

1975

Land Use in Pennsylvania: Any Change since the Environmental Rights Amendment

Eric Pearson

Gerald J. Hutton

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Eric Pearson & Gerald J. Hutton, *Land Use in Pennsylvania: Any Change since the Environmental Rights Amendment*, 14 Duq. L. Rev. 165 (1975).

Available at: <https://dsc.duq.edu/dlr/vol14/iss2/3>

This Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Land Use in Pennsylvania: Any Change Since the Environmental Rights Amendment?

*Eric Pearson**
*Gerald J. Hutton***

I. INTRODUCTION

The general purpose of this article is to examine in light of recent developments the relationship of state and local governmental powers concerning land use control in Pennsylvania. As this area of law is massive and exceedingly complex, the examination will be subject to certain limitations. First, it is assumed that the statutorily authorized system of zoning, as established by the Pennsylvania Municipalities Planning Code (MPC),¹ is the operative land use control in Pennsylvania. The MPC² delegates to local government a discretion essentially unbridled by environmental constraints.³ Given this broad grant of power, this article will not discuss the particularities of such legislation, nor related legislation such as the Eminent Domain Code.⁴ Second, the writers believe that the existing zoning system inadequately protects environmental values, an inadequacy which stems largely from the localized nature of the zoning system's control pattern, its inability to affect property retroactively, the marked tendency towards politization, and the lack of expertise at the local level.⁵ The zoning system often results in duplication of

* B.A., Duquesne University (1968); J.D., Duquesne University (1972); Special Assistant Attorney General, Commonwealth of Pennsylvania, Department of Environmental Resources, 1972-75.

** B.A., Duquesne University (1972); 3rd year day student, Duquesne University School of Law. Mr. Hutton is the Executive Comment Editor of the *Duquesne Law Review*.

1. PA. STAT. ANN. tit. 53, §§ 10101-11202 (1972), as amended, (Supp. 1975).

2. For analysis of the MPC see Fox, *Environmental Protection—a Constitutional Limitation on the Land Use Control Powers of Pennsylvania Municipalities*, 36 U. PITT. L. REV. 255 (1974) [hereinafter cited as Fox]; Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029 (1972); Schmidt, *Laws which Regulate Land Use in Pennsylvania*, 46 PA. B. ASS'N Q. 417 (1975); Wolffe, *Procedure Under the Pennsylvania Municipalities Planning Code*, 14 DUQ. L. REV. 1 (1975); Wolffe, *An Analysis of the New Zoning and Planning Act*, 42 TEMP. L. Q. 420 (1969).

3. The purposes of zoning are broadly fashioned and the power to enact zoning ordinances is broadly delegated. PA. STAT. ANN. tit. 53, §§ 10603, 10604 (1972). See also Fox, *supra* note 2.

4. PA. STAT. ANN. tit. 26, §§ 1-101 to -903 (Supp. 1975).

5. See Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039.

services, unfeasible use of resources and proliferation of arbitrary standards⁶—inadequacies which, in turn, illustrate the pressing need for reasonable regional controls to protect environmental attributes.

This article is also premised on the recognized need to transfer resource-protecting land use controls from the municipal level to the state. The concern will be with the degree and character of such a shift. Accordingly, the article will initially comment on the extent of existing police powers available to regulate land use for environmental ends, as well as the constitutional limitations on those powers. The article will then discuss the environmental rights amendment to the Pennsylvania Constitution⁷ in light of the major interpretive decisions. Finally, it will review current and proposed planning efforts and their speculative future effect. This article will not discuss the sundry other influences on land use such as economic viability, specific taxation policies, offensive exclusionary zoning practices, and natural causes such as topography and climate. The principal concern, rather, is with the concept of environmental constraints on land use policy within the Commonwealth of Pennsylvania.

II. LAND CONTROL AND THE TAKING ISSUE

The attempt by states to directly regulate the use of land, primarily the development of private property, has frequently failed due to the limitation on the police power that is imposed by the fourteenth amendment to the United States Constitution.⁸ Courts, often motivated by the fear of the ever-increasing canopy of governmental

6. *Id.* See also Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

7. PA. CONST. art. I, § 27.

8. See *Chicago B & Q R.R. v. City of Chicago*, 166 U.S. 226 (1897) (incorporating the fifth amendment's prohibition against the uncompensated taking of private property for public use into the fourteenth amendment's regulation of state powers).

To suggest that the federal constitution poses the sole restriction on the exercise of state governmental powers would be misleading. Nearly every state has enacted provisions within its constitution to protect property rights from governmental interference. In Pennsylvania, the applicable provisions are found in PA. CONST. art. I, § 10 ("nor shall private property be taken or applied to public use, without . . . just compensation being first made or secured") and PA. CONST. art. I, § 1 ("[a]ll men . . . have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property").

regulation, have invalidated zoning ordinances and other forms of land control legislation by finding the regulation as applied to be an unreasonable interference with the use and enjoyment of private property.⁹ These results are partially the product of centuries-old notions of property and the concept of absolute dominion by the landowner over the same.¹⁰ Yet, the ever growing complexity of society and the spread of industrialization have created a need to lessen that bundle of rights known as property. It is clear that a state may in the exercise of its police power enact provisions to protect the health, safety and welfare of the community.¹¹ However, unless explicitly articulated in nuisance-type statutes, the nexus between environmental regulation and the general well-being of the community, with but few exceptions, is given little credence by the courts.¹² The predictable result has been a haphazard development of urban, suburban, and rural lands, and a waste of precious natural resources.

The state's police power allows regulation of private property for

9. Medinger Appeal, 377 Pa. 217, 104 A.2d 118 (1954). The court declared:

The natural or zealous desire of many zoning boards to protect, improve and develop their community, to plan a city or a township or a community that is both practical and beautiful, and conserve the property values as well as the "tone" of that community is commendable. But they must remember that property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objective can impinge upon or abolish.

Id. at 225, 104 A.2d at 122. *But compare* this language with that of the United States Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954), stating:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. *It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.*

Id. at 33 (emphasis added).

10. Property is the "sole and despotic dominion . . . over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. BLACKSTONE, COMMENTARIES 2.

"The right of property is before and higher than any constitutional sanctions; and the right of the owner . . . is . . . as inviolate as the right of the owner of any property whatever." KY. CONST. art. 13.13, § 3 (1850).

11. *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

12. *Compare* *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 306 A.2d 308 (1973) (Clean Streams Law, PA. STAT. ANN. tit. 35, §§ 691.1—1001 (Supp. 1975), requires coal company to treat acid mine drainage pumped from an adjacent inactive mine) *with* *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973) (without explicit legislation the Commonwealth is without power to restrict the construction of battlefield tower).

the benefit of the public welfare;¹³ however, the regulation cannot be so severe as to be a taking of property without compensation in violation of the fifth and fourteenth amendments.¹⁴ Land use regulation involves the difficult task of balancing public interests against private rights.¹⁵ In the judicial evaluation of this balance,¹⁶ legislation drafted to protect the quality of the environment should be given great weight. By emphasizing the burdens imposed upon individuals, courts have often wrongfully favored private interests at the unjust expense of the public.¹⁷ The problem is not with the traditional "taking test"¹⁸ employed by the courts but with the manner of its application.

13. One commentator has written:

A government finds its reasons for existence in the services which it renders to the group governed. Hence it is not surprising to find our courts repeatedly asserting that "property rights" are, and always have been, held subject to the "police power"; that is, the power of government to do that for which it exists, namely, to impose restrictions (without compensation to the owner) upon property owners, *whenever such restrictions serve the health, the safety, the morals, the conservation of natural resources, or the general welfare of the governed group.*

Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L. J. 135, 144 (1963) (footnotes omitted) [hereinafter cited as Powell].

14. The fifth amendment provides in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. V. See also U.S. CONST. amend. XIV.

15. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926).

16. *The Court in Lawton v. Steele*, 152 U.S. 133 (1894), stated:

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Id. at 137.

17. Apparently, "there is a hierarchy [of constitutional values] in which the right to profit stands first, with a grudging exception for exigent public need." Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 151 n.7 (1971).

Another writer has stated:

Focusing primarily on private interests, current taking tests ignore the public costs that regulations seek to prevent. The courts' preoccupation with individual loss apparently derives from the venerable words of Justice Holmes and from the current dominance of the takings area by zoning cases. Applying zoning principles, which in the zoning context typically support regulation far beyond strict protection against public injury, courts have been able to ignore public safety factors when they review nonzoning safety regulations like floodplain controls. The deficiencies of this approach have produced anomalies in environmental cases, uncertainty in the courts, and consternation among governmental officials who are handicapped in their regulatory efforts.

Plater, *The Taking Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEXAS L. REV. 201, 202-03 (1974) (footnotes omitted) [hereinafter cited as Plater].

18. This taking test is the product of the United States Supreme Court's decision in

A. *The "Taking Tests": A General Overview*

1. *The Tests*

Property rights exist to the extent that government recognizes them; as such, property is but a package of rights sanctioned by society.¹⁹ Foremost among these rights are those of use and enjoyment. When property is taken for public use, the government is exercising the power of eminent domain,²⁰ which demands that compensation be paid to the property owner.²¹ The earliest of the taking tests grew from this theory: if the state took actual *physical* possession of property, a taking was effected; conversely, without physical possession there was no taking.²² While criticizing this test as simplistic, one commentator suggests that "as far as it goes" the test is valid even today.²³ Other tests for determining when governmental

Lawton v. Steele, 152 U.S. 133 (1894). There the Court stated:

[T]he State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. . . . To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference: and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id. at 136-37.

The continued vitality of this test in Pennsylvania was recently reaffirmed by the Pennsylvania courts in *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 93, 306 A.2d 308, 317 (1973); and *Rochez Bros. v. Commonwealth*, 18 Pa. Commw. 137, 147, 334 A.2d 790, 796 (1975).

19. See, e.g., Powell, *supra* note 13, at 139.

20. See note 14, *supra*.

One commentator suggests the distinction between eminent domain and regulations of land use as public use as opposed to public welfare:

Under the power of eminent domain property cannot be taken for public use without just compensation. However, under the police power, property is not taken for use by the public; its use by private persons is regulated or prohibited where necessary for public welfare.

Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1, 2 (1972) [hereinafter cited as Binder], quoting *Candlestick Properties, Inc. v. San Francisco Bay Cons. & Dev. Comm'n*, 11 Cal. App. 3d 557, 572, 89 Cal. Rptr. 897, 906 (1970).

21. See note 14 *supra*.

22. See Binder, *supra* note 20, at 3.

23. *Id.*, citing *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). Binder recognized the test's limitation; once government regulation became extensive, new theories were devised. Today the courts after discovering actual physical possession of private property by the state will find a taking. But the converse is not true, for the absence of physical possession will not preclude a court from finding a taking. This is well evidenced by the many

regulation of private property amounts to a taking have been devised by the courts. These tests, the noxious use test, the balancing test, and the diminution of value test, crystalize the concepts of private property and state power in order to validate or invalidate regulatory efforts.

Perhaps the easiest of these tests to identify is the noxious use test. This test, stated simply, recognizes the validity of regulations which prohibit the use of private property when the use amounts to a threat to the health and safety of the community. As such, the noxious use test is an outgrowth of nuisance law and is premised on the state's police power. Early cases recognized this power to be nothing more than the authority to compel individuals not to use their property so as to injure others.²⁴

The police power, as defined by the United States Supreme Court in *Lawton v. Steele*,²⁵ is not stagnant. There the Court upheld a statute which provided for the summary confiscation and destruction of fish nets exceeding a specified size in order to control the catching of fish within the boundaries of the state. The police power was said to include everything necessary to protect the public health, safety, and morals.²⁶ More importantly, the Court went on to declare what was to become the traditional statement of the taking test.

To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means

cases voiding zoning ordinances for being an unreasonable exercise of the police power although there has been no governmental possession taken of the property.

24. *Farmers-Kissinger Market House Co. v. City of Reading*, 310 Pa. 493, 165 A. 398 (1933); *Commonwealth v. Pennsylvania Canal Co.*, 66 Pa. 41 (1870).

25. 152 U.S. 133 (1894).

26. *Id.* at 136. The full language of the Court is:

The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. . . . Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.

Id.

are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.²⁷

Commentators suggest that this balancing test, the *Lawton* test, is composed of three elements: the regulation must serve a valid purpose; the means must be reasonably necessary to effect that purpose; and the regulation must not be unduly oppressive upon any individual.²⁸

The third standard used to determine if a taking has occurred is the diminution of value approach, which recognizes that in certain circumstances, the regulation of property may be so extensive as to deny the owner the benefits of its use. When this occurs, a taking is deemed to have been effected. This test was first articulated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.²⁹ There the Pennsylvania legislature had enacted a statute that prohibited the mining of anthracite coal where such mining would cause the subsidence of homes. The statute required coal companies to abandon valuable seams of coal, despite contracts that specifically disclaimed the coal companies' obligation to provide surface support to landowners. In holding the statute invalid, the Supreme Court stated:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . But obviously [governmental power] . . . must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining the [legislation's validity] . . . is the extent of the diminution. *When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.*³⁰

However, exceptions to the diminution of value test exist. One such exception encompasses the aforementioned noxious uses of property exemplified in the distribution of deleterious foodstuffs,³¹ the use of DDT,³² and the operation of beehive coke ovens.³³ In such

27. *Id.* at 137. See note 18 *supra*.

28. See, e.g., Plater, *supra* note 17, at 223-24.

29. 260 U.S. 393 (1922).

30. *Id.* at 413 (emphasis added).

31. *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908).

32. *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

33. *Rochez Bros. v. Commonwealth*, 18 Pa. Commw. 137, 334 A.2d 790 (1975).

instances, if the circumstances are such that the public health, welfare, safety or morals will be jeopardized if a total restriction is not imposed, even a total loss may be justified. Another important limitation of the diminution of value test is that not every diminution will require invalidating the regulation. An ordinance should not be declared invalid merely because it denies the owner the *most* lucrative and profitable use of the land;³⁴ rather, the test is whether *any* reasonable use is permitted.³⁵ However, to underestimate the diminution of value test because of these exceptions would be ill-advised, for its continues to play a large role in deciding the taking issue.³⁶

The diminution of value test deserves criticism, for by emphasizing individual burdens it encourages courts to disregard the public interests sought to be protected. The necessary balancing between private and public interests frequently does not occur, and even where the attempt is made to reconcile these conflicting interests, this approach tends to bias the court in favor of private concerns.³⁷ Indeed, this test lacks that quality which induces courts to

34. See, e.g., *Abrams v. Zoning Hearing Bd.*, 344 A.2d 734 (Pa. Commw. 1975). The court declared:

A finding of unnecessary hardship required proof that the physical characteristics of the property were such that it could not be used for a permitted purpose, or could only be so used at prohibitive expense, or that the property was of no value, or only distress value, if used as zoned.

