>39</sup>

Other provisions of the Pennsylvania Constitution have been held to be self-executing in part, even where they contain an express grant of power to the General Assembly to implement in greater detail the policy which they express. In *Commonwealth ex rel. Crow v. Smith*,<sup>40</sup> the Pennsylvania Supreme Court interpreted Article XII, section 2 (now Article VI, section 2) of the Constitution of Pennsylvania, which prohibits "persons holding or exercising any office or appointment of trust or profit under the United States" from also holding a state office "to which a salary, fee or perquisites shall attach." The court held that the provision was self-executing and rendered a member of the Officer's Reserve Corps who had been called to active duty as a major in the United States Army, constitutionally incapable of continuing to serve his term as mayor of the City of Uniontown.

The court noted that the constitutional provision also stated: "The General Assembly may by law declare what offices are incompatible." This grant of power to the legislature did not prevent the first sentence from becoming operative without the adoption of any implementing legislation: "Such laws have been passed from time to time, but the power thus given to the legislature does not restrict the operation of the first part of the section nor permit of a legislative nullification of the inhibition which it contains. . . ."<sup>41</sup>

Thus, at least the first sentence of the Environmental Protection Amendment should serve as a limitation of governmental power today.<sup>42</sup> As a result, governmental agencies, including municipalities, will have to consider the potential impact of projects which they undertake or which they allow private citizens to undertake upon the enumerated

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39. 454 Pa. at 200, 311 A.2d at 592.

40. 343 Pa. 446, 23 A.2d 440 (1942).

41. 343 Pa. at 450, 23 A.2d at 442 (footnotes omitted).

42. Even after the Supreme Court decision in *Gettysburg Tower*, the commonwealth court consistently has held that the Environmental Protection Amendment as a limitation of governmental action is self-executing: *Payne v. Kassab*, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973) and notes 74-81 and accompanying text *infra*; *Bucks County Bd. of Commrs. v. Commonwealth P.U.C.*, 11 Pa. Cmwlth. 487, 313 A.2d 185 (1973) and notes 83 and accompanying text *infra*. In *Bruhin v. Commonwealth*, \_\_\_\_ Pa. Cmwlth. \_\_\_\_, 320 A.2d 907 (1974), the court refused to hold that the Secretary of the Department of Environmental Resources had primary responsibility for enforcement of the Environmental Protection Amendment.

environmental values. Failure to consider the impact will provide a basis for judicial challenge of the grounds that the agency acted in an arbitrary and capricious fashion or that the decision was the result of an abuse of governmental discretion.

Before pursuing these possible implications of the Environmental Protection Amendment for Pennsylvania municipalities, it would be well to look at the experience of some other jurisdictions in the creation and implementation of governmental duties to consider environmental factors in the area of land use control.

Although many states do not have a constitutional provision similar to Pennsylvania's Environmental Protection Amendment, legislation in other jurisdictions has been construed as creating a duty to consider the environmental effects of municipal regulation and municipal permits for private development activity. A leading case in this area is *Friends of Mammoth v. Board of Supervisors of Mono County*.<sup>43</sup> There the Supreme Court of California construed the California Environmental Quality Act (CEQA) as requiring a municipal body to prepare an environmental impact report before issuing a permit for any private development activity which could have a "significant effect on the environment." International Recreation, Ltd., a developer of land in the county, applied to the Mono County Planning Commission for a conditional use permit to construct the first two of six proposed condominium and rental housing units on a narrow 5.5 acre tract surrounded by the Inyo National Forest. Mono County, the third smallest county in population in California, lies on the eastern border of the state. It was described by the court as "historically a county orientated to the economy of cattle and sheep ranching, [where] nature's bountiful gifts of majestic mountains, lakes, streams, trees and wildlife have produced in the area one of the nation's most spectacularly beautiful and comparatively unspoiled treasures."<sup>45</sup>

The County Planning Board granted the requested permit and its action was affirmed by the County Board of Supervisors. Plaintiffs then instituted an action challenging the validity of the permit. They alleged that the construction of the project would create a number of environmental and other difficulties, including acute water and sewer problems, as well as problems of snow removal, police protection and the loss of

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43. 8 Cal. 3d 1, 500 P.2d 1360, 104 Cal. Rptr. 16, *modified on denial of rehearing*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). (All citations are to the modified opinion.)

44. CAL. PUB. RES. CODE § 21000-11551 (West 1970).

45. 8 Cal. 3d at 253, 502 P.2d at 1052, 104 Cal. Rptr. at 764.

open space. The primary issue was whether the county was required by CEQA to prepare an environmental impact report prior to issuing the permit. The statute provided, in pertinent part:

All other local government agencies shall make an environmental impact report on any project they intend to carry out which may have a significant effect on the environment and shall submit it to the appropriate local planning agency as part of the report required by Section 65402 of the Government Code.<sup>46</sup>

Section 65402 of the Government Code requires governmental agencies to submit a report to the local planning agency prior to acquiring real property or undertaking public works projects so that the planning agency may determine if the proposed project is consistent with the municipality's general plan of development.

