THE NEW LANDSCAPE OF LAND-USE LITIGATION: ROBINSON TOWNSHIP

In Robinson Township v. Commonwealth,[1] the gods have hurled a thunderbolt down from Mount Olympus and shattered a comprehensive legislative scheme designed to remove natural gas extraction from normal local government oversight. Act 13 -- a sweeping law seen by opponents of widespread shale exploitation as an effort to subordinate public health, welfare and safety to economic development -- is dead. The opinion of the plurality (Opinion Announcing the Judgment of the Court, here the "OAJC"), written by Chief Justice Castille, is passionate and, on its take of the facts, persuasive.[2] The plurality would affirm the decision of Commonwealth Court on different grounds. Robinson, 83 A.3d at 813. Justice Baer, who would have affirmed Commonwealth Court on its reasoning, concurred in the decision.

The language of the plurality demonstrates serious concerns about degradation of the environment from gas extraction, recalling Pennsylvania's earlier episodes of mining and timber harvesting that polluted the waters, depleted the forests and generally brought harm to natural systems. In discussing the two modern methods of extraction, hydraulic fracturing ("fracking") and horizontal drilling, the plurality concluded: "Both techniques inevitably do violence to the landscape." 83 A.3d at 914.[3]

> To describe this case simply as a zoning or agency discretion matter would not capture the essence of the parties' fundamental dispute regarding Act 13. Rather, at its core, this dispute centers upon an asserted vindication of citizens' rights to quality of life on their properties and in their hometowns, insofar as Act 13 threatens degradation of air and water, and of natural, scenic, and esthetic values of the environment, with attendant effects on health, safety, and the owners' continued enjoyment of their private property. The citizens' interests, as a result, implicate primarily rights and obligations under the Environmental Rights Amendment – Article I, Section 27. We will address this basic issue, which we deem dispositive, first.

83 A.3d at 942.

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[1] Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013).

[2] Justices Todd and McCaffrey joined Chief Justice Castille's Opinion.

[3] This observation and others like it take on the force of a factual finding, albeit at the appellate level.

The OAJC itself -- 168 pages, no less -- speaks volumes. Mastery of the text and Justice Baer's concurrence on substantive due process grounds will no doubt be a challenge to practitioners.[4] The consequences of a split decision will likely take years to sort out. This paper addresses but a few of the many issues raised in Robinson that may shape land-use litigation in years to come.

COMMONWEALTH COURT STRIKES DOWN ACT 13

Governor Corbett signed Act 13 into law on February 14, 2012. Petitioners[5] filed a petition for review in the nature of a complaint for declaratory judgment and injunctive relief within the original jurisdiction of Commonwealth Court on March 29, 2012. Senior Judge Quigley of Commonwealth Court granted a preliminary injunction on April 11, 2012.[6] On July 26, 2012, Commonwealth Court, sitting en banc, issued a 4-3 decision. The Court found two sections of Act 13 unconstitutional: Section 3304, which permitted gas extraction in every zoning district throughout the Commonwealth, and Section 3215(b)(4), which allowed the Department of Environmental Protection to waive setback requirements. The Court also permanently enjoined the application of Section 3304. The Court dismissed Petitioners' remaining eight counts and held that the Delaware Riverkeeper and three individuals, including the physician, lacked standing to pursue their claims. The Court further clarified that other sections of Act 13 would remain in full force and effect. Notable among these are Section 3302, which prohibited municipalities from passing ordinances regulating oil and gas operations, and Section 3303, which preempted local regulation of matters already governed by state environmental laws.[7] On July 27, 2012 – the very next day –

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[4] Justice Baer characterized the OAJC as a "pioneering opinion by the Chief Justice." Concurring Opinion of Justice Baer, 83 A.3d at 1001 (emphasis supplied). Justice Baer seems to have been more focused on the short-circuiting of local process; the plurality, environmental degradation.

