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PENNSYLVANIA'S SELF-EXECUTING ENVIRONMENTAL AMENDMENT: A VIEW OF THE BATTLE OF GETTYSBURG

The environmental amendment to the Pennsylvania Constitution, article I, section 27, passed by the General Assembly and ratified by the voters on May 18, 1971, 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.¹

Shortly after passage of the amendment, the Commonwealth sought a permanent injunction to prevent construction of a proposed 307-foot observation tower near the Gettysburg Battlefield,² alleging that the tower would despoil Gettysburg's "natural and historic" environment in violation of the amendment.³ After making detailed findings concerning the location and characteristics of the tower and the adjacent park, the chancellor concluded that the amendment was self-executing⁴ as it provided a sufficient rule by

1. PA. CONST. art. 1, § 27.

2. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams Co. L.J. 75 (C.P. 1971), *aff'd*, 8 Pa. Commw. 231, 302 A.2d 886, *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973):

[T]he proposed tower is a metal structure rising over 300 feet above the ground. It is shaped like an hourglass: about 100 feet in diameter at the bottom, 30 feet in the middle and 70 feet at the top. The top level will include an observation deck, elevator housings, facilities for warning approaching aircraft and an illuminated American flag. The proposed site of the tower is an area near which the third day of the battle of Gettysburg was fought.

The site is immediately south of the Gettysburg National Cemetery.

454 Pa. at, 311 A.2d at 597 (Jones, C.J., & Eagan, J., dissenting).

3. "[I]n the words of one critic: '[t]he tower as proposed . . . would disrupt the skyline, dominate the setting from many angles, and still further erode the natural beauty and setting which was once marked by the awful conflict of a brothers' war.'" *Id.* at, 311 A.2d at 590 (quoting testimony of Dr. Milton E. Flowers, Professor of Political Science, Dickinson College; Member Board of Directors, Cumberland County Historical Society).

4. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams Co. L.J. 75, 80 (C.P. 1971).

which the right given might be enjoyed and the duty imposed enforced. He found, however, that the Commonwealth had failed to show by clear and convincing proof that the tower would injure the "natural, scenic, historic, or aesthetic values" of Gettysburg.⁵

In *Commonwealth v. National Gettysburg Tower, Inc.*⁶ the Supreme Court of Pennsylvania affirmed the factual findings of the chancellor but did not conclude whether the amendment was self-executing.⁷ The issue presented to the supreme court in *Gettysburg Tower* was whether the environmental amendment is "intended only to espouse a policy undisposed to enforcement without supplementing legislation," or whether the amendment, in effect, established "the common law public trust doctrine⁸ as a constitutional right to environmental protection susceptible to enforcement by an action in equity."⁹

In support of the contention that the amendment is self-executing, the Commonwealth argued that its provisions are part of article I, which is entitled "Declaration of Rights," and that no section of article I had been judicially declared not to be self-executing.¹⁰ The

5. *Id.* at 86-87.

6. 454 Pa. 193, 311 A.2d 588 (1973).

7. Three opinions were filed with two justices joining in each: the opinion of the court (plurality opinion), a concurrence, and a dissent. The remaining justice concurred only in the result.

8. A public trust is defined as a right of property, real or personal, held by one party for the benefit of the public at large or of some considerable portion thereof. *Goodwin v. McMinn*, 193 Pa. 646, 44 A. 1094 (1899); *accord*, *Boyce v. Mosely*, 102 S.C. 361, 86 S.E. 771 (1915); *see Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). Public trusts and charitable trusts may be considered synonymous expressions. *Bauer v. Meyers*, 244 F. 902, 911 (8th Cir. 1917). Public and charitable trusts differ from private trusts in that their beneficiaries are uncertain and their duration is or may be perpetual. *Id.* at 912. For purposes of this Comment, the corpus of the public's trust comprises certain natural resources and the scenic, natural, historic, and aesthetic values of the environment entrusted to a sovereign or state for the benefit of its subjects or people. *See also Note, The Public Trust in Public Waterways*, 7 URBAN L. ANN. 219 (1974).

9. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, , 311 A.2d 588, 596 (1973) (Jones, C.J., & Eagan, J., dissenting). The four members of the court who expressed views on the self-execution question were equally divided. The remaining three justices expressed no opinion on this question but supported affirmance on other grounds. *See Payne v. Kassab*, 11 Pa. Commw. 14, 28 n.2, 312 A.2d 86, 94 n.2 (1973).

10. 454 Pa. at , 311 A.2d at 591. The general principles of law applied in determining whether a particular provision of a constitution is self-executing are discussed at length in *O'Neill v. White*, 343 Pa. 96, 22 A.2d 25 (1941):

A Constitution is primarily a declaration of principles of the fundamental

court noted that, unlike the first twenty-six sections of article I, the twenty-seventh was more than a mere limitation on the powers of government.¹¹ The first sentence, which states that “[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment,”¹² can be interpreted to limit governmental interference with the people’s right to preservation and maintenance of the Commonwealth’s public natural resources. Hence, the first part of section 27, standing alone, could be read as self-executing.¹³ The court, however, found that the remaining provisions of section 27 expand rather than limit the powers of government:

These provisions declare that the Commonwealth is the “trustee” of Pennsylvania’s “public natural resources” and they give the Commonwealth the power to act “to conserve and maintain them for the benefit of all the people.” Insofar as the Commonwealth always had a recognized police power to regulate the use of land, and thus could establish standards for clean air and clean water consistent with the requirements of public health, § 27 is merely a general reaffirmation of past law.¹⁴

Finally, the court rejected the Commonwealth’s argument because the Commonwealth failed to cite any instance in which a constitutional provision expanding the powers of government was found to be self-executing.¹⁵

The Commonwealth’s second argument for a self-executing construction contrasted the environmental protection amendment’s pro-

law. Its provisions are usually only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws, yet it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing.

Id. at 99-100, 22 A.2d at 26-27, quoting 6 R.C.L. § 52, at 57. A constitutional provision, complete in itself, needs no further legislation to put it in into force. Thus a constitutional provision is self-executing only so far as it is susceptible of execution. *Davis v. Burke*, 179 U.S. 399, 403 (1900); T. COOLEY, CONSTITUTIONAL LIMITATIONS 165 (8th ed. W. Carrington 1927).

11. 454 Pa. at, 311 A.2d at 592.

12. PA. CONST. art. I, § 27.

13. 454 Pa. at, 311 A.2d at 592.

14. *Id.*

15. *Id.*

visions with similar provisions enacted in Massachusetts,¹⁶ Illinois,¹⁷ New York,¹⁸ and Virginia.¹⁹ The Commonwealth emphasized that

16. The People shall have a right to clean air, pure water, freedom from excessive and unnecessary noise and the scenic, historic, and aesthetic qualities of their environment and the protection of the people in their rights to conservation, development and utilization of the agricultural, mineral, forest, water, air, and other natural resources is hereby declared to be a public purpose. The general court [legislature] shall have the power to enact legislation necessary or expedient to protect such right. . . .

Mass. H.B. 3875. A majority of the members of the Senate and House of Representatives adopted the bill in joint session, August 5, 1969.

17. § 1. Public Policy—Legislative Responsibility

The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide for the implementation and enforcement of this public policy.

§ 2. Rights of Individuals

Each person has a right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation as the General Assembly may provide by law.

ILL. CONST. art. XI §§ 1-2.

Article XI, section 1 of the Illinois Constitution expresses a public policy that requires implementation and enforcement by the General Assembly. In stating that it is "[t]he public policy of the State and duty of each person . . . [to] maintain a healthful environment . . .," the drafters of the constitution apparently intended to create an environmental right that would give citizens standing to challenge any governmental act—and conceivably any private act—that degrades the quality of the environment. 6TH ILLINOIS CONSTITUTIONAL CONVENTION, GENERAL GOV'T COMM. *Proposal No. 16*, at 5 (July 1, 1970). The enunciation of this right, however, is coupled with an explicit declaration of a person's standing to enforce the right. Hence, it is not clear what legal effect the Illinois drafters might have thought the statement of right, standing by itself, would have had. See Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 197 (1972) [hereinafter cited as Howard].

18. The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, . . . which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive . . . sessions of the legislature.

N.Y. CONST. art. XIV, § 4.