Id. at 736.

35. E.g., *Township of Neville v. Exxon Corp.*, 14 Pa. Commw. 225, 236, 322 A.2d 144, 150 (1974) (zoning ordinance banning oil tank farm upheld, for property could be put to other reasonable uses).

36. Binder, *supra* note 20, warns:

Despite these occasional deviations the strength of the diminution of value test should not be underestimated. It plays a large role in state court decisions. Regulations are frequently invalidated for resulting in too much diminution of value.

Id. at 5 (footnote omitted).

In Pennsylvania, the validity of this author's statement is well represented by *Hofkin v. Whitmarsh Township*, 88 Montg. 68, 42 Pa. D. & C.2d 417 (C.P. 1967). There an ordinance creating a floodplain zone was found to be invalid since the uses to which the land was left were "impractical and completely profitless" and "fantastic." *Id.* at 70, 42 Pa. D. & C.2d at 420. See text accompanying notes 45-47 *infra*.

37. See Plater, *supra* note 17, at 222 wherein he denounces the diminution of value test:

The courts, instead of exploring the subtle balance between private and public interests, chose to apply the narrow, traditional language of Mr. Justice Holmes' diminution test, which focuses primarily on the decrease in value of private property caused by a police power regulation. In practice, the courts appear to resolve the illogic of this theory, especially in cases involving very serious public concerns, by striking an unspoken balance between private regulatory losses and some unspecified form of public

fashion tests. As is well known, the function which a test serves is to establish basic guidelines upon which future decisions can be made. Predictability and consistency are the desired results. The diminution of value test fails in this respect for it is but a conclusory statement that a taking has occurred; it is nothing more than a shock-the-conscience test, leaving judges wholly free to determine what is fair and right.³⁸ As such, the results may be entirely determined by the tendencies of the particular court. For these reasons, the diminution of value test is of questionable value.

2. *The Balancing Approach*

It has been suggested that the best approach to the taking issue is by a legitimate balancing of public and private interests which accords to both equal emphasis.³⁹ Such balancing would necessitate judicial consideration of the extent of private loss inflicted by regulatory measures and the potential injury to the public interest that the regulation is designed to prevent. The traditional *Lawton* test suggests this decision-making process in its phrase "that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."⁴⁰ Requiring the regulation to be reasonably necessary *and* not unduly oppressive raises the question of whether, in light of the particular state interest sought to be promoted, the regulation is more oppressive upon an individual than what is necessary to accomplish its legislative purpose. To determine this, the interrelation between the state's

interest. Even where implicit balancing is possible, however, the weighing of public interest considerations is necessarily haphazard, and the diminution test tends to bias the takings question in favor of supporting market values.

38. The thought is borrowed from the addendum of Mr. Justice Black's dissenting opinion in *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 350 (1969), wherein he stated:

In any event, my Brother HARLAN's "Anglo-American legal heritage" is no more definite than the "notions of justice of English-speaking peoples" or the shock-the-conscience test. All of these so-called tests represent nothing more or less than an implicit adoption of a Natural Law concept which under our system leaves to judges alone the power to decide what the Natural Law means. These so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional. On the contrary, these tests leave them wholly free to decide what they are convinced is right and fair. If the judges, in deciding whether laws are constitutional, are to be left only to the admonitions of their own consciences, why was it that the Founders gave us a written Constitution at all?

Id. at 350-51.

39. See, e.g., *Binder*, *supra* note 20; *Kraatovil & Harrison, Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

40. 152 U.S. 133, 137 (1894).

interests and the degree of private loss should be explored. Such a methodology would direct needed attention to public concerns as well as to private loss.

In addition to simply considering the traditional state interests, courts must accept the necessity for environmental protection. Without an understanding of the overall relationship between the particular regulation and the public well-being, courts will slight the public interest when questioning the constitutionality of resource-protective legislation.⁴¹ The fact that an extensive regulatory system protecting environmental interests would be somewhat novel should pose no handicap to the protection of the public interest. Constitutional principles, while fixed, recognize changing social needs. Thus, regulations which once would have been declared arbitrary, unreasonable and capricious, are now, as developing conditions necessitate, uniformly upheld.⁴²

B. *The Taking Issue in the Pennsylvania Courts*

The courts in Pennsylvania have adopted numerous approaches to the taking issue. Some decisions have relied on *Pennsylvania Coal's* diminution of value approach, others have employed the noxious use test, while the traditional test of *Lawton* controls the results of still others. The outcome of this, of course, has been inconsistency

41. See, e.g., *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959). There an ordinance banning the disposal of solid wastes that had been shipped into the township, but permitting the disposal of locally generated wastes, was held invalid. The logic of this decision is unsound, for clearly the police power is broad enough to regulate the disposal of garbage within a community. Indeed, the distinction between local and non-local waste was valid, for it was a means to control the amount of solid waste the township deemed it could accept.

42. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the court stated: Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions. . . . In a changing world, it is impossible that it should be otherwise.

Id. at 387. This statement is particularly appropriate in the area of environmental land use regulation for many of the problems which environmental regulations seek to remedy simply did not exist in the past.

and unpredictability; perhaps the single generalization that can be made is that each case has been decided on its facts. Although the courts have been willing to accept antipollution restrictions in the past,⁴³ the lack of consistency has hampered regulatory efforts from being completely effective within the Commonwealth.

1. *The Diminution of Value Test*

The diminution of value test, as employed in Pennsylvania, would prevent the enforcement of regulatory measures when such measures would so effectively curtail the enjoyment of property that the owner would suffer a significant loss. Pennsylvania courts, as most courts, are loath to uphold a regulation that totally destroys the value of affected property.⁴⁴ For example, in *Hofkin v. Whitemarsh Township*,⁴⁵ an ordinance banning construction on a floodplain (an area prone to damage from flooding) was declared invalid. Although recognizing the importance of floodplain control, the court found that the only remaining use which was permitted the appellant property-owner, namely, a park and wildlife sanctuary, rendered the property of no practical or pecuniary value. *Hofkin* parallels the

43. See, e.g., *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 319 A.2d 871 (1974) (discharge of acid mine drainage constituted a public nuisance which Commonwealth could abate under theory of common law nuisance); *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 306 A.2d 308 (1973) (discharge of acid mine drainage originating in neighboring abandoned mine must be treated before being discharged into surface waters).

44. See, e.g., *Garbev Zoning Case*, 385 Pa. 328, 122 A.2d 682 (1956). Here a zoning ordinance classified property as R-2 residential. The owners applied for a building permit to erect a supermarket which was refused on the ground that the application was for a business purpose in a residential zone. The owner showed that the land was unfit for residential purposes because of recurrent flooding. To correct this problem a sum of money well in excess of the residential value of the property would have to be expended. In light of this, the owner contended that the only reasonable use of the property would be commercial. The court accepted the property owner's argument, stating: "The literal enforcement of this ordinance would impose an unnecessary hardship on the subject property." *Id.* at 334, 122 A.2d at 684.

45. 88 Montg. 68, 42 Pa. D. & C.2d 417 (C.P. 1967). For an article discussing this case along with other "floodplain" cases see Binder, *supra* note 20, at 39. A case distinguishing *Hofkin* and upholding the constitutionality of a similar zoning ordinance is *Solomon v. Whitemarsh Township*, 92 Montg. 114 (Pa. C.P. 1969), wherein the court stated:

This court recognizes, as did the board, the urgent, dangerous, and potentially catastrophic consequences which, in clear weather, lie dormant along the banks of the Sandy Run Creek. No purpose is served in playing roulette with this latent potential for disaster. This zoning ordinance providing for a flood plain conservation district reasonably related to the flood potential and containing reasonable appeal procedures is a valid exercise of the police power.

Id. at 118.

generally expressed rule that a taking will be found only if the restriction renders the property of no value, or of distress value if used as restricted.⁴⁶ To determine the constitutionality of a regulation, the test is whether the owner is permitted a reasonable use of his property;⁴⁷ that is, the use must be one fit to the character of the land. The argument that the property restriction denies the owner the most economically appropriate use will carry little weight, provided some reasonable use is permitted.⁴⁸

2. *The Noxious Use Test*

The diminution of value test, however, is not always controlling as the noxious use limitation evidences. A recent case using this latter theory is *Rochez Brothers v. Commonwealth*,⁴⁹ wherein the court affirmed the action of the Department of Environmental Resources (DER) in denying a permit to reactivate beehive coke ovens. The appellant oven operators contended that air pollution regulations prohibiting the reactivation of air contamination sources were invalid as a taking of property without due process of law.⁵⁰ Although recognizing that air pollution was not explicitly declared by statute to be a public nuisance, the court nonetheless construed the legislative intent as characterizing it as such.⁵¹ The court reasoned that there could be no doubt that the police power supplies the state with authority to abate such noxious activities, even when it requires the virtual destruction of existing property. Thus *Rochez Brothers*, after performing extensive repairs of their beehive coke

46. *Abrams v. Zoning Hearing Bd.*, 344 A.2d 734, 736 (Pa. Commw. 1975). See note 34 *supra*.

47. See, e.g., *Township of Neville v. Exxon Corp.*, 14 Pa. Commw. 225, 322 A.2d 144 (1974). The appellant argued that denying the right to build an oil tank farm constituted an unreasonable interference with the use and enjoyment of the property. The court rejected this argument, stating that the test is not whether the ordinance denies the owner the most profitable use of his property but whether it permits reasonable use of the land. This property was well suited to other commercial uses which were permissible. *Id.* at 236, 322 A.2d at 150.

48. *Id.* This principle that an ordinance is not to be declared legally unsustainable merely because it deprives the owner of the most lucrative and profitable use is well established in Pennsylvania. See, e.g., *Pincus v. Power*, 376 Pa. 175, 101 A.2d 914 (1954). So long as the uses permitted by the ordinance are reasonable, the owner has no legal complaint. *Tidewater Oil Co. v. Poore*, 395 Pa. 89, 97, 149 A.2d 636, 640 (1959).

49. 18 Pa. Commw. 137, 334 A.2d 790 (1975). For a very similar case, see *Bortz Coal Co. v. Air Pollution Comm'n*, 2 Pa. Commw. 441, 279 A.2d 388 (1971).

50. Expert testimony showed that operating beehive coke ovens in compliance with the air regulations was impossible. 18 Pa. Commw. at 144, 334 A.2d at 794.

51. *Id.* at 148, 334 A.2d at 796.

ovens, were prohibited from putting these ovens into coke production, the only appropriate use of the property.

Although the police power is sufficient authority to require the abatement of a nuisance, it has been held that the legislature cannot declare something to be a nuisance and order its abatement if, in fact, no nuisance exists.⁵² For example, in *Commonwealth v. Christopher*,⁵³ the Pennsylvania Superior Court struck down a zoning ordinance declaring the operation of an automobile junkyard to be a nuisance per se. The court concluded that junkyards, while not aesthetically pleasing, cause no adverse effect on the public health, safety or welfare. Constitutional safeguards demand a reasonable relationship between the regulation and the object to be achieved. As the court could discover no such connection between the public welfare and the regulation, the ordinance was ruled invalid.⁵⁴

3. *The Noxious Use Test and the Diminution of Value Test—Which Applies?*

Since no clear line exists for deciding which test controls, the question often arises as to whether a court should apply the diminution of value test, which would strike down the governmental regulation, or apply the noxious use test, the application of which would uphold the regulation.⁵⁵ This problem is well exemplified by the diverging decisions of the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court in *Commonwealth v. Harmar Coal Co.*⁵⁶

52. *Commonwealth v. Christopher*, 184 Pa. Super. 205, 132 A.2d 714 (1957). Therein the court stated:

While the legislature may, within reasonable limits, prescribe certain types of endeavors as nuisances . . . The final determination of the legal question is for the courts. . . . What is not an infringement upon public safety and is not a nuisance, cannot be made one by legislative fiat and then prohibited.

Id. at 210, 132 A.2d at 716.

See also *Kadash v. City of Williamsport*, 19 Pa. Commw. 643, 340 A.2d 617 (1975).

53. 184 Pa. Super. 205, 132 A.2d 714 (1957).

54. For a decision recognizing a position contrary to that followed in *Christopher* see *Price v. Smith*, 416 Pa. 560, 207 A.2d 887 (1965) (regulation of junk dealers serves valid legislative purpose).

55. *Compare Pittsburgh Coal Co. v. Sanitary Water Bd.*, 4 Pa. Commw. 407, 286 A.2d 459 (1972), and *Harmar Coal Co. v. Sanitary Water Bd.*, 4 Pa. Commw. 435, 285 A.2d 898 (1972), with *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 306 A.2d 308 (1973).

56. 452 Pa. 77, 306 A.2d 308 (1973). This case consolidated the appeals of the Commonwealth taken from the decisions *Pittsburgh Coal Co. v. Sanitary Water Bd.*, 4 Pa. Commw.

In *Harmar* the commonwealth court, following the diminution of value test, refused to interpret the Pennsylvania Clean Streams Law⁵⁷ as requiring coal mine operators to treat acid mine drainage that originated in neighboring inactive mines but which had to be pumped to the surface in order to permit the safe operation of the active mines. It was said that a contrary interpretation would result in an unreasonable, arbitrary and oppressive exercise of the police power. The court, therefore, permitted the deleterious mine drainage to continue.

The Pennsylvania Supreme Court, applying the noxious use test, reversed the commonwealth court and required abatement of the acid mine drainage. In responding to the constitutional question of whether the Clean Streams Law unreasonably interfered with the use and enjoyment of property, the court reasoned that the state, in the exercise of the police power, could enact regulations promoting the public health and general well-being of the community.⁵⁸ The police power could be used to prevent industrial practices injurious to the public.⁵⁹ The well-documented dangers of acid mine drainage made the reasonableness of the ban on such drainage apparent to the court.⁶⁰ Since acid mine drainage constituted a nuis-

407, 286 A.2d 459 (1972) and *Harmar Coal Co. v. Sanitary Water Bd.*, 4 Pa. Commw. 435, 285 A.2d 898 (1972).