[5] Petitioners included Robinson Township, five other townships, one county, one borough, two officials of separate townships in both their individual and official capacities, the Delaware Riverkeeper Network (as an organization), the Delaware Riverkeeper in her individual capacity, and a physician. Robinson Twp. v. Commonwealth, 52 A.3d 463, 468 n. 3 (Pa. Commw. Ct. 2012). The petitioners, including the municipalities, are referred to as "citizens" in the Opinion. 83 A.3d at 914; see also note 3 supra.

[6] On April 20, 2012, Senior Judge Quigley also denied two petitions for leave to intervene. The first was filed by the Pennsylvania Independent Oil and Gas Association and other industry organizations. The second was filed by State Senator Joseph Scarnati and House Representative Samuel H. Smith. Robinson Twp. v. Commonwealth, No. 284 M.D. 2012, 2012 WL 1429454 (Pa. Commw. Ct. Apr. 20, 2012) at *3-4.

[7] Citizens challenged Section 3303 on the ground that it forced municipalities to violate obligations to take into "consideration environmental concerns in the administration of their zoning ordinances." Robinson Twp., 52 A.3d at 489. Commonwealth Court rejected the challenge to this section since Section 3303 relieved municipalities of those obligations. Id.

Commonwealth agencies appealed to the Supreme Court. Petitioners and the Attorney General later cross-appealed. The Supreme Court issued its decision on December 19, 2013.

THE WELL-CONCEIVED DISSENT WOULD SUSTAIN ACT 13

In this appeal one might have expected customary deference to the General Assembly, the legislative body authorized to delegate or not delegate police power to local government, as in the Municipalities Planning Code (the "MPC").[8] As Justice Saylor wrote in his dissent, "There are very good reasons why judicial review of social policymaking by the political branch is highly deferential and closely constrained." Dissenting Opinion of Justice Saylor, 83 A.3d at 1009-10. In this regard, Justice Saylor's dissent joins the issue cogently.

> This Court regularly acknowledges that the Legislature possesses superior resources for information-gathering, debate, and deliberation in the policymaking arena. See, e.g., Official Comm. Of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PriceWaterhouseCoopers, LLP, 605 Pa. 269, 301-02 & n.27, 989 A.2d 313, 332-33 & n.27 (2010) (referencing the General Assembly's superior policymaking resources and explaining that, "[u]nlike the legislative process, the adjudicatory process is structured to cast a narrow focus on matters framed by litigants before the Court in a highly directed fashion"). **In a democratic system of government, divisive political controversies pitting citizens against citizens are resolved through the political process. Moreover, courts must take special care to avoid substituting their own policy preferences for those of the political branch.** See, e.g., Parker v. Children's Hosp. of Phila., 483 Pa. 106, 116, 394 A.2d 932, 937 (1978). Such perspective informs the strong **presumption of validity** enjoyed by duly implemented legislative enactments and the allocation of a heavy burden upon all challengers to establish that the General Assembly has clearly, palpably, and plainly violated the Constitution. See, e.g., West Mifflin Area Sch. Dist. v. Zahorchak, 607 Pa. 153, 163, 4 A.3d 1042, 1048 (2010).

Id. at 1010 (emphases supplied).

[8] 53 P.S. § 10101 et seq.

Significantly, Justice Saylor questions the factual support for what he calls the plurality's "non-record-based portrayal of Act 13's impact." Id. at 1011. Moreover, "[n]othing in the lead opinion persuades me that its historical account of under-regulated lumber and mining enterprises decimating Pennsylvania lands and resources * * * reasonably can be superimposed on the Act 13 regulatory scheme * * * and without a shred of evidentiary support." Id. at 1013 (emphasis supplied).

THE CONCURRENCE WOULD AFFIRM ON SUBSTANTIVE DUE PROCESS GROUNDS

In essence, Justice Baer believes that municipalities not only have the power to protect their communities through zoning, but are obligated to do so. Concurring Opinion, 83 A.3d at 1004.[9] Justice Baer understands that the citizens are asserting that municipalities have a constitutional obligation to enforce "ordered zoning" in accordance with Village of Euclid and Edmonds, which, he concludes, is breached by Act 13. In this way of thinking, land-use regulations can morph into an entitlement to the planning and zoning framework at any given time. Id. at 1004-05.

