

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOLORES FREDERICK, PATRICIA :
HAGAMAN, AND BEVERLY :
TAYLOR, :
Appellants :
v. : No. 2295 CD 2015
ALLEGHENY TOWNSHIP ZONING :
HEARING BOARD, et al., :
Appellees :

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE*
CLEAN AIR COUNCIL AND
CITIZENS FOR PENNSYLVANIA'S FUTURE

George Jugovic, Jr.
Citizens for Pennsylvania's Future
PA ID No. 39586
200 First Avenue, Suite 200
Pittsburgh, PA 15219
412-456-2785
jugovic@pennfuture.org

Joseph Otis Minott, Esq.
Clean Air Council
PA ID No. 36463
Alex Bomstein
PA ID No. 206983
135 South 19th Street, Suite 300
Philadelphia, PA 19103
215-567-4004
joe_minott@cleanair.org
abomstein@cleanair.org

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INTERESTS OF AMICUS CURIAE

Clean Air Council (Council) and Citizens for Pennsylvania's Future (PennFuture) previously filed an amicus brief in support of Appellants in this matter. In that brief, Council and PennFuture explained their interest in the outcome of this litigation. Council and PennFuture incorporate by reference that Statement of Interest. The Council and PennFuture have a specific interest in ensuring that local governments fulfill their constitutional obligations under Article I, Section 27 of the Pennsylvania Constitution. PennFuture has pending before the Pennsylvania Supreme Court a matter, *Gorsline et al. v. Bd. of Spv. of Fairfield Twp.* 67 MAP 2016, in which it represents citizens who allege that local municipal zoning for shale gas development violated citizens' constitutional rights, including Article I, Section 27 rights. The Council also has a matter pending before the Supreme Court, *Delaware Riverkeeper et al. v. Middlesex Twp. Zoning Hearing Board*, 270 WAL 2017, in which Plaintiffs allege that they have been unconstitutionally harmed by municipal zoning for shale gas development. As a result, the Council and PennFuture have a substantial interest in this Court's consideration of Allegheny Township's ordinance and the Supreme Court's decisions in *Robinson Township*, 83 A.3d 901 (Pa. 2013) and *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

SUMMARY OF ARGUMENT

The Supreme Court's decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*) affects this Court's analysis of Appellants' Article I, Section 27 arguments. The Supreme Court's *PEDF* decision threw out the continued use of the three-part test used to measure government conduct under Article I, Section 27, thereby negating a substantial argument relied on by Appellees to support their position in this case. The Supreme Court's *PEDF* decision substituted the rationale articulated by the plurality opinion in *Robinson Township* for deciding whether government decisions comply with Article I, Section 27. *PEDF*, then, made the plurality opinion in *Robinson Township* into binding precedent. In adjudicating Appellants' claims that Allegheny Township violated Article I, Section 27, this Court must apply the test enunciated by the Supreme Court's plurality in *Robinson Township*. In doing so, this Court must conclude that Allegheny Township's zoning ordinance violates Article I, Section 27 of the Pennsylvania Constitution.

ARGUMENT

1. Introduction

The Council and PennFuture filed an amicus brief earlier in this case that explained why Allegheny Township's industrial-shale-gas-development-everywhere ordinance violates the substantive due process rights of citizens. We now use this opportunity to respond to the Court's inquiry to discuss the effect of the Supreme Court's decision in *PEDF* on this case.

In *PEDF*, Petitioner challenged a series of oil and gas leasing and funding decisions by the Governor and the General Assembly under Article I, Section 27 of the Pennsylvania Constitution. Article I, Section 27 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.

Pa. Const. art. I, § 27. Petitioner argued that Article I, Section 27 imposed limits on the government's authority to use revenue, generated by the sale of public trust resources, for purposes that did not further the purposes of the public trust established under Article I, Section 27. In making this argument, Petitioner substantially relied on the Supreme Court's plurality opinion in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (*Robinson Township*).

In *Robinson Township*, a majority of the Supreme Court decided that three separate provisions of Act 13 of 2012 were unconstitutional. A plurality based their decision on Article I, Section 27. *Id.* at 974-85. Justice Baer based his concurring opinion on substantive due process. *Id.* at 1101. Both the plurality and concurring opinions concluded, for different reasons, that the General Assembly's decision to allow industrial shale gas development across all zoned districts within a municipality that had exercised its authority to zone, unconstitutionally infringed on the fundamental rights of citizens guaranteed under Article I of the Constitution.

Like *Robinson Township*, *PEDF* involved a claim that the government's conduct was unconstitutional in that it violated citizens' fundamental rights guaranteed by Article I, Section 27. As the plurality in *Robinson Township* pointed out, Pennsylvania courts had not previously addressed this limiting aspect of Article I, Section 27:

For the most part, to date, the promise of the Environmental Rights Amendment to protect and conserve the quality of our environment has been realized via legislative enactments and executive agency action. The question of how Article I, Section 27 obligations restrain the exercise of police power by the government (e.g., to regulate an industry), although a significant matter, has not presented itself for judicial resolution and *this Court has had no opportunity to address the original understanding of the constitutional provision in this context until now.* (emphasis supplied).