57. Act of June 22, 1937, No. 394, [1937] Laws of Pa. 1987, as amended, Act of Aug. 23, 1965, No. 192, [1965] Laws of Pa. 372, as amended, Act of July 31, 1970, No. 222, [1970] Laws of Pa. 653, PA. STAT. ANN. tit. 35, §§ 691.1-.1001 (Supp. 1975). The issue in *Harmar* concerned only these statutory amendments.

58. The court stated:

There is no question as to the constitutionality of either the 1965 or 1970 forms of the Clean Streams Law as applied to these cases. A State in the exercise of its police power may, within constitutional limitations, not only suppress what is offensive, disorderly or unsanitary, but enact regulations to promote the public health, morals or safety and the general well-being of the community.

452 Pa. at 92, 306 A.2d at 316.

59. *Id.* at 92, 306 A.2d at 316-17. The court cited numerous cases upholding the constitutionality of restrictions imposed on harmful industrial practices.

60. The court recognized that:

[t]he dangers of acid mine drainage have been noted by the United States Congress, the Pennsylvania Legislature and by the courts. In Section 14 of the Water Pollution Control Act, 33 U.S.C. § 1151 (1970), Congress has provided for substantial federal grant assistance to help combat this problem. The Pennsylvania Legislature, in Section 4 of the 1965 Amendments [of the Clean Streams Law], declared that acid mine drainage, as a major cause of stream pollution, was doing universal damage to the Commonwealth's waters. In *United States v. Jellico Industries*, 3 E.R.C. 1519 (M.D. Tenn. 1971), the court found that the drainage of acid mine water into a surface lake caused irreparable injury to the environment sufficient to support the granting of a

ance, the state clearly had adequate power to require not only regulation but abatement.

4. *The Balancing Test*

While *Harmar* and *Rochez Brothers* have been used herein to exemplify the noxious use test, these cases nonetheless employed the test established in *Lawton* to determine the constitutionality of the governmental regulations. In citing the traditional test of *Lawton*, the courts in *Harmar* and *Rochez Brothers* had to consider: first, whether the public interest required the restriction; and second, whether the means were suited to the desired purpose and not unreasonably oppressive upon individuals.⁶¹ In so phrasing the taking test, the constitutional question became one of the reasonableness of the regulation, determined by weighing these factors of public interest, the relationship between means and purpose, and the degree of loss imposed upon the individual. Thus, where the regulated activity is either a common law or statutory public nuisance,⁶² there should be little doubt of the constitutional validity of a regulation fashioned to abate such activity, since the public interest in banning those uses of property inimical to the health and safety of the public far outweighs any individual loss.

In those situations where regulations restricted activities not traditionally recognized as nuisances, the reasonableness of the restrictions has been subjected to close review by the judiciary. Unfortunately, in too many instances, restrictions have fallen because a substantial relationship between the regulation and public health and safety has not been recognized.⁶³ For instance, in *Lutz v. Armour*,⁶⁴

permanent injunction against mining activities. In addition, we cannot ignore Article I, Section 27 of the Pennsylvania Constitution There cannot be any doubt that an overriding public interest in acid mine drainage pollution control does exist.

452 Pa. at 93-94, 306 A.2d at 317 (footnote omitted).

61. See *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 93, 306 A.2d 308, 317 (1973); *Rochez Bros. v. Commonwealth*, 18 Pa. Commw. 137, 147, 334 A.2d 790, 796 (1975).

62. See, e.g., *Clean Streams Law*, PA. STAT. ANN. tit. 35, § 691.307 (Supp. 1975), which provides:

A discharge of industrial wastes without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the board is hereby declared to be a nuisance.

63. See, e.g., *Lutz v. Armour*, 395 Pa. 576, 151 A.2d 108 (1959) (ban on disposal of out-of-township garbage invalid as applied to sanitary landfill operator); *Archbishop O'Hara's Appeal*, 389 Pa. 35, 131 A.2d 587 (1957) (denial of special exception to zoning ordinance was invalid because no relation between public health and welfare and the erection of a parochial

a prohibition on the local disposal of refuse generated from outside the township was invalidated. The court found no sustainable distinction between local and foreign garbage. There was no substantial relationship, it reasoned, between the source of garbage and the public health. The court's reasoning is faulty however, because restricting the disposal of out-of-township refuse did serve a reasonable purpose: it limited the amount of trash which the community would accept for disposal. In light of the well-known dangers of solid-waste landfills (e.g., vectors,⁶⁵ and leachate⁶⁶ and unpleasant smells), community regulation of these operations deserves every presumption of reasonableness. In *Lutz*, the court singled out one possible unfair effect and invalidated the ordinance, thereby exposing the community to real dangers.

In another case, *Kadash v. City of Williamsport*,⁶⁷ the Pennsylvania Commonwealth Court, in order to maintain the constitutionality of a zoning ordinance, refused to construe it as banning all auto scrapyards within the city limits. The court reasoned that the operation of an auto scrapyard did not amount to a nuisance per se; thus before such operations could be prohibited, the city must prove actual injury to the public health and safety.

5. *Aesthetics and Land Use Controls*

In both *Lutz* and *Kadash*, it is interesting to note that the courts specifically questioned the role of aesthetics in land use controls.⁶⁸

high school in "AA" residential district was shown); Medinger Appeal, 377 Pa. 217, 104 A.2d 118 (1954) (ordinance mandating minimum floor area invalid as applied to homeowner wishing to erect an authentic colonial home).

64. 395 Pa. 576, 151 A.2d 108 (1959).

65. 25 PA. CODE § 75.1 (1971) defines a vector (of disease) as:

[a]n animal or insect which transmits infectious diseases from one person or animal to another by biting the skin or mucous membrane or by depositing infective material on the skin, food, or other object.

See also *id.* at § 75.50, providing for vector control regulation.

66. Leachate is water or other liquid which has percolated through the soil. Such leachate can often be polluted if it passes through solid waste materials. To preserve the integrity of the groundwaters, solid waste landfills are prohibited in areas where soils are pourous. See *id.* at § 75.84, providing for restrictions on solid waste landfills to preserve groundwaters.

67. 19 Pa. Commw. 643, 340 A.2d 617 (1975). For a discussion of similar scrapyard prohibitions see cases cited in notes 53, 54 *supra*.

68. There can be no doubt that aesthetic concerns by themselves have long been considered out of place in regulations restricting the use and enjoyment of property. See *Kerr's Appeal*, 294 Pa. 246, 144 A. 81 (1928). The validity of this conclusion, however, is questionable in light of PA. CONST. art. I, § 27, the environmental rights amendment. This is borne out by

For example, in *Lutz*, it was noted that solid waste landfills may well be offensive to aesthetic tastes, yet aesthetic considerations are not sufficient to warrant exercise of the police power.⁶⁹ In *Kadash*, concerning the auto junkyards, the court declared: "Even if aesthetic reasons are valid, such a *total prohibition* would not be reasonably necessary to keep the junked material out of sight."⁷⁰ The judicial disregard for aesthetic considerations in land use regulation rests on the belief that aesthetic concerns are a matter purely of luxury and not of necessity. As necessity alone justifies the exercise of the police power, the regulation of private property to promote aesthetic interests is deemed constitutionally invalid.⁷¹

This disdain for aesthetics in land use regulations is questionable, however, in light of the United States Supreme Court's pronouncement in *Berman v. Parker*⁷² and the provisions of article I, § 27 of the Pennsylvania Constitution. In *Berman* the Court stated:

The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, *aesthetic* as well as monetary. It is within the power of the legislature to

language in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973). Therein the court declared, "Now, for the first time, at least insofar as the state constitution is concerned, the Commonwealth has been given the power to act in areas of purely aesthetic or historic concern." *Id.* at 201, 311 A.2d at 592.

For an earlier opinion heralding the acceptance of aesthetic considerations in land use regulation in Pennsylvania, see the well reasoned decision of *Commonwealth v. Trimmer*, 53 Dauph. 91 (Pa. C.P. 1942), in which that court, quoting from an early Wisconsin case, *State v. Harper*, 142 Wis. 148, 196 N.W. 451 (1923), declared:

With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend can not now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exciting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities well may be pondered.

53 Dauph. at 98.

For commentary on the role which aesthetics play in regulatory efforts see Broughton, *Aesthetics and Environmental Law: Decisions and Values*, 7 LAND & WATER L. REV. 451 (1972); Comment, *The Aesthetic Factor in Zoning*, 11 DUQ. L. REV. 204 (1972).

69. *Lutz v. Armour*, 395 Pa. 576, 581, 151 A.2d 108, 111 (1959).

70. *Kadash v. City of Williamsport*, 19 Pa. Commw. 643, 649, 340 A.2d 617, 620 (1975).

71. *City of Passaic v. Paterson Bill Posting, Adv. & Sign Painting Co.*, 72 N.J.L. 285, 286, 62 A. 267, 268 (Ct. Err. & App. 1905).

72. 348 U.S. 26 (1954).

determine that the community should be beautiful as well as healthy, spacious as well as clean⁷³

The Pennsylvania Constitution, in article I, § 27, specifically requires that aesthetic concerns be protected.⁷⁴

The invalidation of ordinances which purposely protect aesthetic interests is a potentially abusive exercise of the judicial function. The line between aesthetic concerns and traditionally accepted notions of the public welfare, if one exists, is indeed fine. The pollution of a stream with acid, or of the air with sulfur, has been shown offensive to public welfare; yet these restrictions are in large part only reflections of aesthetic concerns. These regulations are indicative of heightening public sensibilities and ideals. The role of the legislature is to draw the line where it is proper. The court's function is not to shift the line to its fancy, but rather to invalidate only legislation which is clearly unreasonable and thus unconstitutional. Aesthetic concerns are an integral part of the general public welfare and incapable of separation therefrom. As such, reasonable environmental regulation, whether characterized as protective of aesthetic interests or promotive of public welfare, should be upheld by the courts.

C. *A Final Word on the Taking Issue and Environmental Protection*

The concept of property has undergone significant changes in the past century. Notions of the owner's absolute dominion over his property have been modified to correspond to changing social and economic conditions. The public well-being is clearly superior to any individual's property rights. All property is subject to the laws which express the public purpose and conscience; for it to be otherwise would expose vast numbers of people to risks with no recourse of prevention.⁷⁵ The Pennsylvania courts have been slow in limiting property rights where the express purpose of imposing restrictions is environmental protection and resource conservation. Too great an emphasis has been placed on the extent of private loss incurred by individuals with little appreciation of the legitimate and necessary

73. *Id.* at 33 (emphasis added).

74. PA. CONST. art. I, § 27 provides in part: "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."

75. *See, e.g., Powell, supra* note 13.

role environmental measures play in protecting the present and future public well-being.

In light of the public trust imposed by article I, § 27 of the Pennsylvania Constitution, it is the hope of the writers that the Pennsylvania judiciary will adopt, in regard to the taking issue, the position chosen by the Wisconsin Supreme Court in *Just v. Marinette County*.⁷⁶ In *Just*, a restriction prohibited changing the natural contour of wetland and conservancy areas in the absence of official prior approval.⁷⁷ Although this restriction applied to *Just's* property, he proceeded to fill the land without obtaining the necessary permit. The issue before the court was whether an ordinance restricting land uses to those uses amenable to the existing natural condition of the property was tantamount to an unconstitutional taking of private property without compensation.⁷⁸ In deciding this conflict, particular attention was given to the role the state must assume in preventing environmental injury. The *active public trust duties* of the state, said the court, include an obligation to preserve the state's waters for navigation, recreation, and scenic beauty.⁷⁹ Starting with the premise that the natural condition of lakes and rivers is wholesome and unpolluted, the court reasoned that, in a legal sense, *no public benefit* is gained by maintaining the *natural status quo* of the environment. Because the ordinance bestowed no public benefit, no compensation was due the owner.⁸⁰ In responding to the claim that the regulation was unduly severe upon private property

76. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

77. For a discussion of the problems of wetland controls, see Plater, *supra* note 17.

78. *Just v. Marinette County*, 56 Wis.2d 7, 14, 201 N.W.2d 761, 767 (1972).

79. Wisconsin courts had accepted the concept of the public trust in their case law. See *Muench v. Public Serv. Comm'n* 261 Wis. 492, 53 N.W.2d 514 (1952), wherein this trust was interpreted as requiring the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty.

It is to be noted that in 1968 the environmental rights amendment, PA. CONST. art. I, § 27, adopted a public trust theory in regard to all the state natural resources. It would therefore seem that *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) would be helpful to the Pennsylvania courts in interpreting the meaning of PA. CONST. art. I, § 27. Yet the *Just* case has been cited but once by the Pennsylvania courts. See *Commonwealth v. National Gettysburg Battlefield Towers, Inc.* 454 Pa. 193, 206, 208, 311 A.2d 588, 595, 596 (1973) (Roberts, J., concurring), *citing Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

80. The court reasoned that:

the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.

56 Wis. 2d at 16, 201 N.W.2d at 767.

since it effectively precluded any residential use of the lot, the court noted that this diminution of value was not based upon present land value but rather upon its future value in the altered condition. In rejecting Just's argument, the court stated:

It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. *Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public.*⁸¹

The approach taken by the Wisconsin court should be followed in Pennsylvania for several reasons. The court in *Just* recognized the taking issue as one of conflicting public and private interests; in resolving the problem, it gave careful consideration to the public interests sought to be protected by the regulation. The court was willing to view the wetland ordinance as a valid exercise of the police power, which in light of the severity of the restriction—prohibiting any change in the natural contour of the land—was possible only because the court accepted the importance of enforcing environmental controls. Similarly, the diminution of value argument presented no obstacle to enforcement of the regulation, for it was apparent that the legislatively declared public purpose—protection of the state's lakes and rivers—could only be realized by preserving wetland areas in their *natural* condition.

