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THINKING ANEW ABOUT THE ENVIRONMENTAL RIGHTS AMENDMENT: AN ANALYSIS OF RECENT COMMONWEALTH COURT DECISIONS

John C. Dernbach*

I. INTRODUCTION

Article I, section 27 of the Pennsylvania Constitution—the state’s Environmental Rights Amendment—was approved by a four-to-one majority of the state’s voters in 1971.¹ It provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.²

Only a handful of other states have a similar provision in their constitutions, and there is nothing like it in the federal Constitution.³ Because of its uniqueness, as well as its potential adverse consequences for economic development, the state’s courts quickly buried the amendment. Section 27 played only a minimal role in environmental protection for more than four decades, primarily because of a 1973 Commonwealth Court decision, *Payne v. Kassab*,

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¹ John C. Dernbach & Edmund J. Sonnenberg: *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L. J. 181, 273-79 (2015). The vote was 1,021,342 in favor and 259,797 against, which is a margin of four to one. *Id.* at 279.

² PA. CONST. art. I, § 27.

³ Pa. Env’t Def. Found. v. Commonwealth (*PEDF II*), 161 A.3d 911, 918 (Pa. 2017).

that substituted a three-part test for the text of the amendment.⁴ From then until recently, this test, not section 27, was the “all-purpose test” for applying section 27.⁵

Two landmark Pennsylvania Supreme Court cases transformed this state of things. In 2013, in *Robinson Township v. Commonwealth*, the court held unconstitutional several provisions of a state statute governing shale gas extraction.⁶ Three justices, a plurality of the seven-member court, based their decision on section 27. The plurality opinion, written by then-Chief Justice Ronald Castille, contained a detailed exposition of the text of section 27 and how it should be applied.⁷ Still, this opinion was signed by only three of the court’s seven justices, and did not constitute binding precedent on section 27.⁸

Four years later, in June 2017, in *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF II)*, a majority of the

⁴ The test was set forth in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff’d* on other grounds, 361 A.2d 263 (Pa. 1976):

“The court’s role must be to test the decision under review by a threefold standard: (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?”

For the earlier history of article I, section 27, including *Payne*, see John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I: An Interpretative Framework*, 103 DICK. L. REV. 693 (1999). For a detailed explanation of caselaw under the *Payne* test, and its limiting effect on section 27, see John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335 (2015).

⁵ John C. Dernbach, *Natural Resources and the Public Estate*, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 793, 806 (Ken Gormley & Joy G. McNally eds., 2d ed., 2020).

⁶ *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013). For an analysis of this case, see John C. Dernbach, James R. May & Kenneth T. Kristl, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS U. L. REV. 1169 (2015).

⁷ *Robinson Township*, 83 A.3d at 947-63.

⁸ The fourth vote for holding parts of the statute unconstitutional came from Justice Baer, who based his opinion on substantive due process. See *id.* at 1000 (Baer, J., concurring).

Pennsylvania Supreme Court applied much of the *Robinson Township* plurality opinion and recognized the primacy of the text of section 27.⁹ The case involved a challenge under section 27 to state laws that allowed the expenditure of proceeds from oil and gas lease sales on state forests for the general fund. PEDF claimed that these proceeds were from the sale of public natural resources—state forest lands and the gas under them—and therefore must be spent only to “conserve and maintain” such public natural resources.¹⁰ A majority of the supreme court agreed and made the text of section 27 law again. In so doing, the court set aside the *Payne* test. *PEDF II* so thoroughly transformed the legal landscape concerning article I, section 27, that the great majority of earlier section 27 cases are no longer good law.

The supreme court’s two decisions involve the constitutionality of statutes. They do not involve the day-to-day permitting and enforcement work of state and local environmental agencies, nor do they involve the adoption and implementation of local zoning decisions. As a result, much of the law about how section 27 applies in these and other situations has yet to be decided. Because of the uniqueness of section 27 among states, and the lack of any federal constitutional analogue, there are few other places or courts from which to get interpretative guidance.

The Commonwealth Court’s role in interpreting and applying article I, section 27 in this context is no small thing. The Commonwealth Court, after all, was created in 1970 to decide questions of public law, including constitutional questions.¹¹ It hears appeals from decisions by a variety of state and local agencies,

⁹ *PEDF II*, 161 A.3d 911, 916 (Pa. 2017). For an analysis of this case, see John C. Dernbach, Kenneth T. Kristl, & James R. May, *Recognition of Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 70 RUTGERS L. REV. 803 (2018). The Commonwealth Court’s decision is at 108 A.3d 140 (Pa. Commw. Ct. 2015) (*PEDF I*).

¹⁰ *PEDF II*, 161 A.3d at 934.

¹¹ David W. Craig, *The Court for Appeals and Trials of Public Issues: The First 25 Years of Pennsylvania’s Commonwealth Court*, 4 WIDENER J. PUB. L. 321 (1995).

including cases in which constitutional questions are raised.¹² The Commonwealth Court's decision is also, in a great many cases, final. The Pennsylvania Supreme Court's jurisdiction to hear appeals of Commonwealth Court decisions is mandatory only when a case is first brought in Commonwealth Court; the supreme court has discretion to hear or not hear other appeals.¹³

Now, more than four years after the 2017 *PEDF II* opinion, it is instructive to see how the Commonwealth Court is applying this new standard of review for section 27. Of course, the legal landscape for environmental and natural resources law is quite different now than it was in 1973. The early 1970s represent the dawn of the modern environmental movement. A great deal of lawmaking—legislative and regulatory—has occurred in Pennsylvania since that time. These statutes and regulations constitute a considerable, albeit imperfect, bulwark against environmental degradation, and do much of the environmental protection work that section 27 might otherwise be doing.

Still, there is a key similarity between the early 1970s and the present. In the early 1970s, lawyers and policy makers were looking at section 27 for the first time and trying to figure out what it meant for them and their clients. Similarly now, many lawyers and policy makers are quite literally looking at section 27 for the first time and trying to understand what it means. The *Payne* test was so thoroughly entrenched, and so established as doctrine, that most attorneys never read the text of section 27 seriously. But just as the Commonwealth Court's *Payne* test set a trajectory for future jurisprudence under section 27, so Commonwealth Court decisions in the first years following *PEDF II* may create a trajectory for future decisions.

These early cases are important for another reason as well. They give a sense of the complex and varied legal landscape in which section 27 cases are brought, argued, and decided. In so

¹² See *McCloskey v. Pa. Pub. Util. Comm'n.*, 225 A.3d 192 (Pa. Commw. Ct. 2020); *City of Philadelphia v. Glim*, 613 A.2d 613 (Pa. Commw. Ct. 1992); *Ketterer v. Commonwealth of Pa. Dep't of Transp.*, 574 A.2d 735 (Pa. Commw. Ct. 1990).

¹³ 17 STANDARD PENNSYLVANIA PRACTICE 2D *Appeal as of Right*, *Generally* § 93:3 (2020).

doing, they indicate the wide range of legal issues that section 27 raises, and why it is likely that section 27 litigation will continue indefinitely.

From September 2016 through September 2020, the Commonwealth Court issued 13 opinions that produced a holding on section 27 based on *Robinson Township* or *PEDF II*.¹⁴ Of these, eight are officially reported, which means that they are in the Atlantic Reporter and are considered binding precedent.¹⁵ The remaining five are not officially reported, which means that they are available only in Westlaw and are considered persuasive but not binding precedent. These cases are contained in the Appendix to this Article. Citizens or environmental groups brought eight of these cases; industry trade associations brought two; and corporations, homeowners' associations, and cities brought one each. Five of the cases challenged actions by local governments, and three challenged actions by the Pennsylvania Department of Environmental Protection (DEP). Actions by the Commonwealth, the Public Utility Commission, a company, and a city were challenged in one case each.¹⁶

¹⁴ This analysis includes one case growing out of *Robinson Township* that interprets the meaning of that decision for section 27. See Pa. Indep. Oil and Gas Ass'n. v. Pa. Dep't of Env't Prot., 146 A.3d 820 (Pa. Commw. Ct. 2016), *aff'd*, 161 A.3d 949 (Pa. 2017). The Commonwealth Court decided this case in September 2016, which is why September 2016 is used here as a starting date for these cases, not June 2017, when the supreme court decided *PEDF II*.

This analysis excludes cases where a violation of section 27 was alleged but where, for whatever reason, there was no holding by Commonwealth Court on section 27. See, e.g., *Lorenzen v. W. Cornwall Twp. Zoning Hearing Bd.*, 222 A.3d 893 (Pa. Commw. Ct. 2019).

¹⁵ In general, officially reported opinions result in binding precedent unless they are issued by a single judge. 201 PA. ADMIN. CODE § 69.412(b) (Commonwealth Court internal operating procedures). None of these opinions was issued by a single judge.

¹⁶ This analysis omits the challenged party in *In re Andover Homeowners' Ass'n*, 217 A.3d 906 (Pa. Commw. Ct. 2019). See Pa. Env't Def. Found. v. Pennsylvania, 214 A.3d 748 (Pa. Commw. Ct. 2019); *City of Lancaster v. Pa. Pub. Util. Comm'n.*, No. 251 M.D. 2019, 2020 WL 864986 (Pa. Commw. Ct. April 7, 2020); *Del. Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670 (Pa. Commw. Ct. 2018); *UGI Utils. v. City of Reading*, 179 A.3d 624 (Pa. Commw. Ct. 2018).

These cases fall into five subject matter categories. This Article summarizes the history of section 27 and then discusses each of these categories in turn. Part I provides a brief history of section 27 for readers who are not already familiar with it. Part II addresses Commonwealth Court cases involving the role of section 27 in deciding challenges to DEP's regulatory authority. Part III addresses Commonwealth Court cases involving local land use and zoning decisions ostensibly made to further its section 27 responsibilities. These decisions involve shale gas production and related facilities, on one hand, and pipelines on the other. Part IV discusses Commonwealth Court cases involving the use of section 27 in preemption claims, while Part V focuses on a Commonwealth Court decision that addressed whether money other than royalties received by the state for oil and gas drilling on state forests must be spent for public trust purposes. Part VI briefly discusses the remedy of mandamus. Part VII extracts seven key themes from these cases.

II. A BRIEF HISTORY OF SECTION 27 JUDICIAL DECISIONS

The history of judicial decisions under section 27 can be summarized in three decisions—the Commonwealth Court's *Payne v. Kassab* decision, and the supreme court's decisions in *Robinson Township* and *PEDF II*. Together, they exemplify judicial abandonment and then restoration of the text of section 27.

The Commonwealth Court's 1973 decision in *Payne v. Kassab*¹⁷ is easily the most important decision for the first four decades after section 27 was adopted. It involved a challenge to a state agency decision approving a street widening project in Wilkes-Barre. The plaintiffs claimed that the state's decision violated the Commonwealth's public trust obligation under section 27 by converting half an acre of a public park (about three percent of the park's area) to a street for a street widening project.¹⁸ The case was decided shortly after another section 27 case that also involved weak

¹⁷ *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd* 361 A.2d 263 (Pa. 1976).

¹⁸ *Id.* at 88.

facts.¹⁹ The *Payne* court openly worried that section 27, as written, was antidevelopment, threatening to derail otherwise worthy projects based on relatively inconsequential impacts.²⁰

Because of this worry, the Commonwealth Court decided in *Payne v. Kassab* that judicial review of section 27 decisions “must be realistic and not merely legalistic.”²¹ It then formulated a three-part balancing test that came to function as a substitute for the actual text of section 27:

The court’s role must be to test the decision under review by a threefold standard: (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

¹⁹ *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886 (Pa. Commw. Ct. 1973), *aff’d*, 311 A.2d 588 (Pa. 1973). That case involved a challenge by the Attorney General to the construction of an observation tower on private land outside of Gettysburg Battlefield National Park. *Id.* at 589. The Attorney General argued that the tower would adversely affect the right of park visitors to the natural, scenic, historic, and aesthetic values of the environment under the first sentence or clause of section 27. The trial court denied the government’s request for an injunction. *Id.* The evidence put before the trial court showed that the tower would bother some visitors, but that other people visiting the park would appreciate the opportunity to see the entire battlefield from a higher elevation. *Id.* at 590.