The practical issue in the case was the meaning of the word "project" in the statute. Did it include private activity for which a government permit was necessary? Or was it limited to activities undertaken by the governmental agency itself? In an opinion which will become a classic for law school courses in legislation and statutory interpretation, a majority of the Supreme Court of California concluded that the act did indeed apply to the granting of permits for private developments as well as to public works projects:

In resolving the conflict of intent, as we must, we conclude that the Legislature intended [CEQA] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. We also conclude that to achieve the maximum protection the Legislature necessarily intended to include within the operation of the act, private activities for which a governmental permit or other entitlement for use is necessary.<sup>47</sup>

The court later added:

Accordingly, we hold that in the case at bar defendants were required to consider whether the proposed condominium construction 'may have a significant effect on the environment' . . . and, if so, to prepare an environmental impact report *prior to* the decision to grant the conditional use and building permits.<sup>48</sup>

The California Supreme Court set aside the permit granted by the

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46. CAL. PUB. RES. CODE § 21101 (West 1970).

47. 8 Cal. 3d at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 768.

48. 8 Cal. 3d at 262, 502 P.2d at 1059, 104 Cal. Rptr. at 771.

Planning Commission and the Board of Supervisors for failure to comply with the environmental impact report requirements of CEQA.

A footnote by the court indicated that there was evidence that the Planning Commission had considered the effect of the proposed development on "the character and value of surrounding property, traffic, water and sewage facilities, fire and police protection, snow removal and the ecology in general."<sup>49</sup> However, this did not meet the requirement of an "environmental impact report." That "report" must take the form of a specially prepared, written document available before the government entity's decision is made. The purpose of the report is to give members of the public and any concerned parties "an opportunity to provide input both in making of the report and in the ultimate governmental decision based, in part, on that report."<sup>50</sup>

It should be noted that the Environmental Protection Amendment of the Pennsylvania Constitution sets forth in far broader language, and with far more clarity, the right of the public to environmental amenities. If the amendment is a limitation upon the power of government to enact legislation or to regulate private land development, no such tortured reasoning as that of the California court will be required to reach a similar result.

When the *Friends of Mammoth* decision was originally announced in September, 1972, it was met with extreme consternation by California municipalities. Many municipalities reportedly stopped approving any building and other land use permits for fear of environmentally oriented attacks.<sup>51</sup> These municipalities apparently regarded all activities for which permits were required as having some potential effect upon the environment, thus rendering them impermissible unless an environmental impact report had been prepared in advance.

In November of 1972, the California court slightly modified its original decision while denying defendants' motion for rehearing.<sup>52</sup> The Court expressed no opinion as to whether an environmental impact report was required for the proposed development. This was said to be a question for the Board of Supervisors to consider upon remand. While stating that the definition of "significant effect on the environment"

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49. 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8.

50. *Id.*

51. Wall St. J., Sept. 22, 1972, at 2, col. 3; Wall St. J., Oct. 9, 1972, at 26, col. 1; Hagman, *NEPA's Progeny Inhabit the States - Were the Genes Defective?*, 1974 URBAN L. ANN. 3, 22-23.

52. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

must be left to future legislative action and the normal process of case-by-case adjudication, the court attempted to formulate certain guidelines for municipalities to apply in ascertaining whether a particular project would require an environmental impact report. First, the court said that the "significant effect" language could not be used as a device to avoid the preparation of environmental impact reports where the project "will,"<sup>53</sup> "may,"<sup>54</sup> or "could"<sup>55</sup> have such an effect. Second, the court said:

[C]ommon sense tells us that a majority of private projects for which a government permit or similar entitlement is necessary are minor in scope—e.g., relating only to the construction, improvement or operation of an individual dwelling or small business—and hence, in the absence of unusual circumstances, have little or no effect on the public environment. Such projects, accordingly, may be approved exactly as before the amendment of the [CEQA].<sup>56</sup>

This second guideline would indicate that persons objecting to the granting of a permit for failure to prepare and consider an environmental impact report will have the burden of demonstrating that the particular project under consideration has the effect on the environment contemplated by CEQA.

After the court had modified its original decision, the California legislature amended CEQA to require the preparation of environmental impact reports by municipalities prior to the issuance of land use permits for certain private activities.<sup>57</sup> This amendment, which was designed to confirm the court's interpretation of the act, has been described as "not a model of clarity."<sup>58</sup> However, it did serve to remove some of the problems raised by the court's decision.

A number of other states have adopted general environmental protection legislation which utilizes the environmental impact report technique.<sup>59</sup> The effect of these statutes upon a municipality's power to grant land use permits varies considerably from state to state. Several acts appear to have been patterned closely after NEPA and CEQA. Some

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53. CAL. PUB. RES. CODE § 21000 (West 1970).

54. CAL. PUB. RES. CODE §§ 21101, 21150, 21151 (West 1970).

55. CAL. PUB. RES. CODE §§ 21100, 21102 (West 1970).

56. 8 Cal. 3d at 272, 502 P.2d at 1065, 104 Cal. Rptr. at 777.

57. CAL. PUB. RES. CODE § § 21000-174 (West Supp. 1974), amending CAL. PUB. RES. CODE § § 21000-21151 (West 1970).

58. Senecker, *The Legislative Response to Friends of Mammoth: Developers Chase the Will-O'-the-Wisp*, 48 CALIF. ST. BAR J. 126, 130 (1973).