This provision of the New York Constitution imposes a restraint on the disposition of public trust property. Such restraints on legislative power lend themselves to judicial enforcement because they are as susceptible to judicial application as any other constitutional restraint. Enforcement is even easier when the re-

Pennsylvania's amendment is the only one that does not specifically provide for legislative implementation.²⁰ Rejecting this argument,

straint on legislative power provides some explicit standard—in this case action by two successive regular sessions of the legislature. *See* Howard, *supra* note 17, at 202.

19. § 1. Natural resources and historical sites of the Commonwealth.—To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

§ 2. Conservation and development of natural resources and historical sites.—In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations. Notwithstanding the time limitations of the provisions of Article X, Section 7, of this Constitution, the Commonwealth may participate for any period of years in the cost of projects which shall be the subject of a joint undertaking between the Commonwealth and any agency of the United States or of other states.

VA. CONST. art. XI, §§ 1-2.

For a discussion of the thesis that Article XI of the revised Virginia Constitution is more than an exhortation of public policy and constitutes an affirmative mandate to state and local agencies to consider the environmental effects of all their decisions see Howard, *supra* note 17, at 208:

As a formal statement of the public policy . . . , section 1 of article XI requires no implementing legislation. . . . Section 1's self-executing quality is recognized by section 2 which, in authorizing the Assembly to act, says that legislation is to be "in the furtherance of such policy"—policy already in existence by virtue of section 1. An enunciation of public policy, unlike a rule of conduct laid down by legislation, is not aimed at the private citizen and imposes no duty on him. Rather, it is a mandate for and a restraint on governmental activity. Section 1 of article XI is, thus, self-executing not with regard to the public at large but with regard to those entities which are constitutionally bound by public policy, namely the government, its courts, and its agencies. In addition, article XI is not self-executing with respect to obligating the General Assembly to enact environmental legislation.

(Footnotes omitted.)

Unlike article I, section 27 of the Pennsylvania Constitution, article XI, sections 1 and 2 of the Virginia Constitution, do not make explicit reference to the public trust doctrine nor do they specifically create a public right to environmental protection. No Virginia court has yet ruled on the question whether article XI creates substantive rights enforceable by private individuals. *See* *River v. Richmond Metropolitan Authority*, 359 F. Supp. 611, 623 (E.D. Va. 1973), in which a federal district court refused to exercise pendent jurisdiction over a claim that alleged violation of article XI of the Virginia Constitution.

20. The highest courts of Illinois and Virginia have not ruled on the self-

the court found it of greater significance that those states recognized the necessity for legislative implementation before a new, constitutionally created governmental power could be exercised.²¹

Having thus disposed of the Commonwealth's arguments, the court discussed further objections to enforcing the provisions of the amendment without additional legislation. The court considered possible due process and equal protection objections should the governor single out alleged violators of the public trust who were without notice that their conduct might lead to prosecution. "[A] property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property."²² Should an owner contemplate a use similar to others who were not enjoined under the public trust doctrine, no guarantee would exist that the Commonwealth would not seek to enjoin his use. Accordingly, the court would require the Pennsylvania General Assembly to set standards and procedures for executive action.²³

The dissenting justices, maintaining that section 27 is self-executing, would have enjoined construction of the proposed tower.²⁴ Viewing the facts in the light most favorable to the appellee-land owners, they concluded that the proposed structure would undoubtedly do violence to the "natural, scenic, historic and esthetic values" of Gettysburg. The dissent argued that "[a]s part of the declaration of rights embraced by Article I, the amendment confers certain enumerated rights upon the people of the Commonwealth and imposes upon the executive branch a fiduciary obligation to protect and enforce those rights."²⁵ Focusing on the language of the amendment, the dissenters declared that it creates a public trust:

The "natural, scenic, historic and aesthetic [*sic*] values of the environment" are the trust *res*; the Commonwealth, through its

execution question. See notes 17 & 19 *supra*. See generally T. COOLEY, *supra* note 10; Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968); HOWARD, *supra* note 17.

Additional states have recently added environmental provisions to their constitutions or adopted amendments thereto. See FLA. CONST. art II, § 7; MICH. CONST. art IV, § 52; R.I. CONST. art I, § 17.

21. 454 Pa. at, 311 A.2d at 594. See notes 17-19 *supra*. Both the Commonwealth's argument and the court's finding proceed from unsupported assertions.