The government lost on appeal to both the Commonwealth Court and the Pennsylvania Supreme Court. *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 894–95 (Pa. Commw. Ct. 1973); *aff’d*, 311 A.2d 588, 595 (Pa. 1973). Still, the Commonwealth Court held that section 27 is self-executing—which means that it does not require legislation for its implementation. *Id.* at 892. While the Pennsylvania Supreme Court affirmed the Commonwealth Court’s decision, there was no majority opinion on whether section 27 is self-executing. *Nat’l Gettysburg Battlefield Tower, Inc.*, 311 A.2d at 595. This decision established the Commonwealth Court’s opinion as binding precedent on the question of whether the amendment is self-executing. *Id.*

²⁰ Dernbach, *supra* note 5, at 714–16 (discussing how both cases led the courts to interpret section 27 as antidevelopment).

²¹ *Kassab*, 312 A.2d at 86, 94.

outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?²²

The court applied this test to the project in question and found compliance with the three-part test. The Pennsylvania Supreme Court affirmed this decision but not the test. By prefacing the test with a statement that judicial review must be “realistic” rather than “legalistic,” the Commonwealth Court all but admitted that it was substituting its own rule for that stated in the constitution.

Indeed, as noted earlier, the *Payne* test came to be the “all-purpose test for applying [a]rticle I, [s]ection 27 when there is a claim that the amendment itself has been violated.”²³ The test bore no resemblance to the constitutional text; it said nothing, for example, about a public trust for public natural resources. The *Payne* test also greatly diminished the effectiveness of article I, section 27. According to a comprehensive review of reported cases under *Payne v. Kassab* published in 2015, only nine of 79 reported judicial opinions by the Environmental Hearing Board (which hears appeals of DEP decisions), applying the *Payne* test, were favorable to the challenging party.²⁴

That began to change in 2013. The Pennsylvania Supreme Court’s 2013 decision in *Robinson Township v. Commonwealth* set the stage for the supreme court’s 2017 decision. In *Robinson Township*, a plurality of the Pennsylvania Supreme Court held unconstitutional several provisions of Act 13 of 2012, a state statute designed to promote shale gas development, by applying traditional rules of constitutional interpretation instead of the three-part *Payne* test.²⁵ Only two other justices (out of seven on the court) signed on to Chief Justice Ronald Castille’s plurality opinion, meaning that it did not create binding precedent.²⁶ A fourth justice based his holding on substantive due process. Still, it was the first time that

²² *Id.*

²³ Dernbach, *supra* note 5.

²⁴ Dernbach & Prokopchak, *supra* note 4, at 344, 348.

²⁵ *Robinson Township v. Commonwealth*, 83 A.3d 901, 946-59 (Pa. 2013).

²⁶ *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1070 n.14 (Pa. 2006); *Commonwealth v. Sepulveda*, 855 A.2d 783, 790 n.12 (Pa. 2004); *see also* G. RONALD DARLINGTON et al., PENNSYLVANIA APPELLATE PRACTICE § 3102: 2 & nn.15 & 18 (2d ed. 1997) (containing citations to Pennsylvania court decisions).

section 27 had ever been used (even by a plurality) to hold a statute unconstitutional.²⁷ It also brought attention to a fundamental point that had been more or less lost in decades of litigation—that section 27 is contained in Pennsylvania’s Declaration of Rights and thus functions as a limitation on governmental power.²⁸ The environmental rights in section 27, the plurality stated, are “on par with, and enforceable to the same extent as, any other right reserved to the people in [a]rticle I.”²⁹

Prior to Act 13, local governments had been preempted from regulating *how* shale gas activities should be conducted; most technical environmental regulation of these activities was reserved to the state. Municipalities could, however, use their zoning authority to regulate *where* such activities occur. Act 13 changed that. It declared that state environmental laws “occupy the entire field of oil and gas regulation, to the exclusion of all local ordinances.”³⁰ In addition, it required “all local ordinances regulating oil and gas operations” to “allow for the reasonable development of oil and gas resources” and imposed uniform rules for oil and gas regulation.³¹

Recognizing that it was articulating a framework that previous courts had not applied, the plurality stated:

The actions brought under [s]ection 27 since its ratification . . . have provided this Court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision. Moreover, it would appear that the jurisprudential development in this area in the lower courts has weakened the clear import of the plain language of the constitutional provision in unexpected ways. As a jurisprudential matter (and . . . as a matter of substantive law), these precedents do not preclude

²⁷ Dernbach et al., *supra* note 6, at 1182.

²⁸ *Robinson Township*, 83 A.3d at 948–49, 953.

²⁹ *Id.* at 953–54.

³⁰ 58 PA. CONS. STAT. § 3303 (2012), *declared unconstitutional by Robinson Township*, 83 A.3d 901, *on remand*, 96 A.3d 1104 (Pa. Commw. Ct. 2014).

³¹ *Id.* § 3304(a), *declared unconstitutional by Robinson Township*, 83 A.3d 901 (Pa. 2013).

recognition and enforcement of the plain and original understanding of the Environmental Rights Amendment.³²

The plurality emphasized that the amendment is located in article I of the Pennsylvania Constitution, Pennsylvania's analogue to the U.S. Bill of Rights.³³ Rights contained in article I, the plurality noted, are understood as inherent rights that are reserved to the people; they operate as limits on government power.³⁴

The first clause establishes two rights in the people, Chief Justice Castille wrote.³⁵ The first is a right to clean air, pure water, and "to the preservation of the natural, scenic, historic and esthetic values of the environment."³⁶ The second is "a limitation on the state's power to act contrary to this right."³⁷ The second and third sentences of section 27, the plurality wrote, involve a public trust.³⁸ The state has two separate obligations as trustee:

[First,] the Commonwealth has an obligation to refrain from performing its trustee duties respecting the environment unreasonably, including via legislative enactments or executive action. As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of private parties.³⁹

The second is a duty "to act affirmatively to protect the environment, via legislative action."⁴⁰

³² *Robinson Township*, 83 A.3d at 950.

³³ *Id.* at 962.

³⁴ *Id.* at 948.

³⁵ *Id.* at 951.

³⁶ *Id.*

³⁷ *Id.* at 951.

³⁸ *Robinson Township*, 83 A.3d at 948–49, 954–56.

³⁹ *Id.* at 957.

⁴⁰ *Id.* at 958.

The plurality was careful to emphasize that the environmental rights recognized by section 27 should be harmonized with property rights, implicitly contrasting its approach to the worries expressed in *Payne* about the effect of section 27 on economic development. It stated that “the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.”⁴¹ Sustainable development is a normative conceptual framework for integrating social and economic development with environmental protection in a way that fully realizes both, rather than treating them as inherently opposing concepts.⁴² Instead of being anti-development, the plurality said, section 27 is intended to foster economic development that is environmentally sustainable.

The plurality then applied that framework to the legislation at issue. With respect to preemption of local regulation, the plurality explained that the Commonwealth is the trustee under the amendment, which means that local governments are among the trustees with constitutional responsibilities (along with all branches of state government).⁴³ The preemption of all local environmental regulation of shale gas development, the plurality explained, violates section 27 because “the General Assembly has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.”⁴⁴ It went on to state that these provisions were unconstitutional for two reasons. “First, a new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district [including residential] is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life.”⁴⁵ Second, under Act 13 “some properties and communities will carry much heavier environmental and habitability burdens than

⁴¹ *Id.* at 958.

⁴² JOHN C. DERNBACH ET AL., ACTING AS IF TOMORROW MATTERS: ACCELERATING THE TRANSITION TO SUSTAINABILITY 3–7 (2012) (explaining sustainable development).

⁴³ *Robinson Township*, 83 A.3d at 957.

⁴⁴ *Id.* at 976–77.

⁴⁵ *Id.* at 979.

others.”⁴⁶ This result, the plurality stated, is inconsistent with the obligation that the trustee act for the benefit of “all the people.”⁴⁷ As a plurality opinion, however, it left open the question of how much the law of section 27 had changed.

Four years later, the supreme court answered that question. In *PEDF v. Commonwealth (PEDF II)*, a solid majority of the Pennsylvania Supreme Court affirmed the key principles of then-Chief Justice Castille’s *Robinson Township* plurality opinion.⁴⁸ In doing so, the court, in an opinion authored by Justice Christine Donohue, invalidated several state laws that authorized the expenditure of funds from oil and gas drilling on state lands for purposes other than the conservation and maintenance of public natural resources. In recognizing the importance of the text of the Environmental Rights Amendment and specifically rejecting the three-part *Payne v. Kassab* test, the court ushered in a new era of jurisprudence on article I, section 27.

The case began in Commonwealth Court, when PEDF brought a declaratory judgment action against the Commonwealth, challenging the constitutionality under article I, section 27 of several legislative decisions involving the disposition of funds received from oil and gas lease sales. Essentially, PEDF argued that the use of these funds to help balance the budget violated section 27’s requirement that proceeds from the sale of trust assets be used to “conserve and maintain” public natural resources. The Commonwealth Court, relying on the *Payne v. Kassab* test because it was still good law, upheld these legislative decisions.⁴⁹

The supreme court reversed, holding that the use of royalties from oil and gas lease sales on state land violated section 27.⁵⁰ Citing *Robinson Township*, the majority noted that the amendment is located in article I, which is the constitutional declaration of rights, and that it recognizes two sets of rights in the people.⁵¹ As

⁴⁶ *Id.* at 980.

⁴⁷ *Id.*

⁴⁸ *Pa. Env’t Def. Found. v. Commonwealth (PEDF II)*, 161 A.3d 911 (Pa. 2017).

⁴⁹ *Pa. Env’t Def. Found. v. Commonwealth (PEDF I)*, 108 A.3d 140 (Pa. Commw. Ct. 2015).

⁵⁰ *PEDF II*, 161 A.3d at 938 (alteration in original).

⁵¹ *Id.* at 930–31.

the *Robinson Township* plurality had concluded, the court said the first clause “places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.”⁵² The second and third sentences, the court said, also echoing *Robinson Township*, create a constitutional public trust.⁵³ Under these sentences, the public trust clause, the court noted, the Commonwealth is the trustee.⁵⁴ The corpus, or body, of the trust, is public natural resources, which the court said includes state parks and forests, as well as the oil and gas they contain.⁵⁵ The people, including present and future generations, are “the named beneficiaries” of this trust.⁵⁶ The court also explained that “all agencies and entities of the Commonwealth government, both statewide and local,” have constitutional trust responsibilities.⁵⁷ These duties are twofold: “[f]irst, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties [s]econd, the Commonwealth must act affirmatively via legislative action to protect the environment.”⁵⁸

The supreme court held that “the proper standard of judicial review lies in the text of [a]rticle I, [s]ection 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”⁵⁹ In exercising its public trust duties, the Commonwealth is bound by the general trust duties of prudence, exercising “such care and skill as a man of ordinary prudence would exercise in dealing with his own property”; loyalty, managing the trust corpus “so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries”; and impartiality, managing “the trust so as to give all of the beneficiaries due regard for their respective

⁵² *Id.* at 931.

⁵³ *Id.* at 931-32.

⁵⁴ *Id.* at 932.

⁵⁵ *Id.* at 916.

⁵⁶ *PEDF II*, 161 A.3d at 931-32.

⁵⁷ *Id.* at 931 n.23.

⁵⁸ *Id.* at 933.

⁵⁹ *Id.* at 930.

interests in light of the purposes of the trust.”⁶⁰ These holdings solidify what Justice Baer, in a concurring and dissenting opinion, called “the jurisprudential sea-change begun by Chief Justice Castille’s plurality in *Robinson Township*.”⁶¹

The court then addressed the constitutionality of the challenged legislation. The court said: “[w]ithout any question, these legislative enactments permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee’s fiduciary obligations.”⁶² The court then stated: “[t]o the extent the remainder of the Fiscal Code amendments transfer *proceeds from the sale of trust assets* to the General Fund, they are likewise constitutionally infirm.”⁶³ The court said it did not know how to categorize other income to the state from leasing, particularly annual rental fees.⁶⁴ It therefore remanded that issue to the Commonwealth Court.⁶⁵

The detailed expositions of section 27 in *Robinson Township* and *PEDF II*, and the holdings in these cases, provide a framework for future decisions. These, of course, include decisions by the Commonwealth Court.

III. REGULATORY AUTHORITY

The Commonwealth Court has been called on to decide three cases involving the scope of DEP’s regulatory authority. In two of these cases, the Commonwealth Court rejected claims that *Robinson Township* weakened DEP’s regulatory authority. In a third, it substantially but not entirely upheld DEP’s authority to implement regulations adopted under Act 13. To understand these cases, it is necessary to understand in greater detail another part of the *Robinson Township* decision.

⁶⁰ *Id.* at 932-33 (citations omitted).

⁶¹ *Id.* at 940.

⁶² *PEDF II*, 161 A.3d at 938 (citing *Robinson Township v. Commonwealth*, 83 A.3d 901, 950 (Pa. 2013)).