Embodied within zoning is the notion of sic utere tuo ut alienum non laedas, that one may enjoy one's property so long as one does not harm his neighbor. Id. at 1004. Justice Baer concluded, at least implicitly, that Act 13 created an open season on noxious uses throughout the Commonwealth, even in residential and agricultural zones. "Sections 3215(b)(4) and (d), 3303 and 3304 not only allow entry of the pigs into the parlor,[10] but further decree that local governments enact zoning ordinances that expressly permit those intrusions, without exception" Id. at 1008. But he also stated that since zoning ordinances are relied upon by residents, "the state may not alter or invalidate those ordinances, given their constitutional underpinning." Id. at 1006. This thinking -- taken to its logical conclusion -- would potentially freeze zoning in place (but it was the view of but a single justice).

THE PLURALITY CHARTS A NEW COURSE

To strike down Act 13, which had given the shale-oil industry what its opponents viewed as virtual carte blanche to extract gas with but token regulatory

[9] For this proposition, Justice Baer cites City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732-33 (1995) (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 9, (1974)) ("In particular, reserving land for single-family residences preserves the character of neighborhoods, securing 'zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.'"). While these cases stand for the proposition that zoning to protect the character of residential neighborhoods is within the police power, they do not suggest that municipalities are obligated to legislate for this purpose.

[10] Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard").

oversight, the plurality revived a largely moribund provision of the Pennsylvania Constitution, Article I, Section 27, the Environmental Rights Amendment. Few scholars or practitioners would have predicted that the Legislature's police power would ever have been so limited by Article I, Section 27, which had heretofore been interpreted to require only deferential judicial oversight of government action.

In order to get to this new and "pioneering" reading of Article I, Section 27, the plurality rejects the Commonwealth's claim that the challenge presents a "political" question, and breaks free of any perceived constraints of *stare decisis*. "[I]n circumstances where prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language, engagement and adjustment of precedent as a prudential matter is fairly implicated and salutary." Id. at 946. Citing Holt v. Legislative Redistricting Commission, 83A.3d 711, 759, n. 38 (Pa. 2012), Constitutional interpretations that "have proven to be unworkable or badly reasoned" are not entitled to deference. Id. (citations omitted). So much for precedent.

But to the point, "precedent has tended to define the broad constitutional rights in terms of compliance with various statutes and, as a result, to minimize the constitutional import of the Environmental Rights Amendment." 83 A.3d at 964.[11] This view of past decisions -- well founded, truth be told -- allows the Court to address Section 27 afresh.[12] Modestly, albeit forcefully, "this Court has an obligation to vindicate the rights of its citizens where the circumstances require it and in accordance with the plain language of the Constitution." Id. at 969.

The plurality invokes natural law concepts that informed early Pennsylvania zoning decisions: certain rights are inherent in humankind and therefore predate the Pennsylvania Constitution and are preserved, rather than created, thereunder. See Appeal of White, 134 A. 409, 412 (Pa. 1926) and Appeal of Lord, 81 A.2d 533, 537 (Pa. 1951).[13] 83 A.3d at 948. But instead of their traditional place in Pennsylvania's

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[11] The plurality states that until this very appeal the Court has not had the opportunity "to address the original understanding of the constitutional provision in this context." Robinson, 83 A.3d at 964. The plurality walks away from prior decisions that viewed the Environmental Rights Amendment writ small, and which addressed specific private or public projects, on the one hand, and challenges to state or local environmental laws as against property rights, on the other. See, e.g., Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973), aff'd, Payne v. Kassab, 361 A.2d 263, 273 (Pa. 1976).