22. 454 Pa. at, 311 A.2d at 593.

23. *Id.* at, 311 A.2d at 594.

24. *Id.* at, 311 A.2d at 599 (Jones, C.J., & Eagan, J., dissenting).

25. *Id.* at, 311 A.2d at 596.

executive branch, is the trustee; the *people of this Commonwealth* are the trust beneficiaries. The amendment thus installs the common law public trust doctrine as a constitutional right to environmental protection susceptible to enforcement by an action in equity.²⁶

The dissent found no merit in the court's reliance on constitutional amendments of other states,²⁷ which contain obvious textual differences from the Pennsylvania amendment.²⁸ Moreover, the dissent undoubtedly perceived that prior to the amendment the General Assembly had the power to abrogate the common law public trust doctrine. Thus the dissent's construction of the amendment would effectively withdraw the General Assembly's power to act in derogation of the common law public trust doctrine.

The dissent next faced what it believed to be the ultimate issue: whether the proposed tower "violate[d] the rights of the people of the Commonwealth as secured by the amendment."²⁹ Reviewing the chancellor's conclusions of fact,³⁰ the dissent was convinced by the testimony of the Commonwealth's expert witnesses that the proposed tower would do violence to the Gettysburg environment.³¹

The concurring opinion pointed out that the Commonwealth has always had the authority to proceed, either as *parens patriae* at common law or as trustee of the state's public resources, to protect the

26. *Id.*

27. See notes 16-21 and accompanying text *supra*.

28. 454 Pa. at, 311 A.2d at 597 (Jones, C.J., & Eagan, J., dissenting).

29. *Id.*

30. The dissent believed that application of the "abuse of discretion" standard for review of a trial court's findings of fact was inappropriate and drew their own inferences. *Id.* The Supreme Court of Pennsylvania "has held on numerous occasions that, although a chancellor's findings of fact have the force and effect of a jury's verdict, the chancellor's conclusions of ultimate fact are reviewable." *Id.*, citing *Shapiro v. Shapiro*, 424 Pa. 120, 224 A.2d 164 (1966); *Chambers v. Chambers*, 406 Pa. 50, 176 A.2d 673 (1962); *Sechler v. Sechler*, 403 Pa. 1, 169 A.2d 78 (1961); *Commonwealth Trust Co. v. Szabo*, 391 Pa. 272, 138 A.2d 85 (1958); *Peters v. Machikas*, 378 Pa. 52, 105 A.2d 708 (1954).

31. The Commonwealth presented testimony by George Hartzog, Director of the National Park Service, who appeared in place of the United States Secretary of the Interior, Robert Garvey, Executive Secretary of the President's Advisory Council on Historic Preservation, Louis Kahn, a distinguished architect and Professor of Architecture at the University of Pennsylvania, Vincent Kling, a noted Philadelphia architect, and Bruce Catton, Pulitzer prize-winning Civil War historian, among others. 454 Pa. at, 311 A.2d at 597-99 (Jones, C.J., & Eagan, J., dissenting).

interests of its citizens.³² The Commonwealth, as sovereign, has an interest in all earth and air within its boundaries.³³ The sovereign's interest underlies and is independent of that of its citizens.³⁴ This interest, not based on the police power, allows for protection of "parklands and historical sites"³⁵ as the common property of the citizenry. Moreover, if the health and comfort of the state's inhabitants are threatened, the state is the proper party to represent and defend them.³⁶ Therefore, the concurring justices did not decide whether section 27 is self-executing. Nevertheless, the concurrence agreed with the lower courts' conclusion that the Commonwealth had "failed to establish its entitlement to equitable relief either on common-law or constitutional . . . theories."³⁷ The concurrence agreed that the case raised serious constitutional problems regarding the propriety of granting relief absent "appropriate and articulated substantive and procedural standards"³⁸ for executive action.

Because a majority of the court failed to answer the self-execution question, the intermediate commonwealth court's opinion, which did

32. *Id.* at, 311 A.2d at 595-96 (Roberts & Manderino, JJ., concurring).

33. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

34. Pennsylvania courts have taken inconsistent positions on whether land in the Commonwealth is held allodially or tenurially. *Compare Wallace v. Harmstad*, 44 Pa. 492, 501 (1863), *with Citizens' Electric Co. v. Susquehanna Boom Co.*, 270 Pa. 517, 113 A. 559 (1921), *and Carson v. Blazer*, 2 Binn. 475 (Pa. 1810). *See also Stuart v. Easton*, 170 U.S. 383 (1898), *aff'g 74 F. 854* (1896); PA. STAT. ANN. 64 § 1 (1959). The concurrence's argument is based on the existence of a common law public trust held by the Commonwealth. *See, e.g., Citizens' Electric Co. v. Susquehanna Boom Co.*, 270 Pa. 517, 113 A. 559 (1921); *Black v. American Int'l Corp.*, 264 Pa. 260, 107 A. 737 (1919); *Freeland v. Pennsylvania R.R.*, 197 Pa. 529 (1901); *Palmer v. Farrell*, 129 Pa. 162 (1889); *Fursell v. Stover*, 110 Pa. 43 (1885). Common law public trust theory is based on the concept of tenure, the Commonwealth having succeeded to the Crown's proprietary rights as overlord. *See Morris v. United States*, 174 U.S. 196, 226 (1899); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Citizens' Electric Co. v. Susquehanna Boom Co.*, 270 Pa. 517, 113 A. 559 (1921).

35. 454 Pa. at, 311 A.2d at 595 (Roberts & Manderino, JJ., concurring); *see Snyder v. Board of Park Comm'rs*, 125 Ohio St. 336, 339, 181 N.E. 483, 484 (1932).

36. 454 Pa. at, 311 A.2d at 595; *accord, Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

37. 454 Pa. at, 311 A.2d at 596 (Roberts & Manderino, JJ., concurring).

38. *Id.*; *see Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

hold Section 27 to be self-executing,³⁹ remains authoritative Pennsylvania precedent on this point. Assuming, arguendo, that section 27 is self-executing, *Gettysburg Tower* raises several subsidiary questions regarding the amendment's effect. One such question is whether the people, as beneficiaries of the public trust (as well as the Commonwealth as trustee), have standing to sue pursuant to the amendment's mandates.

The opinion of the common pleas court in *Gettysburg Tower* expresses the common law rule that, absent statutory authority to the contrary or a special interest of a private party, only the attorney general has the power to enforce a public trust.⁴⁰ A person having no special interest in the performance of a public trust cannot maintain a proceeding, by mandamus or otherwise, to compel the attorney general to bring an action to enforce the trust.⁴¹ In cases decided by the commonwealth court after *Gettysburg Tower*, however, private parties alleging public trust infringements under section 27 have maintained suit against state agencies without demonstrating a special interest in enforcement of the trust.⁴² These cases provide precedent for allowing all beneficiaries of the constitutionally created public trust to sue a Commonwealth agency for injury to "public natural resources" or "environmental values" caused by the agency's breach of its fiduciary duty to conserve and maintain these resources and values. This result is in line with what appears to have been the intent of the drafters of the environmental amendment.⁴³

39. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 243, 302 A.2d 886, 892 (1973); cf. T. COOLEY, *supra* note 10, at 116 n.1. Notwithstanding the supreme court's plurality opinion, the commonwealth court has cited its own *Gettysburg Tower* opinion in subsequent decisions construing section 27. *Bucks County Bd. of Comm'rs v. Commonwealth*, 11 Pa. Commw. 487, 313 A.2d 185 (1973); *Payne v. Kassab*, 11 Pa. Commw. 14, 312 A.2d 86 (1973). The commonwealth court's self-executing construction thus limits the high court's decision in *Gettysburg Tower* to its facts.

40. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams Co. L.J. 75, 80 (C.P. 1971). Suit may be brought by the attorney general on his own initiative or it may be brought by him on the relation of a third party. See Note, *The Public Trust in Public Waterways*, *supra* note 8, at 236-37.

41. *Ames v. Attorney General*, 332 Mass. 246, 124 N.E.2d 511 (1955); see A. SCOTT, *THE LAW OF TRUSTS* 2760 (1954).

42. *Bucks County Bd. of Comm'rs v. Commonwealth*, 11 Pa. Commw. 487, 313 A.2d 185 (1973); *Payne v. Kassab*, 11 Pa. Commw. 14, 312 A.2d 86 (1973).