⁶³ *Id.* at 938.

⁶⁴ *Id.* at 935-36.

⁶⁵ *Id.* at 936 (“[I]t is up to the Commonwealth Court, in the first instance and in strict accordance and fidelity to Pennsylvania trust principles, to determine whether these funds belong in the corpus of the Section 27 trust.”).

One of the other statutory challenges in *Robinson Township* involved the buffer zone or setback provisions in Act 13. Section 3215(b) of Act 13 prohibits well sites from being located within specified distances (100 feet or 300 feet) of any “stream, spring or body of water” identified as such in U.S. Geological Survey topographical maps or from any wetlands.⁶⁶ Section 3215(b)(4) obliged DEP to waive these distance restrictions if the applicant submitted additional protective measures, and allowed DEP to grant a waiver, including additional permit conditions “necessary to protect waters of this Commonwealth.”⁶⁷ Section 3215(d) allowed, but did not require, DEP to consider comments on a permit application made by municipalities and storage operators, and specifically prohibited municipalities and storage operators from having a right to appeal the department’s decision.⁶⁸ Finally, section 3215(e) requires the Environmental Quality Board, which is the body charged with adopting regulations that DEP then administers, to adopt regulations for DEP on two issues. The first is criteria “to utilize for conditioning a well permit based on its impact to the public resources identified under subsection (c).”⁶⁹ The second provides that DEP has the burden of proof in any appeal to show that its additional permit conditions “were necessary to protect against a probable harmful impact of the public resources.”⁷⁰

The *Robinson Township* plurality said there was no dispute that these provisions involve public natural resources protected by section 27.⁷¹ It also decided that certain of these provisions were unconstitutional.⁷² First, the plurality reasoned, the legislation “does not provide any ascertainable standards by which public natural resources are to be protected if an oil and gas operator seeks a waiver.”⁷³ Second, “[i]f an applicant appeals permit terms or conditions . . . [s]ection 3215(b) remarkably places the burden on [DEP] to ‘prov[e] that the conditions were necessary to protect

⁶⁶ 58 PA. CONS. STAT. §§ 3215(b)(1), 3215(b)(3) (2020).

⁶⁷ *Id.* § 3215(b)(4).

⁶⁸ *Id.* § 3215(d).

⁶⁹ *Id.* § 3215(e)(1).

⁷⁰ *Id.* § 3215(e)(2).

⁷¹ *Robinson Township v. Commonwealth*, 83 A.3d 901, 982 n.59 (Pa. 2013).

⁷² *Id.* at 982-84.

⁷³ *Id.* at 983.

against a probable harmful impact of [sic] the public resources.’”⁷⁴ Third, because section 3215(d) does not require DEP to consider comments by municipalities and storage operators, and prevents anyone other than the applicant from appealing a permit decision, it “marginalizes participation by residents, business owners, and their elected representatives with environmental and habitability concerns, whose interests [s]ection 3215 ostensibly protects.”⁷⁵ “[I]nequitable treatment of trust beneficiaries,” the plurality said, is “irreconcilable with the trustee duty of impartiality.”⁷⁶

The court⁷⁷ thus held sections 3215(b)(4) and 3315(d) of Act 13 to violate section 27.⁷⁸ In addition, deciding that the rest of section 3215(b) is not severable from section 3215(b)(4), the court enjoined “application or enforcement of section 3215(b) . . . in its entirety.”⁷⁹ This includes the buffer zone or setback distances for certain water resources. The court also enjoined section 3215(c), which requires DEP to consider certain public resources in reviewing a permit application, and section 3215(e), the burden of proof provision for permit conditions, “to the extent that these provisions implement or enforce those [s]ections of Act 13 which we have found invalid.”⁸⁰

This part of the *Robinson Township* decision led to litigation in the Commonwealth Court over DEP’s ability to protect water resources that may be adversely affected by drilling for shale gas. In *Pennsylvania Oil and Gas Association (PIOGA) v. Department of Environmental Protection*,⁸¹ the Commonwealth Court “clarified” this part of the decision.⁸² After *Robinson Township*, DEP continued to ask shale gas permit applicants for information about the impact of their proposals on public natural resources under

⁷⁴ *Id.* at 984.

⁷⁵ *Id.*

⁷⁶ *Id.* at 984.

⁷⁷ Justice Baer joined these parts of the disposition and mandate of the case. *Robinson Township*, 83 A.3d at 1000. As a result, these are decisions of a majority, not simply a plurality, of the court.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Pa. Indep. Oil and Gas Ass’n v. Pa. Dep’t of Env’t Prot.*, 146 A.3d 820 (Pa. Commw. Ct. 2016), *aff’d*, 161 A.3d 949 (Pa. 2017).

⁸² *Marcellus Shale Coal. v. Dep’t of Env’t Prot.*, 193 A.3d 447, 464 (Pa. Commw. Ct. 2018).

section 3215(c).⁸³ PIOGA sought declaratory relief from the Commonwealth Court that DEP had no authority after *Robinson Township* to require protection of the public resources identified in section 3215(c). The Commonwealth Court denied PIOGA's request and held that the supreme court's mandate constrained DEP's use of section 3215(c) only to the extent that DEP applied section 3215(b).⁸⁴ Otherwise, as the Commonwealth Court stated in a later case, section 3215(c) is a "viable source of statutory authority" for the challenged regulations.⁸⁵

In late 2016, the Environmental Quality Board adopted comprehensive shale gas regulations for DEP.⁸⁶ Among other things, these regulations required a shale gas permit applicant to notify "public resource agenc[ies]" if the proposed well "may impact a public resource."⁸⁷ The regulations also provide a list of items DEP is required to consider "prior to conditioning a well permit based on impacts to public resources[,] including "measures necessary to protect against a probable harmful impact to the functions and uses of the public resource."⁸⁸ Shortly afterward, the Marcellus Shale Coalition, a trade association for the gas industry, sought pre-enforcement review of these regulations against DEP in the Commonwealth Court, claiming that, under *Robinson Township*, DEP lacked the statutory authority for these regulations.

In *Marcellus Shale Coalition v. Department of Environmental Protection*, the Commonwealth Court rejected that argument.⁸⁹ After explaining its holding in *PIOGA*, the court then said that section 3215(c) provides the statutory authority to ask for information about the potential impact of wells on public resources. Permit applicants, the court held, must provide the requested information. "Without this information, the Department's ability to

⁸³ *PIOGA*, 146 A.3d at 828-30 ("In practice, this means that when DEP considers the impact of a proposed well on a source or sources used for public drinking supplies, it is not constrained to do so 'in accordance with' enjoined [s]ection 3215(b).") *Id.* at 829-30.

⁸⁴ *Id.* at 828-29.

⁸⁵ *Marcellus Shale Coal.*, 193 A.3d at 465.

⁸⁶ 25 PA. CODE Ch. 78a (2016).

⁸⁷ *Id.* at § 78a.15(f).

⁸⁸ *Id.* at § 78a.15(g).

⁸⁹ *Marcellus Shale Coal.*, 193 A.3d 447.

consider the potential impacts to public resources would be severely hampered.”⁹⁰

The Marcellus Shale Coalition (Coalition) made claims that other regulations exceeded DEP’s statutory authority. In deciding these claims, the Commonwealth Court used section 27 to help define the boundaries of that authority. In so doing, it was acting in a manner that is broadly consistent with earlier cases that used section 27 to help determine whether a particular action was within DEP’s statutory authority.⁹¹ In the remaining part of the opinion, the Commonwealth Court invalidated two relatively minor parts of the regulation; the rest of the regulation was unscathed.

Among other things, the Coalition claimed that part of the regulation was outside the scope of section 3215(c) of Act 13. Section 3215(c) provides:

(c) Impact.—On making a determination on a well permit, the department shall consider the impact of the proposed well on public resources, including, but not limited to:

- (1) Publicly owned parks, forests, game lands and wildlife areas.
- (2) National or State scenic rivers.
- (3) National natural landmarks.
- (4) Habitats of rare and endangered flora and fauna and other critical communities.
- (5) Historical and archaeological sites listed on the Federal or State list of historic places.

⁹⁰ *Id.* at 466. The court also held that the regulations in question were not unconstitutionally vague. *Id.* at 467.

⁹¹ John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 DICK L. REV. 97, 100-01 (1999); *See also* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 700 (2006) (advancing a theoretical framework for public trust law for natural resources that blends this law with relevant statutes and regulations).

(6) Sources used for public drinking supplies in accordance with subsection (b).⁹²

These public resources, the Commonwealth Court said, “may be located on privately owned property, but they are not purely private property.”⁹³ “What makes them ‘public’ is the fact that these resources ‘implicate the public interest,’ thereby triggering protection under the Pennsylvania Constitution.”⁹⁴ The Commonwealth has a constitutional fiduciary duty to “conserve and maintain” them, the court explained.⁹⁵

The challenged regulation required permit applicants to provide information not only on the listed resources but also on “common areas of a school’s property or a playground.”⁹⁶ These additional areas, the Coalition argued, and the Commonwealth Court held, exceed DEP’s statutory authority because they “are not of the same class or nature as the statutory items.”⁹⁷ Unlike the resources listed in section 3215(c), which are discrete and readily identifiable, “common areas of a school’s property” and “playgrounds” are broad categories that are not readily identifiable.

In other words, a McDonald’s playground or a school parking lot utilized as a playground are not of the same class or nature as a scenic river, public park, or historical site warranting Commonwealth trustee protection. Although common areas of a school’s property and playgrounds may share some recreational similarities with the statutory public resources, they do not implicate “public interest” in the same way and they are not part of the trust corpus over which the Commonwealth is charged with protecting under the Constitution.⁹⁸

⁹² 58 PA. CONS. STAT. § 3215(c) (2020).

⁹³ *Marcellus Shale Coal.*, 193 A.3d at 479 (citing *Robinson Township v. Commonwealth*, 83 A.3d 901, 955 (Pa. 2013)).

⁹⁴ *Id.*

⁹⁵ *Id.* (quoting *PEDF II*, 161 A.3d 911, 932 (Pa. 2017)).

⁹⁶ 25 PA. CODE § 78a.15(f)(1)(vi) (2016).

⁹⁷ *Marcellus Shale Coal.*, 193 A.3d at 480.

⁹⁸ *Id.* at 481-82.

The Coalition also challenged the regulations for authorizing municipalities and playground owners to comment on permit applications. The regulations did that by requiring permit applicants for a well to notify public resource agencies of their application, and by defining public resource agencies to include municipalities and playground operators.⁹⁹ Using the supreme court's decisions in *Robinson Township* and *PEDF II*, the Commonwealth Court held that municipalities are public resource agencies under Act 13 but that playground owners are not.

Concerning municipalities, the Commonwealth Court began its analysis by explaining that the supreme court in *Robinson Township* held section 3215(d) unconstitutional because it did not require DEP to consider comments by municipalities. The challenged regulation, by contrast, requires DEP to consider their comments.¹⁰⁰ The Commonwealth, including local government, is the trustee for public natural resources.¹⁰¹ Based on *Robinson Township* and *PEDF II*, the Commonwealth Court held, "we conclude that the inclusion of municipalities in the definition of a 'public resource agency' is within the power bestowed under Act 13."¹⁰² The court added that municipalities are readily identifiable, and "[t]hus, the inclusion of municipalities in the definition is not unreasonable."¹⁰³

By contrast, the court held that playground owners are not section 27 trustees, and that there is no legal authority to elevate playground owners to that status.¹⁰⁴ Nor, the court added, are playground owners readily identifiable.¹⁰⁵ The inclusion of playground owners in the term "public resource agency," the court held, was unlawful.¹⁰⁶

⁹⁹ 25 PA. CODE § 78a.1, 78a.15(f).

¹⁰⁰ *Marcellus Shale Coal.*, 193 A.3d at 484.

¹⁰¹ *Id.* at 484-85 (citing *Robinson Township v. Commonwealth*, 83 A.3d 901, 956-57, 979 (Pa. 2013)) ("Protection of environmental values, in this respect, is a quintessential local issue that must be tailored to local conditions.").

¹⁰² *Marcellus Shale Coal.*, 193 A.3d at 485.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (explaining that ownership and management may be divided and therefore identifying a point of contact is unduly burdensome).