[12] The plurality travels through the thicket of previous appellate decisions and finds no compelling reason to defer to past precedent or limit its analysis of the law and these facts. The plurality observes that "[n]othing in the Court's precedent offers substantive and controlling guidance with respect to the type of claims that the citizens assert in this matter." Robinson, 83 A.3d at 969.

[13] "To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a

jurisprudence -- protecting liberty in property -- the laws of nature are invoked here to curtail the power of the General Assembly to limit police powers (especially, the MPC) previously delegated to local agencies to regulate use of private property.[14] "The matter now before us offers appropriate circumstances to undertake the necessary explication of the Environmental Rights Amendment, including foundational matters." Id. at 950.

THE ENVIRONMENTAL RIGHTS AMENDMENT AWAKENS

Article I, Section 27, the Environmental Rights Amendment, 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.

Penn. Const. Art. I, Sec. 27. Section 27 contains three mandatory clauses and twin purposes, that is, protecting citizens' rights and assuring that government acts faithfully as trustee. Id.[15]

Right I: The right of the people to clean air and pure water, and preservation of natural, scenic, historic and esthetic values of the environment and the obligation of government to refrain from violating those rights. Id. at 951.[16]

Right II. "Common ownership of the people, including future generations, of Pennsylvania's public natural resources." Id. at 954-55.

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part of the citizen's natural liberty—an expression of his freedom—guaranteed as inviolate by every American Bill of Rights." White, 134 A. at 412, quoted in Appeal of Lord, 81 A.2d at 128.

[14] Natural law, if one can speak of such things, would seem to have empowered citizens to take what they needed from nature with little thought to husbanding resources. See Jared Diamond, Collapse: How Societies Choose to Fail or Succeed (2005). This leads to the so-called "tragedy of the commons," a dilemma created where individuals, acting independently and rationally in their own self-interest, deplete a shared resource despite the long-term interest of preserving the common resource. See Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968); see also Coll. Savings v. Fl. Prepaid Postsecondary Educ., 527 U.S. 666, 673 (1999).

[15] In view of its treatment of Act 13 under Article I, Section 27, the plurality forgoes addressing separation of powers and substantive due process issues. Robinson, 83 A.3d at 985.

[16] Moreover, "[e]conomic development cannot take place at the expense of an unreasonable degradation of the environment." Robinson, 83 A.3d at 954.

Right III. The public trust doctrine. Id. at 956 et seq.

The Public Trust Doctrine is perhaps the most far-reaching part of the plurality's conclusions: in sum, the trustee must (a) do no harm; (b) act affirmatively; and (c) preserve and maintain the public resources (but foster "sustainable" development),[17] and deal impartially with, and balance, the interests of all beneficiaries, present and future. Id. at 957-58.

The plurality paints a poignant picture of environmental degradation that over the years went hand-in-hand with exploitation of natural resources.

> We seared and scarred our once green and pleasant land with mining operations. We polluted our rivers and our streams with acid mine drainage, with industrial waste, with sewage. We poisoned our 'delicate, pleasant and wholesome' air with the smoke of steel mills and coke ovens and with the fumes of millions of automobiles. We smashed our highways through fertile fields and thriving city neighborhoods. We cut down our trees and erected eyesores along our roads. We uglified our land and we called it progress.

Id. at 961 (citation omitted). Against this backdrop, the plurality divines original intent:

> The drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware of this history, articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations. Moreover, public trustee duties were delegated **concomitantly** to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people's rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.[18]

Id. at 963 (emphasis supplied).

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[17] The phrase "sustainable development" marks the plurality's thinking as current and relevant.

[18] The Marcellus Shale Formation underlies approximately two-thirds of Pennsylvania's territory and extends to about 36 percent of the Delaware River Basin. Robinson, 83 A.3d at 963 n. 51.