83 A.3d at 963-64.

It is critical that this Court recognize that this same principle is at play in the instant matter. Appellants argue that Allegheny Township's ordinance, which allows industrial shale gas development across all zoned districts as a matter of right, is unconstitutional under Article I, Section 27. This argument is based on the premise that Article I, Section 27 not only affirmatively guarantees the public a right to clean air and pure water, but it limits the government's authority to infringe upon those rights. In order to adjudicate Appellants' claim, then, this Court must use the analysis adopted by the Supreme Court in *PEDF* from *Robinson Township*.

2. *PEDF* rejected use of the three-part test on which Allegheny Township relies to assert that its ordinance is not unconstitutional.

In *Robinson*, the plurality opinion heavily criticized the constitutional test announced in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. 1973), *aff'd* 361 A.2d 263 (Pa. 1976). This Court continued using the *Payne* test to adjudicate rights under Article I, Section 27 because *Robinson Township's* plurality was not binding precedent. That changed with *PEDF's* adoption of the plurality opinion in *Robinson Township*, which is now binding precedent on this Court.

In *Payne*, this Court articulated a three-part test to be used when a citizen raises a claim under Article I, Section 27: (1) was there compliance with applicable statutes and regulations, (2) did the record demonstrate a reasonable effort to minimize environmental incursions, and (3) does the resulting environmental harm so outweigh the benefits to be derived such that to proceed would constitute an

abuse of discretion. 312 A.2d at 94. As explained by the plurality in *Robinson Township*, a major difficulty with *Payne*'s three-part test was that it was not grounded in the text of the Constitution, and it failed to recognize that Pennsylvania citizens had enshrined their environmental rights in Article I of the Constitution, its Bill of Rights, where other fundamental rights are enshrined like the right to bear arms, to vote, and to worship freely without government interference.

In *PEDF*, the Supreme Court, following the lead of the plurality in *Robinson Township*, rejected the continued use of the *Payne* test:

The *Payne I* test, which is unrelated to the text of Section 27 and the trust principles animating it, strips the constitutional provision of its meaning. *See Robinson Twp.*, 83 A.3d at 967; *see also* Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 *Envtl. L.* 463, 499 (2015). Accordingly, we reject the test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges. Instead, when reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review 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.

PEDF at 930 (Pa. 2017).

The *PEDF* decision, then, had an important effect on the instant matter. Appellees argued in their initial brief that the Allegheny Township ordinance was not unconstitutional because it did not violate the three-part *Payne* test. *Brief* at 18-22. This argument is grounded in the proposition that “*Robinson* is not binding precedent.” *Id.* at 18. Appellees also support their argument by relying on this

Court's decision in *Gorsline v. Bd. of Supervisors of Fairfield Twp.*, 123 A.3d 1142 (Pa. Commw. Ct. 2015). As this Court is likely well aware, *Gorsline* was appealed to the Supreme Court and the parties, after briefing and argument, are awaiting a decision. *Gorsline v. Bd. of Supervisors of Fairfield Twp.*, 123 A.3d 1142 (Pa. Commw. Ct. (2015), *cert. granted*, 67 MAP 2016.

For the forgoing reasons, the Court should summarily reject that portion of Appellees argument that rests on the *Payne* test, since the Supreme Court no longer considers the test to be a valid basis for adjudicating the constitutionality of government conduct under Article I, Section 27. The constitutionality of the ordinance must, instead, be adjudicated using the Supreme Court's analysis in *PEDF* and *Robinson Township*, which are now binding precedent on this Court.

3. PEDF's adoption of the plurality decision in *Robinson* forcefully supports Appellants' argument that an ordinance that allows industrial shale gas development by right across all zoned districts is unconstitutional under Article I, Section 27.

The Supreme Court in *PEDF* and *Robinson* recognized that Article I, Section 27 creates fundamental constitutional rights in citizens to a clean and healthy environment, and that government action may not unreasonably infringe upon those rights. 161 A.3d 930-931; 83 A.3d 946-948.

Citizens' environmental rights, as embodied in Section 27, were intentionally posited in Article I along with other fundamental rights such as the right to property (Section 1), religious freedom (Section 3), freedom of speech

(Section 7), and security from searches and seizures (Section 8). Most states that recognize citizens' constitutional environmental rights did not posit those rights in their Constitution's bill of rights. *Robinson Township*, 84 A.3d 962-63.

Pennsylvania's placement of Section 27 in Article I means that citizens' environmental rights are fundamental and, as with other Article I rights, limit the power granted to government by the remainder of the Constitution. See *Article I, Section 25* ("To guard against the transgressions of the high powers which we have delegated, we declare that everything in this Article is excepted out of the general powers of government and shall forever remain inviolate.").

In *Robinson Township*, the plurality explained that a case under Article I, Section 27 may proceed on two theories:

A legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizens' rights or the government has failed in its trustee obligations, or upon both theories, given that the two paradigms, while serving different purposes in the amendatory scheme, are also related and overlap to a significant degree.