¹⁰⁶ *Id.*

Another challenge, in this case, was to a DEP regulation providing a measure of protection to “species of special concern.” As part of the permit application process for a shale gas well, the General Assembly authorized DEP “to consider the impact[s] of the proposed well on public resources,”¹⁰⁷ a term that includes not only “[h]abitats of rare and endangered flora and fauna” but also “other critical communities.”¹⁰⁸ The challenged regulation defined “other critical communities” to include “[s]pecies of special concern” as identified through the Pennsylvania Natural Diversity Inventory.¹⁰⁹ The relevant DEP policy, in turn, identified such species as “species that are not listed as threatened or endangered” but are identified “as an at risk species.”¹¹⁰ The Commonwealth Court used statutory construction tools to help decide that species not listed as threatened or endangered were beyond the scope of the regulatory statute.¹¹¹ Such species “are not within the same nature or class as endangered and threatened species” that have been listed as such in a rulemaking process.¹¹² This interpretation is logical, the Commonwealth Court reasoned, in light of Act 13’s purpose of permitting “the optimal development of oil and gas resources in this Commonwealth consistent with the protection of the health, safety, natural resources, environment and property of the citizenry.”¹¹³ The court also quoted from the plurality opinion in *Robinson Township* that “the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.”¹¹⁴ The regulation, the court concluded, “upsets the balance between

¹⁰⁷ 58 PA. CONS. STAT. § 3215(c) (2012). This section is set out in the text accompanying note 92 *supra*.

¹⁰⁸ *Id.* § 3203.

¹⁰⁹ 25 PA. CODE § 78a.1 (2016).

¹¹⁰ *Marcellus Shale Coal.*, 193 A.3d at 470. “Special concern” species of plants and wildlife include species that are rare; that have been proposed for listing as rare, threatened, or endangered; and are “of conservation concern, but lacking regulatory protections.” *Using the PNHP Species Lists*, PENNSYLVANIA NATURAL HERITAGE PROGRAM, <https://www.naturalheritage.state.pa.us/SpeciesInfo.aspx> (last visited Dec. 27, 2020).

¹¹¹ *Id.* at 470-76.

¹¹² *Id.* at 475.

¹¹³ *Id.*

¹¹⁴ *Id.* at 476 (quoting *Robinson Township.*, 83 A.3d at 958).

industry and the environment strived for in Act 13.”¹¹⁵ If the legislature had intended to include “at risk species,” it would have said so.¹¹⁶

IV. LAND USE AND ZONING

The Pennsylvania Supreme Court’s decision in *Robinson Township v. Commonwealth* used the Environmental Rights Amendment to restore to local governments their longstanding authority to regulate where oil and gas activities can lawfully occur.¹¹⁷ It did so by holding unconstitutional section 3304 of Act 13, which required “all local ordinances” to “allow for the reasonable development of oil and gas resources” and imposed uniform rules for oil and gas regulation.¹¹⁸ Act 13 effectively prohibited local governments from deciding where shale gas facilities, including drilling rigs and compressor stations, could be located and substituted a set of statewide rules for that purpose. As explained above, the court concluded that section 3304 violates section 27. To begin with, the court explained, statutory permission to operate shale gas facilities in every zoning district is inconsistent with “conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life.”¹¹⁹ In addition, the inequitable distribution of environmental and habitability burdens under Act 13¹²⁰ is inconsistent with the trustee’s obligation to act “for the benefit of ‘all the people.’”¹²¹

As a result, local governments can once again decide where shale gas facilities can be located. Because of this history, it is perhaps not surprising that a substantial number of the Commonwealth Court decisions on section 27 since *PEDF II* have involved local land use and zoning decisions concerning oil and gas extraction. These decisions involve shale gas production facilities and pipelines.

¹¹⁵ *Id.*

¹¹⁶ *Marcellus Shale Coal.*, 193 A.3d at 476.

¹¹⁷ *Robinson Township*, 83 A.3d at 977-78.

¹¹⁸ 58 PA. CONS. STAT. § 3304 (2012).

¹¹⁹ *Robinson Township*, 83 A.3d at 979.

¹²⁰ *Id.* at 980.

¹²¹ *Id.* (quoting PA. CONST. art I, § 27).

A. *Shale Gas Production and Related Facilities*

In the cases decided thus far, the Commonwealth Court has rejected all section 27 challenges to local government decisions permitting shale gas development. Perhaps the most important of these decisions is *Frederick v. Allegheny Township Zoning Hearing Board*.¹²² The case involved a challenge to a zoning ordinance amendment that allowed “oil and gas well operations in all zoning districts so long as they satisfy enumerated standards designed to protect the public health, safety and welfare.”¹²³ The township then used that amendment to issue a permit for an unconventional gas well in a district that was zoned residential/agricultural.¹²⁴ Objectors, who were adjacent landowners, challenged the ordinance as, among other things, a violation of section 27.¹²⁵ The Commonwealth Court upheld the ordinance.

For the court, a basic problem was that the objectors did not prove legally cognizable harm. The responsibility for proving such harm to constitutionally protected resources, the court said, is on the objectors.¹²⁶ The court’s opinion focused on the amendment’s first clause, which involves the public’s right to clean air, pure water, and the preservation of certain values in the environment. The court described the process and standard for reviewing objectors’ claims as follows: “Judicial review of the government’s action requires an evidentiary hearing to determine, first, whether the values in the first clause of the Environmental Rights Amendment are implicated and, second, whether the governmental action unreasonably impairs those values.”¹²⁷ The objectors failed to meet these requirements, the court held, reasoning that DEP, not the local government, has the authority to regulate how oil and gas activities are to be conducted.¹²⁸ Objectors, the court said, should have taken their

¹²² *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677 (Pa. Commw. Ct. 2018).

¹²³ *Id.* at 679.

¹²⁴ *Id.*

¹²⁵ *Id.* They also claimed that the ordinance constituted unlawful spot zoning and that it violated several provisions of the Municipalities Planning Code. They lost on these claims as well. *Id.* at 680.

¹²⁶ *Id.* at 695.

¹²⁷ *Id.*

¹²⁸ *Frederick*, 196 A.3d at 697 (Pa. Commw. Ct. 2018).

environmental objections to DEP before it issued the permit for this particular well.¹²⁹ In addition, the court held, the permit issued under the amended ordinance would not result in any cognizable harm:

[N]o permanent feature of the Porter Pad will be visible to Objectors from their homes; . . . vehicular traffic to and from the Porter Pad will not go past Objectors' homes; and . . . no credible evidence of harm to Objectors or the community was presented. To the contrary, the credited evidence established that existing gas wells have not impeded, but advanced, the ability of farmers in the Township to continue to use their land for farming.¹³⁰

The objectors argued that the township was required to conduct a pre-decision analysis before adopting the zoning amendment.¹³¹ When this issue was before the Zoning Hearing Board, the Board noted that the objectors apparently abandoned the claim because they did not present any evidence on it.¹³² Still, the Board said there was no basis under section 27 to "require some sort of 'pre-action environmental impact analysis,' " and the Commonwealth Court agreed.¹³³ In a footnote, the court added that an *amicus curiae* brief filed by the Pennsylvania State Association of Township Supervisors argued that "the cost of an environmental impact analysis 'could lead municipalities to decide not to engage in zoning at all in order to save precious taxpayer resources . . . ' " ¹³⁴

Judge Patricia McCollough's dissenting opinion focused on the public trust clause of section 27, which requires Commonwealth entities, including local governments, to conserve and maintain public natural resources for the benefit of present and future generations. She began by pointing out that the challenged zoning

¹²⁹ *Id.*

¹³⁰ *Id.* at 689.

¹³¹ *Frederick*, 196 A.3d at 696 ("Objectors assert the Township did not 'genuinely consider' the environment in the enactment of the zoning amendment.").

¹³² *Id.* at 700.

¹³³ *Id.*

¹³⁴ *Id.* n.44.

amendment allows oil and gas operations in every zoning district in the township by right—including the Single-Family Residential District, the Riverfront Conservation District, various commercial districts, and the Town Center District.¹³⁵ She said, “there is nothing in the record or Ordinance to positively and substantively indicate that the Township made any kind of exclusionary choice or engaged in any meaningful and individualized assessment of its districts’ particular characteristics.”¹³⁶

To go forward with this ordinance, she argued, relying principally on *Robinson Township*, the township should be required to show three things. First, “the Township, as a threshold matter, should have to demonstrate with competent evidence that oil and gas operations are compatible in all of its zoning districts given the districts’ unique characteristics and permitted uses.”¹³⁷ In addition, “the Township should further demonstrate that it is indispensably necessary for all of its zoning districts to be open to oil and gas development to attain the economic well-being of all its citizenry.”¹³⁸ Third, and finally, “the Township should have to account for the public resources it holds in trust and establish that the oil and gas operations in the Agricultural/Residential District have not resulted in a negative effect on the environment as a matter of scientific fact.”¹³⁹

Judge Ellen Ceisler also dissented based on the public trust clause of section 27, and also faulted the township for not considering in advance the impact of amending its zoning ordinance. In addition, she argued that the amending ordinance is facially unconstitutional under section 27. “This Ordinance allows ‘Oil and Gas Development,’ which is defined so as to encompass a vast universe of activities, anywhere in the Township by-right and subject mainly to only open-ended and vaguely worded conditions.”¹⁴⁰ She said it contains no limit on how long drilling

¹³⁵ *Id.* at 705 (McCollough, J., dissenting).

¹³⁶ *Id.* at 709.

¹³⁷ *Frederick*, 196 A.3d at 710.

¹³⁸ *Id.*

¹³⁹ *Id.* at 711.

¹⁴⁰ *Id.* at 715 (Ceisler, J., dissenting).

can occur, has no provisions for public input to the local permit process, and is silent on a variety of potential impacts.¹⁴¹

Given this state of affairs, it is simply impossible for the Township, when considering an Oil and Gas Development permit request, to appropriately weigh the interests of the property owner and of the broader Township community, or those of present Township residents and of generations-to-come, or protect the environment and preserve public interest-implicating natural resources over both the short term and the long haul.¹⁴²

The Commonwealth Court has relied on the *Frederick* decision in subsequent reported and unreported land use and zoning cases involving shale gas production facilities, including a 2019 decision in *Protect PT v. Penn Township Zoning Hearing Board*.¹⁴³ In that case, the township adopted a zoning ordinance that included a Mineral Extraction Overlay (MEO) district.¹⁴⁴ An overlay district allows for a particular type of development in some or all of the zoning districts in a municipality; it supplements, but does not replace, those zoning districts.¹⁴⁵ The MEO district allowed unconventional natural gas development in two specific zoning districts, including the sparsely populated areas of a residential district called the Resource District.¹⁴⁶ To conduct unconventional natural gas development, an applicant was required to obtain a special exception from the township's zoning hearing board. To obtain a special exception, the ordinance specified:

The applicant shall demonstrate that the drill site operations will not violate the citizens of Penn Township's right to clean air and pure water as set forth in [article I,

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 220 A.3d 1174, 1177-78 (Pa. Commw. Ct. 2019).

¹⁴⁴ *Id.* at 1177.

¹⁴⁵ *Id.* at 1187 (quoting *Main St. Dev. Grp., Inc. v. Tinicum Twp. Bd. of Supervisors*, 19 A.3d 21, 28 (Pa. Commw. Ct. 2011)).

¹⁴⁶ *Id.* at 1178.

section 27] of the Pennsylvania Constitution (the Environmental Rights Amendment). The applicant shall have the burden to demonstrate that its operations will not affect the health, safety and welfare of the citizens of Penn Township or any other potentially affected land owner. The application submitted shall include reports from qualified environmental individuals attesting that the proposed location will not negatively impact the Township residents' environmental rights; and will include air modelling and hydrogeological studies as potential pathways that a spill or release of fluid may follow.¹⁴⁷

Protect PT, a citizen group, challenged the ordinance. The group characterized the Resource District as a “growing suburban community,” and argued that unconventional natural gas development (UNGD) “is a heavy industrial activity incompatible with residential use and preservation of the environment.”¹⁴⁸ Among other things, it argued that the ordinance violated article I, section 27.¹⁴⁹ The trial court rejected that argument, and the Commonwealth Court affirmed.

The Commonwealth Court began its analysis by quoting the ordinance's requirement that the applicant demonstrate that it will not violate article I, section 27. Like the objectors in *Frederick*, the court reasoned, Protect PT “failed to establish that the Zoning Ordinance ‘unreasonably impairs’ the rights of Township residents under the [Environmental Rights Amendment].”¹⁵⁰ The trial court's assessment of the credibility of the witnesses who testified about the impacts of UNGD was important to this decision; the trial court had found the industry witnesses credible and Protect PT's witnesses not to be credible. Moreover, the Commonwealth Court reasoned, the Penn Township ordinance “is more stringent than the zoning ordinance in *Frederick*,” noting the requirement for reports from qualified experts that the proposed development will not adversely

¹⁴⁷ *Id.* at 1197 (quoting Penn Township, Pa., Ordinance No. 912-2016, § 190-641(D) (2016)).

