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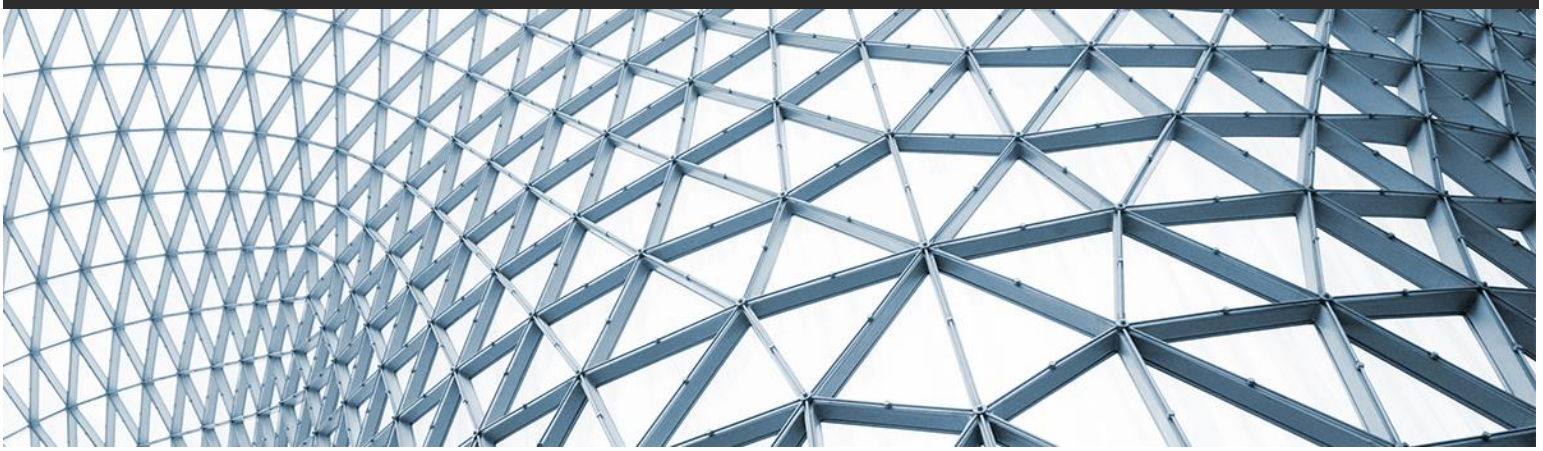
Staying in Lane Under the Environmental Rights Amendment



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By David G. Mandelbaum | December 20, 2018 | The Legal Intelligencer

The Commonwealth Court recently provided new guidance on the extent to which the Environmental Rights Amendment to the Pennsylvania Constitution gives municipalities or agencies additional powers or imposes on them additional obligations. *Frederick v. Allegheny Township Zoning Hearing Board*, No. 2295 C.D. 2015 (Pa. Commw. Ct. Oct. 26, 2018), holds that the amendment does not alter the authority of the ZHB or its procedures. See also *Protect PT v. Penn Township Zoning Hearing Board*, 39 C.D. 2018 (Pa. Commw. Ct. Nov. 8, 2018). On the other hand, the Environmental Hearing Board seems to have held previously that the amendment requires the Department of Environmental Protection (DEP) to engage in an environmental assessment of some sort before granting a permit.

As we have discussed in several prior columns, Article I, Section 27, of the constitution recognizes a right of "the people" to clean air, pure water and to the "preservation" of four "values" of the environment. It also establishes a public trust with all of the commonwealth's "public natural resources" as the corpus, the commonwealth as the trustee, and "all of the people, including generations yet to come" as the beneficiaries. The Supreme Court infused new life in that provision in two cases. First, a plurality of the court in holding that many provisions of the Oil and Gas Act Amendments of 2013 were unconstitutional opined that the prior 40 years of jurisprudence under Section 27 had failed to treat it as a constitutional provision against which statutes and executive actions would be tested, see *Robinson Township v. Public Utilities Commission*, 83 A.3d 901 (Pa. 2013). Then, a majority of the court adopted the *Robinson Township* plurality's reasoning in holding that disposition of the proceeds of oil and gas leases in state forests violated Section 27, see *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

In a portion of its opinion attempting to lay out what Section 27 requires, the *Robinson Township* plurality wrote: "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." That raises the question whether agencies and municipalities (assuming the Environmental Rights Amendment applies to them) may or must graft some sort of environmental assessment onto the procedures they use to make decisions under their authorizing legislation and regulations.

Some argue that the Supreme Court has clearly required government actors to conduct that assessment. But if no statute grants authority to the agency and no regulation establishes a predictable process for the agency to do so, then that assessment risks becoming a free-form, standardless exercise of discretion. Any decision—positive or negative—would be vulnerable to challenge without knowable criteria against which to test the decision's environmental assessment.