Finally, but also of significant import, is the concept of the public trust doctrine as recognized in *Just*. This trust imposed active duties upon the state, foremost of which was the duty to conserve the Wisconsin water resources for recreational uses and scenic beauty. The Commonwealth of Pennsylvania, like Wisconsin, is charged with a similar public trust. Although the Wisconsin trust has its origins in case law, and the Pennsylvania public trust has its origins in a constitutional amendment, article I, § 27 of the Pennsylvania Constitution, the Wisconsin decision can provide helpful precedent in determining the duties and obligations imposed by the Pennsylvania public trust.

81. *Id.* at 22, 201 N.W.2d at 770 (emphasis added).

III. THE ENVIRONMENTAL RIGHTS AMENDMENT

The character and pace of land development and the heralded inadequacies of the zoning system⁸² make clear the necessity for enforceable broad constraints. Such constraints on municipal discretion should require consideration of environmental sensitivities in the land use decisional process. The tool provided the Commonwealth by which this effort might commence is the recently enacted article I, § 27 of the Pennsylvania Constitution:

Natural Resources and the Public Estate

The people have a right to clean air, pure water, and 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.⁸³

The ultimate impact of this provision is, of course, not yet known. Only now is it entering the courtrooms for delineation and discussion. Yet, even in these early days, this section will assuredly be of significant import. The constitutionalization of and investiture in the citizenry of environmental values is of moment if only because no longer is passive allusion to and disregard of such unquantifiables defensible; now, at the least, these factors demand full consideration.⁸⁴ This shift alone must yield some positive results. A second assured benefit will be a heightening of the recognized importance of these enumerated values. As they are elevated to the relative sanctity of constitutional principle, their significance in the minds of persons can do nothing but similarly rise. As their relative worth advances, protection of them becomes a less onerous task. But these optimistic manifestations are generalities only. Therefore, an inquiry into the breadth and immediacy of any such beneficial impact in light of the few elaborative judicial decisions is appropriate. Such inquiry might shed light on the character of authorities now constitutionally supplied the Commonwealth which can be utilized to maintain and preserve environmental quality.

82. See note 6 *supra*.

83. PA. CONST. art. I, § 27 [hereafter referred to as § 27].

84. *Flowers v. North Hampton Bucks Co. Mun. Auth.*, 22 Bucks 88, 57 Pa. D. & C.2d 274, 279 (C.P. 1972).

The test of § 27, as indeed any other law, is its performance on appellate review. Only through judicial vehicles can the future of the amendment be understood. At the time of this writing, Pennsylvania has had three major statements on the implementative capabilities of the amendment. These cases provide relevant, albeit incomplete, indications of how the provision will fare. The next three subsections of this article will discuss these decisions.

A. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*

The initial case was *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,⁸⁵ decided by the Pennsylvania Commonwealth Court approximately three years ago. In that case, the Commonwealth had filed a complaint in equity before the Court of Common Pleas of Adams County seeking to enjoin the construction by National Gettysburg Battlefield Tower, Inc. (NGBT) of a 307 foot tall tower. The tower was to be placed on privately owned property contiguous to the Gettysburg National Military Park and, specifically, near the site of the historic battles of July 3, 1863. The complaint averred that the natural and historic values of this cherished area would be injured because the imposing artificiality of the structure would cheapen the setting. The cause of action was founded exclusively upon the constitutional amendment. The absence of any relevant zoning ordinances or other complications assured a precedential case disposition.

At trial, the plaintiff-Commonwealth paraded a litany of eminent witnesses,⁸⁶ who produced a barrage of testimony characterizing the proposed tower as an unwarranted and unnecessary intrusion upon enumerated § 27 values.⁸⁷ They testified to the diminution of the serenity and natural significance of the site, and further felt that the proposed design of the tower was inappropriately obtrusive.⁸⁸ In rebuttal, NGBT offered testimony⁸⁹ in support of the contention that the tower would expand educational opportunities concerning the battles of Gettysburg and would strengthen the economy of the

85. 8 Pa. Commw. 231, 302 A.2d 886, *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973).

86. The expert witnesses consisted of two architects, an historian and author, a theologian and teacher, two additional historians, the Commonwealth's Director of State Parks, a pastor, and two Federal Park Administrators. 8 Pa. Commw. at 237, 302 A.2d at 889.

87. *Id.* at 237-40, 302 A.2d at 889-90.

88. *Id.* at 238-40, 302 A.2d at 889-90.

89. The NGBT's expert witnesses consisted of an Adams County Commissioner, a civil engineer who designed the tower, and an educational consultant. *Id.* at 241, 302 A.2d at 891.

immediate area. NGBT also asserted that the proximate area supported a "variety of commercial ventures" presumably already compromising the values to be protected.⁹⁰

The trial court found preliminarily that the amendment was self-executing, and therefore could be invoked as a basis for legal action without prior statutory implementation, but denied the injunction since it felt that the Commonwealth had failed to demonstrate by clear and convincing evidence that any harm whatsoever would result from the proposed project. On appeal, the commonwealth court affirmed the lower court, dwelling on the same issues of self-execution and the alleged failure of the Commonwealth to adequately assume its burden of proof.

While the question of self-execution of § 27 has already been the subject of relatively extensive comment,⁹¹ it deserves attention at this juncture. The first noteworthy item concerning the commonwealth court's holding that the amendment is self-executing is the lack of force and unanimity of that ruling: four judges of the court joined the majority opinion of Judge Rogers, finding the amendment capable of immediate implementation because it constitutes a declaration of rights as opposed to a mere policy statement and, as such, need no more await "legislative definition than that the peoples' freedoms of religion and speech should wait upon the pleasure of the General Assembly."⁹² This opinion also rejected the contention that the subject language was too vague for implementation absent definitive legislation, arguing that other "vague" terms such as due process, equal protection, unreasonable search and seizure, and cruel and unusual punishment have never required such statutory clarification.⁹³ President Judge Bowman concurred in the result, but for unarticulated reasons opined that this "difficult and extremely important question" of self-execution should not be addressed in this case.⁹⁴ In a vigorous concurring and dissenting opinion, Judge Mencer quoted at length a lower court decision on point⁹⁵

90. *Id.* at 241-42, 302 A.2d at 891.

91. See Broughton, *The Proposed Declaration of Environmental Rights, Analysis of H.B. 958*, 41 PA. B. ASS'N Q. 421 (1970) [hereinafter cited as Broughton]; Fox, *supra* note 2; Comment, *An Analysis of Pennsylvania's New Environmental Amendment and the Gettysburg Tower Case*, 78 DICK. L. REV. 331 (1973).

92. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 243, 302 A.2d 886, 892 (1973), with Crumlish, Kramer, Wilkinson, and Blatt, JJ., concurring.

93. *Id.*

94. *Id.* at 249, 302 A.2d at 895 (Bowman, P.J., concurring).

95. *Id.* at 250, 302 A.2d at 895 (Mencer, J., concurring and dissenting), *citing* Common-

which argued that the amendment was not self-executing as it was policy rather than mandate and therefore contemplated subsequent legislation. Judge Mencer also maintained that terms such as "natural, scenic, historic and esthetic values of the environment" were objectionably unclear.⁹⁶

This fissured position on the legalities of self-execution was rendered more tenuous by the Pennsylvania Supreme Court's consideration of the same issue on subsequent appeal.⁹⁷ That court affirmed the commonwealth court's ruling on the matter by default: two justices, O'Brien and Pomeroy, concluded the section was not self-executing; two others, Jones and Eagen, argued that it was; and the remaining three, Roberts, Manderino and Nix, withheld comment.

The remnants of these determinations engender the proposition that § 27 is now self-executing; however, when another case arrives for supreme court consideration,⁹⁸ it is pure speculation which way things will go. It is important to note that, subsequent to these deliberations, Judge Bowman announced for the first time his position on the issue, that of agreement with Justices O'Brien and Pomeroy's anti-self-execution stance.⁹⁹ Judge Kramer of that court has also changed his vote;¹⁰⁰ he now feels that the section requires enabling legislation. Therefore, the commonwealth court now stands but 4-3 in favor of the immediate impact of the provision.

It is the opinion of the writers that § 27 is fully self-executing. This opinion is buttressed by a review of the arguments raised in opposition. The contention that the amendment is but policy couched in amorphous terminology is unpersuasive. As emphasized by Chief Justice Jones,¹⁰¹ if the provision were to be wishful thinking only and not an immediate investiture of authority, it would have taken different form. It certainly would not have specified that the Commonwealth assume a well-settled package of fiduciary powers

wealth v. United States Steel Corp., Civil Docket No. 1550 (Pa. C. P. Allegh. Co. April, 1972).

96. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commw. 231, 250-54, 302 A.2d 886, 895-97 (1973) (Mencer, J., concurring and dissenting).

97. 454 Pa. 193, 311 A.2d 588 (1973).

98. Currently pending before the Pennsylvania Supreme Court, No. 25 Jan. 1975, filed Aug. 23, 1974, is the appeal of the Pennsylvania Commonwealth Court decision in Payne v. Kassab, 11 Pa. Commw. 14, 312 A.2d 86 (1973). See text accompanying notes 124-33 *infra*.

99. 11 Pa. Commw. *Id.* at 37, 312 A.2d at 98.

100. Commonwealth v. Pennsylvania Pub. Util. Comm'n, 335 A.2d 860, 866 (Pa. Commw. 1975).

101. Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 208, 311 A.2d 588, 596 (1973) (Jones, C.J., dissenting).

under the common law public trust doctrine if it were to simply be an "ineffectual constitutional platitude."¹⁰² Also, if the legislature had preferred postponement of effect until passage of implementative legislation, it could have easily said so.

Likewise, the assertion that the provision's terminology is sufficiently unclear to allow rational application seems unsubstantiated. It is obvious that one may ask what terms like "clean air" and "natural, scenic, historic and esthetic values" mean, but simply asking the questions and outlining the potential alternatives of definition does not carry the burden. Rather, one must show that those terms so exceed the normal inexactness of language that, absent specific criteria, justice will assuredly be denied. In light of the fact that equally ambiguous terms such as "due process," "equal protection,"¹⁰³ "air pollution"¹⁰⁴ and others¹⁰⁵ have been interpreted repeatedly without demonstrative hardship, this contention should not prevail. Indeed, these positions are well articulated within the *Gettysburg* case.

Another area of relevant inquiry involves the determination of whether § 27 expands or restricts governmental powers. This consideration is primary in the assessment of constitutional provisions, because of the consensus that such provisions, when limiting governmental authority, are effective upon enactment;¹⁰⁶ conversely,

102. *Id.* at 210, 311 A.2d at 597.

103. Both "due process" and "equal protection" were specifically mentioned by the court in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 243, 302 A.2d 886, 892 (1973), as being capable of interpretation without demonstrative hardship.

104. *Rushton Mining Co. v. Commonwealth*, 16 Pa. Commw. 135, 328 A.2d 185 (1974). In this matter, a criminal conviction obtained against appellant for violation of the Air Pollution Control Act, PA. STAT. ANN. tit. 35, §§ 4001-4106 (Supp. 1975), was affirmed. Appellant had been charged with causing air pollution. Although "air pollution" is generally defined within the terms of the Act, appellant was found guilty under that section disallowing "the presence in the outdoor atmosphere of any form of contaminant . . . which unreasonably interferes with the comfortable enjoyment of life or property." *Id.* § 4003(5). Judge Mencer dissented, arguing that "for conviction of a criminal offense, it is necessary to prove that an established standard was violated." *Rushton Mining Co. v. Commonwealth*, 16 Pa. Commw. 135, 142-43, 328 A.2d 185, 189 (1974) (Mencer, J., dissenting).

105. In the area of construction, Justice Stewart's discussion of obscenity in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), is renown:

I shall not today attempt further to define the kinds of material I understand to be embraced within the shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*

Id. (emphasis added).

106. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 200, 311 A.2d 588, 592 (1973); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 249, 302 A.2d 886, 895 (1973) (Bowman, P.J., concurring).

those expansive of power are generally not self-executing.¹⁰⁷

As related to § 27, this inquiry has been mentioned by the courts but not pursued. The Pennsylvania courts bifurcate the amendment in this regard. Both the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court believe that the first sentence of the amendment vests the people with rights that they may assert against the government¹⁰⁸ and would thereby limit existing authority. But the courts argue that the remainder of the amendment, which imposes the fiduciary duties of the public trust doctrine upon the Commonwealth, expands the power of government.¹⁰⁹ By this reasoning, the first sentence at least should be self-executing. The contention that § 27 is fully self-executing rests in part, however, upon the belief that even the concluding sentences of the amendment do not operate to expand the Commonwealth's power.

The elevation of legal duty to the level of constitutional principle, although having an inevitable sanctification and entrenchment effect, does not a fortiori expand power. That expansion logically occurs only if the enactment broadens pre-existing authority of the sovereign. Only one member of either the commonwealth court or the supreme court, Justice Roberts, has given this perspective due attention. He doubted the reasoning that § 27 expands governmental authority, yet did not comment on the question of self-execution:¹¹⁰

107. *E.g.*, *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 201, 311 A.2d 588, 592 (1973), the court stating:

The Commonwealth has cited no example of a situation where a constitutional provision which expanded the powers of government to act against individuals was held to be self-executing.

108. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 200, 311 A.2d 588, 592 (1973) (majority opinion); *id.* at 208, 209, 311 A.2d at 596 (Jones, C.J., dissenting) (the concurring opinion of Justice Roberts did not address the question); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 243, 302 A.2d 886, 892 (1973) (majority opinion); *id.* at 249, 250, 302 A.2d at 895, 896 (Bowman, P.J., concurring).

109. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 200, 311 A.2d 588, 592 (1973) (plurality opinion); *id.* at 208, 209, 311 A.2d at 596 (Jones, C.J., dissenting)(Justice Roberts' concurring opinion did not espouse this view); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 243, 302 A.2d 886, 892 (1973) (majority opinion); *id.* at 249, 250, 302 A.2d at 895 (Bowman, P.J., concurring) (asserting his belief that the amendment expands the enforceable rights of persons vis-à-vis persons, in addition to the creation of rights in government); *id.* at 252, 302 A.2d at 896 (Mencer, J., concurring and dissenting). See note 111 and text accompanying *infra*.

110. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 206, 311 A.2d 588, 595 (1973). Justice Manderino joined in the concurring opinion.