¹⁴⁸ *Id.* at 1177.

¹⁴⁹ *Protect PT*, 220 A.3d at 1177.

¹⁵⁰ *Id.* at 1197-98 (citing *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 697 (Pa. Commw. Ct. 2018)).

affect the rights of township residents under the Environmental Rights Amendment.¹⁵¹

In other unreported opinions, the Commonwealth Court has upheld local zoning decisions regarding oil and gas well development and compressor stations because objectors “have failed to meet their burden that oil and gas drilling pads will injure their neighbors.”¹⁵² One of these decisions, *Protect PT v. Penn Township Zoning Hearing Board*, drew a concurring opinion from Judge Patricia McCollough, who lamented that the Commonwealth Court’s review in section 27 zoning cases “has been severely reduced to a point where this Court functions merely to ascertain whether a zoning hearing board found the objector’s evidence credible.”¹⁵³ In this case, the objectors brought in several experts, one of whom analyzed the specific well proposal and “opined that the Township and its residents would suffer detrimental harm.”¹⁵⁴

¹⁵¹ *Id.* at 1198.

¹⁵² *Del. Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd.*, 2019 WL 2605850, *18 (Pa. Commw. Ct. 2019). The court also reasoned that oil and gas development is compatible with other allowed residential and agricultural uses in these zoning districts, that oil and gas development helps protect agricultural land by providing additional income to farmers, and that oil and gas development limits sprawl. *Id.* at *17; *see also* *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 2020 WL 3639998, *4 (Pa. Commw. Ct. 2020) (challenge to grant of special exception to develop unconventional gas well rejected where zoning hearing board determined that objectors “failed to establish sufficient, credible evidence . . . that the said use would create a high probability that an adverse, abnormal or detrimental effect will occur to public health, safety and welfare.”); *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 2018 WL 5831186, *12 (Pa. Commw. Ct. 2018) (upholding grant of four special exceptions for unconventional gas wells against section 27 claims because “ ‘[o]bjecting parties have failed to establish sufficient, credible evidence . . . that [Applicant’s proposed] use would create a high probability of an adverse, abnormal or detrimental effect [on] public health, safety and welfare.’ ”).

¹⁵³ *Protect PT*, 2020 WL 3639998, at *5.

¹⁵⁴ *Id.* It appears from the Commonwealth Court’s description of the testimony of the expert witnesses and the Zoning Hearing Board’s decision that the Board may not have explained why it did not find these witnesses to be credible. *Id.* at *4.

As this Article was going to press, the supreme court granted petitions for allowance of appeal in this case. *Protect PT v. Penn Township Zoning Hearing Board*, Nos. 247 & 248 WAL 2020 (orders granting petitions for allowance of appeal, Pa. Jan. 5, 2021). The appeal is limited to these issues:

B. Pipeline Construction

The Marcellus shale gas drilling and production boom have led to a variety of proposals to construct pipelines. These pipelines are principally for the transportation of natural gas as well as various commercially valuable chemicals (such as propane, butane, and ethane) that are produced with natural gas. Perhaps the most prominent pipeline project in Pennsylvania is the Sunoco Pipeline L.P.'s Mariner East Project, which would move gas and these chemicals through the state from points in Pennsylvania, Ohio, and West Virginia to Sunoco's Marcus Hook Industrial Complex on the Delaware River in Pennsylvania.¹⁵⁵ In a 2016 decision not involving section 27, a divided Commonwealth Court held that Sunoco had the legal authority, as a public utility under state law, to condemn private property for the Mariner East 1 and Mariner East 2 pipelines, which are part of the Mariner East Project.¹⁵⁶

The section 27 cases involving pipelines tend to involve local zoning authority. In these cases, however, the section 27 claimants have all lost.

In *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, plaintiffs sought to prevent construction of the Mariner East 2

(1) Whether the Commonwealth Court's opinion conflicts with the Court's previous application of the capricious disregard of evidence standard and creates an issue of such substantial public importance as to require prompt and definitive resolution by this Honorable Court?

(2) Whether the Commonwealth Court's failure to meaningfully evaluate the cumulative impacts of developing multiple unconventional natural gas wells in close proximity to residential neighborhoods creating high probability of adverse, abnormal or detrimental effects on public health, safety and welfare and significantly altering the character of the community was an abuse of discretion which creates a question of first impression of such public importance which requires this Honorable Court's prompt and definitive resolution?

Id. These issues do not explicitly involve Section 27, and appear limited to the circumstances of the special exception at issue here.

¹⁵⁵ *Clean Air Council v. Sunoco Pipeline L.P.*, 185 A.3d 478, 482 (Pa. Commw. Ct. 2018).

¹⁵⁶ *In re Condemnation by Sunoco Pipeline L.P.*, 143 A.3d 1000, 1008 (Pa. Commw. Ct.) (en banc), *appeal denied*, 164 A.3d 485 (Pa. 2016).

pipeline on the grounds that it violated the West Goshen Township zoning ordinance.¹⁵⁷ The township adopted an ordinance in 2014 that prohibits such pipelines in residential zoning districts and allows them in other districts subject to setback restrictions.¹⁵⁸ The Commonwealth Court held, relying on a long line of cases, that exclusive authority over public utilities, including Sunoco, lies with the Public Utility Commission (PUC), and that “the Township lacks authority to zone out a public utility pipeline service or pipeline facility regulated by the PUC.”¹⁵⁹ The court rejected plaintiffs’ argument that the PUC’s exclusive authority did not apply to where the pipeline is located, explaining that “the General Assembly intended the PUC to be preeminent in regulation of public utilities when questions arise about local zoning.”¹⁶⁰

Plaintiffs challenged the constitutionality of this structure under section 27, arguing that local governments are trustees and that statewide preemption of local zoning authority for public utilities prevents them from carrying out their constitutional responsibility.¹⁶¹ The Commonwealth Court rejected this argument for three reasons. “First and foremost,” the court said, the *PEDF II* and *Robinson Township* decisions are distinguishable because they “do not deal with public utility services and facilities regulated by the PUC.”¹⁶² Second, the court said, the plaintiffs ignore the fact that section 27 and the 2014 ordinance were adopted after much zoning and public utility law were adopted, even though differences in the timing of laws “is usually a matter of significance to legal analysis.”¹⁶³ (In a later unreported case,¹⁶⁴ the Commonwealth Court appears to have repudiated these first two reasons. Section

¹⁵⁷ Del. Riverkeeper Network v. Sunoco Pipeline L.P., 179 A.3d 670, 674 (Pa. Commw. Ct. 2018).

¹⁵⁸ *Id.* at 675.

¹⁵⁹ *Id.* at 690.

¹⁶⁰ *Id.* at 695.

¹⁶¹ *Id.* at 693-95.

¹⁶² *Id.* at 695-96.

¹⁶³ Del. Riverkeeper Network, 179 A.3d at 696.

¹⁶⁴ City of Lancaster v. Pa. Pub. Util. Comm’n, No. 252 M.D. 2019, 2020 WL 864986 (Pa. Commw. Ct. 2020).

27, the court held in this later case, “applies to the PUC.”¹⁶⁵) Finally:

Third, Plaintiffs do not explain how the 2014 Ordinance furthers the Township’s ERA trustee duties and relates to conserving public natural resources. This is especially true where, as here, the pipeline in question will be placed in or near a pre-existing pipeline right of way and parallel to a pre-existing pipeline.¹⁶⁶

Judge Kevin Brobson (joined by Judge Patricia McCollough) concurred in the court’s decision as based on existing precedent, but dissented from that part of the opinion that dismissed the plaintiffs’ complaint.¹⁶⁷ In his view, the question of the location of the pipeline should be remanded to the PUC. He explained:

I confess that Plaintiffs have not asked for this relief. Nonetheless, I am moved by what appears to be an undisputed fact that no governmental entity has ever reviewed, let alone approved, the location of the [Mariner East 2] ME2 Pipeline. There is no specific statute and regulation that limits, let alone guides, Sunoco Pipeline, L.P.’s discretion to choose the location of the ME2 Pipeline.¹⁶⁸

Another pipeline case, *In re Andover Homeowners’ Association, Inc.*,¹⁶⁹ involved a challenge to the township’s issuance to Sunoco of a grading permit to allow construction of the Mariner East 2 Pipeline. The affected property had once been an apple orchard, and the soil had been contaminated with arsenic because of pesticide use.¹⁷⁰ The Andover Homeowners’ Association

¹⁶⁵ *Id.* at *5.

¹⁶⁶ *Del. Riverkeeper Network*, 179 A.3d at 696.

¹⁶⁷ *Id.* at 699-700.

¹⁶⁸ *Id.* at 700.

¹⁶⁹ *In re Andover Homeowners’ Ass’n*, 217 A.3d 906 (Pa. Commw. Ct. 2019).

¹⁷⁰ *Id.* at 912. Lead arsenate, an arsenic compound, was once a common pesticide in orchards, and lead contamination in the soil of old orchards is a

(Association) claimed the township violated its trusteeship duties under section 27 by failure to consider this prior use of the site.¹⁷¹ Some years earlier, DEP had overseen a remediation of the site that evidently resulted in lower levels of arsenic in the soil.¹⁷² According to the Commonwealth Court, the Association “offered no evidence to support its claim that there will be degradation of” public natural resources.¹⁷³

Prior to the issuance of its permit, DEP had issued an erosion and sedimentation control plan to Sunoco requiring certain protective actions for handling contaminated soil.¹⁷⁴ The Association did not appeal the issuance of that permit.¹⁷⁵ The township’s grading permit to Sunoco included a condition requiring compliance with DEP’s permit.¹⁷⁶ This permit condition, the Association argued, is insufficient: “The Township must also take affirmative steps to protect the public from potential arsenic contamination.”¹⁷⁷ The Commonwealth Court said this was not consistent with its decision in *Frederick*: “When an objector challenges a governmental action, it must demonstrate, with evidence, that the government acted in derogation of” its trust duty under section 27.¹⁷⁸ Like the objectors in *Frederick*, the court said, the objectors here did not prove that “the township unreasonably impaired their rights under the Environmental Rights Amendment.”¹⁷⁹ It added that if the Association was worried about soil contamination from Sunoco’s construction activities, it should

widespread problem. Therese Schooley et al., *The History of Lead Arsenate in Apple Production: Comparison of Its Impact in Virginia with Other States*, 10 J. PESTICIDE SAFETY ED. 22, 25 (2008).

¹⁷¹ *In re Andover*, 217 A.3d at 912.

¹⁷² *Id.*

¹⁷³ *Id.* at 915.

¹⁷⁴ *Id.* at 911 (“Sunoco shall be required to follow PA [Department of Environmental Protection (DEP)] permit requirements when handling contaminated soils as noted in [Erosion and Sedimentation (E&S)] Permit No ESG 01 000 15 001.”).

¹⁷⁵ *Id.* at 916.

¹⁷⁶ *Id.* at 911.

¹⁷⁷ *In re Andover*, 217 A.3d at 915.

¹⁷⁸ *Id.* at 916 (citing *Frederick v. Allegheny Twp. Zoning Bd.*, 196 A.3d 677, 695 (Pa. Commw. Ct. 2018)).

¹⁷⁹ *Id.*

have raised that issue in an appeal of DEP's erosion and sedimentation control permit.¹⁸⁰

V. PREEMPTION

Section 27 has not fared well as a defense to preemption claims. As explained above, in *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, the Commonwealth Court rejected the argument that statewide preemption of local zoning authority for public utilities prevents local governments from carrying out their constitutional responsibility under section 27.¹⁸¹

Similarly, in *UGI Utilities, Inc. v. City of Reading*, the Commonwealth Court held that PUC regulations governing the location of gas meters preempted a Reading ordinance concerning the installation of gas meters in historic districts.¹⁸² The PUC regulations generally required that gas meters be located "outside and aboveground," but also required the consideration of inside locations for buildings in historic districts.¹⁸³ The Reading ordinance, "in contrast, imposes an absolute prohibition on outdoor, aboveground installation of gas meters where the only available outdoor location is in a front yard or façade visible from the street unless 'no other means of gas service can be provided.'"¹⁸⁴ Because the PUC has exclusive statutory authority over the public utility facilities, the court said, local ordinances that conflict with PUC regulations are preempted.¹⁸⁵

Reading defended the lawfulness of its ordinance by arguing that it was trying to protect historic resources under section 27.¹⁸⁶ It noted that the supreme court in *Robinson Township* used article I, section 27 to hold unconstitutional parts of a state law that

¹⁸⁰ *Id.*

¹⁸¹ *Del. Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 693-96 (Pa. Commw. Ct. 2018).

