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The evolution of Act 13: Commonwealth Court limits applicability of *Robinson Township* plurality opinion

Pennsylvania's evolving law regarding regulation of oil and gas development has undergone yet another change, this time in a footnote to the Commonwealth Court's January 7, 2015 *en banc* opinion in *Pennsylvania Environmental Defense Foundation v. Commonwealth* 2015 Pa. Commw. LEXIS 9 (2015). The *Pennsylvania Environmental Defense Foundation* (PEDF) case, in which PIOGA filed an amicus brief, rejected constitutional challenges to the leasing of state land for natural gas development and to the use of funds generated by those leases. In doing so, the Commonwealth Court took the opportunity to clarify the legal weight to be given to the analysis of the plurality decision in *Robinson Township v. Commonwealth*, 83 A.2d 901 (2013) interpreting Article I, Section 27 of the Pennsylvania Constitution (the Environmental Rights Amendment).

By way of background, in *Robinson Township* the Supreme Court invalidated various sections of Act 13, the General Assembly's 2012 comprehensive update to the former Oil and Gas Act. The three-justice plurality opinion in *Robinson Township*, authored by Chief Justice Castille, introduced a new and much more extensive interpretation and application of the Environmental Rights Amendment (ERA), finding that it imposes on the Commonwealth and its municipalities a fiduciary duty to "conserve and maintain" natural resources. According to the plurality, this "implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources." The plurality found that this duty is two-fold, comprised of "a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources" and a duty "to act affirmatively to protect the environment, via legislative action." As a result, the plurality found that certain provisions of Act 13, including the provision limiting local regulation of oil and gas development, failed to satisfy these duties. Justice Baer provided the fourth vote in support of this ruling, although he did so on substantive due process grounds and not the ERA.

In articulating its interpretation of the ERA, the plurality opinion did not define the scope of the duty or provide a test

for determining whether its requirements are satisfied, thus creating uncertainty regarding what the law requires of governments before they take action that may impact natural resources. Heralding the *Robinson Township* decision as breathing new life into the ERA, numerous parties, including the PEDF, took advantage of this uncertainty to contest government actions before a variety of tribunals.

For example, residents in several municipalities have challenged the validity of local zoning ordinances before their zoning hearing boards, arguing that the existing oil and gas regulations do not go far enough to satisfy the ERA, as interpreted and applied in *Robinson Township*. Others have appealed permits issued by the Department of Environmental Protection to the Environmental Hearing Board, arguing that the agency's fiduciary duty prohibits it from authorizing oil and gas development. In the absence of applicable guidance in the *Robinson Township* plurality opinion, these parties have asserted their own interpretation as to what the ERA means, insisting, for example, that the applicable agency must undertake a constellation of environmental or health and safety studies before allowing (via permitting or legislation) oil and gas development. In the case of local zoning regulations, these challenges also have included claims that ordinances that permit oil and gas operations in agricultural and residential zoning districts violate the ERA.

In the case decided in January, the PEDF challenged Fiscal Code amendments permitting the transfer of monies from the Oil and Gas Lease Fund—a depository for all rents and royalties paid from oil and gas leases on Commonwealth lands, which is traditionally used to maintain and conserve public natural resources—to fund the Department of Conservation and Natural Resources' operations, the Treasury, and the General Appropriations Act of 2014. All together, the challenged legislative enactments envision spending well over or in excess of \$250 million from the lease fund in FY 2014-2015. PEDF argued, among other things, that these amendments violated the ERA because they fail to fulfill the duty to conserve and

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maintain the public natural resources for the benefit of the people.

In a critical footnote, the Commonwealth Court in *PEDF* stated that the *Robinson Township* decision is not binding precedent, but merely persuasive authority “to the extent it is consistent with binding precedent from [the Commonwealth] Court and the Supreme Court on the same subject.” The court also acknowledged the remaining legitimacy of the pre-existing multifactorial test for constitutionality under the ERA expressed by the Commonwealth Court in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973) (*en banc*), *aff’d*, 361 A.2d 263 (Pa. 1976).

Unlike the *Robinson Township* plurality opinion, the *Payne* decision and its progeny emphasized the need for the Commonwealth to balance its duties under the ERA against other duties owed by the Commonwealth to its citizens; those cases acknowledge that the protections of the ERA are not absolute, and were not intended to prohibit development. Importantly, the *PEDF* decision confirms that *Payne*, not *Robinson Township*, contains the operative test for deciding challenges brought under the ERA. As a result, the Commonwealth Court unanimously¹ held in *PEDF* that the challenged appropriations were constitutionally sound, declaring a “decision by the General Assembly...to vest in itself the power to appropriate certain monies in the Lease Fund does not by itself infringe upon the rights afforded...under the Environmental Rights Amendment.”

Notably, a Commonwealth Court *en banc* decision—like that in *PEDF*—can be overturned only by a subsequent *en banc* decision of that court or a ruling from the state Supreme Court. As a result, the Commonwealth Court’s brief consideration of the *Robinson Township* plurality decision and its conclusion that it is not binding precedent, along with its clarification that the *Payne* test is still authoritative, may significantly limit the persuasiveness of *Robinson Township*-inspired constitutional arguments before local zoning and state environmental tribunals, at least until there is a definitive ruling from the Supreme Court.²

¹ Judge Cohn-Jubelirer authored a dissenting opinion unrelated to this issue.

² On February 3, the Commonwealth Court denied a *PEDF* application for reargument (*see article below*).