83 A.3d at 950-51.

Robinson Township explains, in detail, the basis for courts to assess whether a government action violates citizens' rights under Article I, Section 27. The first clause of Section 27 declares the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. This clause affirms a limitation on the

state's power to act contrary to that right. 83 A.3d 951. Laws that unreasonably impair the right are unconstitutional. *Id.* In order to ensure no unreasonable interference, “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. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.” 83 A.3d at 952 (emphasis added). This obligation binds all levels of government, state and local. *Id.*

Although recognizing the legislature’s obligations to implement Article I, Section 27, the Supreme Court nevertheless articulated the substantive standard and role courts must play in enforcing the rights set forth in the first clause of Article I, Section 27.¹ “Courts are equipped and obliged to weigh parties' competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by the other

¹ The Supreme Court also explained the means by which Courts must assess whether the government has fulfilled its obligations under the second and third clauses of Article I, Section 27. The state is trustee of our public natural resources, and as such it has a fiduciary duty to “conserve and maintain” them. “The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.” 83 A.3d at 957. The state has two separate obligations as trustee. The first is “a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources.” *Id.* The second is a duty “to act affirmatively to protect the environment, via legislative action.” *Id.* at 958. It is the view of Amicus Curiae that this Court need not engage in the an analysis under the second and third clauses because the ordinance fails under the first clause of Article I, Section 27.

branches of government. The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality.” Id. at 953. (citing *Montana Env'l Info. Ctr. v. Dep't of Env'l Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236, 1249 (Mont. 1999) (constitutional "inalienable . . . right to a clean and healthful environment" did not protect merely against type of environmental degradation "conclusively linked" to ill health or physical endangerment and animal death, but could be invoked to provide anticipatory and preventative protection against unreasonable degradation of natural resources)).

This language belies the oft-repeated and, at this point, incredulous assertion by Appellees and others, that *Robinson* only decided *who* may regulate where industrial shale gas development may occur. To the contrary, *Robinson* held that, whether it was the state or local government, *both* being “the Commonwealth” and bound by Article I, Section 27, laws that allow industrial shale gas development across all zoned districts, as did Act 13, unconstitutionally infringe upon citizens’ rights under Article I, Section 27.

The decision in *PEDF* has a substantial effect on this matter because it affirms the adoption by the Supreme Court of the analysis under Article I, Section 27 set forth in *Robinson Township’s* plurality opinion. As set forth

by Appellants in their brief, Allegheny Township failed to obtain any evidence regarding the adverse environmental effects of its decision to allow industrial shale gas development to occur throughout all zoned districts throughout the township. Allegheny Township's decision to treat this one industry different than all others by allowing it to engage in industrial activities in all zoned districts as of right is irrational, and unconstitutionally infringes on Appellants' rights under Article I, Section 27. Appellants are, in the words of the Supreme Court, entitled to "anticipatory and preventative protection" against the unreasonable degradation of their natural resources.

CONCLUSION

For all of the foregoing reasons, the Council and PennFuture support the position of Appellants and a ruling that Allegheny Township's ordinance violates citizens' fundamental constitutional rights under Article I, Section 27 of the Pennsylvania Constitution.

Respectfully submitted,

/s/ George Jugovic Jr.

George Jugovic, Jr.

Pa. ID No. 39586

200 First Avenue, Suite 200

Pittsburgh, PA 15229

412-456-2785

jugovic@pennfuture.org

Joseph Otis Minott, Esq.
PA ID No. 36463
Executive Director & Chief Counsel
Clean Air Council
Alex Bomstein
PA ID No. 206983
135 South 19th Street, Suite 300
Philadelphia, PA 19103
215-567-4004
joe_minott@cleanair.org
abomstein@cleanair.org

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PROOF OF SERVICE

I hereby certify that on the date below, I have caused a true and correct copy of the foregoing Supplemental Brief of *Amicus Curiae* to be served upon the following persons through the court's PACFile system:

Edward J. Bilik, Esq.
Bilik Law, LLC
126 S. Pennsylvania Ave.
Greensburg, PA 15601-3005

Bernard P. Matthews Jr., Esq.
Meyer Darragh
40 N. PA Avenue, Suite 410
Greensburg, PA 15601

Larry D. Loperfitor, Esq.
Geary Loperfitor Utri, LLC
158 Grant Ave.
Vandergrift, PA 15690

Blaine A. Lucas, Esq.
Babst Calland Clements & Zomnir PC
Two Gateway Center, 6th Floor
Pittsburgh, PA 15222

Leslie J. Mlaker, Esq.
Avolio Law Group, LLC
117 N. Main Street
Greensburg, PA 15601

Christopher A. Papa, Esq.
Papa LLC, Attorneys
318 Highland Avenue
New Castle, PA 16101

January 25, 2018

/s/ George Jugovic Jr.
George Jugovic, Jr.
PA ID No. 39586