¹⁸² *UGI Utils., Inc. v. City of Reading*, 179 A.3d 624 (Pa. Commw. Ct. 2017).

¹⁸³ *Id.* at 626 (quoting 52 PA. CODE § 59.18 (2020)).

¹⁸⁴ *Id.* at 630 (quoting Reading, Pa., ORDINANCE NO. 45-2015 Ch. 225 § 295-106, F(1)(a)(2) (2015)).

¹⁸⁵ *Id.* at 629-30.

¹⁸⁶ *Id.* at 631.

preempted zoning laws because the law prevented local governments from carrying out their constitutional duties.¹⁸⁷ The Commonwealth Court rejected that argument, saying that *Robinson Township* involved a challenge to the law itself, whereas there was no similar challenge to the PUC regulations in this case.¹⁸⁸ Moreover, the court reasoned, there could not be a successful section 27 challenge to the PUC regulations because they allow for consideration of indoor placement of gas meters in historic districts.¹⁸⁹ In a subsequent unreported decision involving a facial section 27 challenge to the same PUC regulation by other municipalities with historic districts, the Commonwealth Court upheld the regulation.¹⁹⁰ The municipalities, the court reasoned, had not alleged that “the buildings in these Historic Districts have suffered any type of specific, or even symbolic, harm or degradation to the aesthetic/scenic or concrete values that they represent or depict.”¹⁹¹

VI. USE OF FUNDS RECEIVED FROM SALE OR LEASE OF PUBLIC NATURAL RESOURCES

While the Pennsylvania Supreme Court in *PEDF II* held that royalties from oil and gas leasing are subject to the section 27 public trust, it remanded the case to the Commonwealth Court for a determination on whether expenditure of proceeds other than royalties from oil and gas leasing—bonus and rental payments—is governed by the public trust.¹⁹² As the supreme court stated in *PEDF II*, “the proper standard of judicial review” for this question

¹⁸⁷ *Id.*

¹⁸⁸ *UGI Utils., Inc.*, 179 A.3d at 631.

¹⁸⁹ *Id.* at 631-32. The Commonwealth Court also cited two pre-*Robinson Township* decisions preempting local regulation for environmental purposes notwithstanding article I, section 27. *Id.* at 631 (citing *Range Res.-Appalachia, LLC v. Salem Township*, 964 A.2d 869, 873, 875-77 (Pa. 2009) and *PECO Energy Co. v. Township of Upper Dublin*, 922 A.2d 996, 999, 1005 (Pa. Commw. Ct. 2007)).

¹⁹⁰ *City of Lancaster v. Pa. Pub. Util. Comm’n*, No. 251 M.D. 2019, 2020 WL 864986, at *1, *2, *10 (Pa. Commw. Ct. Apr. 7, 2020), *reconsideration denied*.

¹⁹¹ *Id.* at *7.

¹⁹² *PEDF II*, 161 A.3d 911, 935-36, 939 (Pa. 2017).

“lies in the text of article I, section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”¹⁹³ The Commonwealth Court, the supreme court said, must make that decision “in strict accordance and fidelity to Pennsylvania trust principles.”¹⁹⁴ While the question about bonus and rental payment seems technical on its face, it has significant consequences for the use of trust law in interpreting section 27. It also has significant financial consequences: the bonus payments alone for one period totaled \$383 million.¹⁹⁵

In *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF III)*, the Commonwealth Court applied *private* trust law to decide that two-thirds of the proceeds from bonus and rental payments belong in the constitutional public trust, while one-third can be spent in any way the Commonwealth sees fit.¹⁹⁶ The Commonwealth Court used a principle of private trust law, rather than any other principles of traditional trust law, to get to that result. As I have argued elsewhere in much greater detail, the Commonwealth Court should have used other trust law principles to decide this case and should have decided that all of the proceeds from bonus and rental payments belong in the public trust.¹⁹⁷

To make sense of this case, it is important to recognize that the supreme court in *PEDF II* endorsed three general duties of all trustees in traditional trust law—the duties of prudence, loyalty, and impartiality. The supreme court’s statement of the standard of review and remand instructions referred generally to traditional trust law to help interpret section 27. There are, however, two kinds of express trusts, each with their own additional rules. One is a charitable trust, and the other is a noncharitable (or private) trust.

¹⁹³ *Id.* at 930.

¹⁹⁴ *Id.* at 936.

¹⁹⁵ Jon Hurdle, *Court to Decide if Nearly \$400 Million in State Oil and Gas Bonuses Fund Conservation*, ST. IMPACT PA. (July 4, 2017, 8:38 AM), <https://stateimpact.npr.org/pennsylvania/2017/07/04/advocate-says-state-should-use-oil-gas-lease-revenue-to-fund-conservation/>.

¹⁹⁶ *Pa. Env’t Def. Found. v. Commonwealth (PEDF III)*, 214 A.3d 748, 774 (Pa. Commw. Ct. 2019).

¹⁹⁷ John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 U. MICH. J.L. REF. 77, 124-44 (2020).

The Commonwealth Court began by explaining the meaning of bonuses and rental payments in the context of the Pennsylvania Department of Conservation and Natural Resources' (DCNR) oil and gas leasing process. DCNR puts out competitive bids for oil and gas production on specific tracts in state forests and other lands. While there is a standard royalty payment, different companies seeking to operate on the same tract submit different bids, and the highest bidder wins. "The bonus payment is money paid to DCNR after successfully obtaining a lease."¹⁹⁸ The opinion identified two illustrative leases where the bonus payments for entering a lease were \$12.3 million and \$23.3 million.¹⁹⁹ The winning bidder enters a lease with DCNR.²⁰⁰ The lessee is required to pay annual rental fees, which tend to be \$20 to \$25 per acre of leased property, beginning the first year of the lease.²⁰¹ If the lessee does not "commence a well" within the first five years, the lease ends automatically.²⁰² If oil and gas are produced, the lessee must make monthly royalty payments based on the quantity of such oil and gas produced.²⁰³

Based on a footnote in the supreme court's opinion,²⁰⁴ the Commonwealth Court believed itself limited to private trust law when deciding the case. According to the Commonwealth Court, the private trust law governing the disposition of bonus and rental payments existing when section 27 was adopted in May 1971 was Section 9 of the Principal and Income Act of 1947, as amended.²⁰⁵

In a private trust context,²⁰⁶ the trustee "has a fiduciary obligation to satisfy both the interests of the trust's income

¹⁹⁸ *PEDF III*, 214 A.3d at 772.

¹⁹⁹ *Id.* at 770-71.

²⁰⁰ *Id.* at 769 (citing 71 PA. STAT. AND CONS. STAT. ANN. § 1340.302(a)(6) (West 1995)).

²⁰¹ *Id.* at 770.

²⁰² *Id.*

²⁰³ *Id.* at 772.

²⁰⁴ *PEDF III*, 214 A.3d at 755.

²⁰⁵ *Id.* at 760-61, 765, 767-68.

²⁰⁶ While the Act is directed toward trustees of a trust, it is also directed at personal representatives of a decedent's estate. *Summary: Uniform Principal and Income Act 1 (1997)*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (2002), https://www.thefirma.org/2006_conference/Personal%20Trust%20Administration/DeMaris-Admin4.pdf.

beneficiaries during the life of the trust, and the interests of the remainder beneficiaries at the trust's termination."²⁰⁷ Commonly, a private trust instrument provides that the trustee is to distribute income from the trust to certain beneficiaries while they are alive and further provides that the trustee must distribute the principal of the trust to certain other beneficiaries (remainder beneficiaries) who survive the original beneficiaries. Of course, the trust then terminates.

Section 27 is analogous to a private trust, the Commonwealth Court reasoned. The present generation is like the income beneficiaries, and future generations are the remainder beneficiaries. Therefore, the court held, one-third of the payments are to be deemed as income, and therefore not subject to the terms of the constitutional public trust. On the other hand, "the remaining two-thirds thereof shall be deemed principal," and are therefore subject to the "conserve and maintain" requirement. The 1947 Act, the court explained, provides "an equitable balance between the needs of present and future generations of Pennsylvanians," which the court said is consistent with section 27.²⁰⁸ The PEDF has appealed this decision to the Pennsylvania Supreme Court.²⁰⁹

Quite plainly, the Commonwealth Court wrote a careful opinion that placed the bulk of the bonus and rental proceeds under the section 27 public trust. So on one level, the Commonwealth Court reached a decision that split the difference between opposing litigants, albeit with a little more to the public trust.

On another level, the Commonwealth Court unduly narrowed the trust law available to interpret section 27 from traditional trust law, including general trust law principles as well as the law of charitable and private trusts, to simply private trust law.²¹⁰ In so doing, it has narrowed the standard of review for section 27 cases. The Commonwealth Court did not consider that the principles of prudence, impartiality, and loyalty likely direct that all the bonus and rental money be used for public trust purposes. Nor did it

²⁰⁷ *Id.*

²⁰⁸ *PEDF III*, 214 A.3d at 774.

²⁰⁹ *See id.*, appeal docketed, No. 64 MAP 2019 (Pa. Aug. 12, 2019) (*PEDF IV*).

²¹⁰ *Dernbach*, *supra* note 194.

consider interpreting section 27 in light of charitable trust law, even though the section 27 public trust is similar in many ways to a perpetual charitable trust. Finally, an income producing trust for life tenants and remaindermen is not analogous to a perpetual public trust for natural resources whose beneficiaries are present and future generations; the private trust analogy appears inapt.

Two other cases before the Commonwealth Court raise additional section 27 issues related to oil and gas leasing on state forest lands. Both cases were brought by the Pennsylvania Environmental Defense Foundation. The first is like *PEDF II*, except that it challenged later state legislation, which authorized money from oil and gas leasing on state forest lands to be used to pay operating expenses of the DCNR. The state argued that this is consistent with the constitutional obligation to use the money to “conserve and maintain” public natural resources. PEDF argued that the legislation violates section 27’s public trust clause, and that this money must be used to repair damage from oil and gas leasing in the Marcellus Shale region.

The Commonwealth Court decided this case in October 2020, after the end of the four-year period reviewed in this Article. In brief, the Commonwealth Court held that the later legislation is not facially unconstitutional under section 27, and that lease fund money, including trust principal, may be expended on environmental conservation initiatives beyond the Marcellus Shale region.²¹¹ At the same time, the court held the Commonwealth is neglecting its traditional trust law duty to properly account for how public trust money in the oil and gas lease fund is expended.²¹² Under traditional trust law, the court said, the trustee has an obligation to keep adequate records of trust property, to maintain trust property separately from other property, and to inform and report to the beneficiaries about trust property.²¹³ At present, the court said, trust and nontrust money are commingled in the lease

²¹¹ *Pennsylvania Environmental Defense Foundation v. Commonwealth*, No. 358 M.D. 2018, 2020 WL 6193643, at *17, 241 A.3d 119 (Table), (Pa. Commw. Ct. Oct. 22, 2020).

²¹² *Id.*

²¹³ *Id.* at *16 (citing Uniform Trust Act, Uniform Trust Act, 20 Pa. C.S. §§ 7780(a), 7780(b). & 7780.3).

fund, and it is not possible to tell whether moneys subject to the section 27 public trust are being lawfully expended.²¹⁴ The Commonwealth, the court held, “is required to keep detailed accounts of the trust monies derived from the oil and gas leases and track how they are spent as part of its administration of the trust.”²¹⁵ The court also denied the Commonwealth’s request for declaratory relief that current use of trust fund moneys is entirely consistent with section 27 and that “affirmative legislation” is not needed to address this issue.²¹⁶

The second case challenges not the expenditure of funds but rather the leasing process itself, claiming that leasing violates the constitutional duty to conserve and maintain public natural resources.²¹⁷ As this Article goes to press, this case is still pending. These are all cases whose final decisions will be part of the foundation for future section 27 jurisprudence.

VII. MANDAMUS

Mandamus is an available remedy under section 27 where DEP has done almost nothing from 1999 to the present to remediate a site heavily contaminated with trichloroethylene and other volatile organic compounds.²¹⁸ In an unreported opinion, *Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection*, the Commonwealth Court overruled DEP’s preliminary objection that mandamus is an inappropriate remedy because its duties under section 27 are discretionary rather than mandatory.²¹⁹

²¹⁴ *Id.* at *17.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Pennsylvania Environmental Defense Foundation v. Commonwealth Department of Conservation and Natural Resources*, No. 609 MD 2019 (Pa. Commw. Ct. filed Nov. 5, 2019).