59. See Hagman, note 44 *supra*, and see notes 53-57, *infra*, and accompanying text.

expressly require a municipality to prepare an environmental impact report before issuing certain land use permits, in the same manner as CEQA after its amendment.<sup>60</sup> Other statutes, while similar to CEQA in their announced purpose and language, are silent as to their effect upon the local land use permit process.<sup>61</sup> These are susceptible to a judicial interpretation similar to *Friends of Mammoth*. Connecticut's statute, which requires environmental impact reports by state agencies for projects under their jurisdiction having a significant effect upon the environment, so narrowly defines "projects" as to minimize the likelihood that it will be interpreted in the same way as CEQA.<sup>62</sup> The New Mexico legislation, creating a state agency with state-wide regulatory jurisdiction over environmental matters, specifically provides that the act does not preempt the regulatory power of local governments over subdivisions.<sup>63</sup> Finally, Indiana's Environmental Policy Law states that environmental impact reports are not required for the issuance of any license or permit, presumably including land use permits, by any agency of the state.<sup>64</sup>

Like NEPA, CEQA and similar acts do not prohibit municipalities and other governmental bodies from carrying out or approving projects which will have a significant effect on the environment, even projects having a significant detrimental effect. Apparently, Mono County, for example, may reissue the conditional use and building permits (a) immediately if it determines that the proposed development will not have a "significant effect on the environment," or (b) after preparation and consideration of an environmental impact report if a determination is made that the development will have a "significant effect."

Under CEQA, an environmental impact report must contain the following information:

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60. *E.g.*, MASS. GEN. LAWS ANN. ch. 30, § 61 *et seq.* (1973); MINN. STAT. ANN. § § 116D.01 *et seq.*, added by Laws of 1973, ch. 412 (this act also requires environmental impact reports of private persons undertaking development activity for which no governmental permit is required); and WASH. REV. CODE ANN. § 43.21-43.21C.900 (Supp. 1974). (Held to require environmental impact reports in certain permit-granting situations: *Loveless v. Yantis*, 82 Wash. 2d 754, 513 P.2d 1023 (1973)(subdivision approval); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wash. App. 59, 510 P.2d 1140 (Ct. of Apps. 1973) (grading permit).)

61. *E.g.*, MD. CODE ANN. § 1-301 *et seq.* (Supp. 1974); and WISC. STAT. ANN. § 1.11 (Supp. 1974-75).

62. Conn. Environmental Policy Act, Public Act No. 73-562, adopted June 22, 1973, effective February 1, 1975; and see N. C. GEN. STAT. § 113A-4(2)(c) (Supp. 1974).

63. 3 N. M. STAT. ANN. § § 12-12-10B and 12-12-11B (Supp. 1973).

64. IND. STAT. ANN. tit. 13, § 13-1-10-6 (1973).

- (a) The environmental impact of the proposed action.
- (b) Any adverse environmental effects which cannot be avoided if the proposal is to be implemented.
- (c) Mitigation measures proposed to minimize the impact.
- (d) Alternatives to the proposed action.
- (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
- (f) Any irreversible changes which would be involved in the proposed action should it be implemented.<sup>65</sup>

Neither CEQA nor the opinion of the California Supreme Court in *Friends of Mammoth* indicates that a municipality may not approve a project where the environmental impact report suggests that the project will have avoidable and irreversible adverse environmental effects.<sup>66</sup> If the governmental body has considered mitigation measures which might minimize the impact and also has considered alternatives to the proposed action and rejected them, presumably it may proceed to approve the project. Of course, any such approval would be subject to attack as an abuse of discretion by the approving body.<sup>67</sup>

It is this aspect of *Friends of Mammoth* which may prove most important for Pennsylvania municipalities in developing land use control strategies and in granting land use permits. The traditional standard of judicial review governing the issuance of land use permits by Pennsylvania municipalities has been limited to the question of whether or not the agency abused its discretion or made an error of law in approving or denying the requested permit.<sup>68</sup> It is difficult to make any definitive

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65. CAL. PUB. RES. CODE § 21100; compare the "environmental impact statement" required under NEPA, 42 U.S.C. § 4332(2)(c) (1971).

66. See 14 CAL. ADMIN. CODE § 15102, described in Senecker, *supra* note 58, at 185.

67. At least one California court has held that courts have the power to review the adequacy of the contents of an environmental impact report as well as the manner of its preparation. *Environmental Defense Fund, Inc. v. Coastside County Water Dist.*, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972). Several federal courts also have held that NEPA requires "that an agency's decision should be subjected to a review on the merits to determine if it is in accord with the substantive requirements of NEPA. The review should be limited to determining whether the agency's decision is arbitrary or capricious. 'The court is not empowered to substitute its judgment for that of the agency.'" *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973). *Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972), *cert. denied* 412 U.S. 931; *Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664 (4th Cir. 1973); *Save Our Ten Acres v. Krieger*, 472 F.2d 463 (5th Cir. 1973); *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971); *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

68. *Concord Twp. Appeal*, 439 Pa. 466, 268 A.2d 765 (1970) (validity of a zoning ordinance); *Delaware County Community College Appeal*, 435 Pa. 264, 254 A.2d 641 (1969) (special excep-

statement as to what constitutes an abuse of discretion. However, the cases indicate that "abuse of discretion" includes at least any of the following: (1) a lack of substantial evidence in the record to support findings of fact made by the agency;<sup>69</sup> (2) findings which contradict the conclusions based thereon;<sup>70</sup> (3) the enforcement of a regulation which is arbitrary, capricious or otherwise unreasonable under the circumstances;<sup>71</sup> and (4) the exclusion or disregarding of relevant evidence.<sup>72</sup>

To the extent that the Environmental Protection Amendment serves as a limitation on governmental power, *Friends of Mammoth* suggests that a municipal agency may now have an affirmative duty to include findings of fact and conclusions with respect to the environmental values protected by the amendment when making land use control decisions. At the very least, the appropriate municipal agency will be required to seriously consider evidence submitted by objectors to a particular project where approval of that project would result in serious and adverse environmental consequences.