ACT 13 IS STRICKEN

The plurality correctly sees this case -- which addresses state-wide legislation that limits the police power of municipalities throughout the Commonwealth in service of gas extraction -- as operating on a completely different (and more comprehensive) level from past Article I, Section 27 cases. And now begins the analysis of Act 13 and its consequences. "[F]ew could seriously dispute how remarkable a **revolution** is worked by this legislation [Act 13] upon the existing zoning regimen in Pennsylvania, including residential zones." Id. at 971 (emphasis supplied). The plurality correctly understands the profound effect on communities, not only by the superseding of local restrictions, but also the curtailment of local government's ability to control what happens in neighborhoods located above shale deposits throughout Pennsylvania. Under Act 13, what remained of local government's role in regulating gas extraction is but a *pro forma* accommodation. Id. at 972.

Section 3303 provides that Act 13 "preempts and supersedes the local regulation of oil and gas operations." The issue:

> To put it succinctly, our citizens buying homes and raising families in areas zoned residential had a **reasonable expectation concerning the environment in which they were living,** often for years or even decades. Act 13 fundamentally disrupted those expectations, and ordered local government to take measures to effect the new uses, irrespective of local concerns. The constitutional command respecting the environment necessarily restrains legislative power with respect to political subdivisions that have acted upon their Article I, Section 27 responsibilities: the General Assembly can neither offer political subdivisions purported relief from obligations under the Environmental Rights Amendment, nor can it remove necessary and reasonable authority from local governments to carry out these constitutional duties.

Id. at 977 (emphasis supplied). Accordingly, the expectation of protection afforded by reciprocal burdens and benefits take on a constitutional dimension.[19] In disrupting these expectations, the Court found that the General Assembly has "transgressed" its police

[19] Cf. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Mahon discusses the concept of average reciprocity of advantage, whereby the benefit that comes from a regulation, in the aggregate to all members of the community, should be approximately equal to the amount of burden the regulation causes. When the burden shifts to outweigh the benefits, a taking under the Fifth Amendment of the U.S. Constitution may occur. See also In Re Realen Valley Forge Greenes, 838 A.2d 718, 729 (Pa. 2003).

powers as limited by the Environmental Rights Amendment and other "constitutional commands." Id. at 978.[20] "The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment." Id.

"The displacement of prior planning, and **derivative expectations**, regarding land use, zoning, and enjoyment of property is unprecedented."[21] Id. at 972 (emphasis supplied). These zoning expectations derive not just from zoning, but also from "prior" planning, i.e., comprehensive plans.[22] It is the notion of "derivative expectations," in essence, that drives the decision, both in the plurality and the concurrence.

Section 3304, "Uniformity of local ordinances," provides that "all local ordinances regulating oil and gas operations shall allow for the reasonable development of oil and gas resources." Section 3304, by failing to take into account local conditions and permitting "industrial uses as a matter of right in every type of pre-existing zoning district," violates the Environmental Rights Amendment for two reasons. Id. at 979.[23] "The entirely new legal regimen alters existing expectations of communities and property owners and substantially diminishes natural and esthetic values of the local environment." Id. at 979. In this regard, Act 13 "degrades the corpus of the trust." Id. at 980.

Among the fiduciary obligations of the General Assembly is "the obligation to prevent degradation, diminution, and depletion of our public natural resources." Id. at 979. Section 3304 falls short of satisfying that obligation, for two reasons. The first is

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[20] In testing preemption through the substantive prism of the Environmental Rights Amendment, the plurality avoids the dilemma of the citizens' argument that preemption forces municipalities to violate the law. See note 7, supra.

[21] Never before in Pennsylvania zoning jurisprudence has there been any sense that landowners enjoyed what is tantamount to vested rights in a particular zoning scheme. To the contrary, in cases like Appeal of O'Hara, 131 A.2d 587 (Pa. 1957), and National Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965), -- albeit in the context of local regulation -- communities must accept newcomers even when public facilities, such as roads, might be overburdened, nor could zoning be used to forestall the future.

[22] See Euclid, supra; but see MPC § 303(c) ("Notwithstanding any other provision of this act, no action by the governing body of a municipality shall be invalid nor shall the same be subject to challenge or appeal on the basis that such action is inconsistent with, or fails to comply with, the provision of a comprehensive plan").