43. See Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. B.A.Q. 421 (1970).

Assuming that all beneficiaries of the public trust have standing to seek relief, judicial intervention can only be effective if standards and procedures are developed to give content to this constitutionally protected right. The commonwealth court has held that section 27 was intended not only to affix a public trust concept to the management of public natural resources but also to allow normal development of private property in the state.⁴⁴ Rather than no development, the court's mandate calls for controlled development of natural resources. In implementing its holding, the commonwealth court has delineated the proper scope of judicial review for determining what human activity impairs the "natural, scenic, historic and esthetic values of the environment." The court has recognized: "[D]ecision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources."⁴⁵ To balance social and environmental concerns, the court has proposed a threefold test:

- 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 derived therefrom that to proceed further would be an abuse of discretion?⁴⁶

Because this test provides only general standards, an evaluation of its efficacy must await judicial refinement.

Even if questions of standing and appropriate standards are judicially resolved, the problem of allocating the trusteeship responsibilities imposed by the amendment remains. It is elementary that Pennsylvania administrative agencies, counties, and municipalities may not subvert the intent of section 27. Must they, however, take

44. *Payne v. Kassab*, 11 Pa. Commw. 14, 29, 312 A.2d 86, 94 (1973).

45. *Bucks County Bd. of Comm'rs v. Commonwealth*, 11 Pa. Commw. 487, 498-99, 313 A.2d 185, 191 (1973); *Payne v. Kassab*, 11 Pa. Commw. 14, 29, 312 A.2d 86, 94 (1973).

46. *Payne v. Kassab*, 11 Pa. Commw. 14, 29-30, 312 A.2d 86, 94 (1973).

affirmative steps to implement the amendment? This question is of special importance to governmental planners.

Municipalities and counties already have many planning responsibilities. Pursuant to the Pennsylvania Municipalities Planning Code,⁴⁷ a county or municipal planning agency "shall at the request of its governing body have the power and shall be required to . . . prepare a comprehensive plan. . . ."⁴⁸ Municipalities have the power to adopt official maps,⁴⁹ land development and subdivision ordinances,⁵⁰ zoning ordinances,⁵¹ or planned residential development ordinances.⁵² Counties may also by reference adopt county subdivision and land development,⁵³ zoning,⁵⁴ or planned unit residential development ordinances.⁵⁵ In addition, the Sewage Facilities Act⁵⁶ requires every municipality to submit to the Department of Environmental Resources of the Commonwealth an officially adopted plan for sewage treatment.⁵⁷ Imposition of a section 27 duty upon counties and municipalities, however, would significantly expand their planning responsibilities. Under the amendment, private parties, the Commonwealth, and perhaps even state instrumentalities or political subdivisions, would have standing to challenge municipal or county action that is inconsistent with sewage facilities or comprehensive plans, or that fails to consider actual or potential injury to the "public natural resources" or "environmental values" of the Commonwealth.

47. PA. STAT. ANN. tit. 53, §§ 10101-11202 (1972).

48. *Id.* § 10209.1.

49. *Id.* § 10401.

50. *Id.* § 10501.

51. *Id.* § 10601.

52. *Id.* § 10702.

53. *Id.* § 10502 (Supp. 1973).

54. *Id.* § 10602.

55. *Id.* § 10702.

56. PA. STAT. ANN. tit. 35, §§ 750.1-.15 (Supp. 1973).

57. *Id.* § 750.5(a) The Department is authorized to approve or disapprove this plan or revisions thereto. *Id.* § 750.5(e). Except for the Department's "veto power" over sewage facility plans, planning requirements in the Municipalities Planning Code and the Sewage Facilities Act are generally procedural in nature and demand only that conformity be attempted between official plans and ordinances adopted to implement these plans. *See id.* § 750.5(d)(7); PA. STAT. ANN. tit. 53, §§ 10402, 10503, 10606 (1972). Actual conformity between plans and ordinances is not required unless the ordinance expressly commands conformity. *But see* PA. STAT. ANN. tit. 53, § 10703 (1972).