Should the entire Environmental Protection Amendment eventually be held to be self-executing, as suggested by Chief Justice Jones, the Commonwealth Court and some commentators,<sup>73</sup> some form of environmental impact reporting requirement may be imposed upon local governments prior to their issuing land use permits. This would be an appropriate requirement for the courts to impose to ensure that the municipality, as delegate of the state's sovereign police power, was performing its fiduciary duty on behalf of the public trustee—sovereign

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tion); *Brauns v. Swathmore Borough*, 4 Pa. Cmwlth. 627, 288 A.2d 830 (1972) (plan of subdivision); *Doran Investments v. Muhlenberg Twp.*, 10 Pa. Cmwlth. 143, 309 A.2d 450 (1973) (planned unit residential development); *Township of Neville v. Exxon Corp.*, — Pa. Cmwlth. —, 322 A.2d 114 (1974) ("curative amendments"); and *Board of Supervisors of Lower Providence Twp. v. Ford*, 3 Pa. Cmwlth. 380, 283 A.2d 731 (1971) (review interpretation of ordinance).

69. *E.g.*, *Rees v. Zoning Hearing Board of Indiana Twp.*, 11 Pa. Cmwlth. 461, 315 A.2d 317 (1974); *Mignotti Const. Co., Inc.'s Zoning Application*, 3 Pa. Cmwlth. 242, 281 A.2d 355 (1971); *Richman v. Zoning Board of Adj.*, 391 Pa. 254, 137 A.2d 280 (1958).

70. *E.g.*, *De Cristoforo v. Philadelphia Zoning Bd. of Adj.*, 427 Pa. 150, 233 A.2d 561 (1967); *Appeal of Enokay, Inc.*, 427 Pa. 128, 233 A.2d 883 (1967); *Gilfillan's Permit*, 291 Pa. 358, 140 A. 136 (1927).

71. *E.g.*, *Cornell Uniforms, Inc. v. Township of Abington*, 8 Pa. Cmwlth. 317, 301 A.2d 113 (1973); *City Planning Comm'n of Greensburg v. Threshold, Inc.*, 12 Pa. Cmwlth. 104, 315 A.2d 311 (1974).

72. *E.g.*, *Burgoon v. Zoning Hearing Bd. of Charlestown Twp.*, 2 Pa. Cmwlth. 238, 277 A.2d 837 (1971); *Appeal of Enokay, Inc.*, 427 Pa. 128, 233 A.2d 883 (1967).

73. *See Howard, State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972); *Broughton*, note 37 *supra*; *Tobin*, note 21 *supra*. Comment, note 30 *supra*.

in a proper manner. To a certain extent, the Commonwealth Court has already imposed a test on the exercise of governmental power in the fact of environmentally oriented attacks which can best be met by preparation of a written report of this type.<sup>74</sup>

Even if only the first sentence of the amendment is self-executing, public land use control decisions can be subjected to judicial attack for failure to give adequate consideration to the enumerated environmental rights of the people. Governmental decisions, when made within the scope of delegated power, usually are entitled to presumptions of regularity and validity. However, where constitutional rights of citizens are affected by those decisions, these presumptions may be of little practical use in litigation. In the area of environmental rights, courts seem to have evidenced a particular willingness to review the merits of those decisions.<sup>75</sup> There also exists a pragmatic need for the municipality to be prepared to demonstrate the reasonableness of particular decisions with due regard for the evidence presented to it on the environmental issues.

Certainly, failure to give adequate consideration to environmental evidence presented by opponents of a land use decision would constitute an abuse of discretion by the municipality, justifying a court's reversing that decision. Refusal to admit evidence on the impact of a proposed zoning, subdivision or similar regulation in a proceeding for a variance or special exception would also seem to support reversal of the decision on appeal. On the other hand, a municipal agency could not refuse to grant a special exception or impose a large minimum lot requirement in a zoning district because of its potentially detrimental effect upon the quality of air or water in the area, or, e.g., upon the scenic or historic values of the environment, without substantial evidence in the record to support that position.

Prior preparation of even an informal written evaluation or report on the effect a proposed decision upon the values described in the Environmental Protection Amendment would not guarantee that the decision would survive judicial review. It would go far, though, toward demonstrating that the municipality did not abuse its discretion in making the particular decision.

At least one common pleas court has recognized the effect of the Environmental Protection Amendment as a limitation upon the power of governmental decision making. In *Flowers v. Northhampton Bucks*

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74. See note 77 and accompanying text *infra*.