[23] The plurality notes with some dismay, it would seem, that "Act 13 permits industrial oil and gas operations as a use 'of right' in every zoning district throughout the Commonwealth, including in residential, commercial, and industrial districts. 58 Pa.C.S. § 3304(a), (b)(1), (5)-(9)." Robinson, 83 A.3d at 979 (emphasis in original).

that it fails to take into local conditions. The plurality notes with some dismay, it would seem, that "Act 13 permits industrial oil and gas operations as a use 'of right' in every zoning district throughout the Commonwealth, including in residential, commercial, and industrial districts. 58 Pa.C.S. § 304(a), (b)(1), (5)-(9)." Id. (emphasis in original).

The second defect of Section 3304 is the disparate effect on landowners and communities that will bear a heavier burden, and the fact the Section ties the hands of local government to take into account local circumstances. As a result, the Section "permits significant degradation of public natural resources." Id. at 980. Accordingly, Section 3304 -- for "degradation" of the trust and "disparate impact" -- runs afoul of the Environmental Rights Amendment. Id. at 981.

Section 3215(b)(4) requires the Department of Environmental Protection to waive setback requirements from streams, springs, wetlands and other bodies of water, where "necessary." The Court addresses two issues presented by this requirement. First, the term "necessary" lacks a meaningful standard, which Justice Castille calls "malleable and unpredictable". Id. at 983. Secondly, Section 3215(b) does not overtly require the Department of Environmental Protection to consider other environmental statutes in issuing permits or imposing conditions under Act 13. Id. Therefore, the scheme created Section 3215(b) lacks identifiable and readily-enforceable environmental standards, which also violates the Environmental Rights Amendment. Id.

The plurality understands that the Commonwealth argued that Act 13 was intended by the Legislature to carry out legislative policy and therefore was, on its face, well within the legislative prerogative, which, in substantive due process analysis, is entitled to broad deference. In normal jurisprudence, legislation with even arguable objectives is sustainable against attack unless without any rational nexus.[24] Id. at 974.

But here, the citizens argued that the case was not about the granting and limiting municipal power to regulate, but about constitutional duties. The plurality bought in to this larger framework in a grand way: "Unless the Declaration of Rights is to have no meaning, the citizens are correct."[25] Id. Implementation of the trust language in Section 27 does not require the intercession of the Legislature. Section 27 "speaks on behalf of the people, to the people directly." Id. And, most significantly, the Commonwealth's environmental trust obligations are enforceable. Id. at 974-75. Where legislative trust obligations are "negative or prohibitory," they are self-executing. Act 13 is not limited to public lands, but applies to land throughout the Commonwealth and

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[24] Compare Justice Baer's concurrence on substantive due process grounds.

[25] This, of course, neglects the "meaning" accorded Article I, Section 27 in prior case law, which, one must concede, even if restrained, had some meaning. See, e.g., Payne v. Kassab, supra.

therefore implicates not only stewardship of public lands, but also the police power, the power to regulate for the general welfare. Id. at 975.

The plurality was well aware of the impact of what it was doing. "The type of constitutional challenge presented today is unprecedented in Pennsylvania as is the legislation that engendered it." Id. at 976. While recognizing the economic benefits to the Commonwealth in jobs and energy, the plurality reads the record in stark terms and in effect make the following finding of fact, as if by taking judicial notice:

> "By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction."[26]

83 A.2d at 976. While the Commonwealth argued that the litigation presented a public policy dispute "voiced by a disappointed minority," the plurality makes clear that the issue here is not merely political: the constitution is a norm higher than legislation. Id. at 976. Simply put, in its delegation of police power to local government, the General Assembly is subject to scrutiny by the courts under the Environmental Rights Amendment.[27]

THE LANDSCAPE GOING FORWARD

Major environmental and zoning jurisprudential changes articulated in the Robinson plurality may, if they land in precedent, be summarized as follows: expansion of standing to encompass a right of municipalities to challenge state-wide legislation limiting their regulatory powers; the endowment of landowners and communities with vested rights in the status quo in the face of powerful, across-the board introduction of potentially harmful industrial uses; revival of Article I, Section 27 to what was ostensibly the framers' intent; and, perhaps most notably, imposition upon all branches of state and municipal government an active environmental trusteeship.