²¹⁸ *Del. Riverkeeper Network v. Pa. Dep’t of Env’t Prot.*, No. 525 M.D. 2017, 2018 WL 3554639, at *2-3, *5-6 (Pa. Commw. Ct. June 4, 2018).

²¹⁹ *Id.* at *6. The court’s analysis of this issue also applied to two other statutes that the petitioners claimed imposed mandatory duties. *Id.*

VIII. SEVEN KEY THEMES IN THESE CASES

The section 27 cases decided by the Commonwealth Court in the first four years after the revitalization of the Environmental Rights Amendment cover a wide range of contexts. Section 27 is a source of regulatory DEP authority (or not); it is both a source of authority for local government zoning and land use decisions and a basis (thus far not successful) for claiming that local government actions are unconstitutional; it has been raised (unsuccessfully so far) as a defense to preemption claims against local ordinances; it provides a basis for deciding how bonus and rental payments from oil and gas leasing can be expended; and it is a basis for mandamus actions against state agencies. The cases have at least seven key themes.

A. The Commonwealth Court has often made environmentally protective advances in the law of section 27.

In *Pennsylvania Independent Oil and Gas Association (PIOGA) v. Department of Environmental Protection*,²²⁰ the Commonwealth Court “clarified” DEP’s ability to protect water resources after the *Robinson Township* decision—an essential feature of oil and gas regulation. In another case, it clarified the meaning of “public natural resources” in the public trust clause of section 27. The *Robinson Township* plurality said that these resources include “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and groundwater, wild flora, and fauna (including fish) that are outside the scope of purely private property.”²²¹ In *PEDF II*, the supreme court held that these resources include state forests and parks as well as the gas trapped in the shale under these forests and parks. This approach led to the gas industry in *Marcellus Shale Coalition* arguing that public natural resources are limited to publicly owned property. Not so, the Commonwealth Court held. Public natural resources “may be located on privately owned property, but they are not purely private

²²⁰ Pa. Indep. Oil & Gas Ass’n v. Pa. Dep’t of Env’t Prot., 146 A.3d 820, 828-30 (Pa. Commw. Ct. 2016), *aff’d*, 161 A.3d 949 (2017).

²²¹ *Robinson Township v. Commonwealth*, 83 A.3d 901, 954 (Pa. 2013).

property.”²²² These resources are public, not because they are publicly owned, but because they “‘implicate the public interest,’ thereby triggering protection under the Pennsylvania Constitution.”²²³ That is a significant and important advance in the development of the law.

The court has also held that mandamus is an available remedy under section 27 where DEP has chronically failed to clean up a heavily contaminated site.²²⁴ The case is important because it establishes the availability of mandamus, at least in this type of situation. It is also an example of the use of section 27 to fill in gaps in DEP’s regulatory program.

B. Plaintiffs or objectors are required to demonstrate a significant level of environmental harm to a protected resource, and have generally failed to show that level of harm.

This is true in every one of the land use and zoning cases, whether they involved production and related facilities or whether they involved pipelines. There is an echo here of the caselaw under the *Payne v. Kassab* test, in which those invoking section 27 won only rarely. On the other hand, the *Payne* case involved a weak claim by those invoking section 27, and so it could be that what we are seeing here, in at least some of these cases, is more of the same. There is also reason to believe that, after *Robinson Township* and *PEDF II*, some developers are designing projects with greater care to prevent successful section 27 legal challenges.²²⁵

²²² *Marcellus Shale Coal. v. Dep’t of Env’t Prot.*, 193 A.3d 447, 479 (citing *Robinson Township*, 83 A.3d at 955).

²²³ *Id.*

²²⁴ *Del. Riverkeeper Network v. Pa. Dep’t of Env’t Prot.*, No. 525 M.D. 2017, 2018 WL 3554639, at *2-3, *5-6 (Pa. Commw. Ct. June 4, 2018).

²²⁵ *Constitutional Amendment; Environmental Rights: Hearing on Maryland H.R. 82 Before S. Judiciary Proc. Comm., S. Educ., Health and Env’t Affs. Comm., and H. Env’t and Transp. Comm.*, 442d Sess. 5 (Md. 2021) (statement of Martin R. Siegel, Counsel, Barley Snyder):

[I]t is likely that the ERA [Environmental Rights Amendment] has led many developers and businesses to submit better project proposals to municipalities and the DEP by incorporating heightened consideration of environmental impacts into their design of projects. Doing so reduces the potential that projects will be delayed by challenges and

Another possible explanation is that the legal standard that the objectors must meet is higher or more difficult than it needs to be. To be sure, under the supreme court's *PEDF II* decision, objectors who claim a violation of section 27's first clause must show that "the governmental action unreasonably impairs" the values protected by that clause.²²⁶ For the public trust clause, the trustee must "prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties."²²⁷ It is not easy to demonstrate a violation of either clause, and that seems to help explain many of these cases.

Objectors appear to have additional hurdles to overcome in challenges to local zoning decisions. To begin with, objectors appear to be handicapped by the division of regulatory authority for wells between DEP (which controls how they are operated) and the township (which controls where they are located). The most likely sources of environmental harm in shale gas production and development are under DEP's regulatory authority. As the *Frederick* court made clear, objectors need to raise those issues with DEP as part of DEP's permitting process; the objectors cannot take those issues to the local government. If DEP does not respond in a satisfactory way to the objectors' comments on a permit application, they can appeal DEP's decision to the Environmental Hearing Board. But many of the problems with where shale gas facilities are located are due to limits in DEP's regulatory process, including the visibility and intensity of the initial drilling operation. The closer someone's house or business is to a shale gas facility, the more acutely these effects will be felt. But to the extent that the "where" decision for local governments is understood as part of the "how" decision for DEP, local government decisions to expand shale gas

the need for developers to go back to the drawing board. While it is difficult to objectively assess the magnitude of the ERA's impact in this regard, I know that I, as well as many of my colleagues, routinely advise our clients to do such analysis to help streamline approvals and avoid appeals.

²²⁶ *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677, 695 (Pa. Commw. Ct. 2018) (citing *Pa. Env't Def. Found. v. Commonwealth*, 108 A.3d 140 (Pa. Commw. Ct. 2015)).

²²⁷ *PEDF II*, 161 A.3d 911, 933 (Pa. 2017). .

production into all or many zoning districts appear difficult to successfully challenge on section 27 grounds. Because the Environmental Hearing Board does not address local zoning decisions, objectors may be without an effective remedy.

Another hurdle appears to be the level of deference that the Commonwealth Court is obliged to give the findings made in local zoning decisions, particularly the findings of the Zoning Hearing Board. Judge McCollough's concurring opinion in *Protect PT v. Penn Township Zoning Hearing Board* suggested that objectors who lose before the Zoning Hearing Board on findings of fact will almost certainly lose on appeal to the Commonwealth Court.²²⁸ Yet there appears to be nothing that would prevent the court from more closely scrutinizing the findings of fact and conclusions of law reached by the Zoning Hearing Board, given the constitutional nature of the claims being made, and especially when expert testimony offered by objectors has been disregarded. Indeed, the Commonwealth Court has done just that in other cases.²²⁹

To say that the Commonwealth Court has rejected section 27 claims based on the insufficiency of the alleged harm is not to say that the Commonwealth Court has done that in all cases. In the mandamus case, *Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection*, there was strong evidence of contamination and failure by DEP to address it over a long period of time.²³⁰

C. The Commonwealth Court does not believe that Commonwealth entities are required to conduct a pre-decision evaluation of the potential effect of their decision on protected resources and values.

A critical and recurring issue in these cases is whether Commonwealth entities have a constitutional duty to consider the

²²⁸ *Protect PT v. Penn Twp. Zoning Hearing Bd.*, No. 576 C.D. 2019, 2020 WL 3639998, at *5 (Pa. Commw. Ct. July 6, 2020).

²²⁹ *See, e.g., Lorenzen v. W. Cornwall Twp. Zoning Hearing Bd.*, 222 A.3d 893 (Pa. Commw. Ct. 2019) (deciding that petitioners had standing under section 27 to challenge local government decision and reversing Zoning Hearing Board decision on that issue after detailed review of testimony before the Board).

²³⁰ *See Del. Riverkeeper Network v. Pa. Dep't of Env't Prot.*, 2018 WL 3554639 (Pa. Commw. Ct. 2018).

impacts of their decisions on protected resources and values prior to making decisions. In both *Robinson Township* and *PEDF II*, the supreme court indicated as much. The Commonwealth Court has gone the other way.

The substantive duty in Section 27 to protect certain resources and values implies a corollary responsibility that is intended to ensure that these rights are actually protected: the responsibility to consider impacts on those rights and values prior to a decision. This duty should apply to both public rights in section 27. As the *Robinson Township* plurality explains: “Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.”²³¹ This understanding is reinforced by the amendment’s legislative history.²³² Concerning clause two, the public trust provisions, the same logic applies.²³³ The *Robinson Township* plurality cited with approval the California Supreme Court’s decision in *National Audubon Society v. Superior Court*,²³⁴ in which the court held that the state’s failure to consider the impact of granting water diversion permits on protected natural resources violated the public trust doctrine.²³⁵

The required environmental assessment for each clause should cover the environmental resources or features protected by that clause. The assessment under clause one should thus pertain to “constitutionally protected features”—the four stated environmental values as well as air and water.²³⁶ Similarly, the assessment for clause two should pertain to public natural resources.²³⁷

This understanding has particular relevance to long-term and cumulative impacts. As the *Robinson Township* plurality explained:

²³¹ *Robinson Township v. Commonwealth*, 83 A.3d 901, 952 (Pa. 2013).

²³² *See id.* at 952–54 nn.41–42 (quoting a question and answer referendum intended to “aid voters in understanding the proposed constitutional amendment”).

²³³ *See id.* at 955 (finding that the legislative history of the second clause supports the court’s reading).

²³⁴ *Nat’l Audubon Soc’y v. Superior Ct.*, 658 P.2d 709, 728 (1983).

²³⁵ *Robinson Township*, 83 A.3d at 958.

²³⁶ *Id.* at 952 (referring to first sentence of section 27).

²³⁷ *See id.* at 958 (discussing differences between the protections offered by clauses 1 and 2).

[E]nvironmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations. The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.²³⁸

The supreme court in *PEDF II* turned key parts of this plurality opinion into a majority opinion, and it did so in two ways. First, as indicated earlier, the supreme court used the general trust law duty of prudence to interpret section 27's public trust clause. The duty of prudence, the majority said, involves "considering the purposes" of the trust and exercising "reasonable care, skill, and caution" in managing the trust corpus.²³⁹ It is impossible for a trustee to be prudent without carrying out some advance investigation of the effect of its decisions.²⁴⁰ Second, the supreme court faulted the General Assembly's adoption of the Fiscal Code amendments allocating public trust proceeds to the general fund without considering the impact of this decision on the trust corpus: "there is no indication that the General Assembly *considered the purposes of the public trust* . . . consistent with its Section 27 trustee duties."²⁴¹

²³⁸ *Id.* at 959; *see also* Sullivan v. Resisting Env't Destruction on Indigenous Lands, 311 P.3d 625 (Alaska 2013) (holding that that Alaska's "public interest" constitutional standard for resource development requires courts to take a hard look at whether state agencies adequately considered the cumulative environmental impacts of oil and gas leases).

²³⁹ *PEDF II*, 161 A.3d 911, 938 (Pa. 2017) (citing 20 PA.CON.S. STAT. § 7780).

²⁴⁰ GEORGE T. BOGERT, TRUSTS § 93 (6th ed. 1987) (explaining that the standard of care involves "at least two different qualities: the element of initiative or effort, and the element of skill or judgment. The element of initiative includes such acts as seeking qualified professional assistance where necessary for the property and efficient administration of the trust." As part of this first element, the trustee also has a "duty to obtain advice" where a reasonably prudent person would seek such advice. *Id.* at n.7.

²⁴¹ *PEDF II*, 161 A.3d at 938.

Because local governments are included among Commonwealth trustees under section 27,²⁴² it would seem to follow that they have *some* responsibility to consider in advance the effect of their decisions on public natural resources. Apart from what *PEDF II* and *Robinson Township* say, there is reason to believe that a pre-decision environmental evaluation would help protect section 27 resources and values. First, by requiring Commonwealth entities to consider protected resources and values in advance, a pre-decision evaluation requirement would force them to understand the likely effect of their decisions and give them the opportunity to be more protective. In *Marcellus Shale Coalition*, the Commonwealth Court used section 27 to hold that permit applicants for oil and gas facilities must supply information about the potential impact of wells on public resources. “Without this information,” the court explained, “the Department’s ability to consider the potential impacts to public resources would be severely hampered.”²⁴³ A pre-decision evaluation would also require the development of a record that would permit a reviewing court to quickly assess whether the decision-making body even considered these impacts. A Commonwealth entity could in many cases address the resource limitation issue by requiring a project proponent to develop this information, subject to its own review as well as public review.