I believe that the Commonwealth, even prior to the recent adoption of Article I, Section 27 possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27. The express language of the constitutional amendment merely recites the "inherent and independent rights" of mankind relative to the environment which are "recognized and unalterably established" by Article I, Section 1 of the Pennsylvania Constitution.¹¹¹

This reasoning would illustrate that, at least insofar as the natural and historic values are concerned,¹¹² the amendment does not expand governmental power and should be self-executing.

Bearing in mind the language of *Berman v. Parker*,¹¹³ which expressly recognizes that exercise of the police power to protect aesthetic and scenic values already rests with the state, it is submitted that § 27 does not expand the pre-existing powers of the sovereign. If only for this reason, it is the writers' hope that the Pennsylvania Supreme Court will definitively rule that the provision is indeed self-executing.

The "other holding" of *Gettysburg* is also of present concern. The trial court found that in order to successfully invoke the amendment, proof of violative conduct must be clear and convincing¹¹⁴ rather than by a preponderance of the evidence.¹¹⁵ In affirming the

111. *Id.* at 206, 311 A.2d at 595. PA. CONST. art. 1, § 1 provides as follows:

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

112. It is the opinion of the writers that, if *Gettysburg* were an appropriate vehicle, Justices Roberts and Manderino would have specifically denominated protection of scenic and aesthetic values as within the "inherent sovereign power."

113. 348 U.S. 26 (1954). Therein the court stated:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. at 33. This passage was recently quoted in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6 (1974).

114. Clear and convincing evidence is accepted to mean more than a mere preponderance of evidence. *State v. Cale*, 19 N.J. Super. 397, 88 A.2d 529 (1952). Clear and convincing proof is less than the proof beyond reasonable doubt required in criminal cases but more than that required in ordinary civil actions. *McClintock v. Sweitzer*, 138 Ohio St. 324, 34 N.E.2d 781 (1941).

115. It has been said that preponderance of the evidence

decision of the trial court in *Gettysburg*, the commonwealth court offered the following reasoning:

Injunction is an extraordinary remedy. Where, as here, it is sought for the purpose of prohibiting a use of land not prohibited by description, but on grounds as amorphous as its asserted injury of historic and esthetic values of the environment, equity properly requires clear and convincing proofs.¹¹⁶

This reasoning is quizzical due to that same opinion's rejection of arguments that the constitutional language was prohibitively vague:

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.¹¹⁷

Thus, the commonwealth court seemingly contradicted its own factual premise. Recognition of injury to enumerated values should be of no greater difficulty than recognition of any other injury. It is notable that all seven judges of the commonwealth court agreed in this respect. Although only two justices of the supreme court discussed the burden of proof question,¹¹⁸ they agreed with the commonwealth court rationale.

This holding intensifies the difficulty confronting one attempting to negate a decision or action allegedly harmful to the enumerated values of § 27. The burden of clear and convincing proof, of course, is not automatically improper and indeed, the court cited what it

means preponderance in weight, rather than amount

To preponderate in favor of any proposition evidence must exclude any equally well-supported belief in any inconsistent proposition. When evidence tends equally to sustain either of two inconsistent propositions, neither is established.

15 PA. L. ENCYCLOPEDIA *Evidence* § 450 (1959) (footnotes omitted).

116. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 248, 302 A.2d 886, 894 (1973).

117. *Id.* at 243-44, 302 A.2d at 892.

118. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 206, 207-08, 311 A.2d 588, 595, 596 (Roberts & Manderino, JJ., concurring).

termed as "ample precedent" supporting its ruling.¹¹⁹ Yet, inasmuch as there exists similar precedent for requiring a less stringent burden,¹²⁰ it seems that this finding is by choice rather than compulsion. Thus, although the court's logic may not be faulty, its decision perhaps unnecessarily impedes the facile use of § 27.¹²¹

Those persons who interpret this rigid position of the court as implicit revelation of its discomfort with the elemental substance of § 27 are perhaps more suspicious because this supposed holding is dictum. The court in *Gettysburg* found no harm to the protected values;¹²² thus, the Commonwealth failed to successfully carry its burden by even the more lax "preponderance" standard. Under the facts, the court could have avoided the issue entirely. But the court preferred assertion to restraint: not only did it adopt the "clear and convincing standard" but it also volunteered its procedural willingness to balance the rights vested by § 27. The court did so by articulating its "immemorial duty to weigh in its conscience the effect upon the defendant of a decree, even where the plaintiff's right has been established."¹²³ There was no need for this exercise; as no injury was discovered, no discussion of balancing injuries with any other value was warranted. By this commentary, the court assumed a rather inflexible posture without any noted consideration of relevant factors, such as the definitional understanding of the

119. *Commonwealth v. National Gettysburg Tower, Inc.*, 8 Pa. Commw. 231, 247, 302 A.2d 886, 894 (1973), *citing* *Rick v. Cramp*, 357 Pa. 83, 53 A.2d 84 (1947) (party seeking injunction must show preponderance of the equities); *Windber Borough v. Spadafora*, 356 Pa. 130, 51 A.2d 726 (1947) (injunctions may be issued only where the reason and necessity therefore are clearly established); *Sparhawk v. Union Passenger Ry.*, 54 Pa. 401 (1867) (plaintiff's injury must be clear before injunction will issue).

120. The standard of proof generally applied in civil cases is the preponderance standard. *Rasner v. Prudential Ins. Co. of America*, 140 Pa. Super. 124, 13 A.2d 118 (1940). *Greenhouse v. Leister*, 60 Lanc. L. Rev. 48 (Pa. C.P. 1965), *exceptions dismissed*, 60 Lanc. L. Rev. 107 (Pa. C.P. 1966); 32A C.J.S. *Evidence* § 1020 (1964). This standard has been applied and determined proper even when an adverse ruling will result in imputation of criminal conduct. *Las Vegas Supper Club, Inc. Liquor License Case*, 211 Pa. Super. 385, 387-88, 237 A.2d 252, 253 (1967), *quoting with approval* *Greenberg v. Aetna Ins. Co.*, 427 Pa. 494, 235 A.2d 582 (1967).

121. Illustrative of the degree of added impediment is *State v. Cale*, 19 N.J. Super. 397, 88 A.2d 529 (1952). There, a conviction under a criminal statute was affirmed despite the erroneous application of the clear and convincing standard. In finding no harm, the Court stated, "the line of demarcation between what is 'clear, satisfactory and convincing and that which removes 'all reasonable doubt' is more fanciful than real." *Id.* at 400, 88 A.2d at 531, *quoting In re Cale's Will*, 109 N.J.Eq. 181, 156 A. 475, 477 (Prerog. 1931).

122. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 248, 302 A.2d 886, 894-95 (1973).

123. *Id.* at 249, 302 A.2d at 895.

term "preservation" as used in the context of the amendment and pertinent legislative history.

B. *Payne v. Kassab*

This tenuous reception by the commonwealth court in *Gettysburg* and the forebodings of its opinion in that case were concretized in that court's next major statement on the matter. In *Payne v. Kassab*,¹²⁴ concerned citizens initiated an equity action under the original jurisdiction of the court to enjoin the Commonwealth from widening portions of two streets in Wilkes-Barre, Pennsylvania which would cause the taking of approximately one half-acre from an area known as River Common, eliminating some trees and a pedestrian walk. The affected property had been previously dedicated for use as a public common and had certain historical value.¹²⁵ In dismissing the complaint, the court reinforced its dictum in *Gettysburg*, holding that the amendment contemplated the "controlled development of resources rather than no development."¹²⁶ In order to effectuate a "balancing of environmental and social concerns" which was "realistic,"¹²⁷ it offered a threefold standard by which any future activity should be judged in light of the amendment:

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?¹²⁸

This threefold standard is the commonwealth court's operative equivalent of the amendment. Analysis of it might yield further preliminary indications as to whether the amendment, as structured in *Payne*, will or will not constitute a supplementation of authority

124. 11 Pa. Commw. 14, 312 A.2d 86 (1973).

125. *Id.* at 17, 312 A.2d at 88.

126. *Id.* at 29, 312 A.2d at 94.

127. *Id.*

128. *Id.* at 29-30, 312 A.2d at 94.

by which one might successfully modify or prohibit an environmental incursion otherwise beyond legal recourse. To more accurately assess the standard, each of its three components will be independently reviewed.

The first test, requiring compliance with existing and relevant codified law, is logically a standard by which compliance with § 27 should be judged. For example, it is fundamental that an activity violative of a pollution control law would also offend the amendment. Yet as pre-existing laws already provide stringent remedies for redress of offenses,¹²⁹ it seems that this first portion of the *Payne* test is only a reiteration and offers no positive impact. This first component only relates to those activities already subject to alternative legal recourse; therefore, satisfaction of its terms neither imposes new burdens nor supplements existing powers to regulate land use.

The second portion of the *Payne* test requires a "reasonable effort to reduce the environmental incursion to a minimum."¹³⁰ This standard is logically included since avoidance of environmental harm is assuredly contemplated by a statute espousing "preservation" and "conservation" and imposing fiduciary duties on the Commonwealth. Once again, however, the test does not significantly improve the existing state of affairs. This admirable "minimization" requirement is essentially an equitable maxim¹³¹ and would be expected in such proceedings under any circumstances. Also, alternative statutory law presupposes this general approach.¹³²

The inevitable effect of this portion of the test will be to judge the enumerated values in terms of dollars and cents. A "reasonable effort" in most cases is gauged by balancing additional financial expenditure with the resultant benefit to be derived. One can rest

129. See, e.g., Clean Streams Law, PA. STAT. ANN. tit. 35, §§ 691.601, .602, .605, .609 (Supp. 1975). Air Pollution Control Act, PA. STAT. ANN. tit. 35, §§ 4009, 4009.1, 4010 (Supp. 1975).

130. 11 Pa. Commw. at 29-30, 312 A.2d at 94.

131. This general principle of equity is perhaps best explained by the dictate, "Equity seeks to do justice and avoid injustice." 30 C.J.S. *Equity* § 89 (1965).

132. The overriding premises of Pennsylvania pollution control statutes, which can be fairly paraphrased as the elimination of pollution in order to reduce resultant adverse effects and better environmental quality, are logically consistent in principle with a standard requiring reasonable reduction of any environmental incursion. Clean Streams Law, PA. STAT. ANN. tit. 35, § 691.401 (Supp. 1975); Air Pollution Control Act, PA. STAT. ANN. tit. 35, § 4002 (Supp. 1975).

assured that during times of economic difficulty, courts will be hard pressed to compel substantial and concrete additional expenditures in order to provide debatable protection to "amorphous" values.

This portion of the *Payne* test, which is notably premised on the resigned acceptance of the inevitability of environmental incursion, does not provide one invoking the amendment with power beyond that previously available through purely statutory means. It seems, then, that these two standards do not add to impactful implementation of the amendment. Therefore, if *Payne* is to so implement § 27, it must accomplish such through the final portion of its test: "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?"¹³³

Unfortunately, rather than propose a standard by which much environmental harm can be avoided, this test strikes a balance against environmental values. In accordance with this language, one attempting to stop or reform a despoilative project will not prevail by simple demonstration of environmental degradation. He may not prevail even with bare proof of massive degradation. He will only assuredly prevail upon showing that the harm "clearly outweighs" the benefits. From the opposite perspective, a developer or other actor need only demonstrate under the words of this test that his project, admittedly harmful to constitutionally vested rights, will produce some roughly equal social benefit, for example, the bolstering of a local economy. Even assuming that "controlled development" must precondition any "realistic" interpretation of § 27, still it seems inexcusable to relegate these constitutional values to such secondary status. A balancing of public constitutional rights should accord prominent weight to these rights. That provision of weight is sadly lacking in the *Payne* standard.

C. *Community College v. Fox*

In preliminary conclusion, it is clear that *Gettysburg* and *Payne* present greater obstruction than facility to the effective use of § 27. The commonwealth court has imposed procedural and substantive burdens upon those invoking its powers, and has continued this seeming trend in its most recent statement, *Community College v.*

133. 11 Pa. Commw. at 30, 312 A.2d at 94.

Fox.¹³⁴ This case involved the issuance by the Department of Environmental Resources (DER) of a permit to the Central Delaware Authority (Authority) authorizing construction of sewer extension lines to serve a college campus, which lines would traverse a creek. The sewer extensions would be located near a public water supply, a state park and certain undeveloped property.

The complainants, adjoining landowners, alleged at trial before the Environmental Hearing Board¹³⁵ that DER had failed to consider the long-range and indirect environmental impact of the sewer line construction—arguing that the Clean Streams Law,¹³⁶ the Sewage Facilities Act,¹³⁷ and § 27 required such considerations in the permit review process of the agency. The Environmental Hearing Board, agreeing with that contention, vacated the permit and remanded it to DER for further consideration. Both the Authority and college appealed to the commonwealth court.

Commonwealth court used the case as a vehicle for expanded commentary on the amendment. The first area of inquiry involved the matter of standing to sue before an administrative body. The college and the authority had asserted that complainants should not have been entitled to challenge the permit issuance before the Environmental Hearing Board inasmuch as they were not individually or collectively a “person aggrieved.”¹³⁸ The Environmental Hearing Board had rejected the contention and, relying upon the authority of § 27, had attempted to liberalize the traditional grounds of standing.¹³⁹

134. 342 A.2d 468 (Pa. Commw. 1975).

135. The Environmental Hearing Board is a quasi-judicial administrative body vested with initial jurisdiction over appeals from final actions of DER. It is essentially independent in its operations from DER. See PA. STAT. ANN. tit. 71, § 510-21(a) (Supp. 1975). This body should not be confused with the Environmental Quality Board, which has rule-making authority for DER. *Id.* § 510-20(b).

136. PA. STAT. ANN. tit. 35, §§ 691.1-.1001 (Supp. 1975).

137. PA. STAT. ANN. tit. 35, §§ 750.1-.20 (Supp. 1975).

138. The Pennsylvania Administrative Agency Law, PA. STAT. ANN. tit. 71, § 1710.41 (1962) establishes the standard for a “person aggrieved”:

Within thirty days after the service of an adjudication (or if a petition for rehearing or reconsideration is filed pursuant to statutory authority, then within thirty days after service of the order of the agency refusing such petition, or of the order following rehearing or reconsideration) any person aggrieved thereby who has a direct interest in such adjudication shall have the right to appeal therefrom.

Note, this section was amended by the Appellate Court Jurisdiction Act of 1970. PA. STAT. ANN. tit. 17, §§ 211.403, .502 (Supp. 1975) (changing jurisdiction to the commonwealth court, and the time to appeal to thirty days from entry of the order or decision).