The plurality's groundbreaking take on the Environmental Rights Amendment, however, has no precedential effect.[28] Commonwealth v. Covil, 378 A.2d

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[26] The plurality states that the Commonwealth's position amounts to "blindness" to the record and the potential of present and future harm. Robinson, 83 A.3d at 974.

[27] In theory, therefore, any new amendment to the MPC, for example, must pass muster before it may restrict municipal zoning power as it stands today.

[28] The disposition as to Act 13, however, is precedential because Justice Baer joined in it. Plurality opinions can engender profound developments in the law. In Girsh Appeal, 263 A.2d 395 (Pa. 1970), a plurality decision struck down exclusionary zoning in Nether Providence Township, Delaware County. When the Township persisted in thwarting its mandate, the Court granted definitive relief.

841, 844 (Pa. 1977). In Covil, the Pennsylvania Supreme Court discussed whether it should follow a plurality decision in which only three of the six Justices adopted the analysis of the opinion supporting affirmance. Id. The Court held that "the opinion in support of affirmance has no precedential value ... we consider it only for its persuasive value." Moreover, it is difficult to conceive of another fact pattern so significant as that put before the Court in Robinson, with issues so broad as an industry-specific preemption of local land-use controls with so great a potential for harm.

Standing is key to future zoning cases with Article I, Section 27 implications. Since the plurality and the concurring Justice affirmed on different grounds, standing in the context of either environmental or substantive-due-process challenges is not entirely settled. In any event, zoning challengers must still establish aggrievement.[29] It will not be sufficient to allege breach of the environmental trust in every garden variety land-use dispute. But that will not stop objectors from invoking the Environmental Rights Amendment whenever a land-use decision does not go their way.[30] In future Environmental Rights Amendment cases, but without substantive due process issues, Robinson will not be dispositive on standing.

Robinson is a powerful victory for the citizens, but perhaps with unintended consequences. The challenge was of course successful in striking Act 13. In bringing the Environmental Rights Amendment to full blossom, however, albeit without precedential effect, the municipal petitioners must reckon with a plurality opinion that would impose on each and every Commonwealth entity, including the municipal petitioners, an ongoing trust for the environment.

The prospect of an environmental trust, even without the force of precedent, shall likely inform municipal decision-making in land use for years to come. Planning commission meetings, meetings of governing bodies, decisions of zoning hearing boards and courts on appeal will potentially be addressing an energized reading of Article I, Section 27. More fundamentally, as a preliminary matter municipalities will have a

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Casey v. Zoning Hearing Board of Warwick Township, 459 Pa. 219, 230 (1974). That supplementary order, followed in Casey, was the origin of definitive relief as a remedy in exclusionary zoning cases in Pennsylvania.

[29] See, e.g., William Penn Parking Garage v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975).

[30] On remand, Commonwealth Court heard several other issues arising from their finding, later overturned, that certain parties lacked standing and which, therefore, Commonwealth Court never heard on the merits. Robinson Twp. v. Commonwealth, --- A.3d ----, 2014 WL 3511722 at *1 (Pa. Cmmw. Ct. 2014). The Court rejected all of the challenges presented to various aspects of Act 13. Nonetheless, the Court found certain other provisions (§§ 3305, 3006, 2207, 2008, 2009(a)) not severable from Sections 3303, 3304 and 3215(b). Since those provisions were not sufficiently independent from the provisions stricken by the Supreme Court, the Court struck those from Act 13 as well.

decision to make: whether to conduct business as usual or to adopt new protocols designed to address potential environmental issues early on. And just one perspective that may prove especially challenging in practice: what room in the deliberative process for "future generations"?

Michael Sklaroff