The Commonwealth Court has reached a different conclusion. The court decided in *Frederick* that a township was not required to conduct a pre-decision analysis prior to amending its zoning ordinance to allow the issuance of permits for shale gas production facilities in every zoning district in the township. That holding has been restated in subsequent cases.²⁴⁴

To be sure, this issue raises hard questions. Two related questions are the scope and detail of an environmental evaluation and the availability to Commonwealth entities of the resources to

²⁴² *Id.* at 931 n.23.

²⁴³ *Id.* at 466. The court also held that the regulations in question were not unconstitutionally vague. *Id.* at 467.

²⁴⁴ *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 241 A.3d 119 (Table), 2020 WL 6193643, at *11 (Pa. Commw. Ct. Oct. 22, 2020) (“[T]here is no requirement for the Commonwealth, or the General Assembly, to provide the Foundation or the public with any written evaluation prior to amending the Lease Fund or other legislative enactments.”).

conduct the evaluation. Environmental law provides a wide range in the scope, detail, and preparation requirements for other environmental evaluations, with the most substantial evaluations required for projects that have the greatest potential impacts. There is also considerable variety in the financial resources and personnel available to Commonwealth entities subject to section 27. Municipalities, for example, range in size from Philadelphia (almost 1.6 million people) to Allegheny Township, which was involved in the *Frederick* decision (about 6,700 people).²⁴⁵ The wide variety of local government decisions that could implicate Section 27—including zoning amendments and special exceptions—suggests that there could be different approaches to this issue under different circumstances.

One could reasonably argue, at a minimum, that the Commonwealth Court too quickly concluded that such an evaluation is not required under section 27 under any circumstances. In *Frederick*, the Zoning Hearing Board apparently believed that the objectors had withdrawn this issue because they did not pursue it. In addition, the Commonwealth Court has not considered the trustee's duty of prudence under section 27 in determining whether a pre-decision evaluation is required. Is it lawful or appropriate to say that local governments have no duty under Section 27 to consider in advance the impact of their decisions on public natural resources?

D. The Commonwealth Court's local preemption decisions raise the possibility that a section 27 claimant will be left without a remedy.

The *PEDF II* court explained that “all agencies and entities of the Commonwealth government, both statewide and local,” have constitutional trust responsibilities.²⁴⁶ In preemption cases, it would seem to follow, it is permissible to hold that the state has preempted

²⁴⁵ Quick Facts; Philadelphia, Pennsylvania, U.S. Census Bureau, <https://www.census.gov/quickfacts/philadelphiacitypennsylvania> (last visited Jan. 10, 2021); Allegheny Township Demographics, Allegheny Township, <https://www.alleghenytownship.us/index.php/about-us-allegheny-township/demographics> (last visited Jan. 10, 2021).

²⁴⁶ *PEDF II*, 161 A.3d at *Id.* at 931 n.23.

local governments from doing a certain thing that would carry out the Commonwealth's trust responsibility under section 27, so long as some other Commonwealth entity has done it. Thus, in the historic preservation/PUC cases, the Commonwealth Court explained that, while local governments were preempted from enforcing historic preservation requirements against gas companies, the preempting PUC regulation contained provisions protecting historic values. But in another case, *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*,²⁴⁷ Judges Brobson and McCollough's dissent was directed at a preemption holding that apparently left the plaintiffs without any Commonwealth entity to sue. Although the township was preempted from regulating the location of a pipeline, they explained, "no governmental entity has ever reviewed, let alone approved, the location" of the pipeline, and there is "no specific statute and regulation that limits, let alone guides," the pipeline's location.²⁴⁸ When a public natural resource is implicated—and here the Commonwealth Court held otherwise—that would be problematic under section 27.

E. The Commonwealth Court is sometimes not clear about which clause of section 27 is at issue.

The *Robinson Township* plurality and the *PEDF II* majority made clear that section 27 has two parts or clauses. The first protects air, water, and four environmental values. The second protects "public natural resources." While the environmental features protected under each overlap to a considerable degree, they are not the same. The *PEDF II* court focused on the public trust provisions of section 27 because state forests and the gas under them are public natural resources. The Commonwealth Court is clear in some cases about which environmental resources or values are implicated, and under which clause, and in other cases, it is not. In *PEDF v. Commonwealth (PEDF III)*, the Commonwealth Court recognized that it was discussing the public trust clause. In *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, the court held that the

²⁴⁷ Del. Riverkeeper Network v. Sunoco Pipeline L.P., 179 A.3d 670 (Pa. Commw. Ct. 2018).

²⁴⁸ *Id.* at 700.

plaintiffs had not shown how the challenged zoning ordinance adversely affected public natural resources. In the historic district preemption cases discussed in Part V, the court was focused on historic and other values protected by the first clause of section 27.

But in other cases, it is not clear which clause of section 27 is at issue. In *Protect PT v. Penn Township Zoning Hearing Board*,²⁴⁹ for example, it is difficult to understand which clause of section 27 is at issue. In *Frederick*, the majority and dissenting opinions focused on different clauses without answering each other's arguments. The majority's section 27 analysis focused on the first clause and on the aesthetic and scenic values of the environment (i.e., offsite visibility of the one well for which a permit was issued). The two dissenting opinions, by contrast, focus on the public trust clause of section 27 but do not explain what public natural resources the township failed to protect in its amended ordinance.²⁵⁰ To the extent that this problem stems from lack of specificity by the plaintiffs or objectors, the Commonwealth Court should require them to identify which clauses are at issue.

F. Until recently, there has been little evidence of attention to traditional trust law as a means of interpreting section 27.

In *PEDF II*, as noted earlier, the supreme court held that “the proper standard of judicial review lies in the text of section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.”²⁵¹ These traditional trust law principles, the court explained, include the trustee's duties of prudence, loyalty, and impartiality.²⁵² Justice Baer's concurring and dissenting opinion emphasized his agreement with the use of these principles.²⁵³ Yet, there has been almost no reference to these

²⁴⁹ *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 220 A.3d 1174 (Pa. Commw. Ct. 2019).

²⁵⁰ Most probably, this is due to the plaintiffs' reliance on the supreme court's decision in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), which also at points is unclear about which clause of section 27 was at issue.

²⁵¹ *PEDF II*, 161 A.3d 911, 933 (Pa. 2017).

²⁵² *Id.* at 932–33 (citations omitted).

²⁵³ *Id.* at 945.

principles in the Commonwealth Court's opinions since *PEDF II* was decided. An unanswered question in all the cases involving the public trust clause is whether the trustees would have to exercise greater care in conserving and maintaining public natural resources if their actions were scrutinized under these duties. By contrast, the Environmental Hearing Board has been using trust law to help decide the meaning of section 27.²⁵⁴ The only case in the four-year study period where the Commonwealth Court considered trust law in interpreting section 27 is in *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF III*), where the court applied private trust law to decide that one-third of the money received from bonus and rental payments from oil and gas leases in state forests could be spent free and clear of the trust restrictions.²⁵⁵ As explained earlier, the Commonwealth Court failed to consider the Commonwealth's duties of prudence, loyalty, and impartiality, and used an inapt analogy to private trust law.

The Commonwealth Court's October 2020 decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth* (*PEDF V*) may mark a change in the court's approach to trust law. In that case, the court used traditional trust law to decide that the Commonwealth must conduct properly account for section 27 trust moneys in the lease fund. These accounting principles, moreover, are general trust law principles—like the duties of loyalty, prudence, and impartiality—and not private trust law principles. In that respect, this decision is a good step in the right direction.

G. The Commonwealth Court is directly addressing what sustainable development means, and not treating environmental protection and development as inherently antagonistic.

The court is using sustainable development to reconcile the fraught relationship between economic development and

²⁵⁴ See, e.g., *New Hanover Twp. v. Commonwealth*, Dep't of Env't Prot., EHB Docket No. 2018-072-L (Consolidated with 2018-075-L) (Apr. 24, 2020), at 72 (holding that DEP "failed to act with prudence and impartiality as the trustee of Pennsylvania's public natural resources.").

²⁵⁵ *PEDF III*, 214 A.3d 748, 773-74 (Pa. Commw. Ct. 2019).

environmental protection.²⁵⁶ The *Robinson Township* plurality invoked sustainable development for that purpose.²⁵⁷ There is no script or set of well-established rules for how to protect the environment and proceed with economic development in a modern industrial society. Quite plainly, as the Commonwealth Court well understands, environmental regulation is necessary to reduce the worst environmental and public health impacts and to help direct economic development to be more environmentally protective. One vision of what makes economic development compatible with environmental protection comes from *Frederick* and other zoning cases. In authorizing shale gas development in mixed agricultural and residential zoning districts, some townships and gas companies have argued successfully that these townships are protecting agricultural land by providing additional income to farmers, and that they are also limiting sprawl.²⁵⁸ Whatever might be said of this particular vision, the recent Commonwealth Court cases recognize the importance of using section 27 to foster sustainable development, instead of assuming, as the *Payne* court did, that section 27 as written is inconsistent with economic development.

IX. CONCLUSION

The Commonwealth Court decided a wide variety of section 27 cases in the first four years after the supreme court revitalized the Environmental Rights Amendment. Because of the uniqueness of section 27, and its recent re-emergence after decades of near dormancy, there is relatively little instructive precedent from Pennsylvania, from other states, or from the federal courts. The Commonwealth Court is looking at many issues for the first time. The issues—particularly the issue of reconciling economic development with environmental protection—are also hard. Still, the constitutional stature of section 27 provides an opportunity to supplement Pennsylvania’s environmental statutes and regulations

²⁵⁶ *Id.*

²⁵⁷ *Robinson Township v. Commonwealth*, 83 A.3d 901, 958 (Pa. 2013).

²⁵⁸ See, e.g., *Frederick v. Allegheny Twp.*, Zoning Hearing Bd. 196 A.3d 677 (Pa. Commw. Ct. 2018); *Protect PT v. Penn Twp.*, Zoning Hearing Bd., No. 576 C.D. 2019, 2020 WL 3639998, *5 (Pa. Commw. Ct. July 6, 2020).

to better protect human health and the environment. As the ill-fated *Payne v. Kassab* test informs us, the challenge for the Commonwealth Court is to build caselaw that honors the constitutional stature, text, and purpose of section 27—caselaw that will last.

APPENDIX

*Commonwealth Court Cases That Produced a Holding on
Article I, Section 27 (Sept. 2016-Sept. 2020)*

Reported Cases

Pa. Indep. Oil and Gas Ass'n. v. Pa. Dep't. of Env't Prot., 146 A.3d 820 (Pa. Commw. Ct. 2016), *aff'd*, 161 A.3d 949 (Pa. 2017).

UGI Utils., Inc. v. City of Reading, 179 A.3d 624 (Pa. Commw. Ct. 2017).

Del. Riverkeeper Network v. Sunoco Pipeline L.P., 179 A.3d 670 (Pa. Commw. Ct. 2018).

Marcellus Shale Coal. v. Dep't of Env't Prot., 193 A.3d 447 (Pa. Commw. Ct. 2018).

Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677 (Pa. Commw. Ct. 2018).

Pa. Env't Def. Found. v. Commonwealth, 214 A.3d 748 (Pa. Commw. Ct. 2019).

In re Andover Homeowners' Ass'n, Inc., 217 A.3d 906 (Pa. Commw. Ct. 2019).

Protect PT v. Penn Twp. Zoning Hearing Bd., 220 A.3d 1174 (Pa. Commw. Ct. 2019).

Unreported Cases

Del. Riverkeeper Network v. Pa. Dep't. of Env't Prot., 2018 WL 3554639 (Pa. Commw. Ct. 2018).

Protect PT v. Penn Twp. Zoning Hearing Bd., 2018 WL 5831186 (Pa. Commw. Ct. 2018).

Del. Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd., 2018 WL 3554639 (Pa. Commw. Ct. 2019).

City of Lancaster v. Pa. Pub. Util. Comm'n, 2020 WL 864986 (Pa. Commw. Ct. 2020).

Protect PT v. Penn Twp. Zoning Hearing Bd., 2020 WL 3639998 (Pa. Commw. Ct. 2020).