139. *Fox* Appeal, No. 73-078-B (Pa. Environmental Hearing Bd., May 16, 1974), asserts

The commonwealth court agreed that the complainants had standing, but did so by simply concluding their qualification under the existing "person aggrieved" standard. The court said that, as the proposed sewers would cross complainants' property and, as the property was downstream of the proposed construction, it was "likely . . . to be adversely affected by any siltation or pollution which might result" and by "any development which might take place there because of the future availability of sewer services to that area."¹⁴⁰ But the court did not stop there. Instead of simply finding standing by traditional means, it took the additional unnecessary step of holding that, insofar as administrative appeals are concerned, the "person aggrieved" test is the only standard to be applied. The opinion, however, was cautiously limited to proceedings on appeal to administrative agencies; it left open the possibility that "a more broad standard" might apply to original actions against administrative agencies.¹⁴¹

This assertion is not of damning impact for several reasons. It is arguably dictum and, although certainly portending future judicial inflexibility, it nonetheless should not have the force of law in the strict conventional sense. As it only applied to administrative appeals, it is limited in scope. But most importantly, its impact is lessened by the practical ability of non-qualifying persons to simply locate a plaintiff who does qualify under the traditional test, and employ such an individual as a straw party in whose name the suit may be maintained.

It should be noted that the court refrained from any explanation as to its reasoning. It simply avowed the propriety of the traditional standard and proceeded to apply it. In light of worthy comment indicating that a prime goal of the amendment might be the expansion of standing rights,¹⁴² it is certainly surprising that the court would so cavalierly handle the matter.

that all the Commonwealth's citizens as beneficiaries of the public trust, have a right to sue to enforce their rights granted in the environmental rights amendment. Therefore, there would be no need to show *direct* injury to the particular plaintiff. *Id.* at 34.

140. 342 A.2d at 475.

141. *Id.* at 474. The court probably drew this distinction due to the earlier *Payne* case. In that case, which was an original action, the plaintiffs were certain citizens of Wilkes-Barre and students of Wilkes College in that city. They may well have been excluded under a traditional "person aggrieved" standing to sue test. In *Payne*, however, the issue apparently was not raised by the parties and the court did not raise it *sua sponte*.

142. Broughton, *supra* note 91, at 427-28.

Having disposed of this initial consideration, the court proceeded to address the substantive issue of the case, namely whether DER had acted properly in issuing the sewer construction permit. In approaching the question, the court predictably relied upon its previous *Payne* rationale, asserting that if DER had complied with the threefold standard, it had automatically complied with its constitutional mandate.¹⁴³ This reliance required the court to discuss the Environmental Hearing Board opinion. The Board had ruled, in its application of the *Payne* test, that the DER permit-review process should include consideration of four independent factors. As paraphrased by the court, these factors were:

- 1) the direct impact upon each of the environmental values listed in the first sentence of Section 27;
- 2) the long range indirect impact on these values, due to possible increased development or other secondary results of action;
- 3) alternative methods of using the resource in question; and
- 4) alternative methods of attaining the objective sought by a permit applicant.¹⁴⁴

The court's stated task was to determine whether the four Environmental Hearing Board criteria were improperly imposed upon DER or whether those criteria were within the scope of the *Payne* standard and therefore properly imposed. The court determined the issue in convoluted fashion. Primarily it reasoned that the first two Environmental Hearing Board criteria were within the first portion of the *Payne* standard¹⁴⁵ and therefore, within DER's legitimate purview. But, said the court, in this instance there was no immediate or long-range direct impact on § 27 values. Immediate impact was never really a subject of concern as only long-range damage to the environment was alleged. Though the Environmental Hearing Board had found remote harm, the commonwealth court overturned this finding, stressing that the evidence presented was highly speculative in nature. The court reasoned that relief under such circumstances would only be granted if the alleged long-range harms were

143. 342 A.2d at 476-77. The court ruled that the Environmental Hearing Board's standards must be "within" the *Payne* test. See note 145 and accompanying text *infra*.

144. 342 A.2d at 474.

145. *Id.* at 481.

almost certain to result directly and were of such character that "current law and technology provide no reasonable means to control them." The court further characterized existing pollution control laws as satisfactory safeguards of the environment.¹⁴⁶ The court preliminarily concluded that DER had met the requirements of the Clean Streams Law, the only statute at issue, had complied with the first part of the *Payne* test and, presumably, had complied with the first two considerations of the Environmental Hearing Board standard. It was in the subsequent consideration of the third and fourth Environmental Hearing Board criteria imposed upon the DER permit-review process that the court parted company with the Board. It ruled that those standards were purely planning considerations and beyond any authority of DER, reasoning that the Clean Streams Law, concerned only with pollution elimination, provided DER no primary planning function—nor did § 27. The amendment, the court asserted, does not specify what governmental agency or agencies may be responsible for the preservation of the natural, scenic, historic and aesthetic values; that responsibility is surely shared by many agencies.¹⁴⁷ Certainly, the court continued, as witnessed by the Municipalities Planning Code and the Eminent Domain Code, the primary land use decision-making authority rested not with DER but with local political subdivisions.¹⁴⁸ Those subdivisions, "best equipped with the expertise to make decisions on these matters,"¹⁴⁹ are both agents of the Commonwealth and trustees of the public natural resources.¹⁵⁰

On this basis, it was the court's position that the Environmental Hearing Board could not justify the imposition of planning considerations upon the DER permit-review process. As this DER decision independently satisfied the second and third portion of the *Payne* standard, the vacation of that permit for the alleged failure of DER to adequately consider planning matters constituted error.

146. *Id.* at 479-80.

147. The responsibility to implement the amendment is also shared by the three co-equal branches of the state government. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 202, 311 A.2d 588, 593 (1973). This interpretation of the transfer of power by § 27 may be legally accurate, but is pragmatically troublesome. How, for example, can the judiciary, within its confines of operation, participate in a positive planning project? Likewise, is the legislature to assume such detail work?

148. 342 A.2d at 482.

149. This contention is not universally accepted. See notes 5, 6 *supra*.

150. 342 A.2d at 482.

Fox is of particular significance because it represents the court's only statement concerning the amendment's effect on the actual land use planning process. As indicated earlier in this writing and as highlighted in *Fox*, the current system is largely one of municipal controls. It is the hope of many that § 27 will empower the Commonwealth to exercise regional and environmentally sensitive constraints on the process, thereby reducing the wide discretion now statutorily delegated to the local level. Under this philosophy, the goal is to effect a greater centralization of power at the state level. Obviously, *Fox* holds that the power is *shared* at all levels, but whether its legal reasoning is preclusive of the possibility of centralized controls depends upon how one interprets it.

One perspective is that, prior and subsequent to the passage of § 27, the municipal power to control land use was purely statutory in origin. If such is the continuing fact, then it is to be presumed that the Commonwealth has the power to pull back those authorities should it so choose. Likewise, the Commonwealth, in accordance with the amendment, could delimit the existing powers by imposition of environmental constraints designed to reduce the widely abused discretion of the existing system. If such is the reality, *Fox* does not seriously hamper the Commonwealth in this regard.

Yet, the commonwealth court obfuscated this reading by its casual comment that municipalities are "trustees of the public natural resources." By that statement, it created the spectre that § 27, presumably by its inclusion of the term "Commonwealth,"¹⁵¹ *constitutionally* vests municipalities with land use planning powers. If this is true, the state government could only withdraw or reduce municipal statutory authority at the risk of violating its own constitution. Such a legal situation would seriously jeopardize the possibility of increased central controls, since the only means would be amendment of the amendment.

The better construction is that the commonwealth court's language confirming an apparent transfer of constitutional authority to municipalities is loose phraseology only. This understanding is prompted by the court's affirmative citation to specific statutory delegations¹⁵² and its well-driven point that no governmental agency

151. The "Commonwealth" is the party entrusted, by the language of article 1, § 27, with fiduciary obligations as trustee of the public natural resources. See note 3 and accompanying text *supra*.

152. *Community College v. Fox*, 342 A.2d 468, 481-82 (Pa. Commw. 1975). The court cited

has been singled out as sole trustee under the section. Likewise convincing is the fact that a legitimate reading of § 27 should not support the contention that the term "Commonwealth" includes with traditional state government all lesser political subdivisions. "Commonwealth" is generally a term interchangeable with "State," especially as relates to particular political entities in the Union, *i.e.*, Pennsylvania, Virginia, Massachusetts, and Kentucky.¹⁵³ In this context, it should not without more include lesser entities. Similarly, the term's use within the Pennsylvania Constitution relates usually to the state government and the administrative agencies of its executive branch only.¹⁵⁴ Finally, as was done in article 1, § 26 of the Pennsylvania Constitution,¹⁵⁵ the Pennsylvania General Assembly could well have expressly included municipal bodies within the purview of § 27 had it so chosen.

D. *In Summary of the Environmental Rights Amendment*

Gettysburg instructs that the amendment is now in force but can only be successfully invoked with extremely persuasive and credible evidence. *Payne* adds to these burdens the imposition of a standard by which to assess activity in light of the amendment, which standard unfortunately tips the balance against the enumerated values. *Fox*, in turn, recognizes the need for comprehensive planning, presuming the passage of such authority through § 27,¹⁵⁶ but only incompletely explains the proper investiture of that constitutional authority. These preliminary indications of the implementative

the Municipalities Planning Code, PA. STAT. ANN. tit. 53, §§ 10101-11202 (1972), *as amended* (Supp. 1975), and the Eminent Domain Code, PA. STAT. ANN. tit. 26, §§ 1-101 to -903 (Supp. 1975).

153. *State v. Lambert*, 44 W. Va. 308, 28 S.E. 930 (1898).

154. Illustrative of the fact that courts presuppose the term "Commonwealth" does not include lesser political subdivisions are cases relating to PA. CONST. art. 1, § 11 (sovereign immunity). *E.g.*, *Bannard v. New York State Natural Gas Corp.*, 404 Pa. 269, 172 A.2d 306 (1961); *Commonwealth v. Berks County*, 364 Pa. 447, 72 A.2d 129 (1950); *Pennsylvania Gas & Water Co. v. Kassab*, 14 Pa. Commw. 564, 322 A.2d 775 (1974); *Ross v. Keitt*, 10 Pa. Commw. 375, 308 A.2d 906 (1973).

155. PA. CONST. art. 1, § 26 provides:

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

156. *Community College v. Fox*, 342 A.2d 468, 482 (Pa. Commw. 1975). The court simply stated its agreement with the Environmental Hearing Board that "some comprehensive planning is required of the trustee."

ability of § 27 are but a rudimentary focus; we can expect a wealth of cases involving environmental incursion in years to come. Yet the cases are crucial since they supply the thrust and direction for future interpretation. Should those future interpretations reflect the course roughly cut to date, we can be resigned to the fact that § 27 standing alone will not shift the "balance of power" in the land use decisional process so that environmental values are routinely protected. Absent assertive legislative implementation of the public trust powers, the proliferation of development and the insensitivity of zoning policy will most likely roll on unmonitored. The fortuity of the situation is that the Pennsylvania General Assembly has the power to act should it choose to do so.

IV. PLANNING EFFORTS

The focus of the preceding section, which dealt with the development of legal powers tending toward centralization of land use control, will now shift to more concrete considerations. This section will discuss three planning efforts presently underway. The first is pursuant to the Pennsylvania Sewage Facilities Act,¹⁵⁷ reenacted subsequent to and in contemplation of the powers of § 27. The other two planning efforts are ongoing administrative activities that may have great impact on future land control and resource use in the Commonwealth.

A. *The Sewage Facilities Act*

The Pennsylvania Sewage Facilities Act imposes an environmental prerequisite on the municipal planning process, thus indirectly amending the powers vested at the local level. A general understanding of the mechanics of the Act is beneficial. The Act continues the provision of authority to municipalities to issue or deny permits authorizing construction of individual or community on-lot sewage systems.¹⁵⁸ These systems are commonly employed in

157. PA. STAT. ANN. tit. 35, §§ 750.1-.20 (Supp. 1975).

158. An individual sewage system is defined as:

a system of piping, tanks or other facilities serving a single lot and collecting and disposing of sewage in whole or in part into the soil or into any waters of this Commonwealth or by means of conveyance to another site for final disposal. . . .

Id. § 750.2. A community sewage system is defined as:

any system, whether publicly or privately owned, for the collection of sewage or in-

rural areas where public sewage facilities remain unavailable. The exercise of this authority, prior to the Act, was solely dependent on the narrow determination of potential adverse pollutional impact occasioned by a particular proposed system installation. In short, only if the system would result in pollution of the waters of the Commonwealth,¹⁵⁹ would a permit be refused.

The Sewage Facilities Act supplements this constrictive frame of operations by imposition of an additional prerequisite. In addition to ruling upon the pure environmental feasibility of any such proposal, the municipality must now evaluate the project's consistency with sound environmental planning. The mechanism by which this evaluation is accomplished is generally known as the "Act 537 plan."¹⁶⁰

Under the terms of the Act, each municipality has been required to fashion a comprehensive plan, which plan should

[d]elineate areas in which community sewage systems are now in existence, areas experiencing problems with sewage disposal including a description of said problems, areas where community sewage systems are planned to be available within a ten year period, areas where community sewage systems are not planned to be available within a ten year period and all subdivisions existing or approved.¹⁶¹

No advised or mandated criteria to accomplish this task are offered. Upon completion of the statutory period, the plans are to be submitted to the Commonwealth of Pennsylvania for approval.¹⁶² Upon

dustrial wastes of a liquid nature from two or more lots, and the treatment and/or disposal of the sewage or industrial waste on one or more of the lots or at any other site.

Id. The authority provided municipalities relating to the installation of such facilities is provided by PA. STAT. ANN. tit. 35, § 750.8(a) (Supp. 1975). This authority is limited to those facilities not requiring permits pursuant to the Pennsylvania Clean Streams Law (PA. STAT. ANN. tit. 35, §§ 691.1-1001 (Supp. 1975)). PA. STAT. ANN. tit. 35, § 750.7(a) (Supp. 1975).