A similar situation would result from imposition of planning duties upon Commonwealth administrative agencies. These duties would certainly entail comprehensive environmental trusteeship. The Department of Environmental Resources of Pennsylvania is primarily responsible for conserving and maintaining the public natural resources and environmental values of the Commonwealth.⁵⁸ It has the power and duty to adopt rules and regulations,⁵⁹ to approve facilities requiring Commonwealth permits,⁶⁰ to abate nuisances,⁶¹ and to prescribe penalties for violators of several Commonwealth statutes.⁶² The Environmental Hearing Board of the Department of Environmental Resources⁶³ has construed section 27 to require the Department to act affirmatively beyond statutory requirements to protect the environment for the present and the future. The Hearing Board further held that the amendment's concern with the future demands careful and thorough planning today.⁶⁴ Although the Hearing Board has not required full-scale environmental impact statements, such as those submitted under the federal National Environmental Policy Act,⁶⁵ it has indicated that elements of these statements would be helpful to the Department in fulfilling its role as trustee.⁶⁶ More specifically, the Hearing Board has held that "any planning process that does not give serious consideration to (a) alternative methods of using the resources in question, and (b) alternative methods of attaining the objective sought by the permit applicant, does not constitute an exercise of reasonable care."⁶⁷ However vague its present guidelines may be, the Hearing Board may well require the Department to meet its planning obligations

58. See PA. STAT. ANN. tit. 71, §§ 510-1 to -108 (Supp. 1974).

59. *Id.* §§ 510-20(b), (c), (f), (g) (power given to Environmental Quality Board).

60. *E.g., id.* § 510-18 (power to issue waterworks permits).

61. *Id.* § 510-17.

62. See *id.* § 510-1.

63. *Commonwealth v. Fox*, Docket No. 73-078, PA. ENVIRONMENTAL HEARING Bd. (June 12, 1973).

64. *Id.*

65. 42 U.S.C. §§ 4321, 4331-35 (1970).

66. *Commonwealth v. Fox*, Docket No. 73-078, PA. ENVIRONMENTAL HEARING Bd. 4 (June 12, 1973).

67. *Id.* at 5.

by procedures similar to filing detailed environmental impact statements.⁶⁸

Analogous results may be found in future orders of the commonwealth court directed at other state agencies. To fulfill their duties under section 27, all Commonwealth agencies might require permit or license applicants to collect the information necessary to assess environmental impacts.⁶⁹ Whether this requirement would prove too burdensome and costly for permit applicants is a practical problem that must be considered by judicial bodies before reading a planning requirement into the environmental amendment. If impact statement costs become a significant percentage of total project costs, environmental planning may succumb to competing social and economic demands. High economic costs notwithstanding, Commonwealth agencies have authority to order permit applicants to meet reasonable information collection requirements.⁷⁰ Such requirements appear economically feasible and are necessary to effectuate the mandates of the environmental amendment.

In conclusion, *Gettysburg Tower* leaves the meaning of article I, section 27 of the Pennsylvania Constitution unclear. Until the supreme court rules otherwise, section 27 remains the only environmental amendment to a state constitution that has been held self-executing. The implications of this holding present both a challenge and an opportunity for judicial ingenuity. Through creative constitutional interpretation, the Pennsylvania courts can set a useful example for "conserving and maintaining" the quality of the environment.

Bertram C. Frey

68 The National Environmental Policy Act, 42 U.S.C. § 4332(2)(c)(i) (1970), requires that all agencies of the federal government must file a detailed statement on the environmental impact of any proposed "major" federal action.

69. *Bucks County Bd. of Comm'rs v. Commonwealth*, 11 Pa. Commw. 487, 313 A.2d 185 (1973); *Payne v. Kassab*, 11 Pa. Commw. 14, 312 A.2d 86 (1973); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 302 A.2d 886, *aff'd*, 454 Pa. 193, 311 A.2d 588 (1973). To obtain permits under the Clean Streams Law, PA. STAT. ANN. tit. 35, §§ 691.1-1001 (1964), and the Sewage Facilities Act, PA. STAT. ANN. tit. 35, §§ 750.1-15 (Supp. 1973), for example, the Department of Environmental Resources requires applicants to submit detailed technical information. To comply with permit application regulations promulgated by the Department, applicants usually must hire several engineers or environmental experts.

70. *Cf. Commonwealth v. Fox*, Docket No. 73-078, PA. ENVIRONMENTAL HEARING Bd. 4 (June 12, 1973).