75. See cases cited note 60 *supra*.

*County Municipal Authority*<sup>76</sup> certain property owners and others sought to enjoin the Authority from erecting two 1,000,000 gallon water storage tanks and drilling wells on a three-acre tract owned by the Authority and located near the plaintiffs' property. The Authority filed preliminary objections in the nature of a demurrer to plaintiffs' second amended complaint in equity. That complaint set forth three theories upon which equity jurisdiction was sought to be invoked. In Count I, the Authority's decision to locate the tanks and wells on the parcel in question was alleged to be arbitrary and capricious; Count II alleged that the tanks and wells would be a nuisance; in Count III, the location decision was said to violate the "environmental policy" of the United States and the Commonwealth, as set forth in several federal and state constitutional and statutory provisions.

The court's opinion treats each of these counts, first with respect to the proposed erection of the storage tanks and, second, with respect to the drilling of the wells. Defendant's preliminary objections as to Counts II (nuisance) and III ("environmental policy"), were sustained, and plaintiffs were granted leave to amend their complaint further. The preliminary objections to Count I, were dismissed, the court holding that a cause of action against the Authority was stated adequately by plaintiffs' allegations that the location of the proposed storage tanks and wells was the result of arbitrary and capricious action.

The court neatly, if not altogether satisfactorily, navigated the strait between the Pennsylvania requirement that material facts be pleaded showing that the governmental action complained of is "arbitrary and capricious" without floundering on the rock of pleading only conclusions<sup>77</sup> or drowning in the whirlpool of pleading evidence.<sup>78</sup> It held sufficient plaintiffs' allegations that "defendant's decision . . . was not based upon full and good faith consideration of readily available alternative methods of construction and . . . alternate sites. . ." and that defendants "acted 'arbitrarily . . . in failing to give full consideration to a site optionally [sic] suited for reasons of economy, safety, ecology and environment.'"<sup>79</sup>

The court then proceeded to determine that these material facts stated a cause of action against the Authority:

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76. 57 D. & C.2d 274 (C.P. Bucks Co. 1972).

77. *E.g.*, *Hyam v. Upper Montgomery Jc., Auth.*, 399 Pa. 446, 160 A.2d 539 (1960).

78. PA. R. CIV. P. 1019(a).

79. 57 D. & C.2d at 277.

[I]t is axiomatic that in order to avoid capricious action, a public body must give proper consideration to *all* relevant factors. That environmental considerations have become relevant factors is demonstrated by the adoption of Article I, sec. 27, of the Pennsylvania Constitution. . . . [W]e are not without precedent in concluding that any action taken by the defendant without having given full and good faith consideration to environmental and ecological factors would constitute arbitrary and capricious action.<sup>80</sup>

This holding was tempered with the following warning to plaintiffs as to the scope of judicial review of the Authority's decision when the time would come to consider the case on its merits:

Our conclusion that a public body must take into consideration all relevant factors, including the ecological, environmental and esthetic consequences of its proposed action, is not to say that plaintiffs' burden will be light. While an administrative body is not wholly immune from judicial review, *the scope of review is limited to whether there has been a manifest abuse of discretion, and, absent such a finding, the court will not substitute judicial discretion for administrative discretion even though the court might upon initial consideration have reached a different result . . .*<sup>81</sup>

In sustaining the preliminary objections to Count II alleging nuisance, the court found that insufficient facts had been alleged to demonstrate that the mere existence of these facilities would constitute a nuisance. There was no allegation that the manner of operation of the facilities would interfere with plaintiffs' use and enjoyment of their land. Rather, the claim rested upon the same environmental considerations raised in Counts I and III.

Nor could the court discover any independent "environmental policy" limitation on the actions of the Authority as alleged in Count III, other than as the Authority's failure to consider the environmental effects of its decision could be regarded as arbitrary and capricious action. If Count III attempted to state a different theory of action from that in Count I, the pleadings did not indicate the circumstances within which that theory should be applied, nor the body which should apply the theory. The court postulated that possibly plaintiffs desired it to exercise its own discretion in applying this "environmental policy" to the factual circumstances of the instant case. This it could not do. The initial responsibility for making appropriate decisions within the limitations of "environmental policy" lay with the defendant. The court could

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80. 57 D. & C.2d at 279.

81. 57 D. & C.2d at 280.

only review the fulfillment of that responsibility, not apply its independent judgment as to the nebulous "environmental policy" being asserted.

The implication of this case for future plaintiffs seeking to invoke the policy of the Environmental Protection Amendment is apparent. The constitutional amendment does not state a policy enforceable in the abstract. It must be utilized as a limitation on the powers of a governmental agency to undertake a particular action or regulate private conduct. The governmental body has a duty to consider its actions in the light of the values secured to the citizens of the Commonwealth by the amendment. To the extent that it fails to consider the impact of its action upon the clean air, pure water, and preservation of the natural, scenic, historic, and esthetic values of the environment, that action may be "arbitrary and capricious" and invalid under general principles of law. A municipality has a duty at least to consider all relevant evidence offered by any interested party on the effects of its action upon those various values before final approval of the action is had.