159. Such systems can pollute in numerous ways. For example, if soils are inadequate for filtration purposes, if the groundwater table is relatively close to the surface of the property, or if rock formation will cause transport of sewage deposits to lower elevations, pollution can result. Likewise, installation of such systems too near each other can bring about a saturation effect. It should be noted that these systems simply dispose of sewage rather than treat it.

160. The plans are thus referenced because the Sewage Facilities Law was enacted as the Act of January 24, 1966, No. 537, [1966] Laws of Pa. 1535, Pa. Stat. Ann. tit. 35, § 750.1 (Supp. 1975).

161. *Id.* §§ 750.5(a), (d)(1).

162. *Id.* § 750.5(e). Apparently, every municipality in the Commonwealth has complied

approval, the plan becomes an operative force within the municipality and only those projects "consistent" with its terms are to be permitted.¹⁶³

This scheme injects an element of planning and regulation into the permit-issuance process. Act 537 plans constitute a means by which, through the management of its permit program, a municipality can guarantee continued availability of adequate sewage services while monitoring its own growth. For example, under the "old" system, if a developer proposed on-lot sewage disposal for an anticipated apartment structure, a municipality, absent information indicating immediate adverse pollutional impact, would be required to issue a permit authorizing installation of the system. This bare fact could well result in a proliferation of such systems and a growth in population, for which a municipality might be sorely unprepared. Sufficient roadways, shopping areas, educational and recreational facilities, for example, could be lacking, yet the growth could continue. Such a situation often results, in turn, in generating the pollution that the municipality initially hoped to avoid,¹⁶⁴ as well as generating a disproportionate demand for the missing services. With an Act 537 plan in force, however, a municipality, realizing the potential difficulties of such growth, can provide for extension of public sewage services on a gradual basis, more in line with its absorptive capabilities. In such an event, the proliferation of on-lot systems inconsistent with the plan can be avoided. Alternatively, an Act 537 plan can provide an intended inducement to development in chosen portions of a municipality. By designating public sewage service for an area within a finite period of time, the local government makes investment and development of that area more attractive. This is obviously the case when a municipality has committed itself to follow its original plan and has let that fact be known.

At least on the surface, this schematic seems to institutionalize the environmental overlay many desire; yet the fact is that the plans have often failed to materialize these hopes. The reasons are seemingly twofold. The first cause is the necessary provision for flexibility in administration. This flexibility takes the form of the right to

with this initial requirement.

163. *Id.* § 750.7(b) (4).

164. Many persons agree that on-lot sewage systems are per se inadequate and will ultimately pollute, especially in proliferation conditions. See note 159 *supra*.

revise the plan as deemed advisable after original formulation and adoption.¹⁶⁵ It is obvious that such discretion is required; otherwise the impact of unforeseen future events or trends might render existing plans unworkable and irrelevant. But this discretion can also be the legal means by which the entire thrust of any such document is thwarted. Whether this occurs is dependent upon the good will of each affected municipality.

If, for example, a local body wishes to induce a rampant and largely unreasoned development program in order to, say, increase its tax base, it can probably achieve the goal notwithstanding the prerequisites of the Sewage Facilities Act. It could, for example, adopt a "minimum" plan, one which simply outlines existing services without proposing future extension of additional sewer interceptors. This minimum plan would almost certainly receive initial approval due to the Commonwealth's secondary role¹⁶⁶ and DER's possible bent toward a no-growth philosophy. Then, as land development would be subsequently proposed, the municipality, on the theory that the plan must provide adequate sewage service,¹⁶⁷ would simply revise as necessary. By this tack, development objectionable as inconsistent with the plan might be avoided. This procedural avenue for untrammelled exercise of municipal discretion again demonstrates the continuing reality that the impact of a statute depends on the willingness of those charged with its implementation to carry it into effect.

The second inhibition arises most often when a municipality, acting in good faith conformance with the requirements of the Act, attempts to limit development due to a planning prerequisite. That prohibition, already addressed in this writing,¹⁶⁸ is the federal protection against taking without just compensation. This restraint on the planning authority has been best articulated in two recent legal decisions.

In the first decision, *Commonwealth v. Harger*,¹⁶⁹ a landowner

165. PA. STAT. ANN. tit. 35, § 750.5(a) (Supp. 1975).

166. *Community College v. Fox*, 342 A.2d 468 (Pa. Commw. 1975). There the court stated that DER should not "second-guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning, and such other concerns of local agencies, even though they obviously may be related to the plans approved." Rather, DER's function is "merely to insure that proposed sewage systems are in conformity with local planning and consistent with statewide supervision of water quality management . . ." *Id.* at 478.

167. *Commonwealth v. Harger*, 61 Pa. D. & C.2d 289 (Environmental Hearing Bd. 1973).

168. See notes 8-81 and accompanying text *supra*.

169. 61 Pa. D. & C.2d 289 (Environmental Hearing Bd. 1973).

wished to construct a lagoon-type sewage treatment facility to serve a proposed mobile home park. DER, clothed with decisional authority under the Act,¹⁷⁰ refused the permit since the proposed structure was not contemplated by the plan in force.¹⁷¹ No sewage treatment plants existed in the township and none were proposed until 1978. In reversing DER's decision, the Environmental Hearing Board held that DER's permit denial was "arbitrary and improper" as the "purpose of the law is to serve the people, and not to deprive them of needed facilities, especially where, as in the instant case, the facilities are being constructed at the expense of the citizens who need them."¹⁷² This case, of statewide precedent, declared a temporary delay in the use of property to be an unconstitutional taking. Whether the broad implications of this opinion will become effective constraints on the application of Act 537 plans to the land use control system remains to be determined.

The more impactful decision in this area was decided by the commonwealth court in *Commonwealth v. Trautner*,¹⁷³ which involved another denial by DER of a permit authorizing an on-lot system. The applicant in this instance, the appellant before the Environmental Hearing Board, was a landowner desiring to build a residence on his property. The township's Act 537 plan, having jurisdiction over the locus of the property, made no provision for such a system. The township had attempted to revise its plan to include the on-lot system, but DER felt that the revision was inadequate under its regulations.¹⁷⁴

The court, speaking through a panel of three judges,¹⁷⁵ was offended by DER's rigidity and denominated the situation as "con-

170. Since a sewage treatment plant was proposed, as opposed to an on-lot disposal unit, DER retained permit issuance authority under the Clean Streams Law. See PA. STAT. ANN. tit. 35, § 750.7(a) (Supp. 1975).

171. The township in this instance, rather than formulate its own Act 537 plan, had adopted the Butler County Comprehensive Sewage Plan. *Commonwealth v. Harger*, 61 Pa. D. & C.2d 289, 291 (Environmental Hearing Bd. 1973).

172. *Id.* at 297.

173. 338 A.2d 718 (Pa. Commw. 1975).

174. *Id.* at 719-20. The objections of DER were that the revision itself was inadequate due to the lack of necessary data and the requirement that such systems be in "isolated" areas. See 25 PA. CODE §§ 71.16, 91.32 (1971).

175. *Commonwealth v. Trautner*, 19 Pa. Commw. 116, 338 A.2d 718 (1975) (opinion by Kramer, J., joined by Crumlish and Rogers, JJ.). Although the court hears most appeals *en banc*, it has discretion to sit in panels of not less than three judges. PA. STAT. ANN. tit. 17, § 211.6(a) (Supp. 1975).

fiscatory and tantamount to a taking without due process of law."¹⁷⁶ The court was most upset by the Act's relegation of a property owner to a position of relative impotence. Under the Act, said the court, the independent and unilateral recalcitrance of a third party, the municipality, can preclude legitimate land use by an arbitrary failure to convince DER that the proposed sewage services will correspond with "comprehensive" planning.¹⁷⁷ The court was unimpressed by an indirect remedy provided by DER regulations.¹⁷⁸ That remedy, an appealable right to request DER to order an adequate plan revision, was considered inadequate as the landowner's rights would still be temporized by action or inaction of the additional party. As such, no guarantee of recourse would be available to the person directly aggrieved.¹⁷⁹

Harger and *Trautner* are symbols of the burdens carried by those favoring a more regionalized influence on land use controls: although the concept of environmental planning seems legally indisputable, reliance upon a plan for decisional authority may be ruled constitutionally violative in its application to individual landowners. The prevalence of such rulings dilutes the benefits of planning by encouraging a sprinkling of unanticipated sewage facilities throughout an area. The greater this unplanned proliferation, the less credible the plan itself becomes and the less effective is its influence upon the existing control system.

B. *The Environmental Master Plan*

Unlike the Sewage Facilities Act, the Environmental Master Plan (EMP) is only administrative theory having no present coercive force. It nonetheless constitutes the Commonwealth's most optimistic pursuit toward regional environmental planning.

As its name indicates, the EMP is a vehicle by which the Commonwealth might directly impose comprehensive and uniform constraints upon the land use decisional process. The development of the EMP was originally authorized by a 1970 statute that was brief in form and lacked written legislative history. That enactment, the purpose of which was to create the Environmental Quality Board and to delegate to it rule-making authority, included the following

176. *Id.* at 120, 338 A.2d at 720.

177. *Id.*

178. 25 PA. CODE § 71.17 (1971).

179. Pa. Commw. at 123, 338 A.2d at 721.

simple and vague instruction: "The Environmental Quality Board shall have the responsibility for developing a master environmental plan for the Commonwealth."¹⁸⁰ Not specified in the legislation was any means by which to devise such a master plan nor the time by which to complete the endeavor. Likewise, the parameters and nature of its ultimate impact remain legislatively unarticulated.

The development of the plan to date is of interest. The initial authorization generated no stir of activity within the Environmental Quality Board (EQB);¹⁸¹ as a matter of fact, it caused not even a quiver. To the best of anyone's knowledge, the EQB has never taken affirmative steps in response to this delegation. Rather, DER through its Bureau of Environmental Master Planning assumed the obligation and began the massive task of accumulating the environmental data necessary in such a project. That Bureau now exclusively controls plan formulation.

The Bureau's first major step in formulating the EMP was to present to the EQB a statement of comprehensive environmental goals for the Commonwealth. These goals were written to be consistent with the directives of § 27 and were intended, after adoption, to guide the further work of master plan development. As revised by the EQB and adopted February 21, 1974,¹⁸² they included overall environmental goals and several subordinate specific objectives.¹⁸³

180. PA. STAT. ANN. tit. 71, § 510-20(a) (Supp. 1975). This initial authorization to proceed was buttressed, if unintentionally, by the *Fox* rationale which assumed that comprehensive planning was a duty of the trustee of the public natural resources. See *Commonwealth v. Fox*, 342 A.2d 468, 482 (Pa. Commw. 1975).

181. The Environmental Quality Board is that independent agency which promulgates rules and regulations for DER enforcement and advises DER on matters of policy. PA. STAT. ANN. tit. 71, § 510-20(b) (Supp. 1975).

182. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, BUREAU OF ENVIRONMENTAL MASTER PLANNING, ENVIRONMENTAL GOALS OF THE COMMONWEALTH OF PENNSYLVANIA (1974).

183. These objectives, as set forth in full, provide:

The Overall Environmental Goal of the Commonwealth shall be—

To protect the natural processes and ecological relationships of man's life-support system, and

To manage our activities to preserve natural, scenic and esthetic values of the environment while meeting society's needs.

ENVIRONMENTAL GOALS FOR NATURAL RESOURCE QUALITY

Pennsylvanians will work toward their OVERALL ENVIRONMENTAL GOAL through the development of policies and programs seeking to achieve the goals set forth below.

Air Quality—To restore and maintain the quality of the air for the protection of man's health, welfare and property and for the protection of ecological systems enhancing their scenic and esthetic quality.

Additional "environmentally-related" goals aimed at coordination of the overall goals with social and economic interests were also adopted.¹⁸⁴ These are demonstrative of the possible future comprehension of the plan and roughly indicate the massive project it portends.

Supplied with these directives, the Bureau decided to engage in detailed study of "critical areas" which were "deemed essential to the preservation and enhancement of statewide environmental values or for the protection of the health, safety, and well-being, of Pennsylvania citizens from natural or man-made environmental hazards."¹⁸⁵ Sixteen such areas were selected,¹⁸⁶ eight of which have been prioritized for immediate attention.¹⁸⁷ Initial study on those eight is now complete and has been outlined in a preliminary edition of the EMP entitled *Policy Recommendations for Critical Environ-*

Water Resources—To achieve water of high quality in adequate supply to meet society's present and future needs, while enhancing scenic and esthetic quality, and giving consideration to the natural distribution of surface and subsurface water to protect ecological systems.

Land Resources—To ensure that surface and subsurface uses are planned to be compatible with the resource capability and protect the general health and welfare of the people, and to protect the ecological systems; and to protect and improve the productive capacity of the soils, fields and woodlands, and to reclaim those land resources degraded by man or natural disasters; and to protect those ecologically fragile and wild lands and preserve for posterity places having archeological, cultural, ecologic, educational, recreational, historic or scenic value.

Esthetic Quality—To achieve a visual, scenic and acoustic environment consistent with the protection of environmental values.

Flora and Fauna—To provide for the protection of eco-systems for flora and fauna ensuring species health, diversity and propagation consistent with the management of fish and wildlife resources.

Waste Resources—To recognize all wastes as potential resources and to manage those resources for the protection, preservation and enhancement of public health and environmental quality.

Id. at 2-3.

184. *Id.* at 4.

185. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, BUREAU OF ENVIRONMENTAL MASTER PLANNING, CRITICAL AREA CONSIDERATIONS 6 (1975).

186. These sixteen areas are floodplains, prime agricultural soils, forests and woodlands, mineral resources, historic resources, scenic areas, subsidence prone areas, water supply limited areas, soils with development limitations, wetlands, conservation areas, aquifer recharge areas, metropolitan open space, public lands, rare and unique resources, and areas exceeding ambient air quality standards. *Id.* at 9-25.

187. The areas chosen for study are: watersheds with high quality streams, floodplains, prime agricultural soils, mineral resources, water supply limited areas, soils with development limitation, and metropolitan open space. The final critical area to be studied is identified as "clean air resource area"; this denomination does not seemingly fit within the list. *Id.*

mental Areas,¹⁸⁸ which was presented on November 20, 1975, to the Environmental Quality Board for approval. Its recommendations, substantiated by a compilation of data on present and projected property uses, took the form of various policy statements and specific proposals for action by the various organs of the executive branch.