An alternative understanding of Section 27 would call for the commonwealth government as a whole to have considered environmental effects at some point, not every point. If the General Assembly properly assigned to the Department of Environmental Protection the task of assessing the environmental impacts of a new power plant, for example, then those same effects would not have to be reconsidered by, for example, the Department of Transportation approving road access, the Public Utilities Commission or the local municipality. That is, if agencies had no procedure or standards to consider environmental impacts that might not invalidate their decision-making. Each decision-maker could stay in its own lane, but the ultimate set of approvals would call upon the commonwealth as a whole to make an adequate pre-action assessment of the effects of a project on constitutionally protected values.

The first view of Section 27 must have some merit. After all, *Robinson Township* decided that the Oil and Gas Amendments unconstitutionally deprived municipalities to make individualized assessments of the environmental impacts posed by oil and gas development as required by Section 27. On the other hand, the second view must also have some merit. No one asks the Division of Motor Vehicles to consider the environmental impact of allowing me to re-register my fuel-inefficient automobile; indeed, I can conduct that transaction on line without engaging with any humans at the DMV.

Less facetiously, as I have suggested previously, denying a permit or approval, denying funding, or rejecting a bill is every bit as much a governmental "action" as the opposite. One would only want to use Section 27 to put a thumb on the scale against any action if one believed that all change were environmentally risky when compared to the status quo. To take just one set of issues, the recently released second volume of the Fourth National Climate Assessment received a great deal of press precisely because it opined that immediate action is necessary to avoid very significant adverse environmental effects. We require significant new infrastructure, among other things, to mitigate climate change and to adapt to its effects. So, inaction is, often riskier than action. Accordingly, one cannot seriously read Section 27 to impose a massive procedural hurdle to government action as every agency and every level of government conducts an independent pre-action assessment of effects on the constitutionally protected values.

The stay-in-lane reading of Section 27 would require agencies and municipalities to have authority under statute, ordinances or regulations to consider environmental effects, and to do so under discernible standards. *Frederick* involved a challenge to a local zoning ordinance by neighbors opposed to installation of a natural gas well. The municipality had amended its zoning ordinance to allow oil and gas activity in every zone as of right, subject to certain conditions. The use required a "zoning compliance permit," the issuance of which apparently provided objectors an opportunity to appeal to the zoning hearing board for an evidentiary hearing. Thus, the zoning compliance permit had some features of a conventional special exception, but was granted administratively before the hearing.

The conditions imposed by the ordinance generally tracked those imposed by the Oil and Gas Amendments invalidated by *Robinson Township*. The zoning officer made no independent assessment of the overall assessment of the environmental effects of oil and gas activity generally or of the applicant's individual well.

The Commonwealth Court held that this ordinance did not facially violate Section 27. The court ruled that Environmental Rights Amendment did not require the township to have made an assessment of the environmental impacts of allowing oil and gas development in every zone, nor an individualized an assessment of the particular applicant's land use. The court observed that nothing obligates a township to have zoning at all. Therefore, the constitution cannot impose an environmental assessment precondition to the adoption of what ordinance the township does adopt. Moreover, the Department of Environmental Protection regulates the environmental impacts of oil and gas activities. Indeed, under the surviving pre-emption provision of the Oil and Gas Act, 58 Pa. Cons. Stat. Section 3302, the municipality may only regulate "where" that activity takes place, not "how" it occurs, see *Huntley & Huntley v. Borough Council of Borough of Oakmont*, 964 A.2d 855 (Pa. 2009).

This ruling contrasts with the analysis that the Environmental Hearing Board appears to have employed in *Center for Coalfield Justice v. Department of Environmental Protection*, EHB Dkt. No. 2014-072-B (Aug. 15, 2017). The EHB evaluated DEP's grants of permits for coal mining on the assumption that any permit must be preceded by a pre-action environmental assessment. See also *Friends of Lackawanna v. Department of Environmental Protection*, EHB Dkt. No. 2015-063-L (Nov. 8, 2017).

Section 27 is a constitutional provision. We cannot know what it truly requires until the courts speak. Courts decide cases one at a time on specific facts. Many of the cases right now seem to arise in the context of oil and gas development which is just not the same as, say, road, or power plant, or industrial facility construction, urban redevelopment, or any of the other myriad sorts of public and private activities to which a "pre-action assessment" might apply. Nevertheless, *Frederick* stands for the proposition that a majority of the Commonwealth Court believes that at least sometimes agencies and municipalities may stay in their lanes.

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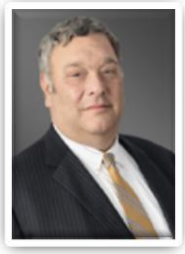

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