In *Payne v. Kassab*<sup>82</sup> and *Bucks County Board of Commissioners v. Commonwealth, Public Utility Commission*<sup>83</sup> the Commonwealth Court of Pennsylvania also has recognized the importance of Article I, Section 27 as a limitation on the decision making and regulatory powers of Pennsylvania governmental bodies. The *Payne* case involved an effort by citizens of the City of Wilkes-Barre and others to enjoin the widening of a state highway which would require the taking of some park land along the Susquehanna River, the removal of some large trees and the elimination of a pedestrian walk. Altogether, approximately ½ acre of the twenty-two acre park would be lost as a result of the project. Plaintiffs alleged that the highway project as proposed would result in a deprivation of their right to the preservation of the scenic and historic values of their environment as secured to them by the Environmental Protection Amendment.

The Secretary of the Pennsylvania Department of Transportation (Penn DOT) was able to show a need for the project through a regional transportation study which gave it high priority. The particular route had been selected following a public hearing at which an alternate proposal also had been considered. As part of the project PennDOT would plant more trees than were to be removed, protect existing walkways,

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82. 11 Pa. Cmwlt. 14, 312 A.2d 86 (1973).

83. 11 Pa. Cmwlt. 487, 313 A.2d 185 (1973).

rebuild certain stone walls and repair another one, and protect the park at all times during construction. The Department also consulted with the City, the State Departments of Environmental Affairs, Community Affairs and Health, the State Planning Board, Fish Commission, the Pennsylvania Historical and Museum Commission, and various county and local governmental bodies. As a result of these various consultations, as well as the information presented at the public hearing and at meetings with private citizens, many changes had been made in the original project plans.

The court found as a fact that the project would not significantly alter the park area. It also stated that the park was "an area of local historical significance . . . within the purview of . . . Article I, Section 27 of the Pennsylvania Constitution."<sup>84</sup> While recognizing the disagreement within the supreme court over the issue in *Gettysburg Tower*, the court held the Environmental Protection Amendment to be self-executing in its entirety, but refused to read it in absolute terms:

We hold that 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.*<sup>85</sup>

The court formulated a threefold standard of judicial review of decisions affecting environmental values:

- (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 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?<sup>86</sup>

The court then proceeded to apply the test to the decision of the Secretary. A Pennsylvania statute prohibits the building or expansion of any transportation facility so as to affect any public park or historical site until the Secretary, after public hearings, makes a written finding either (a) that the approved design is not likely to have an adverse environmen-

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84. 11 Pa. Cmwlth. at 28, 312 A.2d at 93.

85. 11 Pa. Cmwlth. at 29, 312 A.2d at 94.

86. 11 Pa. Cmwlth. at 29-30, 312 A.2d at 94.

tal effect or (b) "no feasible and prudent alternative" to the approval design exists and "all reasonable steps have been taken to minimize such [adverse] effect."<sup>87</sup> The statute lists 23 factors to be considered at the public hearings, including "conservation," "noise and air and water pollution," "recreation and parks," "aesthetics," and "natural and historic landmarks." The record in the case indicated that the Secretary had complied fully with these requirements. It further indicated that "reasonable efforts will be expended to reduce the adverse environmental consequences of the project to a minimum."<sup>88</sup> Finally, the court found that the adverse effects were "clearly outweighed by the public benefits to be derived from the project."<sup>89</sup> A loss of two to three percent of park area was not as important or as valuable to the public as the increased flow of traffic on a major highway artery in an urban area.<sup>90</sup>

The threefold test of compliance with the Pennsylvania Environmental Protection Amendment bears a striking resemblance to the test applied by many federal courts in reviewing the merits of federal decisions subject to NEPA environmental impact statement requirements.<sup>91</sup> It also indicates that Commonwealth Court is willing to review the merits of governmental decisions which may have an impact upon the environmental values described in the amendment or on the public natural resources of the Commonwealth.

The court's opinion is also significant in that it regards the thrust of the amendment as controlling the development of land and other resources in a responsible manner rather than as preventing development altogether. This attitude is consistent with the legislative history of the amendment. For example, when first introduced in the House of Representatives in 1969, the word "conserve" in the third sentence—"As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people"—read "preserve." The word was changed at the request of Dr. Maurice K. Goddard, Secretary of the then Department of Forest and Waters who wished to avoid the difficulties which could attach to a literal reading of the word.<sup>92</sup>

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87. PA. STAT. ANN. tit. 71, § 512(b) (Supp. 1974).

88. 11 Pa. Cmwlth. at 32, 312 A.2d at 95.

89. 11 Pa. Cmwlth. at 33, 312 A.2d at 96.

90. It is interesting to note that the author of this opinion was Judge Mencer, who had dissented so vigorously from the court's holding in *Gettysburg Tower* that the Environmental Protection Amendment was self-executing.

91. Broughton, *supra* note 37, at 424.

92. *Id.*

It is submitted that the court's attitude is, in theory at least, a proper one. One cannot even make time stand still, let alone reverse its direction. Society's goal should be the proper management of our natural resources and sound policy to improve the environment. But this cannot be achieved simply by halting all development as of May 18, 1971, or any other date.

The difficulty arises, not in the statement of the constitutional test, but in its application to concrete situations. To the extent that the General Assembly chooses to provide guidelines for environmentally oriented decisions, as in *Payne*, it always has been free to do so. The Environmental Protection Amendment gives it added authority to act in this area. Where, however, the General Assembly has not acted, the Commonwealth Court has indicated a willingness to develop guidelines on a case-by-case basis, as did the California Court in *Friends of Mammoth*.