Exemplary of these recommendations is the critical area of prime agricultural soils. To protect these regions of the Commonwealth, the *Preliminary Edition* offered five policies for implementation. These policies advised the promotion of a favorable social and economic climate for communities in these areas, discouragement of extension of public facilities, coordination of all levels of government to implement environmentally sensitive land use policies, encouragement of natural filtration waste water renovation, and the promulgation of preferential taxation programs to support agricultural and open space activities.¹⁸⁹ Specific action proposals were similarly advanced to advise the governor, legislature, agencies and citizenry of feasible efforts they might undertake to begin implementation of such policies.¹⁹⁰

The EMP in final form will propose similar policies and implementative actions for each of the critical areas. Its adoption, even with some modification, would result in an orderly and properly based framework of mandatory and inducive temperances on land use. Even while continuing the investiture of primary decisional authority at the local level, it would surely reduce and define the discretion accorded local bodies. The reduction and definition of discretion would follow the directives of § 27, since legislative adoption of the plan would be authorized by and pursuant to the fiduciary obligations announced therein.

As with the Sewage Facilities Act, however, there are uncertainties as to its ultimate efficacy. The first uncertainty is the ambiguous *Fox* language¹⁹¹ that environmental planning is a duty to be shared by *all* levels of Pennsylvania government. Assuming this first problem is simply conjectural, the next uncertainty is the final en-

188. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, BUREAU OF ENVIRONMENTAL MASTER PLANNING, ENVIRONMENTAL MASTER PLAN, PRELIMINARY EDITION, POLICY RECOMMENDATIONS FOR CRITICAL ENVIRONMENTAL AREAS. (Review Draft, November 1975) [hereinafter referred to as PRELIMINARY EDITION].

189. *Id.* at 52-57.

190. *Id.* at 251-74.

191. See notes 145-51 and accompanying text *supra*.

forceable form of the plan. Will it be a statute, an administrative regulation of DER, or simply an advisory endorsement? If it is passed as a statute, the plan can have significant impact since it would modify existing delegations of land use authority to local government. If, however, it is adopted by the EQB as a regulation only, such an effect would be unlikely since a regulation does not have sufficient legal force to contradict and impliedly veto a legislative enactment. Even if the EMP could be considered within applicable rule-making constraints, its disfavor by the courts is still foreseeable. Finally, if the EQB simply endorsed the propriety of the plan, its enforceability would be so hampered as to make the document an exercise in theory only. Therefore, the future legal stature of this plan is crucial to its value. As of now, the Bureau's intent is to achieve adoption of the plan as a regulation only;¹⁹² this procedure will not produce the desired centralization of environmental controls.

Even assuming that the EMP could pass the legislature, its enforceability would still be highly suspect. First of all, it takes the form of policy recommendations only; even if binding, these generalities may frequently prove to be insufficient bases for requiring action: it is obviously difficult to show that a specific decision or development is violative of a policy consideration. Secondly, such generalized policy, as applied adversely to the specific interests of a landowner, might give rise to the omnipresent taking issue.

Despite these questionable areas, the plan at the least is a reflection of laudable concern by government to insure environmental quality in a fair and patterned manner. Such a concern must result in some ultimate rewards; the quantum of that result is the matter at issue.

C. *The State Water Plan*

Another offspring of article I, § 27 is the *State Water Plan*.¹⁹³ This plan, unlike the EMP,¹⁹⁴ is of limited scope; it is to be a "manage-

192. As witnessed by submission of the PRELIMINARY EDITION, *supra* note 188, to the Environmental Quality Board.

193. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, BUREAU OF RESOURCES PROGRAMMING, STATE WATER PLAN viii (Nov. 1975) [hereinafter referred to as STATE WATER PLAN].

194. The statutory authorization for the STATE WATER PLAN, *supra* note 193, is much more comprehensive than that for the EMP. The authorization provides:

Waters.

ment tool to guide the conservation, development and administration of the Commonwealth's water and related land resources on a comprehensive and coordinated basis."¹⁹⁵ Its intent, then, is not direct intervention in the land use control process but rather the fostering of a resource.

In line with its more restrictive area of operation, the articulated goals of the effort are clearly resource-protective. These goals are the assurance of adequate water supply, flood damage reduction, provision for recreational resources, water quality management and improvement of the quality of life.¹⁹⁶ Upon completion, its proposals, in the form of twenty-three planning reports, will be implemented "under policy requirements and guidelines established by the General Assembly to assure that the best interests of all of the Commonwealth's citizens are protected."¹⁹⁷ Each report relating to a particular geographic basin will analyze physical and demographic characteristics, problems related to available water resources, and resource opportunities and alternatives.¹⁹⁸ All reports will be integrated into one final comprehensive statement.

This plan, like the EMP, constitutes a worthy, if less controversial, effort. Its use, for example, might reduce the vast property

The Department of Environmental Resources shall have the power and its duty shall be:

(6) To maintain a complete inventory of all the water resources of the Commonwealth; collect all pertinent data, facts, and information in connection therewith; classify, tabulate, record, and preserve the same; and, upon the basis thereof, determine, the points at which storage reservoirs may be constructed for flood control, for municipal and domestic supply, hydraulic and hydroelectric power, steam raising, steam condensation, navigation, and other utilization; and generally to devise all possible ways and means to conserve and develop the water supply and water resources of the Commonwealth for the use of the people thereof.

PA. STAT. ANN. tit. 71, § 510-4(6) (Supp. 1975).

Another possible source of authority is § 510-9 of the same act which states:

The Department of Environmental Resources shall have the power and it shall be its duty:

(1) To make or cause to be made studies, surveys and examinations of local, State or National flood conditions, causes and effects and prepare, or cause to be prepared designs, plans and recommendations for bringing flood conditions under adequate and reasonable control and for saving life and property from damage by flood

Id. § 510-9(1). It is currently being developed by the DER chiefly through its Bureau of Water Quality Management.

195. STATE WATER PLAN, *supra* note 193, at vii.

196. *Id.* at 2-4.

197. *Id.* at viii.

198. *Id.* at 9.

losses and financial drains often occasioned by flooding. Also, the plan should assist in assuring that sufficiently abundant and pure water will always be available for domestic, recreational and other purposes.

Providing much of the data base requisite for the development of the *State Water Plan* is an independent yet related effort known as the Comprehensive Water Quality Management Plan (COWAMP). This plan, authorized by the Clean Streams Law,¹⁹⁹ is attempting to determine the specific "combination of actions" necessary to "achieve and maintain water quality" while dually considering economic and environmental ramifications.

COWAMP, which is scheduled for completion within three years, involves expansive study of the water resources of the Commonwealth. This study has divided Pennsylvania into nine separate regions, each of which is assigned an engineering consultant. Each consultant assumes overall responsibility for compiling the data base within the region, and works with the assistance of three advisory committees representing the varied interests of local and county governments, the citizenry, industry, environmentalists, sportsmen and others. The operational structure is designed to formulate final recommendations and policies reflective of diverse views.²⁰⁰ Unfortunately, a pervasive public apathy with the project may generate conclusions predominantly mirroring the perspectives of commercial interests. If this should occur, COWAMP may be of greater political than resource-protective significance.

V. CONCLUSION

That the Pennsylvania General Assembly has attempted to provide the Commonwealth with broad powers for environmental control is a fact not to be argued. One need only witness the various pollution control laws, eminent domain powers, and article I, § 27

199. The Clean Streams Law, PA. STAT. ANN. tit. 35, § 691.5(b)(2) (Supp. 1975) provides that the Sanitary Water Board shall:

(2) Establish policies for effective water quality control and water quality management in the Commonwealth of Pennsylvania and coordinate and be responsible for the development and implementation of comprehensive public water supply, waste management and other water quality plans.

The duties of the Sanitary Water Board were transferred to the Department of Environmental Resources by PA. STAT. ANN. tit. 71, § 510-1(22) (Supp. 1975).

200. COMMONWEALTH OF PENNSYLVANIA, BUREAU OF WATER QUALITY MANAGEMENT, WATER QUALITY PLANNING FOR PENNSYLVANIA 2 (March, 1974).

of the Pennsylvania Constitution to so conclude. These express delegations are in addition to common law public trust powers traditionally resting with the sovereign, and powers tantamount to total dominance over lesser political subdivisions.²⁰¹

Yet, even with this panoply of alternatives, maintenance of ecological integrity has been only partially successful. The Commonwealth has, for example, effectively and often employed its pollution control statutes resulting in abatement of public nuisances noxious to use of surrounding property.²⁰² It has imposed "sewer bans" on wide areas, with the indirect effect of halting urban development in the affected localities.²⁰³ It has required municipalities to enter negotiations to resolve their common environmental problems.²⁰⁴ In a non-enforcement context, it has even purchased in this century over one million acres of game lands to protect wildlife and has set aside state forest areas comprising approximately two million acres.²⁰⁵

These efforts have been necessary in light of the prevailing rate at which land is consumed in Pennsylvania. That rate, caused largely by a population growth of approximately six thousand persons per month, is incredible. Trends "indicate that more houses (400,000 new units by 1980), schools, industrial sites (66,300 additional acres) and other facilities (2,000 new sewage projects by 1990) will be built; more jobs will be created (16% increase by 1990); and more resources will be consumed to support these activities."²⁰⁶

Yet, in spite of the powers accorded the Commonwealth and the clear need for their exercise, sensitive environmental policies have been overshadowed by traditional concepts of property ownership as reflected in the "taking" tests.

It is now apparent that even the passage of a constitutional amendment specifically designed to crystallize and protect environmental quality brings no guarantee of success. At seemingly every opportunity, the courts have hampered rather than facilitated the

201. See *Commonwealth v. Westmoreland-Fayette Mun. Sewage Auth.*, 336 A.2d 704 (Pa. Commw. 1975).

202. See, e.g., *Rochez Bros. v. Commonwealth*, 18 Pa. Commw. 137, 334 A.2d 790 (1975).

203. E.g., *Commonwealth v. Borough of Carlisle*, 330 A.2d 293 (Pa. Commw. 1974). "Sewer bans" are administrative orders disallowing any party to "tap-in" to an existing sewer system. Generally, the reason for such broad prohibitions is the continuing sewage pollution caused by malfunctioning sewage treatment plants to which the sewers are tributary.

204. E.g., *Commonwealth v. Derry Township*, 10 Pa. Commw. 619, 314 A.2d 868 (1973).

205. PRELIMINARY EDITION, *supra* note 188, at 10.

206. *Id.* at 13.

use of § 27. This trend began with *Gettysburg*, an obviously unpalatable initial vehicle.²⁰⁷ It continued with force through *Payne* and *Fox*. The threefold standard of *Payne*, more than any other single factor, has precluded the effective use of § 27. Indeed, every subsequent use of the standard found by the writers has resulted in a decision allowing the challenged environmental incursion to continue.²⁰⁸

The staying power of this disappointing trend of decisions is well demonstrated by dictum in *Raum v. Board of Supervisors*.²⁰⁹ Decided seven days after *Fox*, the case queried in a footnote whether the duty of a municipality to implement the amendment is not satisfied by the mere passage of a conventional zoning and subdivision ordinance and the "requirement of a developer to comply with the comprehensive environmental protection laws of the Commonwealth."²¹⁰ If this were to become the standard, the duty to plan delegated by § 27 is meaningless since it is already accomplished. Such a position would render the amendment virtually impotent.

Therefore, the legal forecast is dour. If decisional law persists in its current direction, the Commonwealth will never assume the controls it requires, and attempts to deter despoilative actions and impose affirmative environmental restraints will be of little success. The Commonwealth should promptly move to begin reversing this snowball. The Pennsylvania General Assembly should, at the least, enact implementative legislation defining broadly the parameters of § 27. That legislation should place the burden upon those proposing potentially harmful projects to show compliance with the amendment rather than the opposite. It should provide stringent penalties

207. This conclusion is largely based on the fact that *Gettysburg* involved an affirmative action by government to halt a traditionally proper private activity. Ideally, the first vehicle should have presented a factual situation where the people invoked the amendment to enjoin a government encroachment of the enumerated values. Such would have set more easily with the court, as self-executing constitutional amendments are classically promulgated to restrict the powers of government.

208. *Community College v. Fox*, 342 A.2d 468 (Pa. Commw. 1975); *Commonwealth v. Pennsylvania Pub. Util. Comm'n*, 335 A.2d 860 (Pa. Commw. 1975); *Bucks County Bd. of Comm'rs v. Pennsylvania Pub. Util. Comm'n*, 11 Pa. Commw. 487, 313 A.2d 185 (1973); *Summit Township Taxpayers Ass'n v. Commonwealth*, Docket No. 74-176-C (Pa. Environmental Hearing Bd. 1974); *Gondos v. Commonwealth*, Docket No. 73-421-B (Pa. Environmental Hearing Bd. 1973); *Anthony v. Commonwealth*, Docket No. 73-356-W (Pa. Environmental Hearing Bd. 1973).

209. 342 A.2d 450 (Pa. Commw. 1975).

210. *Id.* at 456 n.9.

for municipalities which flaunt its provisions. And it should dissolve the *Payne* standard, substituting one legitimately sensitive to the enumerated values.

Administrative agencies of the Commonwealth should routinely consider land as an integrated system rather than as parcels and should act to preserve the system. DER, the agency most directly faced with these responsibilities, should consolidate its planning functions to avoid duplication of effort and insure consistency of results. It should also present its well-documented planning policies to the General Assembly when politically feasible.

Most importantly, the judiciary must, in the tradition of *Just v. Marinette County*,²¹¹ routinely accord prominent weight to environmental values. As these values are now constitutionally vested and effective, it should have no difficulty in striking a more legitimate balance between public and private interests. It should be mindful that allowance of environmental incursions can also work an unconstitutional end: projects often unreasonably self-allocate environmental capabilities for private use, thus denying those following the same rights to enjoy and use.²¹²

It is prudent to remember that environmental quality is not ours alone:

*The land belongs to the people . . . a little of it to those dead
. . . some to those living . . . but most of it belongs to those
yet to be born. . . .*²¹³

211. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

212. See *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973).

213. Quoted from the letterhead of the Zoning and Sanitation Department, Jackson County, Wisconsin, as found in *Just v. Marinette County*, 56 Wis. 2d 7, 24 n.6, 201 N.W.2d 761, 771 n.6 (1972).