The threefold test may not prove totally satisfactory in the absence of legislative action. What is the effect of the first branch of the test where there are no statutory provisions to direct decision-makers' attention to specific environmental considerations? As stated earlier, no such provisions are contained in the Municipalities Planning Code.

In *Bucks County Board of County Commissioners v. Pennsylvania Public Utilities Commission*,<sup>93</sup> which was argued on the same day as *Payne*, the Commonwealth Court, by its silence, suggests that the solution is to ignore the question and concentrate on the other two branches of the test. Here, the county commissioners of Bucks and Montgomery Counties, their respective planning commissions, the trustees of the Reading Railroad, two environmentalist organizations and one individual appealed from an order of the Pennsylvania Public Utilities Commission granting a Certificate of Public Convenience to an oil pipeline company. The Certificate authorized the company to construct a transmission line to carry petroleum products from Marcus Hook to Martins Creek for sale to several electric utility companies. Appellants charged that the action of the PUC was not supported by the evidence presented during eighteen days of hearings, resulted from errors of law and violated the constitutional rights secured by the Environmental Protection Amendment. In particular, they alleged that the pipeline was not the most appropriate means of providing fuel for the utilities, and that its

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93. 11 Pa. Cmwlth. 487, 313 A.2d 185 (1973).

construction would cause injury to places of historical interest and to the natural environment.

In previous cases, the court had stated that the Public Utility Law allowed it only a narrow scope of review over actions of the PUC, a position to which it purported to adhere in the instant case.<sup>94</sup> The Commission's order could be overturned only in the event of (1) an error of law; (2) lack of evidence to support it; or (3) violation of constitutional rights. The court could not independently weigh the evidence and substitute its judgment for that of the PUC. Nevertheless, by accepting appellants' characterization of their charges as "errors of law" or "violations of constitutional rights," the court did review the merits of the Commission's order.<sup>95</sup>

Appellants asserted that the Commonwealth Court's holding in *Gettysburg Tower*—that the Environmental Protection Amendment was self-executing—required the PUC to deny the certificate "if it were shown that the pipeline will have any effect on the interests enumerated" in [the amendment].<sup>96</sup> Again the court refused to accept so absolute an interpretation to the amendment, quoting at length from its opinion in *Payne*.

Prior to its hearings, the PUC had indicated that it intended to obtain information on: the need for fueling the electric utility with oil; whether transmission by pipeline was the "best means" of delivery to the area "from the public viewpoint;" whether the pipeline company had "exercised great concern for the public interest and safety" in selecting the proposed route; and the adequacy of provisions made for review and supervision of its design and construction. In short, the PUC had anticipated the *Payne* decision.

In its order granting the Certificate, the Commission further demonstrated its prescience in this regard. It compared the economic costs and environmental effects of transporting sufficient quantities of fuel oil to Martins Creek by rail or pipeline. It concluded that rail transportation would be more expensive, would burn more fuel and produce more air pollutants than the pipeline. The PUC also considered the use of coal

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94. 11 Pa. Cmwlth. at 494, 313 A.2d at 189, and cases there cited. See also Pa. Public Utility Law, PA. STAT. ANN. tit. 66, § 1437 (1959).

95. While stated in different terms, this test does not appear to be substantially different from that utilized by some federal courts under NEPA; see *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973), where the court reached an identical result under an "arbitrary, capricious or abuse of discretion" test.

96. 11 Pa. Cmwlth. at 498, 313 A.2d at 191.

instead of oil as a fuel. Based upon the testimony of a member of the Pennsylvania Department of Environmental Resources, it concluded that oil would not offend existing air pollution standards, whereas pollution control devices in coal-fired systems were less reliable. Finally, the Commission found that while the pipeline would affect places of historical interest and the natural environment adversely, "these effects could be reduced by careful and vigilant construction work and careful line selection."<sup>97</sup> As a result of these findings, the order required the pipeline company to identify to the PUC all "historical or archeological sites within 1000 feet" of the pipeline, prohibited placing the pipeline closer than 25 feet to the boundary of any site, and imposed other conditions upon the construction of the pipeline in an effort to minimize adverse environmental effects.

Thus, the record before the PUC and its order demonstrated to the Commonwealth Court's satisfaction that the *Payne* test had been met. There was evidence of "a reasonable effort to reduce the environmental incursion to a minimum." The record also established that the PUC had weighed the "environmental harm" which will result from the construction of the pipeline against the "benefits to be derived therefrom," and concluded that the public need for energy was sufficiently greater than the harm to the environment which the pipeline could cause.<sup>98</sup>

As a result of *Flowers*, *Payne* and *Bucks County Board of Commissioners*, it would appear to be only a matter of time before municipal land use control decisions are subjected to the same constitutional standards. *Flowers* and *Payne* suggest the standards which must be considered by governmental agencies in undertaking public works projects. *Bucks County Board of Commissioners* indicates that the same constitutional standards will be applied to governmental decisions involving the issuance of permits for private development. Therefore, the silence of the Municipalities Planning Code on the need to consider the environmental consequences of land use control decisions should not be regarded as insulating those decisions from judicial scrutiny under the light of the Environmental Protection Amendment.

The Municipalities Planning Code requires that all land use control

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97. 11 Pa. Cmwlth. at 496, 313 A.2d at 190.

98. In light of the court's earlier statement that it could not substitute its judgment for that of the Commission, and could engage in only narrow review of the decision, it is interesting to note the court's statement concerning the result reached by the Commission: "our consideration of the record compels agreement with that conclusion." 11 Pa. Cmwlth. at 499, 313 A.2d at 192.

decisions of potentially major impact, with the exception of the issuance of permits for "permitted uses" and the approval of plats of subdivisions, be preceded by a public hearing before the planning agency,<sup>99</sup> governing body,<sup>100</sup> or zoning hearing board.<sup>101</sup> It may be advisable for municipalities in the future to invite testimony at these hearings on the potential impact of a proposed decision upon the environmental values enumerated in the amendment. It may not be sufficient for a municipality to rely upon its citizens to present sufficient relevant evidence on these matters, however. The second branch of the *Payne* test requires that the record upon which it is based "demonstrate a reasonable effort to reduce environmental incursion to a minimum."

Where a request for a decision — e.g., zoning ordinance amendment, conditional use, special exception, variance, subdivision or planned residential development — is initiated by a particular applicant, the municipality should be able to require that the applicant demonstrate, as part of its case in support of the requested decision, that a favorable decision will not result in any significant degradation of the environment. Where this cannot be shown, the applicant may be required to demonstrate that the public benefits to be derived from a favorable decision so outweigh the resultant environmental harm that the favorable decision would not constitute an abuse of discretion or an error of law.

Municipalities should be cautious in the extent to which they rely upon such evidence in arriving at a decision, particularly where there is contradictory evidence from opponents of the application. The federal courts, in interpreting the standards for preparation of environmental impact statements under NEPA, have said that the applicant may provide the federal agency with information, and may assist in the preparation of the statement. However, the federal agency must "bear the responsibility for the ultimate work product designed to satisfy the requirement of [NEPA]."<sup>102</sup> A recent Fifth Circuit decision provides a similar statement of this limitation, which, as slightly paraphrased, seems equally applicable to performance of the municipality's duty under the Pennsylvania Constitution:

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99. PA. STAT. ANN. tit. 53, § 10607 (1972) (adoption of zoning ordinance).

100. PA. STAT. ANN. tit. 53, § 10302 (1972) (comprehensive plan); PA. STAT. ANN. tit. 53, § 10402 (1972) (official map); PA. STAT. ANN. tit. 53, § 10504 (1972) (subdivision and land development ordinance); PA. STAT. ANN. tit. 53, § 10708 (1972) (planned unit residential development).

101. PA. STAT. ANN. tit. 53, § 10908 (1972).

102. *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974).

Its commands, however, do not permit the responsible agency to abdicate its duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process.<sup>103</sup>

If the "public trust" aspect of the Environmental Protection Amendment is self-executing, as indicated by the Commonwealth Court in *Gettysburg Tower, Payne* and *Bucks County Board of Commissioners*, there may be a further limitation on the power of a municipality to impose the full burden of satisfying the *Payne* test upon the applicant. A trustee may not delegate essential responsibilities for administration of the trust to third parties.<sup>104</sup> Imposition of too great a responsibility on the applicant, or the placing of too great reliance upon the applicant's evidence, might be regarded as an attempt to delegate an essential responsibility of the public trustee to make the final decision with respect to administration of the trust to a third party.

This same caution should apply where the municipality is considering public works projects or the adoption or amendment of land use control regulations to apply generally within its borders. Where there is no specific application under consideration, it would be prudent for the municipality or its planning agency to prepare a report similar to the environmental impact statement of NEPA or the environmental impact report of CEQA before making any formal decision. This report, at least, should describe the project or other decision, and the anticipated effect which it will have on the "clean air," "pure water" and the "natural, scenic, historic and esthetic values of the environment." Where an adverse result can be foreseen, the report should also consider alternative courses of action and their resultant environmental effects. The municipality will then be able to demonstrate a good faith effort to "conserve" the "public natural resources" without sacrificing the benefits which come with sound development and with sound development controls.

It may be that these reports will not need to be as detailed as those required under NEPA or CEQA, or as the record in *Payne*. However, they must demonstrate the essential reasonableness of the ultimate decision in terms of its environmental effects. It may also be that public

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103. See *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

104. RESTATEMENT (SECOND) OF TRUSTS § 171 (1959); A. SCOTT, TRUSTS § 171 (1967).

hearings on land use decision will not have to be as lengthy nor as detailed as that of the PUC in *Bucks County Board of Commissioners*. However, the decision-maker will have to afford all interested parties an opportunity to develop the potential environmental effects of the requested decision, and will have to admit evidence on a greater number of issues than heretofore.

The potential consequences of the Environmental Protection Amendment for municipal land use control decisions undoubtedly will include the duty to receive greater amounts of evidence, listen to more points of view and consider more factors than ever before prior to making a final decision. It may take longer to arrive at these final decisions. Decision making may become more expensive, however, to the extent that the decision-makers become more aware of the subtle effects of their decisions, and to the extent that the quality of the decisions themselves are improved, the resultant benefits in terms of a healthier, more pleasant and more socially productive environment should immeasurably exceed the social costs of these inconveniences.